International Trade and Business Law Review

Volume XVIII, 2015

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Volume XVIII, 2015

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International Trade and Business Law Review

Volume XVIII, 2015

Gabriël A Moens

LexisNexis

First published 2015
by LexisNexis

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Typeset in Times New Roman by LexisNexis

Printed and bound by LexisNexis

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ISSN: 1836-8573

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Articles

THE FREE SPEECH IMPLICATIONS OF US ANTI-BOYCOTT REGULATIONS

MATTHEW E SILVERMAN*

Abstract

Anti-boycott — Arab League — Briggs — Central Hudson — Commercial Speech — Discrimination — Export Administration Act (EAA) — First Amendment — Free Speech — International Trade — Israel — Jewish — Political Speech — United States

This article provides an analysis of s 2407(a)(1)(D) of the Export Administration Act and its implications on Americans' free speech rights. Section 2407(a)(1)(D) is a significant US anti-boycott regulation that prohibits American persons and companies from complying with unsanctioned foreign boycotts. This article analyses s 2407(a)(1)(D) within the context of the development and application of US anti-boycott legislation which grew out of a response to the Arab League Boycott of Israel. As well, this article examines the relevant First Amendment jurisprudence involving both commercial and political speech and argues that s 2407(a)(1)(D) should be subject to a strict-scrutiny analysis in order to account for the social and political interests often inherent within economic-boycott activity. This article concludes that the government interest in enforcing s 2407(a)(1)(D) is outweighed by the significant restrictions imposed on Americans' free speech rights, and thus, there is no justification for this regulation to be constitutionally upheld and enforced.

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I INTRODUCTION

Israel's policies regarding the West Bank settlements are increasingly controversial and have drawn protests internationally and domestically.[1] In 2011, some Israeli citizens began calling for boycotts of products with links to the West Bank settlements.[2] In an effort to alleviate the economic damage felt by West Bank businesses as a result of these boycott campaigns, the Israeli Parliament (the Knesset) approved a controversial anti-boycott law on 11 July 2011 which instituted civil penalties for Israeli citizens who organise or publicly endorse boycotts against the country.[3] The Israeli anti-boycott law defines a boycott as:

> deliberately avoiding economic, cultural or academic ties with another person or body solely because of their affinity with the State of Israel, one of its institutions or an area under its control, in such a way that may cause economic, cultural or academic damage.[4]

To supporters, the law provides a necessary mechanism by which to combat damaging economic protests against Israel's policies regarding the settlements in the West Bank.[5] To critics, the law represents an unacceptable infringement on Israelis' fundamental rights to freedom of speech and expression.[6] Such critics include a

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1 Lior A Brinn, 'The Israeli Anti-Boycott Law: Balancing the Need for National Legitimacy Against the Rights of Dissenting Individuals' (2012) 38 *Brooklyn Journal of International Law* 345, 350–1.

2 Ibid 351.

3 Ibid 345. The Knesset passed the law by a vote of 47 to 38: ibid 351.

4 Ibid. Under the Israeli anti-boycott law, it is a civil offense to: 'knowingly publish a public call for a boycott against the State of Israel, where according to the content and circumstances of the publication there is reasonable probability that the call will lead to a boycott, and he who published the call was aware of this possibility': at 351–2.

5 Ibid 345–6.

6 Ibid 345. The Israeli Supreme Court will have to render a decision to determine whether the anti-boycott law is a valid exercise of the Knesset's legislative authority. As Israel has no formal constitution and lacks codified protection for speech and expression, the Israeli Supreme Court will need to construe such protection from Israeli statutes, common law, international precedent (including American) and the teachings and values of Judaism ('Jewish Law') in order to strike down the law: at 346–7.

significant portion of the international community, including the United States, which has criticised the undemocratic nature of the law.[7]

A recent commentary opined that comparing the Israeli anti-boycott law with US anti-boycott laws is like 'comparing apples and orangutans', because unlike the Israeli law, US anti-boycott laws do not bar US citizens from organising boycotts of anything or any country.[8] What US law bars is participation in unsanctioned boycotts imposed by other countries that conflict with US policies.[9]

In the same vein, a recent law review article stated the following:

> the [Israeli law] and American anti-boycott legislation are easily distinguishable. Crucially, the [Israeli law] is a ban on domestic boycotting of domestic business (primary), while the American regulations concern participation in foreign boycotts (secondary). Primary boycotts merit a court's protection far more than participation in a secondary boycott because domestic boycotts are an avenue for participation in one's own government, a practice firmly established as a fundamental right.[10]

In light of this controversial Israeli law and the comparisons it has drawn with US anti-boycott regulations, the following paper provides an analysis of US anti-boycott laws and their implications on Americans' free speech rights, specifically in the context of the Arab League Boycott of Israel. The focus of this paper is on s 2407(a)(1)(D) of the *Export Administration Act* (*EAA*) —

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7 Ibid 346.

8 Lara Friedman, 'Israel's New Boycott Law and US Law: Like Apples and Orangutans', *The Huffington Post* (online), 14 July 2011 <http://www.huffingtonpost.com/lara-friedman/israel-boycott-law_b_898317.html>:

> '[This] means that a group of angry Americans can organize a boycott of France and French products to protest France's perceived non-support of the US in the Iraq war … Americans are free to organize a boycott against Canada, a close friend of the US, to protest seal hunting or to organize a boycott against Mexico, simply because they don't like it. And any American can organize a boycott of Arizona to protest its outrageous racial profiling policy.'

9 Ibid.

10 Brinn, above n 1, 371.

a significant component of US anti-boycott regulations that prohibits US persons and companies from complying with unsanctioned foreign boycotts. This author does not make the argument that US anti-boycott laws are as comparatively restrictive of its citizens' free speech rights as Israel's controversial anti-boycott law (on the contrary, Israel's law goes beyond the level of free speech infringement that could ever conceivably be tolerated in the United States). However, it is this author's ultimate conclusion that US anti-boycott laws, specifically s 2407(a)(1)(D) of the *EAA*, impose significant restrictions on Americans' free speech rights that are not outweighed by the governmental interest in enforcing such laws. Therefore, there is no justification for these regulations to be constitutionally upheld and enforced.

II THE ARAB LEAGUE BOYCOTT OF ISRAEL

The Arab League is an organisation comprising 22 Middle Eastern and African countries and entities.[11] Since the founding of Israel in 1948, the Arab League has maintained an official boycott of Israeli companies and Israeli-made goods, as well as a boycott of non-Israeli companies which maintain economic relations with Israel or are perceived to support it.[12]

The boycott has three tiers: primary, secondary, and tertiary.[13] The primary boycott prohibits an Arab League member and its nationals from doing business with the Israeli government or an Israeli citizen.[14] The secondary boycott prohibits an Arab League member and its nationals from doing business with a company that does business with Israel.[15] A blacklist of firms worldwide that engage in

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11 Martin A Weiss, 'Arab League Boycott of Israel' (Congressional Research Service, United States Congress, 2013) 1. The Arab League members are: Algeria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, the Palestinian Authority, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, and Yemen.

12 Ibid.

13 Ibid 2.

14 Ibid.

15 Ibid.

business with Israel is maintained by the Central Boycott Office in Damascus and disseminated to Arab League members.[16] The tertiary boycott prohibits an Arab League member and its nationals from doing business with a company that in turn deals with companies that have been blacklisted by the Arab League.[17] The Arab League recommends that member countries demand certificates of origin on all goods acquired from suppliers to ensure that such goods meet all aspects of the boycott.[18]

Adherence to the boycott is an individual matter for each Arab League member and enforcement varies by member.[19] There are indications that some Arab League members publicly support the boycott while continuing to quietly trade with Israel.[20] Others assert that enforcement of the boycott by Arab League members varies depending on the intensity of the Israeli-Palestinian conflict.[21]

Some Arab League members have formally ended their part in the boycott, or at least some aspects of it.[22] Egypt in 1979, the Palestinian Authority in 1993, and Jordan in 1994 signed peace treaties or agreements that ended their participation in the boycott.[23] Mauritania, which never applied the boycott, established diplomatic relations with Israel in 1999.[24] Algeria, Morocco, and Tunisia do not enforce the boycott.[25] In 1994, the member countries of the Gulf Cooperation Council (GCC), including Bahrain, Kuwait, Oman, Qatar, Saudi

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16 Ibid.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid. According to Doron Peskin, the head of research at a consulting firm for foreign and Israeli companies specialising in trade with Arab states: 'the Arab boycott is now just lip service'. One Arab official commented to the Egyptian newspaper *Al-Ahram* that: 'boycotting Israel is something that we talk about and include in our official documents but it is not something that we actually carry out — at least not in most Arab states'.

21 Ibid.

22 Ibid 3.

23 Ibid.

24 Ibid.

25 Ibid.

Arabia, and the United Arab Emirates, announced that they would only enforce the primary boycott.[26]

The US government has been at the forefront of international efforts to end the boycott, including participation in negotiations with Arab League members.[27] In addition, US foreign-assistance legislation since 1959 has included statutory provisions expressly opposing the boycott.[28]

III US ANTI-BOYCOTT LAWS

A *The Development and Application of US Anti-Boycott Laws*

US anti-boycott legislation is designed to prohibit and penalise American companies' cooperation with international boycotts that are not sanctioned by the United States.[29] The first official US response to the Arab League Boycott of Israel occurred in 1965, when Congress adopted legislation requiring US persons and companies to report to the US Department of Commerce any request received to cooperate in a boycott against a country friendly to the United States.[30] For the next 10 years, the anti-boycott regulations received no attention from Congress.[31]

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26 Ibid. In 1996, the GCC states recognised that the total elimination of the boycott is a necessary step for peace and economic development in the region. However, US companies continue to receive requests to cooperate with the boycott from GCC member countries.

27 Ibid 1.

28 Ibid; Section 7035 of the *Consolidated Appropriations Act*, FY2012 (PL 112-74): at 4.

29 Kim Strosnider and Christine Minarich, *US Antiboycott Laws: Overview and Compliance Strategies* (April 2012) WorldECR, 1 <www.worldecr.com>.

30 Ibid; Weiss, above n 11, 1; David Cain, 'International Business Communication and Free Speech: *Briggs & Stratton Corp v Baldridge*' (1986) 9 *Boston College International and Comparative Law Review* 131, 135. The Commerce Department defines 'boycott request' broadly. Boycott requests may appear in questionnaires, purchase orders, tender invitations, contracts, letters of credit, or a number of other sources. Strosnider and Minarich, above n 29, 2.

31 Cain, above n 30, 135.

In early 1975, Congress began to re-evaluate US anti-boycott legislation at the urging of Jewish-American special interest groups (see section IIIB below) and with the support of the Ford Administration.[32] In 1977, Congress passed strengthened anti-boycott regulations that not only maintained the mandatory reporting requirements to the US Department of Commerce, but also expressly prohibited US persons and companies from engaging in acts to 'comply with, further or support' unsanctioned foreign boycotts.[33] These regulations are included in s 8 of the *Export Administration Act of 1979* (*EAA*)[34] and in the Ribicoff Amendment to the *Tax Reform Act of 1976* (*TRA*),[35] as administered by the US Department of Commerce and US Department of the Treasury, respectively.[36] The anti-boycott regulations within the *EAA* authorise the imposition of civil and criminal penalties against US companies that cooperate in unsanctioned boycotts.[37] The anti-boycott regulations within the *TRA* deny tax benefits to US companies that cooperate in unsanctioned boycotts.[38]

US anti-boycott regulations are 'complex and sometimes inconsistent'.[39] However, in general, a US person or company

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32 Ibid 135–6.

33 Ibid 136–7; Weiss, above n 11, 1, 4–5. US anti-boycott laws generally do not target primary boycotts. Rather, they are directed against secondary and tertiary boycotts. Strosnider and Minarich, above n 29, 1.

34 Section 8 of *The Export Administration Act of 1979* (PL 96-72; 50 USC app §2407) has expired but its provisions are continued under the authorisation granted to the President in the *National Emergencies Act* (*NEA*) (PL 94-412; 50 USC §1601-1651) and the *International Economic Emergency Powers Act* (*IEEPA*) (PL 95- 223; 50 USC app §2407), most recently under Executive Order 13222 signed 17 August 2001 (66 FR 44025, 22 August 2001). The US Commerce Department's anti-boycott regulations are found in the *Export Administration Regulations* (*EAR*), 15 CFR 760.1 et seq. Weiss, above n 11, 5 n 18; Strosnider and Minarich, above n 29, 1.

35 The Ribicoff Amendment to the *Tax Reform Act of 1976* (PL 94-455) added s 999 to the Internal Revenue Code of 1986, as amended (26 USC §1 et seq). Tax regulations are at 26 CFR §7.999-1. Weiss, above n 11, 6 n 19.

36 Strosnider and Minarich, above n 29, 1.

37 Weiss, above n 11, 1, 5–6.

38 Weiss, above n 11, 5–6.

39 Strosnider and Minarich, above n 29, 1.

violates the regulations if it acts to comply with, further, or support a boycott imposed by a foreign country against a nation friendly to the United States,[40] in any of the following manners:

- agreeing to refuse or actually refusing to do business in the boycotted country or with a blacklisted company;
- agreeing to discriminate or actually discriminating against other persons based on race, religion, sex, national origin, or nationality;
- agreeing to furnish or actually furnishing information about business relationships in the boycotted country or with blacklisted companies; and/or
- agreeing to furnish or actually furnishing information about the race, religion, sex, or national origin of another person.[41]

As examples of the practical application of the regulations, recent anti-boycott enforcement actions pursued by the US Department of Commerce include:

- Rexnord Industries LLC, a US company dealing in engineered mechanical components, paid a civil penalty for allegedly providing a commercial invoice containing the following statement: 'We certify that the goods are neither of Israeli origin nor do they contain any Israeli materials'.[42]
- Smith International Inc, a supplier of drilling tools and services, paid a civil penalty for allegedly agreeing to a condition in a subcontract providing: 'subcontractor acknowledges that the laws of Abu Dhabi and the UAE include, inter alia, laws regarding the boycott of "Israel"

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40 John J Tkacik Jr, 'American Companies, Taiwan, and US Anti-boycott Law' (WebMemo No 1962, The Heritage Foundation, June 2008), 1 <www.heritage.org/Research/TradeandForeignAid/wm1962.cfm>.

41 Weiss, above n 11, 1, 5; Strosnider and Minarich, above n 29, 2–3.

42 Strosnider and Minarich, above n 29, 2.

> especially those related to blacklisted companies, ships and persons'.[43]

Although the US anti-boycott laws were specifically designed to counteract the Arab League Boycott of Israel, in practice, they apply to all foreign boycotts of US allies.[44] For example, an article published by the Heritage Foundation in 2008 noted the 'countless instances of US persons, both corporations and individuals, supporting Chinese boycott demands against at least one country "friendly" to the United States — Taiwan'.[45] In an effort to strengthen its own embargo against Taiwan, China has recently threatened to stop buying aircraft from American companies such as Boeing, Bell Helicopter, and Sikorsky if these companies continue to sell weapons and 'advanced helicopter technologies' to Taiwan.[46] American companies receiving boycott requests from the Chinese are obligated to report such activity to the US Department of Commerce as well as refrain from compliance in accordance with US anti-boycott regulations.[47]

B *The Role of Special Interest Groups in Developing US Anti-boycott Legislation*

In the words of Harvard Law Professor Henry J Steiner:

> the origin or fate of major legislative proposals depends upon well organized groups that are knowledgeable, effective and committed to (or committed to oppose) the proposal. Their decisions to fight or yield will strongly influence the timing and content (or collapse) of legislation.[48]

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43 Ibid.

44 Weiss, above n 11, 5. According to the Office of Antiboycott Compliance, the laws were enacted to 'encourage, and in specified cases, require US firms to refuse to participate in foreign boycotts that the US does not sanction'.

45 Tkacik, above n 40, 3.

46 Ibid 1–2.

47 Ibid 2.

48 Henry J Steiner, 'Pressures and Principles — The Politics of the Antiboycott Legislation' (1978) 8 *Georgia Journal of International and Comparative Law* 529, 530.

In the context of US anti-boycott legislation in the 1970s, these 'well organized groups' included three Jewish-American agencies — the Anti-Defamation League of B'nai B'rith, the American Jewish Committee, and the American Jewish Congress — which acted cooperatively in fighting for strengthened anti-boycott legislation.[49] A variety of business associations opposed the anti-boycott legislation, arguing that strengthened legislation would prevent American companies from pursuing business opportunities in the Middle East and result in devastating trade and job losses.[50] Advocates of the legislation, including the three Jewish-American groups, put forth a three-fold argument: allowing American companies to cooperate with the Arab League Boycott would (1) encourage religious discrimination; (2) encourage trade discrimination; and (3) threaten US sovereignty.[51] A brief analysis of each of these three arguments is discussed below.

1 *Religious Discrimination*

Proponents of strengthened US anti-boycott legislation portrayed the Arab League Boycott as encouraging anti-Jewish discrimination by American companies.[52] However, the accuracy of this portrayal was questionable.[53] The secondary and tertiary boycott requests were predominantly focused on ascertaining US companies' business

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49 Ibid.

50 Ibid 530, 541. Another group also exerted a powerful influence on the final terms of the legislation — the Arab League and its member countries whose boycott was under attack. While the Arab League and its member countries did not have direct representation before Congress, their cause was in effect argued by the business associations, just as the Jewish agencies spoke to concerns not only of the American Jewish community but also of Israel: at 530.

51 Ibid 535–40.

52 Ibid 535.

53 See, eg, the statement of Robert McNeill, Executive Vice Chairman of the Emergency Committee for American Trade, who argued that legislation should 'deal with foreign boycotts as they are and not as some describe them to be'. The Arab League Boycott, he stated, involved not religious but political discrimination, and a trivial number of boycott-related requests involved religious discrimination. Ibid 535 n 15, citing *1977 House Hearings*.

relationships with Israel, not with Jewish people.[54] While some requests sent to American companies inquired about the religious identity of persons related to the firm, such instances of anti-Jewish discrimination were rare.[55] On occasion, the US State Department was successful in terminating the use of such discriminatory requests through diplomatic negotiations with the Arab country involved.[56]

On the other hand, the Arab League Boycott was 'instinct with subtle pressures towards religious discrimination',[57] even if such discrimination was not always blatant in the boycott requests. Some Arab League Boycott regulations made reference to 'Zionist-sympathizers'.[58] As well, some Arab League members may have placed pressure on US companies to avoid business relationships with Jewish people and to hesitate in appointing Jewish people to executive positions.[59]

2 *Trade Discrimination*

The principle of non-discrimination in international trade was a core ideal in the 1970s, as it is today.[60] Proponents of strengthened US

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54 Steiner, above n 48, 535–6.

55 Ibid 535 n 16. A survey indicated that of 50 000 transactions involving boycott requests which firms had reported to the Department of Commerce, only 25 involved religious discrimination. *Hearings on Discriminatory Arab Pressure on US Business Before the Subcommittee on International Trade and Commerce of the House Committee on International Relations*, 94th Cong, 1st Sess 119 (1976). The rarity of internal religious discrimination was demonstrated through the testimony of Maxwell Greenberg, chairman of the National Executive Committee of the Anti-Defamation League of B'nai B'rith. An analysis which he submitted indicated that religious discrimination figured in only 3 of 836 reports filed with the Commerce Department since October 1976. Of these reports, there were no requests for information about ownership or control of companies by Jewish people or whether officers or directors were Jewish. See *1977 Senate Hearings*; Steiner, above n 48, 536 n 16.

56 Steiner, above n 48, 536 n 16.

57 Ibid 536.

58 Ibid 536–7.

59 Ibid 536.

60 Ibid 537–8.

anti-boycott legislation opposed the Arab League Boycott under the assertion that it was a discriminatory trade policy.[61] While the Arab League Boycott is discriminatory, it is 'easy to expose the contradictions in the invocation of that economic objective'. [62] Specifically, America's own trade policy is rife with laws and regulations that are discriminatory, including tariffs, quotas, export controls, sanctions and trade embargos against foreign nations. [63] However, there is an important distinction to be made between discriminatory US trade policies that are developed autonomously and in our national interest, versus foreign discriminatory trade policies (such as the Arab League Boycott) that are 'imposed' on US companies.[64] This distinction plays into the third argument that was made by the pro-legislation interest groups — the Arab League Boycott's imposition on US sovereignty.

3 *US Sovereignty*

Advocates of strengthened US anti-boycott legislation argued that the Arab League Boycott not only promoted religious and trade discrimination, but also threatened the sovereignty of the United States. [65] Specifically, they argued that the secondary and tertiary aspects of the boycott were a 'territorially aggressive policy, [seeking] to absorb third-countries into the boycotters' economic warfare against the target country'. [66] This perceived threat to US sovereignty was a significant factor in Congress' decision to pass the strengthened anti-boycott legislation.[67]

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61 Ibid.

62 Ibid 537.

63 Ibid.

64 Ibid 537–8.

65 Ibid 538.

66 Ibid.

67 Ibid. The legislative record contains numerous references to foreign interference with US sovereignty. See, eg, remarks of Senator Stevenson (the boycott 'intrudes upon American sovereignty') and statement by the AFL-CIO Executive Council on the Arab Boycott (the secondary boycott has 'put at issue America's willingness to defend its own principles and sovereignty'), in *1977 Senate Hearings*. Steiner, above n 48, 538 n 24.

IV COMMERCIAL SPEECH

The First Amendment to the *US Constitution* provides that 'Congress shall make no law … abridging the freedom of speech'.[68] However, the right of free speech is not absolute.[69] Even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes 'strict scrutiny' (ie, if the government shows that the restriction serves 'to promote a compelling interest' and is 'the least restrictive means to further the articulated interest').[70] Furthermore, the US Supreme Court has interpreted the First Amendment to provide limited protection for specific categories of speech, including commercial speech.[71]

There is no distinction in the text of the First Amendment between commercial and non-commercial speech.[72] However, since the mid-1970s, the Supreme Court has maintained a commercial/non-commercial distinction in its First Amendment jurisprudence.[73] Commercial speech has been defined by the Supreme Court as 'speech that proposes a commercial transaction'.[74] Almost all

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68 Henry Cohen, 'Speech and Press: Exceptions to the First Amendment' (Congressional Research Service, United States Congress, 2009) 1.

69 Ibid.

70 Ibid.

71 Ibid. In addition to commercial speech, the Supreme Court has determined that the First Amendment provides less than full protection to defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees' speech.

72 Alex Kozinski and Stuart Banner, 'Who's Afraid of Commercial Speech?' (1990) 76 *Virginia Law Review* 627, 631; see ibid 631–4 (for a discussion of the lack of a historical explanation for a constitutional distinction between commercial and non-commercial speech).

73 Ibid 628; see *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 US 748 (1976) ('commonsense differences' between commercial speech and non-commercial speech 'suggest that a different degree of protection is necessary'); Kozinski and Banner, above n 72, 629.

74 *Board of Trustees of the State University of New York v Fox*, 492 US 469, 482 (1989); Cohen, above n 68, 6 n 41.

commercial speech cases have involved the governmental regulation of advertising.[75]

The Supreme Court has prescribed the *Central Hudson*[76] test to determine whether commercial speech is constitutionally protected.[77] To warrant protection, the *Central Hudson* test initially requires that: (1) the commercial speech concerns lawful activity and is not misleading. If it meets these initial criteria, the government may regulate the speech only if: (2) the government interest in regulating the speech is substantial; (3) the regulation directly advances the government interest; and (4) the regulation is no more extensive than necessary to serve the government interest.

The Supreme Court has applied this 'intermediate-scrutiny' test in all commercial speech cases since *Central Hudson*.[78] However, in its

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75 Bradley Paul Nelson, '*Briggs & Stratton Corp v Baldrige*: International Boycotts and the Politics of Commercial Speech' [1986] *Wisconsin Law Review* 367, 369; see Cohen, above n 68, 7–12 (for a summary of recent Supreme Court cases regarding commercial speech and advertising); see also Cain, above n 30, 150 n 169, citing *Briggs & Stratton*, 539 F Supp, 1318, citing *Metromedia Inc v City of San Diego*, 453 US 490 (1981) (advertisements on billboards); *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557 (1980) (advertisements promoting consumption of electricity); *Bates v State Bar of Arizona*, 433 US 350 (1977) (advertisement of legal services); *Carey v Population Services International*, 431 US 678 (1977) (advertisements of contraceptives); *Linmark Associates Inc v Township of Willingboro*, 431 US 85 (1977) (posting of real estate 'For Sale' and 'Sold' signs); *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council*, 425 US 748 (1976) (prescription drug price advertising); *Bigelow v Virginia*, 421 US 809 (1975) (advertisements of abortion services); *Lowe*, 725 F 2d, 904 (Brieant J, dissenting) ('[t]he concept of commercial speech has now been confined to naked advertising and closely related methods of commercial solicitation'); *Ad World*, 672 F 2d, 1140 (noting the Supreme Court has confined commercial speech cases to those involving advertising); but see *Lowe*, 725 F 2d, 900 (holding that the Court has not limited commercial speech cases solely to advertising).

76 *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557, 566 (1980).

77 Cohen, above n 68, 7; Kozinski and Banner, above n 72, 630.

78 Cohen, above n 68, 7.

most recent commercial speech case,[79] the court noted that 'several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases'.[80] The following section provides an analysis of the *Briggs* cases — a series of cases in the US Court of Appeals for the Seventh Circuit which applied the *Central Hudson* test in the context of a constitutional challenge to US anti-boycott regulations.

V THE *BRIGGS* CASES

A *Briggs & Stratton Corp v Baldrige* (1982)

In 1982, the US District Court for the Eastern District of Wisconsin decided the case of *Briggs & Stratton Corp v Baldrige*.[81] The plaintiff was an American manufacturer of components for international combustion engines and had a distributor in Syria.[82] In an effort to enforce the secondary and tertiary aspects of the Arab League Boycott, the Syrian distributor sent the plaintiff a questionnaire

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79 *Thompson v Western States Medical Center*, 535 US 357 (2002); Cohen, above n 68, 11 n 83.

80 Cohen, above n 68, 7; see Lora E Barnhart Driscoll, '*Citizens United v Central Hudson:* A Rationale for Simplifying and Clarifying the First Amendment's Protections for Nonpolitical Advertisements' (2011) 19 *George Mason Law Review* 1, 247–50 (discussing recent Supreme Court dicta that suggests many of the current Justices support abandoning the *Central Hudson* test and applying a strict-scrutiny analysis to commercial speech regulations). Some scholars have opined that language from the recent Supreme Court decision in *Citizens United v Federal Election Commission*, 130 S Ct 876 (2010) (5-4 decision) suggests that the traditional commercial speech analysis may be headed for a change. As Professor Tamara R Piety recently wrote on the subject:

> The majority of the court is sympathetic to the argument for more protection for commercial speech and *Citizens United* reflects that sympathy. It suggests that with the proper case, there is an increased likelihood the Supreme Court will either do away with the commercial speech doctrine altogether and declare that commercial speech should be treated as fully protected speech, or it will nominally retain the doctrine but apply strict scrutiny review.

Tamara R Piety, 'Citizens United and the Threat to the Regulatory State' (2010) 109 *Michigan Law Review* 16.

81 539 F Supp 1307 (ED Wis 1982), aff'd, 728 F 2d 915 (7th Cir), cert denied, 105 S Ct 105 (1984).

82 *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1310 (ED Wis 1982).

inquiring about the company's business relationship with Israel.[83] The plaintiff was prevented from responding to the questionnaire under US anti-boycott regulations[84] — specifically, s 2407(a)(1)(D) of the *EAA*.[85]

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[83] Ibid. The questions submitted to Briggs and Stratton Corp were translated as follows:

- Has the company now or in the past main or branch factories or combinating factories in Israel?
- Has the company now or in the past general offices in Israel for its regional or international works?
- Has it grant now or in the past the right of utilizing its name or trade marks or patents to persons or establishments or Israel works inside or outside Israel?
- Does it share in or own now or in the past shares in Israel works or establishments inside or outside Israel?
- Does it now or did it offer in the past any technical assistance to any Israeli work or establishment?
- Does it represent now or did it represent in the past any Israel establishment or work inside or outside Israel?
- What are the companies which it shares in or with, their nationality and the size or rate of this share?: at 1310–11.

[84] Ibid 1311.

[85] Section 2407(a)(1)(D) of the *Export Administration Act of 1979* provides in part:

> (a)(1) … [T]he President shall issue regulations prohibiting any United States person, with respect to his activities in the interstate or foreign commerce of the United States, from taking or knowingly agreeing to take any of the following actions with intent to comply with, further, or support any boycott fostered or imposed by a foreign country against a country which is friendly to the United States and which is not itself the object of any form of boycott pursuant to United States law or regulation:
>
> (D) Furnishing information about whether any person has, has had, or proposes to have any business relationship (including a relationship by way of sale, purchase, legal or commercial representation, shipping or other transport, insurance, investment, or supply) with or in the boycotted country, with any business concern organized under the laws of the boycotted country, with any national or resident of the boycotted country, or with any other person which is known or believed to be restricted from having any business relationship with or in the boycotting country.

50 USCS Appx § 2407.

The plaintiff argued that its responses to the boycott questionnaire constituted protected commercial speech and that the applicable section of the US anti-boycott regulations did not pass scrutiny under the *Central Hudson* test.[86] The District Court rejected this argument and found the regulation to be constitutional.[87] In applying the *Central Hudson* test, the District Court determined that the government had a substantial interest in preventing foreign governments from 'forcing [American citizens] to participate in actions which are repugnant to American values and traditions', and that the anti-boycott regulations were not more restrictive than necessary to serve this interest.[88]

B *Trane Co v Baldrige* (1983)

In 1983, the US District Court for the Western District of Wisconsin decided the case of *Trane Co v Baldrige*.[89] The facts of this case paralleled those of the *Briggs* case from 1982, except that the plaintiffs in *Trane Co* argued that their questionnaire responses should not be classified as commercial speech, and therefore should receive full protection under the First Amendment.[90] The plaintiffs argued that their responses to the questionnaires did not fit within the definition of commercial speech that had been offered by the Supreme Court in *Central Hudson* ('expression related solely to the economic interests of the speaker and its audience') because 'more than economic interests are at stake'.[91] Specifically, the plaintiffs contended that the questionnaire responses were 'necessary to promote the truth concerning their business relationships and to dispel any misapprehensions which the Arabs might have about them'.[92]

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86 *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1317–19 (ED Wis 1982).

87 Ibid 1320.

88 Ibid 1319, citing S Rep No 104, 95th Cong, 1st Sess 21 (1978).

89 552 F Supp 1378 (WD Wis 1983), aff'd sub nom. *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915 (7th Cir), cert denied, 105 S Ct 105 (1984).

90 *Trane Co v Baldrige*, 552 F Supp 1378, 1385 (WD Wis 1983).

91 Ibid.

92 Ibid.

The District Court rejected the plaintiffs' argument, stating that their interests were solely economic,[93] and therefore the questionnaire responses constituted commercial speech that was subject to a lower standard of protection under the First Amendment.[94] In applying the *Central Hudson* test and using an analysis similar to that in the *Briggs* decision from the previous year, the District Court determined that the applicable anti-boycott regulation passed constitutional muster.[95]

C *Briggs & Stratton Corp v Baldrige* (1984)

In 1984, the US Court of Appeals for the Seventh Circuit reviewed the *Briggs* and *Trane Co* cases in a consolidated appeal and affirmed the lower courts' decisions.[96] In support of its determination that the appellants' questionnaire responses constituted commercial speech, the Court of Appeals' analysis included three definitions of commercial speech gleaned from Supreme Court cases: (1) speech 'which does no more than propose a commercial transaction';[97] (2) speech that is 'confined to the promotion of specific goods or

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93 Ibid:

> It is abundantly clear that plaintiffs' sole interest in providing responsive answers is economic. To the extent that the plaintiffs have an interest in promoting truth or dispelling misapprehensions, it is directly related to their ultimate interest in continuing to do business with the Arab states.

94 Ibid 1386.

95 Ibid 1386–8:

> The court concludes that the governmental interest here is substantial, involving delicate foreign policy questions and the interest of the government in forestalling attempts by foreign governments to embroil American citizens in their battles against others by forcing them to participate in actions which are repugnant to American values and traditions.

At 1386–7, quoting *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1319 (ED Wis 1982), quoting S Rep No 104, 95th Cong, 1st Sess 21 (1978).

96 *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915 (7th Cir), cert denied, 469 US 826 (1984).

97 Ibid 917, quoting *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc*, 425 US 748, 762 (1975).

services';[98] and (3) speech that is 'related solely to the economic interests of the speaker and its audience'.[99]

The appellants raised three arguments to demonstrate why their questionnaire responses did not constitute commercial speech, and should therefore be afforded the highest degree of First Amendment protection.[100] The appellants argued that their motives behind answering the questionnaires were: (1) to promote the truth about their business relationships; (2) to influence political decision-making; and (3) economic in nature, however, 'the presence of an economic motivation alone is not enough to show that speech is commercial'.[101] The Court of Appeals rejected each of the appellants' arguments in turn and concluded that the questionnaire responses constituted commercial speech under the definitions provided.[102]

As to the appellants' first argument, the Court of Appeals stated:

> the appellants' interest in disseminating truthful information cannot be distinguished in this instance from their economic interests … their interest is in maintaining their advantageous commercial relationships, and any interest in promoting truth is directly proportional to the economic result it would achieve.[103]

As to the appellants' second argument, the Court of Appeals stated:

> Despite appellants' attempts to color their communications with a protected interest in political speech, this argument must also fail … the appellants do not seek to answer the questionnaire in order to influence the Arabs' decision to conduct or enforce a trade boycott with Israel … They wish through their answers only to show that the boycott's

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98 *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915, 917 (7th Cir), quoting *Metromedia Inc v City of San Diego*, 453 US 490, 505 n 12 (1981).

99 *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915, 917 (7th Cir), quoting *Central Hudson Gas & Electric v Public Service Commission*, 447 US 557, 561 (1980); see Nelson, above n 75, 374.

100 *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915, 917 (7th Cir).

101 Ibid.

102 Ibid 916–18.

103 Ibid 917.

> sanctions should not be applied to them, because they have not violated its terms.[104]

As to the appellants' third and final argument, the Court of Appeals stated:

> We have not discarded the 'common-sense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech *Ohralik v Ohio State Bar Ass'n, 436 US 447, 455–56 (1978)* … The appellants' proposed answers to boycott questionnaires would serve only to allow appellants to continue to maintain commercial dealings with the Arab world … Applying the common-sense distinction articulated in *Ohralik*, we hold that the appellants' proposed communications are commercial speech.[105]

The remaining sections of this paper present the argument that the analyses used in the *Briggs* decisions to justify a lesser standard of free speech protection for the questionnaire responses was misguided. First, on careful examination, the commercial speech definitions provided by the *Briggs* courts do not apply to the factual scenarios presented in the case. Therefore, the questionnaire responses should have never been classified as commercial speech. Second, even if a liberal interpretation of the commercial definitions provided by the courts would justify the questionnaire responses being classified as commercial speech, the government's interest in preventing compliance with the Arab League Boycott is not so substantial as to condone a restriction on Briggs' free speech rights. Finally, regardless of classification, the political, social and economic value of the questionnaire responses should have been given greater consideration by the *Briggs* courts in making their determination. The 'commercial speech' in the context of the *Briggs* cases is inherently more complex in nature than commercial speech which is regulated in a strictly advertising context; therefore, such speech is deserving of greater protection under the First Amendment. The remaining sections of this paper flesh out the above arguments in greater detail and conclude by offering a practical compromise that would protect free speech rights

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104 Ibid.

105 Ibid 918.

while accounting for the government's interest in preventing compliance with unsanctioned foreign boycotts.

VI THE COMMERCIAL SPEECH DEFINITIONS IN *BRIGGS*

The District Court in *Briggs* noted that '[m]ost, if not all, of the cases considering first amendment protection of commercial speech have considered various aspects of advertising'.[106] Because the facts of *Briggs* did not involve advertising, 'serious questions are raised as to whether the definitions and balancing tests employed are sufficient to protect the wider range of first amendment values involved'.[107] As to each of the three commercial speech definitions relied on by the Court of Appeals in *Briggs*, none of them adequately describe the type of speech involved in the case, as argued below.[108]

A *Speech 'Which Does No More than Propose a Commercial Transaction'*

Responding to the boycott questionnaire did not propose any transaction; rather, it conveyed information regarding business relationships between Briggs and Israel.[109] Even if providing such information could be broadly interpreted as 'proposing a commercial transaction', the full definition used by the Court of Appeals would still not be applicable to the facts in *Briggs*.[110] Responding to the questionnaire did *more* than propose a commercial transaction: it 'responded to an inquiry of vital political and economic interest to the listener and conveyed information regarding Briggs' possible relationships with those who have acted contrary to the interests of the listener'.[111]

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106 *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1318 (ED Wis 1982).
107 Nelson, above n 75, 369.
108 Ibid 375.
109 Ibid 377.
110 Ibid.
111 Ibid.

B *Speech 'Confined to the Promotion of Specific Goods or Services'*

The purpose of responding to the boycott questionnaire was not confined to promoting Briggs' products.[112] Although Briggs ultimately had an interest in continuing to sell its products in Arab countries that motivated its decision to answer the questionnaire, Briggs also had an interest in promoting the truth about its business relationships.[113] The boycott questionnaire did not even inquire about Briggs' products; it was only concerned with Briggs' business relationships with Israel.[114] Even if the Court of Appeals was correct in its determination that Briggs' interest in disseminating truthful information was directly related to its interest in selling products, this still does not fall within the limiting nature of the '*confined* to the promotion of specific goods or services' definition that was applied by the Court.[115]

C *Speech 'Related Solely to the Economic Interests of the Speaker and Its Audience'*

The responses to the boycott questionnaires were not related solely to the economic interests of both Briggs and the Syrians.[116] Although Briggs' motives in responding to the questionnaire may have been economic, the interests of the Syrians went beyond economics.[117] The Arab League Boycott is a *political* boycott where 'boycott advocates put economic pressure on third parties to further their goals of

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112 Ibid 378.

113 Ibid; *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915, 917 (7th Cir 1984). First, the appellants argue that each question in the boycott questionnaire is implicitly an allegation that they have engaged in conduct or maintained relationships contrary to the Arabs' boycott principles. They assert that they have a right to answer the questionnaires in an effort to promote the truth about their business relationships.

114 Nelson, above n 75, 378.

115 Ibid. '[B]y ignoring the limiting nature of the definition, the court applied it to speech that does not fit within the confines of the definition'.

116 Ibid 375.

117 Ibid 375–6.

fostering political change'.[118] Therefore, this definition of commercial speech is not applicable in the *Briggs* case.[119]

VII THE GOVERNMENT INTEREST IN PREVENTING BOYCOTT COMPLIANCE

Even if a liberal interpretation of the above-stated definitions would justify the questionnaire responses being classified as commercial speech, the government's interest in preventing compliance with the Arab League Boycott is not so substantial as to condone a restriction on Briggs' free speech rights. The District Court in *Briggs* determined that the government had a substantial interest in preventing foreign governments from 'forcing [American citizens] to participate in actions which are repugnant to American values and traditions'.[120] However, it is difficult to contend that the act of responding to boycott questionnaires is 'repugnant to American values and traditions' when the United States employs similar questionnaires in its own boycotts.[121] In an article on this subject, Professor Andreas F Lowenfeld wrote the following:

> The United States has been the Olympic champion in imposing political trade controls: through a combination of persuasion, inducement, and threat of sanction, it has sought and largely secured the cooperation of foreign nations in its programs. And it has utilized many of the same devices used by the Arab League — questionnaires, certificates and blacklists.[122]

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118 Ibid 376, quoting Comment, 'Secondary Boycotts and the First Amendment' (1984) 51 *University of Chicago Law Review* 811, 836; see S Rep No 104, 95th Cong, 1st Sess 20 (1978) (the Arab boycott of Israel 'exists for political reasons rather than for the purpose of securing commercial advantage').

119 Nelson, above n 75, 376.

120 *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1319 (ED Wis 1982), citing S Rep No 104, 95th Cong, 1st Sess 21 (1978).

121 Nelson, above n 75, 389. Even if the 'repugnant actions' described by the *Briggs* court referred to the idea that the boycott promoted religious intolerance and/or discrimination against Jewish people, the questionnaire at issue in *Briggs* made no reference to religious or racial information. Ibid 388; see *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1310–11 (ED Wis 1982).

122 Andreas F Lowenfeld, '"Sauce for the Gander": The Arab Boycott and United States Political Trade Controls' (1977) 12 *Texas International Law Journal* 25, 33.

Furthermore, even though the *Briggs* courts did not make a national security argument in support of the government's 'substantial interest', if such an argument were to be made, it would likely not stand up to scrutiny; there is no national security threat involved in allowing American companies to respond to Arab League Boycott questionnaires. As stated by author David Cain, regarding the need to analyse the 'substantial interest' of the government in perspective:

> the substantiality of the government's interest in restricting speech "depends on the gravity of the harm the state is seeking to avert and the likelihood of its occurrence." For example, prohibiting the transfer of information concerning a destructive weapon to a terrorist group during wartime would be a substantial government interest, while prohibiting the transfer of freely available data having peaceful applications would not.[123]

VIII THE VALUE OF COMMERCIAL SPEECH

Commercial speech outside of the advertising context should not be distinguished as a class of speech that is deserving of less protection under the First Amendment.[124] Despite the commercial/non-commercial distinction that has long-existed under First Amendment jurisprudence, judges and scholars have continued to make the argument that commercial speech contains a 'constitutional value' which deserves as much protection as traditional speech.[125] The

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123 Cain, above n 30, 156–7, quoting Alexander, 'Preserving High Technology Secrets: National Security Controls on University Research & Teaching' (1983) 15 *Law and Policy in International Business* 173, 205-206, citing *Dennis v US*, 341 US 494, 510 (1951).

124 Nelson, above n 75, 392.

125 See *Virginia State Board of Pharmacy*, 425 US 748, 763 (a 'particular consumer's interest in the free flow of commercial information … may be as keen, if not keener by far, than his interest in the day's most urgent political debate'); see Nelson, above n 75, 394, citing Neuborne, 'A Rationale for Protecting and Regulating Commercial Speech' (1980) 46 *Brooklyn Law Review* 437, 448 (commercial speech should be fully protected inasmuch as it is 'critical to an informed opinion on the concededly political issue of whether and to what extent the economic marketplace should be regulated'); see also Nelson, above n 75, 394, citing Note, 'Constitutional Protection of Commercial Speech' (1982)

commercial/non-commercial distinction gives the government a powerful weapon to suppress speech.[126] The more speech that is classified as 'commercial', without due consideration to the underlying political, social and economic values inherent in such speech, the more expression can be suppressed under the cover of commercial regulation.[127] The following sections analyse the political and economic value of the speech in *Briggs*.

A *The Political Value of Briggs' Speech*

There was no strong evidence in the *Briggs* cases to suggest that the motivation of the plaintiffs was anything other than economic. However, in general, a US person or company's response to such questionnaires could well be the 'manifestation of a sincere political or religious belief'.[128] In a law review article critiquing the *Briggs* decision, Chief Judge Alex Kozinski of the US Court of Appeals for the Ninth Circuit, offered the following:

> Suppose the management of Briggs & Stratton supported the creation of a Palestinian state, or were devout Moslems, and had contended that their desire to respond to the questionnaire was motivated by these concerns as much as by economic ones. Would responding to the questionnaire be commercial speech?[129]

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82 *Columbia Law Review* 720, 731, 744–6 (Of the four values advanced by free speech — (1) political self-government, (2) self-realisation through expression, (3) discovery of truth, and (4) individual growth through perception — three of these are advanced by commercial speech). Judge Fuchsberg wrote the following with regard to the commercial/non-commercial distinction:

> As untroubling as neat distinctions between the dissemination of ideas and the distribution of goods may have been in an earlier age, they are well-nigh impossible today … That politics and economics have become irretrievably interdependent is a conclusion that must be drawn by even the most casual of observers … political freedom may be so dependent on economic freedom that the pursuit of one cannot be readily divorced from the other.

Nelson, above n 75, 395, quoting Fuchsberg, 'Commercial Speech: Where It's At' (1980) 46 *Brooklyn Law Review* 389, 392–3.

126 Kozinski and Banner, above n 72, 653.

127 Ibid 649–50.

128 Ibid 645.

129 Ibid.

While the Court of Appeals in *Briggs* was not convinced by the appellants' argument that they were attempting to 'influence the political decisions of a sovereign government',[130] another person or company served with boycott questionnaires could conceivably use this medium as a way to express its approval of the boycott. While this might not be the most effective or straightforward method of political expression, that factor should be irrelevant. It is the political motivation (or lack thereof) in responding to the boycott questionnaires that should be determinative in classifying the speech and/or determining the degree of protection afforded to it. A US person or company with political motivation to comply with the Arab League Boycott by providing questionnaire responses should be given as much protection under the First Amendment as they would with almost any another manifestation of political speech.

Furthermore, even if the motivation of a US person or company in responding to a boycott questionnaire is more economic than political in nature (as was the case in *Briggs*), this does not take away from the fact that the speech is a response to a political boycott, rather than merely the transmittal of business information.[131] Regardless of the speaker's motivation, there is a political context in providing responses to Arab League Boycott questionnaires which was not considered when the courts in *Briggs* classified the speech as 'commercial'. The nature of the boycott makes acts of compliance more complex than simply providing business information (eg, an advertisement). [132] Therefore, providing questionnaire responses should not be classified as commercial speech when there are 'inherently political and social aspects of the communication'[133] that demand greater protection under the First Amendment.[134]

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130 *Briggs & Stratton Corp v Baldrige*, 728 F 2d 915, 917 (7th Cir 1984).

131 Nelson, above n 75, 381.

132 Ibid.

133 Ibid.

134 See ibid 392. '[W]hen the commercial speech rationale is applied in non-advertising situations, additional complicating factors suggest that a traditional first amendment analysis, as opposed to a commercial speech categorical analysis, should be applied'.

Finally, there is a political aspect to the questionnaire responses that was overlooked by the *Briggs* courts, but is important to consider in light of the background and context under which the US anti-boycott regulations came to be established. As detailed above (see section IIIB), special interest groups favouring American support for Israel provided the impetus for the strengthened anti-boycott regulations.[135] These groups placed pressure on Congressional Members to implement strict anti-boycott legislation, often at the risk of being perceived as anti-Israel or even anti-Semitic to do otherwise. Subsequently, the ability of US persons and companies to choose to comply with aspects of the Arab League Boycott is a form of speech that derives value from 'its ability to counteract the special interests behind the legislation'.[136]

B *The Economic Value of Briggs' Speech*

The existence of an economic interest, such as that in *Briggs*, should not preclude speech from receiving a high degree of protection under the First Amendment. In a free-market economy, the ability to give and receive information about commercial matters may be 'as important, sometimes more important, than expression of a political, artistic, or religious nature'.[137] Aaron Director, the father of the law and economics movement, stated:

> the bulk of mankind will for the foreseeable future have to devote a considerable fraction of their active lives to economic activity. For these people freedom of choice as owners of resources in choosing within available and continually changing opportunities, areas of employment, investment, and consumption is fully as important as freedom of discussion and participation in government.[138]

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135 Ibid 386, citing Franck & Johnson, 'Writing an Anti-Boycott Law: A Study in New Modes of Interest Group Participation' (1979) 12 *New York University Journal of International Law and Politics* 1, 1–28; Nelson, above n 75, 386 n 134.

136 Nelson, above n 75, 386.

137 Kozinski and Banner, above n 72, 652.

138 Ibid, quoting Director, 'The Parity of the Economic Market Place' (1964) 7 *Journal of Law and Economics* 1, 6.

In his dissenting opinion from *Dunn & Bradstreet v Grove*,[139] Justice Douglas echoed this statement by emphasising the societal importance of the free flow of economic information:

> Nor ... should commercial content be controlling. The language of the First Amendment does not except speech directed at private economic decisionmaking. Certainly such speech could not be regarded as less important than political expression ... private sector decisionmaking is at least as effective an institution as are our various governments in furthering the social interest in obtaining the best general allocation of resources.[140]

Furthermore, there is arguably an economic aspect to most forms of expression that traditionally receive the highest degree of protection under the First Amendment.[141] In his concurring statement in *Central Hudson*, Justice Stevens expressed this belief in the following statement:

> Neither a labor leader's exhortation to strike, nor an economist's dissertation on the money supply, should receive any lesser protection because the subject matter concerns only the economic interests of the audience. Nor should the economic motivation of the speaker qualify his constitutional protection; even Shakespeare may have been motivated by the prospect of pecuniary reward.[142]

Finally, the economic value of Briggs' speech can be understood in the most basic terms. Briggs' sales to persons who export its products to Arab League countries totalled more than $15 000 000 in the fiscal year ending 30 June 1980 and accounted for the employment of approximately 100 people.[143] Thus, a great deal of money and a large number of jobs depended upon Briggs' continued accessibility to Arab League markets.[144] Therefore, there is a tangible economic

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139 440 US 898 (1971).

140 Ibid 905; Nelson, above n 75, 385.

141 Kozinski and Banner, above n 72, 653.

142 *Central Hudson Gas & Electric Corp v Public Service Commission*, 447 US 557, 579–80 (1980).

143 Nelson, above n 75, 383, citing *Briggs & Stratton Corp v Baldrige*, 539 F Supp 1307, 1311 (ED Wis 1982).

144 Nelson, above n 75, 383.

value in Briggs' responses to the boycott questionnaires that should be acknowledged.

IX Recommendations and Conclusion

Commercial speech should not necessarily receive the highest degree of protection under the First Amendment in every case (especially in an advertising context).[145] Rather, the values and interests associated with the speech should be considered by courts in determining the constitutionality of the laws that regulate such speech.[146] Because of the complex nature of speech within the context of US anti-boycott regulations, including s 2407(a)(1)(D) of the *EAA*, the regulation of such speech should be subject to a strict-scrutiny standard.[147] This would require courts to give serious weight to the free speech values/interests of US persons and companies, as well as require the government to demonstrate a *compelling* interest in regulating such speech.[148] Given the various political, social, and economic values and interests that are inherent in boycott questionnaire responses, in relation to the government's interest in discouraging compliance with foreign boycotts, s 2407(a)(1)(D) of the *EAA* would almost certainly not pass constitutional muster under a strict-scrutiny analysis.

However, even assuming that under a strict-scrutiny analysis the government does have a compelling interest in preventing US persons and companies from complying with the Arab League Boycott, such an analysis also requires that the regulation at issue be the 'least restrictive means' by which to achieve that interest. Section 2407(a)(1)(D) of the *EAA* does not meet this standard. If the government's compelling interest is to prevent US persons and companies from complying with, furthering or supporting unsanctioned foreign boycotts, it can do so in ways that would not restrict free speech rights.[149] For example, the US could impose a

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145 Ibid 394.
146 Ibid.
147 Ibid 394–5.
148 Ibid 395.
149 Cain, above n 30, 161.

trade embargo or stricter export controls on Arab League members just as it does with other countries (Cuba, North Korea, Iran, etc).[150]

More realistically, however, this author suggests another option: reform the US anti-boycott regulations to read as they did prior to 1977, ie, before US companies were expressly prohibited from providing the Arab League with information regarding their business relationships with Israel. Doing so would still require US persons and companies to report boycott requests to the Department of Commerce, thereby allowing the government to keep track of the boycott's progress and employ diplomatic mechanisms to resolve the boycott. At the same time, this compromise would not entail a restriction of free speech rights, as US persons and companies would be able to freely respond to boycott questionnaires.

Strong supporters of Israel may not see room for compromise when it comes to US policy in the region, even where the *Bill of Rights* is at issue. However, when considering the implications of the Arab League Boycott, it is important to maintain perspective. Political, religious and ideological differences in the Middle East are often 'resolved' through violent conflict and/or human rights abuses. While an economic and political boycott (such as that maintained by the Arab League since 1948) may not be endorsed or understood by supporters of Israel, it should be condoned as a preferred alternative to violent conflict. Americans who choose to comply with such peaceful boycotts, regardless of the political, religious, social or economic motive, should be allowed to do so as an expression of their free speech. Americans would never stand for a law which restricted their free speech rights to the extent that the current Israeli anti-boycott law does; in the same vein, Americans should not be willing to accept the free speech restrictions included in s 2407(a)(1)(D) of the *EAA* anti-boycott regulations.

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150 Ibid.

WHERE THE REAL ISSUE LIES: NORMATIVE CONFLICT BETWEEN THE WTO SYSTEM AND HUMAN RIGHTS

DR DESTAW A YIGZAW*

Abstract

Normative Conflict — World Trade Organization Law — Human Rights

The conflict between the WTO system and human rights is typically presented as a technical problem, chiefly attributable to the parallel development of the two regimes. To resolve conflicts between the two fields, commentators propose a broader definition of 'norm conflict'. This article advances a different account of the issue. It argues that contrary to the prevailing assumption, the conflict between the WTO and human rights is not primarily technical in nature. The conflict fundamentally arises from deliberate policy choices, and it is so systemic that it cannot be adequately addressed through judicial techniques of conflict resolution. The problem is not one of specific WTO rules directly clashing with human rights norms; it is rather the WTO as a system undermining human rights because its rules are disjoined not only from human rights values but also from the organisation's own goals. Therefore, without fresh political negotiations, there is only so much that can be done at the judicial

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level to ensure coherence between the two fields no matter how liberally pertinent terms are defined.

I INTRODUCTION

The law of the World Trade Organization (WTO) — occupies center stage in the debate on conflict of norms in international law. It is often argued that there is a clash between trade and non-trade values.[1] Any meaningful diagnosis of the supposed conflict must begin by identifying the values that are said to be in conflict. We all know what non-trade values are, some so intrinsic to all of us that they figure in our daily thoughts: basic needs, such as food and shelter; peace and security; freedom and dignity, to name but a few. These values are sanctioned in various human rights instruments. Now, it remains to ask what the values of trade are. This may hit at the root of the above hypothesis, but trade per se has no intrinsic value. As alluringly elucidated in the preamble of the *Marrakesh Agreement* Establishing the WTO, free trade is only useful for the sake of improving the standards of living of people around the world: to ensure that they are well nourished; live in peace and security; enjoy fundamental freedoms; and so on.[2] Yet, by no means are these goals conflicting with human rights. Rather, they embody human rights. In view of such apparent unity of purpose, one cannot help wondering why the WTO has so many human rights critics or any critics at all. Where does the conflict between human rights and the WTO system emanate from? This is a simple but momentous question this article aims to address.

The conflict between the WTO and human rights is typically characterised as a technical problem attributable to the parallel development of the two regimes, as an inevitable outcome of international law succumbing to its own growth. Accordingly,

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1 See, eg, Joel P Trachtman, 'Trade and … Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9 *European Journal of International Law* 32.

2 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) Preamble paras 1–3 ('*Marrakesh Agreement*').

probing the interface between the two branches of international law, and embracing appropriate techniques of conflict resolution is suggested as a solution. Leading scholars in the field propose a broader definition of 'norm conflict'.[3] Indeed, the prevailing scholarship on conflict of norms revolves mainly around how broadly or restrictively the term 'conflict' ought to be interpreted.[4]

This article advances a different account of the issue. It argues that contrary to the prevailing assumption, the conflict between the law of the WTO and human rights is not primarily a question of 'regime conflict'. At its core, it is not a conflict of technical nature that stems from the sheer growth of international law. It arises from a dissonance within the WTO, between its stated goals and its operative rules. In reality, it is argued here, there is no glaring difference between the WTO, which claims to create jobs, lift living standards, and other nobler goals, and a trading regime that is tuned to the pursuit of pure mercantilism. In other words, the profound conflict arises from deliberate policy choices, and it is so systemic that it cannot be meaningfully addressed through judicial techniques of conflict resolution. Indeed, from a technical point of view, WTO rules and human rights norms operate in parallel; hence, they are not as such in conflict.[5] The fundamental problem is not that specific WTO rules are directly clashing with human rights norms; it is rather that the WTO

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3 No commentator has probably advanced this argument more authoritatively than Joost Pauwelyn. See generally Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law* (Cambridge University Press, 2003).

4 See generally Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17(2) *European Journal of International Law*; Adarsh Ramanujan, 'Conflicts over the "Conflict": Preventing Fragmentation of International Law' (2009) 1(1) *Trade, Law and Development*.

5 Sajo argues that 'trade and human rights regimes have parallel lives, as the WTO does not allow for consideration of illegality or exceptions for international law violations other than those expressly recognised by the WTO regime itself'. Andras Sajo, 'Socioeconomic Rights and the International Economic Order' (2002) 35 *New York University Journal of International Law and Politics* 261. If trade and human rights operate in parallel, it seems axiomatic that they do not conflict (intersect each other).

system undermines human rights because its rules are disjoined from human rights values as well as the organisation's own raison d'être. In fact, it was the realisation that the goals stated in the preamble of the WTO 'Charter' were effectively left out of its operative rules rather than a concern about how WTO panels might interpret possible normative conflicts that animated protests in Seattle and elsewhere. In short, the conflict is more political than it is technical, and thus calls for structural solutions.

The article is structured as follows. Part II details the sources and dimensions of normative conflict in international law. It also tries to clarify the subsisting confusion on when legal norms are said to be in conflict. It further conceptualises the notion of 'legal norms'. Part III demonstrates the technical, normative and ideological reasons why the WTO has special significance to the debate on conflict of norms. Part IV tries to unravel the roots of the conflict between the WTO system and human rights, and demonstrates why ensuring fundamental coherence between the two fields requires negotiations at the political level.

II CONFLICT OF NORMS IN INTERNATIONAL LAW

In its final report on the subject, the International Law Commission (ILC) concluded that 'normative conflict is endemic to international law'.[6] To be sure, conflict of norms is not peculiar to international law. It is a normal phenomenon inherent in any legal system.[7] With hundreds of thousands of 'fragmented' treaties and over a hundred international courts and tribunals operating in near complete absence of power structure between them, the potential for conflict of norms is, however, decidedly more glaring and complex in international law than in domestic legal systems.[8] In domestic legal systems, there is

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6 Martti Koskenniemi, *Fragmentation of International Law: Difficulties Arising From The Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) [486] ('*ILC Report*').

7 See generally Pauwelyn, above n 3, 12.

8 See generally Wolfram Karl, 'Treaties, Conflicts Between' in R Bernhardt (ed), *Encyclopedia of Public International Law* (Elsevier, 2000) (4) 936.

normally one supreme legislative body whose will prevails over all subsidiary laws, thereby limiting normative conflicts. Beyond the business of law-making, there is usually one supreme judicial body (supreme or constitutional court) that abrogates rules that contradict with higher norms. The job of both of these bodies is made easier by the presence of one supreme law (constitution) against which the validity of all subordinate laws is adjudged. Importantly, domestic legal systems are generally equipped with strong sanction mechanisms.[9] Still, conflict of norms cannot be avoided altogether. Not only are legal norms often vague and imprecise but also in real life more complex and dynamic than could possibly be fully foreordained. Conflict of norms is not, therefore, an issue attributable solely to the lack of normative hierarchy.

None of the above attributes figure prominently in the international legal system. Indeed, whether international law operates as a 'system' or as a cluster of systems is not beyond dispute.[10] According to Hart, although international law is analogous to domestic law with respect to content and function, it falls short of a fully developed legal system when it comes to form. It lacks not only the secondary rules of change and adjudication 'but also the basic unifying rule of recognition specifying "sources" of law and providing general criteria for the identification and validity of its rules'.[11] International law operates

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9 For its detractors, international law is not binding because its subjects are independent States that may disregard their obligations with impunity. In other words, international law lacks organised sanctions. Hart rejects such argument as flawed that falls into the trap of the Austinian conception of law as 'essentially a matter of orders backed by threats'. H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 217. Still, it is clear that compared to domestic legal systems, international law is generally weaker.

10 According to Fischer-Lescano and Teubner, for example, the level of fragmentation in international law has reached a proportion that any attempt for normative unity is an exercise in futility. Andreas Fischer-Lecanto and Gunther Tuber, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25 *Michigan Journal of International Law* 1045.

11 Hart, above n 9, 214.

not as a system but just as a set of rules, according to Hart.[12] The lack of centralised legislator, adjudicator, and organised sanctions mechanism (making international law appear weaker) are other sources of skepticism. While unfair comparison with domestic legal systems might continue to trigger such misgivings, the ILC Study Group has now addressed the question head-on.[13] 'International law is a legal system. Its rules and principles (i.e. its norms) act in relation to and should be interpreted against the background of other rules and principles'[14] it concludes. Indeed, once it is accepted that at least certain norms of *jus cogens* are binding on States, regardless of consent, as explicitly recognised under the Vienna Convention on the Law of Treaties (VCLT), disputing the existence of the system to which these norms belong seems problematic.[15]

A *Multiple Sources of Normative Conflict*

International norms stream from a multitude of sources. Article 38 of the International Court of Justice (ICJ) Statute — widely regarded as the most authoritative, albeit equally controversial, statement on sources of international law — declares that treaties, custom, and general principles of law constitute the primary sources of international law applicable before the ICJ. Of these sources, norms deriving from custom and general principles of law are particularly difficult to ascertain.[16] There is no catalogue of international customs

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12 Ibid.

13 See *Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, Adopted by the ILC, 58th Session (2006) [1].

14 Ibid.

15 The reason is that hierarchy of norms is conceivable only within, not between legal systems. See *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 53 ('*VCLT*').

16 Some measure of uncertainty is inherent in the nature of law. However, in domestic legal systems laws are normally written, declared and published (although in some legal systems customary rules are also recognised, especially in such areas as family law) so that they are presumed to be known to the subjects. In international law, by contrast, custom is one of the two primary sources of law.

or of general principles of law.[17] Even what precisely 'general principles of law recognised by civilised nations' refer to remains unclear. Whether such principles exist, separately from customary law but common to all 'civilised nations', regardless of ideological or other differences, is a subject of debate.[18] It appears that the ICJ hardly uses this particular formal source of international law as a sole basis for its decisions. In short, given the general and abstract nature of such concepts, uncertainties abound regarding the determination of their precise content. The same can be said with respect to international custom.[19] Article 38(1)(d) adds to that uncertainty when it states that judicial decisions, scholarly teachings, and even equity may serve as subsidiary sources to determine the applicable law.

International norms emanating from treaties seem the easiest to ascertain. But that is until one realises the fact that States of any number may enter into indefinite number of legal relationships, creating virtually endless international norms. In so doing, they are not even obligated to ensure that the treaties they make are consistent with the existing body of treaty law, save for few exceptions.[20] There exists no categorical *a priori* hierarchy between treaties, with the exception of instruments with constitutional character, such as the

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17 Unlike treaties, customary law and general principles of law lack 'authentic wording'. Ulrich Fastenrath, 'Relative Normativity in International Law' (1993) 4 *European Journal of International Law* 316.

18 See generally G J H van Hoof, *Rethinking the Sources of International Law* (Kluwer, 1983) 132.

19 For example, at the Nuremburg and Tokyo trials at the end of WWII, the crime of 'planning, preparation, initiation or waging of a war of aggression' was one of the major counts top military officers of the defeated powers were charged with. However, there was no treaty or clear customary law making war of aggression a crime at the time, and objections were made along that line, they were just overruled. See David J Bederman, *Custom as a Source of Law* (Cambridge University Press, 2010) 174–5.

20 That means States may enter into a treaty that may be incompatible with their obligations under a separate treaty. If both the subjects of the treaty and the subject matter are the same, that would, of course, constitute an amendment of the previous treaty. But if either the subject matter or the parties is different, both treaties may remain valid despite the inconsistency between them, as long as they are consistent with peremptory norms and the UN Charter.

UN Charter. Besides, international treaty making is not even the exclusive domain of States anymore, as international organisations too generate treaties, unilaterally or through agreements with States or other organisations. What is not sufficiently clear is how such treaties relate to art 38. The notion of treaty under art 38(1)(a) refers exclusively to agreements concluded between States, as defined under art 2(1)(a) of the VCLT.[21] Thus, even the law of the WTO, while a treaty law, does not seem to fall under the purview of art 38(1)(a). While art 38 deals with laws governing exclusively the relations between sovereign States, neither sovereignty nor statehood is much of an issue for the WTO, as 'any state or separate customs territory having full autonomy in the conduct of its trade policies' may become a full-fledged WTO Member.[22]

However, the diversity of its sources is not the sole reason for the fragmentation of international law. It also has a lot to do with other remediable structural weaknesses and deliberate policy choices. International law is clearly less elaborate, compared to domestic legal systems.[23] It is also relatively weaker with no centralised judicial body with compulsory jurisdiction or an effective enforcement mechanism.[24] It is obvious, however, that interest and ideology play an enormous part in exacerbating normative incoherence. It is well known that many regard the establishment of the WTO as the culmination of the triumph of neoliberalism.[25] In view of arts 57 and

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21 Only States may be parties to cases before the ICJ. *Statute of the International Court of Justice* art 34(1).

22 *Marrakesh Agreement*, art XII.

23 See Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 *American Journal of International Law* 413–14.

24 Due to the political nature of international law, States are reluctant to empower international judicial bodies with compulsory jurisdiction. The WTO DSB is often regarded as the exception to the rule. However, even at the WTO, disputes are ultimately settled through political negotiations between the parties. In fact, the findings of the panel or AB come out just as a report, rather than a judgment.

25 The so-called 'capitalist triumphalism' that ushered a more robust role for global financial and trade institutions, was not only a triumph of capitalism over socialism; it has also severed the longstanding demands of the poor for structural changes in the global economic order. See generally M Sornarajah, 'The Neo-Liberal Agenda in Investment Arbitration: Its Rise, Retreat and

63 of the UN Charter, the WTO ought to be a UN specialised agency, as the stillborn International Trade Organization (ITO) was originally designed to be.[26] Yet, the WTO Agreement does not even mention the United Nations.[27] The issue here is not the WTO's institutional detachment from the United Nations; it is rather that employment and development issues, envisioned in the original ITO agenda, were left out of its operative rules.[28] By contrast, all non-trade subjects selectively incorporated into the WTO system at the Uruguay Round as *new issue*; namely, Trade-Related Aspects of Intellectual Property Rights (TRIPS), Trade-Related Investment Measures (TRIMS), and Trade in Services represent the longstanding interests and aspiration of industrialised nations and their corporations.[29] One has to look

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Impact on State Sovereignty' in Wenhua Shan, Penelope Simons and Dalvinder Singh (eds), *Redefining Sovereignty in International Economic Law* (Hart Publishing, 2008) 199.

26 The UN Charter envisions an international order where States strive to address problems of economic, social, cultural or humanitarian character through cooperation. It also envisages the establishment of various specialised agencies that are aimed at facilitating international cooperation, and entrusts the Economic and Social Council (ECOSOC) with the task of coordinating the various specialised agencies. In its very first meeting, the ECOSOC adopted a resolution calling for an international conference on trade and employment. See generally ESC Res 13, UN Doc E/22 (18 February 1946). A preparatory committee was set up and a series of negotiations took place until it came to culmination in 1948 by the adoption of the ITO Charter in Havana, Cuba. The Havana Charter, which was the Final Act of the UN Conference on Trade and Employment, envisioned an organisation that would comprehensively deal with trade, employment and development issues within the UN framework. However, the ITO never came into existence mainly because the US Congress did not approve it (although it was the US that submitted the initial draft).

27 Art V of the agreement mentions only 'other international organizations'.

28 The mere fact of being a UN Specialised Agency may not necessarily guarantee adherence to the fundamental principles of the UN Charter. Historically, for example, the Bretton Woods Institutions, which are UN Specialised Agencies, explicitly declared that they would not take into account political factors (hence, human rights) in their operations. Accordingly, when the International Monetary Fund (IMF) was forced to refuse loan to the former apartheid regime in South Africa, following international condemnation, it had to justify its refusal based on economic grounds of 'labor market rigidity' of the regime rather the immoral, even illegal nature of the regime.

29 The WTO is thus not a delayed ITO.

back to the root of the problem, and ask what animated protests in Seattle and elsewhere, as it was the widespread popular discontent against the trading regime that amplified the issue and brought the WTO into the centre of the debate on normative conflict.[30] Their concern was not about how WTO panels might interpret possible normative conflicts. They knew there was already a conflict of an ideological nature, as their interests were sidelined while corporate interests were selectively embraced.

Since human rights values are deliberately left out of the WTO system, a typical normative conflict does not involve a specific WTO rule violating a specific human right. None of the rules of the TRIPS, for example, directly violate individuals' right to health. Yet, as the notorious *South African pharmaceuticals* case has demonstrated, its systemic effect can be a matter of life or death for millions.[31] Millions have lost their jobs as a result of trade liberalisation. Millions of poor farmers have lost their livelihoods as a result of agricultural subsidies in rich nations.[32] As we shall discuss below, major WTO trade

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30 It was the single-minded pursuit of trade liberalisation, regardless of non-trade values that bred widespread discontents and protests, which in turn led to a renewed inquiry of the normative coherence of international economic law with other fields of international law in general, and human rights law in particular.

31 The *Pharmaceutical Manufacturers' Association of South Africa v the President of South Africa* [2000] 2 SA 674 case was triggered when South Africa, a country hard hit by HIV/AIDS, decided to combat the pandemic by, among other things, taking measures aimed at keeping drugs available to the poor, even if that meant disregarding patent laws. When Western pharmaceuticals (backed by the USA and EU) brought legal action against the South African government, the latter defended along the lines of its legal obligation to fulfill the health rights of its citizens by facilitating the availability of life-saving generic drugs at a fraction of the price at which the drugs were sold by Western companies (which then cost a patient between US$10 000–15 000 annually, effectively putting the drugs beyond the reach of most of those in need). The life *versus* profit battle drew strong international outrage, eventually forcing drug companies to back down.

32 The so-called 'C 4' countries in West Africa: Benin, Burkina Faso, Chad, and Mali that produce cotton at a cost half to that of the USA, have, for example, sustained a loss estimated at 1%–3% of their GDP in 2001 alone as a result the US cotton subsidy, thereby shattering the livelihoods of millions of smallholders who depend on cotton production. See UNDP, 'International Cooperation at a

disputes, from *EC–Bananas* to *Indonesia–Autos*, and many others involve profound conflict. Yet, the conflicts are not primarily technical; they do not result from a direct clash between specific rules; but rather from a systemic disharmony between the WTO and non-trade values. These conflicts arise from conscious and deliberate political choices, and cannot be meaningfully resolved through judicial techniques.[33]

B *Dimensions of Normative Conflict*

The concept of conflict of norms in public international law is two-dimensional: it is technical (horizontal/procedural) as well as normative (vertical/hierarchical).[34] To be sure, the distinction between the two may not always be sufficiently clear, as the relationship between different legal norms is inherently complex and dynamic. The ILC Study Group started its work by identifying four types of relationships that are traditionally associated with conflict of norms, namely: relations between special and general law; between prior and subsequent law; between laws of different hierarchical rank; and between a particular law and its 'normative environment'.[35] Of these, the first two relationships do not imply hierarchy, they are essentially technical conflicts. As such, they may be tackled with relative ease, thanks to techniques of conflict resolution.[36] There are developed legal rules to deal with the third relationship too. This, however,

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Crossroads: Aid, Trade and Security in an Unequal World' (Human Development Report, United Nations Development Program, 2005) 131 <http://hdr.undp.org/sites/default/files/reports/266/hdr05_complete.pdf>.

33 It is obvious that even the very decision to erect the WTO outside of the UN framework, with little or no reference to substantive principles of the UN Charter, including human right norms, has remarkable bearing on conflicts between trade and human rights norms.

34 While conflicts between two ordinarily treaty rules or between an overarching treaty and special treaty (such as the Agreement Establishing the WTO and the TRIPS Agreement) or between a prior norm and subsequent norm are example of horizontal conflict, while a conflict between a treaty norm and a *jus cogens* norm is the least controversial example of hierarchical conflict.

35 *ILC Report*, UN Doc A/CN.4/L.682, [18].

36 See generally *ILC Report*, UN Doc A/CN.4/L.682, [18].

presupposes identifying normative hierarchy, which is highly problematic in the context of international law.[37] The fourth one — arguably the most complex of all — is a question of systemic integration in international law, as required under art 31(3)(c) of the VCLT.[38] According to the ILC, harmonising law with its 'normative environment' is more a technical question of ensuring normative coherence and conflict resolution than it is a declaration of the relative weight of norms in conflict. The ILC states:

> All treaty provisions receive their force and validity from general law, and set up rights and obligations alongside rights and obligations established by other treaty provisions and rules of customary international law. None of such rights and obligations has any *intrinsic* priority against the other. The question of their relationship can only be approached through a process of reasoning that makes them appear as parts of some coherent and meaningful whole.[39]

According to the ILC, with the notable exception of *jus cogens* norms, some norms get priority over others, not on account of their overriding character, but rather because, as parts of a consistent whole, they must be read into each other in line with universal principles.[40] That means, for example, public health or national security issues under General Agreement on Tariffs and Trade (GATT) arts XX and XXI respectively have priority over trade rules, not due to their normative weight, but for functional reasons of systemic coherence.[41] That seems arguable as clearly those who argue for the primacy of human rights over trade rules are less concerned

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37 There are no fixed rules for an *a priori* determination of the relative status of international norms, apart from few *jus cogens* norms and the UN Charter. See generally *ILC Report*, UN Doc A/CN.4/L.682, [407]–[409].

38 See *ILC Report*, UN Doc A/CN.4/L.682, [410]–[480].

39 Ibid [414].

40 Ibid [473].

41 The idea here is that the systemic functioning of the international legal order requires linking specialised parts to each other and to universal principles. For this reason a general norm prevails over the particular rule (*lex generalis derogat legi specialis*) the inverse of *lex specialis derogat legi generalis* principle. See ibid [407]–[408].

about 'functional arguments' than the normative precedence, they believe, should be accorded to human rights.[42]

When two treaty rules of similar normative value are in conflict, resolving the conflict will essentially be a technical question. If the two rules concern the same subject matter, recourse will normally be had to rules of statutory interpretation. The two rather familiar maxims that are customarily called upon are: the special rule prevails over general rules (*lex specialis derogat legi generali*) and the latter rule prevails over earlier rules (*lex posterior derogate legi priori*). Accordingly, the WTO Agreement on Agriculture (AoA) prevails over GATT rules concerning agricultural trade on account its specificity.[43] As regards the *lex posterior* rule, it is generally presumed that by introducing an inconsistent rule, the lawmaker has consciously intended to abrogate the earlier rule on the subject matter. The whole point here is less about evaluating the normative weight of the rules in conflict than about ascertaining legislative intent and ensuring normative harmony.

However, where there is a hierarchical relationship between the rules in conflict, the above rules are impotent. Now, the question is one of rank, not of time or specificity. It is more of normative than it is technical; hence, the higher rule automatically trumps subordinate rules regardless of time or specificity (*lex superior derogate legi inferior*).[44] In constitutional democracies, the legislature is precluded *a priori* from making a law that is inconsistent with constitutional principles. International law does not operate under monolithic constitutional umbrella (although the UN Charter has a certain constitutional character). As the Joint Separate Opinion of Judges

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42 Unlike in such areas as international trade, where the emphasis is more on institutions and horizontal dialogue, international human rights discourse principally concerns the substance and overriding moral character of norms themselves. Human rights claims start with a definition that they (or at least some of them) are inviolable, while full liberalisation of trade has never been set even as a long-term goal.

43 See *Marrakesh Agreement* annex 1A ('*Agreement on Agriculture*') art 21(1).

44 The *lex superior* rule is in a way an exception to the above two rules.

Higgins, Kooijmans, and Buergenthal in *Congo v Belgium* recapitulates, the UN Charter and the emergence of peremptory norms have transformed international law from a horizontal and consensual order into a vertical legal order.[45] Article 53 of The VCLT further reaffirms that peremptory norms of general international law (*jus cogens*) not only prevail over other rules of international law, but also operates as checks on the treaty making power of States. Thus, conflict of norms in international law is not only a question of horizontal disharmony but also about vertical disharmony of rules of different normative rank.

C *Defining Conflict of Norms*

In order for conflict of norms to arise, three basic conditions must be fulfilled: one, there must be an overlapping of two different norms over a certain 'subject-matter'; two, the two norms must be 'incompatible'; and three, at least one of the States (or the subject of international law in question) must be 'bound by both norms', as reflected under art 30 of the VCLT.[46] However, the scope of this provision is limited to conflicts between successive treaties dealing with the same subject-matter.[47] Commentators point out various shortcomings even at that.[48] Crucially, it leaves the meaning of pertinent terms such as same subject-matter and incompatibility unclear.[49] According to Vierdag, for example, if the application of two rules to a set of facts leads to incompatibility, then we can assume that the two rules relate to the same subject-matter.[50] If Vierdag's assumption is right, the existence of conflict of norms seems to depend on two tests, rather than three; ie, if incompatibility

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45 *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) (Judgment)* [2002] ICJ Rep 3, 79 [51] (Judges Higgins, Kooijmans and Buergenthal).

46 See *VCLT* art 30(1)–(2).

47 Ibid art 30(1).

48 See EW Vierdag, 'The Time of Conclusion of a Multilateral Treaty' (1988) 59 *British Yearbook of International Law* 92–108.

49 See Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 2000) 183.

50 See Vierdag, above n 48, 100.

per se implies sameness, then the criterion of 'same subject-matter' will be redundant. But whether his assumption is right or not depends on one's conceptualisation of incompatibility or conflict. Jenks distinguishes, for example, between *direct incompatibility* (which, in his view, is the only scenario that results in technical conflict) and *other divergences* between rules.[51] While there is no disagreement on what direct incompatibility represents, commentators are divided on whether *other divergences* amount to conflict of norms.[52] Indeed, conceptual disagreement on the term 'conflict' is at the heart of the debate on conflict of norms. In the context of *trade and human rights*, for example, the most common contention is that trade and human rights are different subject-matters; hence, they cannot be conflicting.[53] It is for this reason that trade scholars argue that the WTO is a 'self-contained regime' that should not be concerned with or encumbered by non-trade issues.

So, what is norm conflict? 'A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties', writes Jenks.[54] Karl adopts a similar approach: 'Technically speaking, there is a conflict between treaties when two (or more) treaty instruments contain obligations which cannot be complied with simultaneously', he writes.[55] Compare this to Pauwelyn definition that goes: 'Essentially, two norms are … in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other'.[56] Pauwelyn breaks down conflict of norms into two sub-categories:

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51 C Wilfred Jenks, 'The Conflict of Law-Making Treaties' (1953) 30 *British Year Book of International Law* 426.

52 See generally Ramanujan, above n 4.

53 See generally Christopher J Borgen, 'Resolving Treaty Conflicts' (2005) 37 *George Washington International Law Review* 603.

54 Jenks, above n 51, 426.

55 Karl, above n 8, 936.

56 Pauwelyn, above n 3, 175–6. Vranes likewise defines conflict of norms broadly as follows: 'There is a conflict between norms, one of which may be permissive, if in obeying or applying one norm, the other norm is necessarily or potentially violated'. Vranes, above n 4, 415.

'inherent normative conflict', a situation where one norm as such breaches another; and 'conflict in the applicable law' or potential conflict, where conflict between two norms arises only in their application.[57]

1 *Conflict of Norms Distinguished from Conflict of Obligations*

Commentators regard Jenks' definition as unduly narrow and restrictive.[58] Instead, they advocate a broader definition that captures not only patent contradictions but also normative inconsistencies. According to the ILC, a conflict in the wider sense arises 'where two rules or principles suggest different ways of dealing with a problem'.[59] Indeed, although Jenks writing is commonly invoked by commentators and WTO panels as a representative of strict definition of conflict of norms, closer scrutiny reveals that Jenks' work deals with conflict of obligations rather than conflict of norms. To be fair, Jenks himself makes it explicit that his definition was merely technical, and that it does not cover (normative) divergences between treaties that may not involve technical conflict in the strict sense, but nonetheless end up cancelling out each other's intended objectives. He further acknowledges that such divergences may even be practically as fatal as conflicts, as the normative significance of one or the other of the divergent treaties may be seriously undermined. He writes:

> A divergence which does not constitute a conflict may nevertheless defeat the object of one or both of the divergent instruments … A divergence of this kind may … from practical point of view, be as serious as a conflict … Thus, while a conflict in the strict sense of direct incompatibility is not necessarily involved when one instrument eliminates exceptions provided for in another instrument or, conversely, relaxes the requirements of another instrument, the practical effect of the

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57 See Pauwelyn, above n 3, 176–7.

58 See generally *ILC Report*, UN Doc A/CN.4/L.682, [21]–[26]; Vranes above n 4, 412–15; Pauwelyn above n 3, 175–6.

59 See generally, *ILC Report*, UN Doc A/CN.4/L.682, [25].

> coexistence of the two instruments may be that one of them loses much or most of its practical importance.[60]

Therefore, the criticism that Jenks' strict definition of conflict fails to capture the conflict between a permissive norm and a prescriptive norm (ie, obligation or prohibition) should not suggest that Jenks was oblivious about the problem. He recognised the problem; but he regarded it as a problem of a different category than 'conflict in the sense of direct incompatibility', as a State may still, technically, comply with the obligation or prohibition, although that may mean forgoing its right.[61] For example, if rule 1 says: 'you may eat the apple'. And rule 2 says: 'you shall not eat the apple'. According to Jenks, one may comply with both rules simultaneously by not eating the apple (as eating the apple is merely permitted, not mandated). Jenks would agree that these two rules are divergent as complying with one would defeat the purpose of the other. However, he would maintain that there is no technical conflict between them, as one may simultaneously comply with both rules, albeit at the cost of relinquishing one's right under rule 1. According to Jenks, these two rules are not technically conflicting; they are just divergent. In reality, these two rules do not merely diverge from each other; they squarely conflict with each other. There is no conflict of obligations, but that is simply because there is only one obligation; ie, not to eat the apple. But this obligation is *directly incompatible* with the permission to eat the apple. Differently put, we do not have conflicting obligations simply because there is just one obligation; but we have two norms and they are directly conflicting. Legal norms are not synonymous with legal obligations (as norms include rights too).[62] Therefore, there is no logical reason to view the broader issue of conflict of norms from a narrow prism of conflict of obligations.

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60 Jenks, above n 51, 426–7.

61 Jenks' distinction between technical conflict and other treaty divergences are not so much based on the problems they pose (he acknowledges both can be equally serious), but rather on the possibility of compliance with one's obligations.

62 Pauwelyn, above n 3, 9.

In fact, Jenks' work, as the title suggests, concerns mainly with horizontal conflicts between treaty rules, although he also mentions that certain international norms, such as human rights may have overriding character.[63] This follows from his premise that conflicts of law-making treaties involve problems that are analogous to those in conflict of laws than with conflict of obligations within a legal system. He was thus concerned mainly with the techniques of resolving conflicts between treaty rules in a similar fashion to traditional conflict of laws. [64] Differently put, unlike what commentators and WTO panels suggest, Jenks dealt with conflict of obligations, not with conflict of norms.[65]

It is useful to note that not only Jenks, but the prevailing assumption at the time seems that a conflict between two treaties occurs only where a party to two inconsistent treaties cannot simultaneously comply with its obligations under both treaties. That understating has found way into art 103 of the UN Charter which declares that in the event of conflict, States' obligations under the Charter prevail over 'their obligations under any other international agreement'. [66] Despite the text, it is obvious that art 103 is a declaration of the supremacy of the Charter over all other treaties (as opposed to solely obligations).[67] It is pertinent to ask why the obligations under the Charter prevail over those deriving from other treaties. The UN Charter being the most comprehensive universal instrument, it cannot be by virtue of *lex specialis*. Nor does the provision admit the application of *lex*

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63 See Jenks, above n 51, 439.

64 Jenks, above n 51, 405–6. Note that his seminal work appeared in 1953 prior to the drafting of the VCLT and the development of the concept of peremptory norms in international law.

65 The test for the existence of conflict, according to Jenks' strict definition, is the existence of incompatible obligations (as opposed to normative contradiction). Therefore, Jenks' definition concerns conflict of obligations rather than conflict of norms as such.

66 Art 20 of the League of Nations Covenant similarly declared that the Covenant abrogates 'all obligations or understandings *inter se* which are inconsistent with the terms thereof'.

67 Indeed, not only the Charter, but also the resolutions of the Security Council (adopted under Chapter VII), are accorded primacy both in practice and doctrine. See *ILC Report*, UN Doc A/CN.4/L.682, [331].

posterior principle, for all agreements 'must be made always subject to the provision of art 103 of the Charter', as ICJ has reaffirmed in *Nicaragua v United States*.[68] Thus, if obligations deriving from the UN Charter prevail over other treaty obligations, it is for no other reason than the Charter's higher rank.[69] Indeed, art 103 is less about providing technical solution for possible conflicts than it is about establishing vertical normative order between the Charter and other treaties. Yet, art 103 states about obligations under the Charter rather than the Charter itself apparently because the understanding at the time confuses conflict of obligations for conflict of norms.

2 *Conflict of Norms versus Conflict of Laws*

The maxims of statutory interpretation discussed above presuppose the existence of one legal system, and are meant to ensure intra-systemic coherence. They are by definition inapplicable to 'conflicts' between legal systems. Thus, 'conflict of norms' that is resolved by the application of the above principles is radically different from what is traditionally known as 'conflict of law', which essentially concerns a choice between legal systems to resolve a given legal dispute. Understanding the glaring distinction between the two highlights the non-technical dimension of normative conflict. In private international law, it is rules of different legal systems that are said to be in conflict (although that is rather misleading).[70] When that

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[68] See *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America), Jurisdiction and Admissibility, (Judgment)* [1984] ICJ Rep 440. See also *VCLT* art 30(1).

[69] See generally Rudolf Bernhardt, 'Art 103' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 1994) 1120; see also Karl, above n 8, 936–7.

[70] The phrase 'conflict of laws' seems somewhat a misnomer for the simple fact that rules of different legal system cannot conflict with each other. Even though different legal systems may contain contradictory rules concerning a certain subject-matter, those rules cannot be said to be conflicting as they are designed to operate in complete independence of each other. It is merely the subjective factual circumstances of the parties to a dispute that necessitates making a choice; otherwise, there is no inevitable competition, let alone conflict between rules of different legal systems.

happens, the judge does not attempt to harmonise 'conflicting' rules; instead, she employs a set of procedural (choice of law) rules developed *a priori* to determine the applicable law. It proceeds based on a non-normative criteria, without positing any hierarchical relationship between the competing laws. Technically speaking, 'conflicts of laws' situations do not even involve normative conflict precisely because there cannot be a conflict between rules of different legal systems.[71] By contrast, 'conflict of norms' concerns genuine and substantive internal incompatibility between different rules within a legal system. Thus, unlike in conflict of laws situations, a judge may not decide the applicable rule without examining the substantive content of the norms in conflict.

3 *Conflict-Resolution versus Treaty Interpretations*

Some scholars draw a line, however blurred, between conflict resolution and treaty interpretation. It is argued that normative divergences which may be resolved through techniques of treaty interpretation do not constitute a conflict. Karl suggests that it is only when rule of interpretation are inadequate that recourse is had to other maxims of conflict resolution.[72] Pauwelyn shares Karl's view when he states that divergences that may be 'streamlined' through treaty interpretation are not actual conflicts.[73] The ILC disagrees, however, pointing that 'conflict-resolution and interpretation cannot be distinguished from each other'.[74] Even the very determination of the existence of conflict involves interpretation, the ILC argues.[75] The WTO jurisprudence corroborates the ILC's view. Although WTO Panels read from the same body of law, different panels employed different tests to determine the existence of normative conflict, and

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71 Conflict of laws is primarily about particular factual circumstances of the parties in dispute, not about the laws. The judge decides the applicable law as a matter of procedure on factual grounds (without examining the content of the laws or having regard to whether or not the laws are actually conflicting).

72 Karl, above n 8, 938.

73 Pauwelyn, above n 3, 5–6.

74 *ILC Report*, UN Doc A/CN.4/L.682, [412].

75 Ibid.

arrived at different conclusions. As we shall discuss later, for example, the 'conflict test' employed by the *EC-Bananas III* panel was rejected by the panels on *Indonesia- Autos* and *Turkey-Textiles*.[76]

D *Conceptualising Legal Norms*

The literature on 'conflict of norms' largely proceeds without a clear definition of pertinent terms. Pauwelyn mentions about the 'surprisingly … little attention' given to the definition of when two norms are said to be in conflict.[77] It is perhaps even more surprising that the term 'norm' is hardly defined in academic writings. What precisely does a 'legal norm' mean? How, if at all, is it different from a legal rule?[78] On the one hand, the terms 'norm' and 'rule' are often used interchangeably. Pauwelyn, for example, states that he uses 'the notion of "norms" and that of "rules" interchangeably'. [79] Yet, some subtle distinction is observable in the usage of these words. People are generally prone to say: 'human rights norms', rather than 'human rights rules'; 'peremptory norms', rather than 'peremptory rules'; 'trade rules', rather than 'trade norms'; 'soccer rules;' rather than 'soccer norms;' 'grammar rules;' rather than 'grammar norms;' etc.[80] It seems that rules refer to relatively precise and authoritative

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76 See below Part III(B).

77 Pauwelyn, above n 3, 166.

78 'A model or standard accepted (voluntarily or involuntarily) by society or other large group against which society judges someone or something'. The term rule is defined as: 'Generally, an established and authoritative standard or principle; a general norm mandating or guiding conduct or action in a given type of situation'. *Black's Law Dictionary* (West, a Thomson, Business Reuters, 9th ed, 2009).

79 Pauwelyn, above n 3, 6. We can only guess that Pauwelyn does not mean to suggest that the two 'notions' are strictly synonymous as, for example, the term 'norms' in the title of his book may not be conveniently replaced by the term 'rules'.

80 In reference to *jus cogens* norms, the phrase *peremptory norm of general international law* is consistently used in the VCLT. In the literatures, however, the phrase *peremptory rules* are sometimes used interchangeably with *peremptory norms*.

technical standards, while norms extend to the non-technical realm, and hence may lack comparable precision, if not authority.

The ILC suggests that norms of international law embrace rules as well as principles.[81] Therefore, although the term 'rule' may be the closest equivalent to that of 'norm', the two are not always understood as strictly synonymous.[82] Norms are generally considered broader and thicker than rules, carrying some sort of claim that technical rules may not. As such, not all kinds of rules are considered to carry normative value.[83] Indeed, what makes legal rules normative is at the heart of the debate between the two major schools of thought: the value-oriented natural schools of thought and sanction-oriented positive schools of thought.[84] Positivist schools generally put emphasis on institutions and processes, and maintain that the normativity of legal rules has to do with their formal validity.[85] According to natural schools, however, the material content of rules is the main test of normativity. Accordingly, a legal rule may fail to qualify to be a norm owing to its content. In this sense, normativity seems to imply moral justifiability.[86]

1 *Norms: Utopian Claims?*

In the realm of moral theory, normativity may refer to claims and aspiration for a perfect, just, and thus different world order. It is in this sense that Delacroix writes: 'normativity is a convenient word to

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81 *ILC Report*, UN Doc A/CN.4/L.682, [410]; Conclusions of the Work of the Study Group, above n 13, [1].

82 'The expression "norm" is used as a term of art. The nearest English equivalent is "rule". Rules, however, are of a variety of logical types …' Joseph Raz, *Practical Reason and Norms* (Princeton University Press, 1990) 9.

83 While there appears a prevailing agreement that legal rules are norms, it may not an axiom beyond question or needing no justification. See generally ibid 154.

84 See generally Alfred P Rubin, *Ethics and Authority in International Law* (Cambridge University Press, 1997) 6–18.

85 According to Kelsen, the validity of a legal norm can be determined solely based on its formal source. See Hans Kelsen, *Pure Theory of Law* (University of California Press, 1967) 10.

86 See generally, Raz, above n 82, 170–7.

use whenever one wants to refer to that part of our experience which is not the immediate result of what lies *in* the world, but, on the contrary, somehow makes claims on how the worlds *ought* to be'.[87] There is probably nothing wrong about aspiring for a perfect world. However, normative questions such as justice, equality, and the like are invoked in everyday life, not necessarily, or even primarily out of a desire for or expectation of a perfectly just world.[88] Clearly, legal norms are not invocations of a perfectly just legal order. They may, however, be more expansive, perhaps unavoidably, than the 'black letter rule'. The notion of legal norm is often used in a way that captures not only 'black letter rules', but also the principles and reasons behind those rules.[89]

2 *Norms versus Values of 'Pre-Normative Character'*

Some scholars distinguish between 'legally binding norms' and those having merely a 'pre-normative character'.[90] Ingrained in such categorisation seems an assumption of a certain threshold whereby a 'soft law' or those values at the pre-normative stage graduate into legally binding norms.[91] But when do norms become binding? Or what is meant by a legally binding international norm anyway? In a domestic legal system, it is generally thought that legal rules bind individuals to comply on pain of sanction. Trying to make a parallel at the international level may, however, be problematic. Even without getting into debates regarding how law and (power) politics play out in shaping international affairs, the absence of an international adjudicator with compulsory jurisdiction and enforcer means that legal processes in the strict sense cannot be the test for the binding

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87 Sylvie Delacroix, *Legal Norms and Normativity: An Essay in Genealogy* (Oxford University Press, 2006) x.

88 Amartya Sen, *The Idea of Justice* (The Belknap Press, 2009) vii.

89 See generally Duncan Kennedy, *A Critique of Adjudication* (Harvard University Press, 1997) 135.

90 See, eg, Pauwelyn, above n 3, 6.

91 For an elaborate analysis on this question, see Alain Pellet, 'The Normative Dilemma: Will and Consent in International Law-Making' (1988) 12 *Australian Year Book of International Law*.

nature of international legal norms.[92] The ICJ itself affirmed: 'in the international field, the existence of obligations that cannot in the last resort be enforced by any legal process, has always been the rule rather than the exception'.[93] Even at the WTO, where the rule of law and predictability are often lauded, members may ignore the decision of the Dispute Settlement Body (DSB).[94] There is thus a touch of softness in most rules of international law. The lack of positive legal force should not suggest, however, that such rules have diminished normative force. Trying to draw a watertight distinction between legally binding norms and those regarded as non-binding norms may thus be problematic.[95]

3 *Normativity and Formalism*

Somewhat ironically, normative theory in international law is primarily associated with the works of Hans Kelsen.[96] According to

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92 Whether international law (and law in general) is based on some socially constitutive values or is merely a reflection of the prevailing balance of power has always been a subject of debate. According to realists school of thought, international law is of little relevance other than lubricating the wheel of global power (economic or political), and its norms are always framed by those who have the upper hand. From a functional/institutional perspective, international law is viewed more as a tool to attain a level of cooperation in dealing with international affairs. Constructivist scholars on the other hand emphasise on the normative value of international law in guiding the behaviour of international actors. See generally Christian Reus-Smit (ed), *The Politics of International Law* (Cambridge University Press, 2004) 15.

93 *South West Africa (Ethiopia v South Africa; Liberia v South Africa) (Second* Phase) (Judgment) [1966] ICJ Rep 46.

94 While the WTO DSB decides on whether a WTO member has violated its obligations (which then must be endorsed by diplomats in order to be binding), it does not prescribe sanctions as such. If a member State that violated its obligation refuses to comply with DSB's ruling, all the complainant member can do is request for authorisation to retaliate, which, ultimately comes down to power.

95 It is almost impossible to tell with any degree of certainty, for example, at what particular point a certain State practice becomes a part of customary international law. As discussed above, not only sources but also the content of norms, including those with overriding character, remain uncertain.

96 There appears some irony here because Hans Kelsen, as a champion of legal positivism, advances a formalistic (value-free) approach to the study of legal

Kelsen, legal norms can be determined not only independently of moral, political or ideological considerations, but also regardless of the content of the act (legislation) in issue.[97] The formal/empirical source, not the content, is the criteria for the determination of normative validity.[98] Kelsen's appeal to *formal normativity* in contradistinction to *social or ethical normativity* has attracted sharp criticisms even from commentators in the positivist school. Without delving into philosophical criticisms directed against Kelsen's pure theory of law or *legal positivism* in general, it is clear that content-blind normativity is not the terrain on which modern international law, particularly international human rights law proceeds.[99] Indeed, if at all it is possible to completely extricate the law from non-legal matters, such exercise is particularly precarious in international law, where legislation, adjudication and execution very much depend on the political will of its principal subjects- States.

In sum, if law is a means to an end, as Jhering argues, it may not be properly understood in isolation from social reality.[100] Neither human rights law nor WTO law may be fully understood without appreciating the historical context in which they sprang and the socioeconomic and political goal each aims to promote. Indeed, the *WTO-human rights* debate is not primarily about conflicts between formal (positive) rules of the two regimes. Therefore, as pointed already, legal norms are understood here as embracing not only formal rules, but also the principles and reasons behind those rules. In other words, conflict of norms is not just a question of formal

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science. And such formalistic (descriptive) pursuit of legal science is often contrasted with normative (prescriptive) legal thought. See generally Pierre Schlag, 'Normativity and the Politics of Form' (1991) 139(4) *University of Pennsylvania Law Review* 811–12.

97 Kelsen, above n 85, 10.

98 Ibid 198.

99 Indeed extreme moral outrage against calamity caused by the policies such as Nazism (that victimised Kelsen himself — he lost his job), as articulated in the UN Charter, constituted foundations for the fundamental principles of modern international law.

100 See generally Rudolf von Ihering, *Law as a Means to an End* (The Macmillan Company, 1921).

harmony. It is also a question of substantive coherence between norms.[101] As such, it is argued here, that the coherence or otherwise of legal norms cannot be determined independently of their content.

III THE WTO AND CONFLICT OF NORMS

As far back as 1932, Rousseau was convinced that ensuring normative coherence in the international legal order constituted an urgent problem.[102] Few others, such as Wilfred Jenks, endorsed his conviction.[103] However, the topic had not attracted considerable attention until the proliferation of treaties and institutions (especially those with relatively autonomous and complex legal infrastructure) towards the close of the last century reignited the issue. Apparently the establishment of the WTO has the most remarkable impact in amplifying the standing of the topic in international legal discourse. There are interrelated institutional, technical, normative, and ideological reasons for that.[104] With the signing of the *Marrakesh*

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101 'For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so'. ILC Report, UN Doc A/CN.4/L.682, [491].

102 Rousseau, unlike Jenks, writes about normative incompatibility in general. See Charles Rousseau, 'De la compatibilité des normes jurisdiques dans l'ordre international' (1932) 39 *Revue générale de droit international public*.

103 Jenks, above n 51, 403: 'In the absence of a world legislature … treaties are tending to develop in a number of historical, functional and regional grounds which are separate from each other and whose mutual relationships are in some respects analogous to those of separate systems of municipal law.'

104 The establishment of the WTO outside of the UN system, without clear indication of how its complex rules relate to the broader international law, has generated a complex set of normative questions that have spurred a great deal of interest among scholars. However, the issue is not solely intellectual and scholarly. Indeed, when an estimated 40 000 human rights advocates, environmentalists, labor rights activists, and anti-poverty campaigners rocked the streets of Seattle in late 1999 (in what has come to be known as 'Battle of Seattle'), protesting against the Third WTO Ministerial Conference, the scholarship on the topic was yet to flourish. There was generally limited intellectual scrutiny on the subject outside of few experts in the field. It was the ideologically informed protests in Seattle and elsewhere that popularised the multifaceted strands of social and environmental concerns associated with trade liberalisation.

Agreement, one of the most complex legal regimes international law has ever known came into existence.[105] WTO Agreements cover extensive subject matters that trigger almost endless points of contact between trade and non-trade issues.[106] Yet, while the WTO was deliberately created outside of the UN framework, how its complex legal regime fits into the broader corpus of public international law has not been articulated, apparently out of policy choice than oversight. In view of the fact that art XVI(4) of the *Marrakesh Agreement* requires members to ensure that their laws are consistent with their WTO obligations, it is clear that the founders were not oblivious about the issue of normative conflict.

On the contrary, the WTO's *modus operandi* is reminiscent of the tendency to seclude the organisation from general principles of international law in general and human rights law in particular, including those directly linked to its stated goals. For example, although ensuring full employment forms one of the chief goals of the WTO, the organisation has, paradoxically but perhaps unsurprisingly, declared that labor and employment issues are beyond its domain. In the Singapore Ministerial Conference, WTO members declared their 'renewed support' for the observance of core labor standards, but with an emphatic statement that the ILO, and not the WTO, is the competent body.[107] However, in view of the fact that the existence of the World Intellectual Property Organisation (WIPO) was no barrier

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105 The *Marrakesh Agreement* was signed in 1994 following what Jackson describes as 'the largest and most complex negotiation ever' involving over 100 countries for around 8 years. John H Jackson, *The World Trading System: Law and Policy of International Relations* (The MIT Press, 2nd ed, 1997) 1.

106 While the GATT dealt only with trade in goods, the WTO's discipline extends to diverse subject areas; from trade in services to IP and trade-related investment measures; from agriculture to sanitary and psytosanitary measures, from technical standards to customs valuation, from preshipment inspections to rules of origin and import licensing, etc. See generally Sharif Bhuiyan, *National Law in WTO Law: Effectiveness and Good Governance in the WTO System* (Cambridge University Press, 2007) 3–4.

107 *Singapore Ministerial Declaration*, WTO Doc WT/MIN (96)/DEC (18 December 1996, adopted 13 December 1996) para 4 ('*Ministerial Declaration*').

against incorporating TRIPS into the WTO, few would be convinced by the above explanation. Despite the rhetoric about promoting living standards and ensuring full employment, among other things, human rights, including labor rights, are practically viewed at the WTO, not as values that should be upheld and promoted, but as obstacles to the free flow of trade. The WTO knows no human rights standards. Even in the face of horrific human rights abuses, such as the one in connection with 'trade in conflict diamonds' (also called blood diamond), it took a formal waiver for WTO members to ban trade that fueled humanitarian disaster.[108] WTO membership is open to any form of government.[109] How member States treat their citizens is no ground to punish or criticise them at the WTO. In theory, a member State may pursue a policy of racial discrimination, which is a violation of *jus cogens*, and successfully invoke the WTO rule of non-discrimination (MFN). Some commentators argue that human rights have somehow been incorporated into WTO law via GATT art XX.[110] However, that is at best unconvincing. There is simply no indication whatsoever that human rights concerns underlie art XX. From a human rights perspective, there is no coherent ground, for example, to make an exception to prison labour, and not to child labour or forced labour under art XX(e). Nor does the legitimacy of State measures 'to protect human, animal and plant life and health' imply the recognition of human rights under GATT/WTO rules. It is not on account of human rights that animals and plants need to be protected.

A *WTO Rules on Conflict Resolution*

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108 When the UN called for a ban on 'blood diamonds', the WTO responded by adopting a waiver pursuant to art IX, paras 3 and 4 of the *Marrakesh Agreement*, subjecting trade in diamonds to the Kimberley Process Certification Scheme so that it would not fund wars in Sierra Leone and the Democratic Republic of Congo (DRC). In its decision, the WTO stated that the existence of 'systematic and gross human rights violations' in those countries was among the factors that gave rise to 'exceptional circumstances' justifying waiver. But one has to ask if in the first place waiver was required to ban trade in 'blood diamond'. See *Waiver Concerning the Kimberley Process Certification Scheme for Rough Diamonds*, WTO Doc WT/L/518 (27 May 2003).

109 'Many WTO Members were-and still are-communist, socialist, and even fascist' see Hernández -Truyol and Stephen J Powell, *Just Trade* (New York University Press, 2009) 66.

110 Ibid 63.

Given its complexity, the potential for conflicts between and within WTO agreements is obvious. Accordingly, drafters of WTO agreements have devised various intra-systemic harmony enhancing mechanisms. Annexure 1A of GATT 1994 contains various *understandings* on the interpretation of GATT provisions. We also find numerous rules in other WTO agreements that provide guidance as to how a conflict between rules of specialised WTO Agreements and that of the GATT should be streamlined.[111] The rather common legislative technique of conflict avoidance that 'this or that law shall apply, subject to … or without prejudice to … etc', is indeed ubiquitous throughout WTO Agreements.[112] In practice, WTO jurisprudence shows that two provisions on conflict resolution are particularly pivotal.[113] Article XVI(3) of the *Marrakesh Agreement* states that '[i]n the event of a conflict between a provision of this Agreement and a provision of any of the Multilateral Trade Agreements, the provision of this Agreement shall prevail to the extent of the conflict'. Likewise, the General Interpretative Note to annex 1A declares that if a provision of GATT 1994 comes into conflict with a provision of an agreement under annex 1A, 'the provision of the particular agreement shall prevail to the extent of the conflicts'. While it is easy to understand that this note is dictated by the maxim of *lex specialis*, the WTO Agreement prevails over other WTO Agreements on account of its constitutive character. The WTO Agreement may not have *intrinsic* priority over other WTO agreements.[114] However, ensuring intra-systemic coherence requires

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111 For example, art 21(1) of the AoA reflects the *lex specialis* maxim when it states that rule of GATT 1994 and of other agreements are applicable to agricultural matters, but subject to the rules of the AoA.

112 On the typology of conflict clauses, see *ILC Report*, UN Doc A/CN.4/L.682, [268]–[270].

113 While art XVI(3) concerns a conflict between *Marrakesh Agreement* and *any* of the Multilateral Trade Agreements, the Interpretative Note covers conflicts between GATT 1994 and *any* of the Agreements under annex 1A.

114 The whole thrust of art XVI(3) of the *Marrakesh Agreement* is ensuring systemic integration. The WTO Agreement is of similar rank to other treaties negotiated or renegotiated at the same time and forum by the same Members.

reading other WTO Agreements coherently with the organisation's 'Charter'. The concern of art XVI is not, however, limited to intra-systemic coherence, as it, in its sub-art 4, obliges Members to ensure that their 'laws, regulations and administrative procedures' are in conformity with their WTO obligations contained in the elaborate annexes.[115]

The other WTO rule, which provides similar guidance, is contained in art 1(2) of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). It states that the application of the rules and procedures of the DSU to disputes involving the 'covered agreements' identified in app 2 (to the DSU), is subject to special or additional rules and procedures provided for in those agreements. In the event of conflict between the two, the *lex specialis* rule comes into play; that is, to the extent of the conflict, the special or additional rules and procedures in app 2 supersede the rules and procedures of the DSU.[116] Note that the terms 'difference' and 'conflict' are used in this provision apparently interchangeably. The WTO law does not define any of these terms.[117] Hence, in accordance with art 31(4) of

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Therefore, there is no apparent reason other than 'policy objective of systemic coherence' for it to prevail over other agreements.

115 Indeed, this is in line with the well-established principle of international law that States cannot invoke their domestic law to evade obligations under international law. However, the WTO law clearly stands out from all other international agreements by the extent to which it regulates the conduct of its Member States, including their legislative or regulatory conduct. See Bhuiyan, above n 106, 43.

116 It goes:

> The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a *difference* between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail. In disputes involving rules and procedures under more than one covered agreement, if there is a *conflict* between special or additional rules and procedures of such agreements under review, and where the parties to the dispute cannot agree on rules and procedures within 20 days of the establishment of the panel, the Chairman of the Dispute Settlement Body … shall determine the rules and procedures to be followed. … (emphasis added).

117 Pauwelyn, above n 3, 189.

the VCLT, a presumption can be taken that the parties to the DSU have not intended to give special meaning to these terms.[118]

The crucial question for our purpose is this: how does WTO law relate to other areas of international law? Neither the DSU nor any other WTO agreement precisely defines the relationship of WTO law to the broader public international law. To be sure, arts 3(2) and 19(2) of the DSU require that WTO law should be interpreted in accordance with customary rules of interpretation of public international law.[119] It was by invoking this provision that the Appellate Body (AB) on *US-Gasoline* declared that WTO law is a part of public international law.[120] According to Pauwelyn, the significance of this provision goes beyond casting away doubts as to whether WTO law is a part of public international law; it also suggests that WTO law should be read in conjunctive harmony with other rules of public international law.[121]

To be sure, there is no serious intellectual dispute on whether the WTO law is a part of public international law. There is, however, a tradition of viewing the WTO as a special regime. The fact that trade under the WTO actually proceeds largely between private traders (typically corporations); that 'trade-wars' are fought mainly on behalf of trading corporations; and that corporations play decisive (albeit informal) role in shaping trade agreements, among other things, seem to have convinced many to believe that the WTO is somehow special.[122] As a result, the concept of a 'self-contained regime' developed by the ICJ in the *Hostage case* is frequently invoked in the

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118 Ibid.

119 Indeed, one wonders what this provision actually adds other than making explicit what is already understood. The WTO law is treaty law; hence, even without art 3(2), there is little doubt that it shall be interpreted in accordance with customary rules of international law.

120 Appellate Body Report, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1 (29 April 1996) [17] ('*US-Gasoline*').

121 Pauwelyn, above n 3, 29.

122 See generally Pauwelyn, above n 3, 25.

WTO context.[123] That seems the reason why the ILC used the WTO as a principal example to dispel the 'self-contained regimes' argument. Its elaborate diagnosis led the ILC to the conclusion that no regime is self-contained and that the term *self-contained regime* is actually a misnomer.[124]

B *WTO's Jurisprudence*

Commentators suggest that WTO jurisprudence has been influenced by Jenks' narrow definition of conflict. The WTO Panel decisions on *Indonesia-Autos* and on *Turkey-Textiles* are among the most frequently cited examples that reflect a narrow definition of normative conflict.[125] The Panel on *Turkey-Textiles* in particular quotes Jenks to ascertain the meaning of the term 'conflict'.[126] It is curious to note that the Panel seems to accord Jenks' controversial definition the status of a legal principle.[127] The Panel believes that the understanding that there is no conflict 'if it is possible to comply with the obligations of one instrument by refraining from exercising a privilege or discretion accorded by another' is consistent with the general presumption against conflict applied by the AB in *Canada-Periodicals*, *EC-Bananas III*, *Guatemala-Cement*, and the Panel decision on *Indonesia-Autos*.[128] In fact, it was the panel on *EC-Bananas III* that dealt with the issue of 'conflict' more directly and with greater clarity than the AB or the panels on any of these cases. Yet, surprisingly, the *Turkey-Textiles* panel did not mention the *EC-Bananas III* panel's interpretation of *conflict*. Be that as it may, we

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123 *United States Diplomatic and Consular Staff in Tehran (United States v Iran) (Judgment)* [1980] ICJ Rep 41.

124 *ILC Report*, UN Doc A/CN.4/L.682, [192]–[193].

125 See, eg, Vranes, above n 4, 402; Pauwelyn, above n 3, 190; *ILC Report*, UN Doc A/CN.4/L.682, [75].

126 In this case, India challenged the imposition of quantitative restrictions on its textile exports by Turkey, which formed customs union with the EC. Turkey argued that its measure was consistent with GATT art XXIV, which, it argued, constitutes a *lex specialis* for the rights and obligations of WTO Members at the time of regional customs union formations.

127 Ibid [9.93].

128 Ibid [9.92]–[9.93].

shall now examine if the presumption against conflict and WTO Panel and AB decisions on the above cases actually warrant the *Turkey-Textiles* Panel's understanding of conflict.

1 *EC-Bananas Case*

As noted earlier, the issue of conflict of norms underlies a great many of GATT/WTO disputes.[129] And it was in its very first report that the AB had to elucidate that GATT should be read within the context of the broader public international law. In *US-Gasoline*, the AB went so far as reversing the decision of the Panel for overlooking rules of treaty interpretation in public international law, as codified by the VCLT.[130] However, it was the Panel on *EC-Bananas III* that first attempted to define the notion of 'conflict', as stipulated in the General Interpretive Note.[131] The Panel thus stated:

> As a preliminary, it is necessary to define the notion of 'conflict' laid down in the General Interpretative Note. In light of the wording, the

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[129] The *EC — Bananas Case* represents one of the longest and most complex disputes in the history of the multilateral trade. It comprises of a series of rulings rendered by GATT and WTO Panels and AB since the early 1990s. It concerns the banana import regime of the EC that subjects banana imports to tariff-quotas. ACP countries were exempted pursuant to the *Lomé Convention* (a trade and aid agreement between the EC and former European colonies in Africa, the Caribbean and Pacific). Five banana-exporting Latin American countries (Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela) lodged a formal complaint in 1993, claiming that the EC banana regime violated the GATT non-discrimination rule, and the GATT Panel ruled in their favour. Although the EC settled the matter by negotiation with all but Guatemala, at the time, the issue could not be closed. The United States, claiming that its firms operating in South America were harmed, joined Ecuador, Guatemala, Honduras, and Mexico in *EC — Bananas III*, complaining that the EU-banana import regime violated various WTO rules, including GATT arts I, II, III, X, XI and XIII.

[130] The AB, invoking the decision of the ICJ and other authorities, noted that generally the rule of interpretation, which has received the 'most authoritative expression' in the VCLT 'has attained the status of a rule of customary or general international law'. Appellate Body Report, *US-Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1, 16–17.

[131] It is interesting to note that although the GATT Panels on *EC — Bananas I* and *EC — Bananas II* were confronted with the essentially the same issue, none of them attempted to define the notion of conflict.

> context, the object and the purpose of this Note, we consider that it is designed to deal with (i) clashes between obligations contained in GATT 1994 and obligations contained in agreements listed in Annex 1A, where those obligations are mutually exclusive in the sense that a Member cannot comply with both obligations at the same time, and (ii) the situation where a rule in one agreement prohibits what a rule in another agreement explicitly permits.[132]

The first of the above scenarios corresponds to Jenks' definition of conflict (of obligations). However, the Panel holds that conflict of norms occurs even where a State is technically able to comply with the obligations under contradictory rules, if doing so requires renouncing an explicit right or authorisation.[133] The panel thus flatly rejects the strict definition of 'conflict' on the ground that such approach not only defeats the particular 'object' and 'purpose' of agreements, but also renders them meaningless.[134] It is unambiguous, therefore, that the *EC-Bananas III* panel adopted a broader definition of conflict than the *Turkey-Textiles* panel suggests.

At the heart of this marathon dispute is the issue of whether the EC's preferential treatment towards the African, Caribbean and Pacific Group of States (ACP) under the auspices of the *Lomé Convention* is

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132 Panel Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/R/GTM, WT/DS27/R/HND (22 May 1997) [7.159] ('Panel Report, *EC — Bananas III*').

133 Ibid [7.160]–[7.161].

134 The Panel's reasoning is worth quoting in full here:

> For instance, Article XI: 1 of GATT 1994 prohibits the imposition of quantitative restrictions, while XI: 2 of GATT 1994 contains rather limited catalogue of exceptions. Article 2 of the Agreement on Textiles and Clothing (ATC) authorizes the imposition of quantitative restrictions in the textiles and clothing sector, subject to conditions specified … In other words, Article XI:1 of the GATT prohibits what Article 2 of the ATC permits in equally explicit terms. It is true that Members could theoretically comply with Article XI: 1 of GATT, as well as with Article 2 of the ATC, simply by refraining from invoking the right to impose quantitative restrictions in the textiles sector because Article 2 of the ATC authorizes rather than mandates the impositions of quantitative restrictions. However, such an interpretations would render the whole articles or sections of Agreements covered by the WTO *meaningless* and run counter to the *object* and *purpose* of many agreements … negotiated with the intent to create rights and obligations …

Ibid [7.159] n 403 (emphasis added).

consistent with its obligations under the GATT/WTO law.[135] The Panel found that the EC's bananas import regime and licensing procedures violated its obligations under GATT arts I(1), III(4), X(3) and XIII(1), among others. However, it maintained that the Lomé waiver has waived the inconsistency of EC measures with GATT art XIII (1).[136] The AB upheld all but three of the Panel's findings. Crucially, however, the AB reversed the Panel's finding that the Lomé waiver waives the inconsistency of the EC's allocation of tariff-quota with GATT art XIII(1).[137] The AB argued that while waiver is an exception to non-discrimination obligations under art XIII that must be interpreted strictly, the lack of explicit provision to that effect under the *Lomé Convention* makes the Panel's finding erroneous.[138]

While the AB disagreed with the panel's interpretation of the Lomé waiver, which, of course, was crucial, it did not disagree with the Panel's broader, if insufficient,[139] definition of conflict.[140] Indeed, the

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135 The Forth Lomé Convention signed in 1989 between the EC and 70 ACP countries, contains a provision concerning banana trade. The apparent purpose of the Convention being to support the development endeavours of these poor ACP countries, through preferential treatment, parties to the Convention requested a waiver of EC's obligations from GATT Art I(1), which was granted by GATT Contracting Parties, and later extended by the decision of the WTO General Council, upon which the Panel asserted jurisdiction. Panel Report, *EC — Bananas III*, WTO Doc WT/DS27/R/GTM, WT/DS27/R/HND [3.33]–[3.35].

136 Panel Report *EC — Bananas III*, WTO Doc WT/DS27/R/GTM, WT/DS27/R/HND, [7.110].

137 Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/AB/R (9 September 1997) [188]–[255(j)] ('Appellate Body Report, *EC — Bananas III*').

138 Appellate Body Report, *EC — Bananas III*, WTO Doc WT/DS27/AB/R, [179]–[188].

139 According to Pauwelyn, conflict of norms may arise in four scenarios: when there is contradiction between two commands; between command and prohibition; between command and exemption; and between prohibition and permission. Thus, he argues that *EC — Bananas* Panel 'lost sight' on the conflict between a command and an exemption, Pauwelyn, above n 3, 191.

140 It should be noted that although the Panel interpreted the notion of conflict relatively broadly, it nonetheless concluded that the EC acted inconsistently with its GATT obligations, and such inconsistencies were not waived by Lomé

AB did not directly deal with the definition of conflict.[141] Therefore, while the *Turkey-Textiles* Panel is right in that various WTO Panels and the AB emphasis on the presumption against conflict, the AB report on *EC-Bananas III* does not show an endorsement of Jenks' narrow definition of conflict. Indeed, the Panel on *Turkey-Textiles* seems to confuse the 'presumption against conflict' with Jenks' strict definition.[142] In fact, the presumption against conflict may even imply the contrary, as it embraces the principle of 'effective interpretation' so that, for example, permissive norms will not be sacrificed to comply with a prescriptive norm, as Jenks' narrow definition would lead to.[143]

The *EC-Bananas III* case represents a classic conflict between corporate profit and the development aspirations of some of the poorest nations in the world (and the livelihoods of millions in those countries). In all fairness, the Panel on *EC-Bananas III* adopted a commendably broad definition of the term 'conflict' uncommon in the WTO jurisprudence. Yet, even such broad interpretation of 'conflict' did not result in development (one of the overriding goals of the WTO) trumping over corporate profit. The reason is obvious; the fundamental conflict lies in the design of WTO law, and that is a

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waiver, save the inconsistency of EC with respect to GATT art XIII. The reversal of the Panel's findings that the Lomé waiver waives the inconsistency of the EC's allocation of tariff-quota with GATT art XIII(1) is not so much about the scope of the definition of the term conflict; it is rather about the lack of explicit provision in the convention.

141 The Panel found no conflict between art 2 of TRIMs Agreement and GATT 1994, as it relates to the EC's import licensing procedures for bananas, stating that obligations under the two agreements can be complied with without the need to renounce explicit right. While the AB upheld most of the Panel's findings, it didn't specifically address the alleged conflict between art 2 of TRIMs Agreement and GATT 1994. It left the Panel's finding on the issue intact. Appellate Body Report, *EC — Bananas III*, WTO Doc WT/DS27/AB/R, [256].

142 It must also be noted that Jenks discusses presumption against conflict as a derivative of fundamental principles of treaty interpretation, such as good faith and reasonableness. See Jenks, above n 51, 428.

143 A glaring problem of the Panel's narrow understanding of conflict is that it runs counter to the principle of *effective interpretation*, which WTO Panels otherwise seem to hold dear.

political choice, which cannot be rectified through liberal interpretation of terms by anonymous panelists.

2 *Canada-Periodicals*

Although the issue of conflict between obligations under General Agreement on Trade in Services (GATS) and GATT 1994 was entertained, it did not constitute the major source of dispute in this case, as the defendant conceded that there was none.[144] As a result, the AB did 'not find it necessary to pronounce on the issue …'.[145] Therefore, contrary to what the panel on *Turkey-Textile* alludes, there is little in this case that indicates the AB's position on the scope of the definition of conflict of norms.

3 *Indonesia-Autos*

Automobile exporting rich nations (EC, Japan and USA) complained that Indonesia's National Car Program violated its obligation under GATT art III (national treatment), among others. Indonesia defended that as a developing nation, it was entitled to provisionally maintain certain subsidies under art 27(3) of the Subsidies and Countervailing Agreement (SCM Agreement). Invoking the conflict test adopted by the Panel on *EC-Bananas III*, Indonesia claimed that its obligations under GATT art III cannot be complied with without renouncing its explicit right under the SCM. The Panel, however, rejected Indonesia's defence, stating that 'obligations of the SCM Agreement and art III:2 are not mutually exclusive'.[146] The Panel reiterated that

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144 The main point of contention in the dispute was rather whether Canada's measures, ie, prohibition of certain periodicals and its Excise Tax Act, were consistent with its WTO obligations. See Panel Report, *Canada — Certain Measures Concerning Periodicals*, WTO Doc WT/DS31/R (14 March 1997) [5.19].

145 Appellate Body Report, *Canada — Certain Measures Concerning Periodicals*, WTO Doc WT/DS31/AB/R, (30 June 1997) 19.

146 Panel Report, *Indonesia — Certain Measures Affecting the Automobile Industry*, WTO Doc WT/DS54/R/, WT/DS55/R, WT/DS59/R, WT/DS64/R, (2 July 1998) (*Panel Report, Indonesia — Autos*) [14.99].

the presumption against conflict is particularly pertinent to the WTO for it is a *single undertaking*, where all agreements were essentially negotiated at the same time and forum between the same members.[147]

Clearly, the *Indonesia-Autos* Panel succumbed to Jenks' strict conception of conflict that occurs only where obligations are mutually exclusive. WTO Panels' customary emphasis on the presumption against conflict and adherence to Jenks' mutual exclusiveness test seems to have limited the applicability of *lex specialis* in the WTO context.[148] According to Pauwelyn, by endorsing the narrow conception of conflict as suggested by Jenks and Karl, the panel failed to recognise a contradiction between a right and an obligation as a normative conflict.[149] Vranes adds that by taking the existence of mutually exclusive obligations as the only scenario that gives rise to conflict, the *Indonesia-Autos* Panel did not even bother itself to examine the permissive norm relied upon by Indonesia constituted a *lex specialis*.[150]

To be sure, the panel deliberately refrained from commenting on the *conflict test* employed by the *EC-Bananas III* Panel.[151] Indeed, it must be emphasised that the *Indonesia-Autos* Panel did not base its decision on any particular definition (strict or otherwise) of conflict. Instead, the principal line of the panel's reasoning is this: subsidy is one thing, discriminatory taxation is quite another. Thus, the Panel holds, even though Indonesia may be said to have a right to maintain actionable subsidies under SCM Agreement, it is not authorised to

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147 Ibid [14.28]. The Panel on *Turkey Textiles* likewise reaffirmed that 'WTO obligations are cumulative that members must comply with all of them at all times unless there is a formal "conflict" between them. In other words, conflict of rules is interpreted restrictively'. Panel Report, *Turkey — Textiles*, WTO Doc WT/DS34/R, [9.92].

148 *ILC Report*, UN Doc A/CN.4/L.682, [75].

149 Pauwelyn, above n 3, 193.

150 Vranes, above n 4, 399–400.

151 'In examining this issue, we need not decide whether the test suggested by the Bananas III panel report with regard to the interpretative note to Annex 1 A is the correct one in the WTO context'. Panel Report, *Indonesia — Autos*, WTO Doc WT/DS54/R/, WT/DS55/R, WT/DS59/R, WT/DS64/R, [14.98].

impose discriminatory taxes.[152] In view of this reasoning, it is tempting to say that criticisms against the Panel are unfair. However, the Panel's position on the issue is unambiguous. The Panel hesitates to directly comment on whether contradiction between a right and an obligation constitutes a conflict, although that was Indonesia's main argument. Instead, the Panel preferred to reveal its position in a footnote, where it equated normative conflict with the existence of 'mutually exclusive obligations'.[153]

In general, although many WTO disputes are triggered by conflict between the pursuit of free trade and non-trade values, WTO panels generally seem reluctant to pronounce the existence of normative conflict. Even when they rarely assert the existence of conflict, as the above cases illustrate, panels and the AB generally tend to lean towards a narrow definition of conflict. The bananas trade saga in particular may be taken as a typical clash between trade and development issues or even between corporate profit and the right to development.[154] Yet, and this is rarely emphasised, both the Panel and the AB treated the issue as an intra-systemic conflict between different GATT/WTO rules, not as a conflict between the WTO law and the Lomé Convention. In fact, the Panel basically conceded, as

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152 Panel Report, *Indonesia — Autos*, WTO Doc WT/DS54/R/, WT/DS55/R, WT/DS59/R, WT/DS64/R, [14.98]:
Indonesia argues that there is a conflict because the SCM Agreement 'explicitly authorizes' measures to provide subsidies that are prohibited by Art III(2) of GATT. Assuming that such 'explicit authorization' is the correct conflict test in the WTO context, the SCM Agreement clearly does not authorise members to impose discriminatory product taxes.

153 Panel Report, *Indonesia — Autos*, WTO Doc WT/DS54/R/, WT/DS55/R, WT/DS59/R, WT/DS64/R n 1284.

154 While market access to the EC determines the lives of millions of banana growers in ACP countries, the United States was involved in this case because it believed that its enterprises operating in Latin America (note that the United States is not a banana exporter) were affected by the preferential treatment the poor were receiving. That just five companies, namely, Dole, Del Monte, Chiquita, Fyffes and Noboa, control around 80% of the global banana trade is indicative of the interests involved in the 'banana trade war'. See Anup Shah, *The Banana Trade War* (3 January 2010) Global Issues <http://www.globalissues.org/article/63/the-banana-trade-war>.

the EC and ACP countries have argued, that it was not authorised to interpret the Lomé Convention. However, since the Lomé waiver was granted by GATT Contracting Parties, and later extended by the WTO General Council, it asserted jurisdiction only to the extent that 'the Lomé Convention became a GATT/WTO issue'.[155] In short, WTO panels are overtly reluctant to ensure the consonance of WTO law with other principles of international law.

To be sure, without interpreting non-WTO law, there is no apparent way a WTO panel could interpret WTO law consistently with other norms of international law. It is true that art 3(2) of the DSU cautions (perhaps superfluously) that recommendations and rulings of the DSB cannot alter the rights and obligations of members as provided in the covered agreements.[156] Unmistakably, this is an instruction for the DSB to adhere to legal formalism, which is believed to enhance predictability and certainty.[157] That is, clarifying what the law 'is', without being concerned about what it 'ought to' be, for the substantive content of trade rules can only be determined by politicians (negotiators). Whether law can be construed without involving a degree of law-making is a philosophical question that cannot be entertained here. There is little doubt, however, that although Panel and AB findings have the status of a report (rather than a judgment), there is already a body of jurisprudence which is frequently appealed to by commentators and panels. Despite the express legislative proscription against law-making, few will be

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155 Panel Report, *EC — Bananas III*, WTO Doc WT/DS27/R/GTM, WT/DS27/R/HND, [9.97]–[9.98].

156 The last sentence of the sub-article goes: 'Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'. If this provision is instruction for panels not to engage in treaty-making for member States, then that is superfluous. But if this is a proscription to panels that they ought to confine themselves to 'covered agreements', and should not consult other principles of international law, then there is a fundamental problem.

157 Providing security and legal certainty is the principal reasons for creating the DSB. See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('DSU') art 3(2).

convinced that the WTO jurisprudence has no bearing on substantive trade policies of its members. Some even believe that 'the WTO dispute settlement system has been far more an exercise in policy-making and far less an exercise in even-handed interpretation'.[158] Also, indeterminacy being inherent in the nature of law, it may not be plausibly argued that every right and obligation emanating from the WTO law is predetermined in unambiguous terms. After all, WTO law, like any law, is not composed solely of crystal clear rules, but also broad and abstract principles. Even core principles, such as the Most Favored-Nation Treatment (MFN) and National Treatment (NT) are formulated so broadly, subject to complex exceptions which are open to interpretation.[159] Indeed, disputes are in the first place referred to a WTO panel (or any tribunal) because there is some legal indeterminacy. Although contentions may extend to issues of fact as well, there is normally less reason to fight a case where the law is certain.[160]

It is, therefore, pertinent to ask whether art 3.2 is a restriction on the body of law a panel can take into account. The provision can be understood in either of the following two ways: one, the DSB should simply confine itself to covered agreements; or that the DSB may consider other relevant norms of international law, but it nonetheless cannot make new obligations for the parties in dispute, like any tribunal should not. Given the fact that the same provision requires the interpretation of WTO law in accordance with customary rules of international law, the second understanding is more plausible.[161] The *Korea-Procurement* panel shares this view when it elucidates that not

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158 John Greenwald, 'WTO Dispute Settlement: An exercise in Trade Law Legislation?' (2003) 6(1) *Journal of International Economic Law* 13.

159 MFN and NT principles are moderated by a number of complex exceptions, some of which are highly sweeping and broad (arts XX and XXI come to mind).

160 See generally Sol Picciotto, *Regulating Global Corporate Capitalism* (Cambridge University Press, 2011) 361.

161 Indeed to state that customary rules of interpretation shall apply implies that other 'relevant rules of international law' may also apply, as provided under *VCLT* art 31(3)(c).

only rules of interpretation but also other rules of international law may apply via DSU art 3.2. The panel states:

> We take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO.[162]

In the same vein, art 7.1 of the DSU limits the jurisdiction of WTO panels to claims arising from WTO covered agreements. It is thus argued that the mandate of WTO panels is limited to examining exclusively rights and obligations under WTO agreements. Hence, if a defendant State claims that it cannot perform its WTO obligation because it conflicts with, say, its obligation under human rights law, the panel should ignore such a claim.[163] WTO panels appear so cautious not to overstep their mandate under art 7.1. Yet, it cannot be claimed that a panel can base its ruling solely on covered agreements.[164]

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[162] Panel Report, *Korea — Measures Affecting Government Procurement*, WTO Doc WT/DS163/R, 00-1679 (1 May 2000) [7.96].

[163] In *Turkey-Textile*, for example, India argued that:

> although it might be true that Turkey faced conflicting obligations in the WTO and in its bilateral agreement with the European Communities [which Turkey claimed], this issue was not germane to the task of the Panel, whose mandate according to Article 7.1 of the DSU was to examine exclusively Turkey's obligations under the WTO agreements cited by the parties to the dispute, not any other treaties accepted by turkey … So far, all panels faced with … [similar] situation had simply ignored it and left to the defendant to decide how to resolve its conflict of international obligations.

Panel Report, *Turkey-Textiles*, WTO Doc WT/DS34/R, [3.31].

[164] Circumscribing the material jurisdiction of panels does not imply that they are precluded from applying other rules of international law. WTO law, like any treaty law, is built on the background of general international law. After all, it is with our preexisting understanding of the concept of law, treaty, legal dispute, evidence, burden of proof, etc, that we approach WTO law. See Pauwelyn, above n 3, 460.

It should be conceded, however, that even with a broad approach to applicable law, there is only so much that a WTO panel or AB can do. The conflict involved is more profound and systemic than could be remedied by a broader interpretation of the notion of 'conflict'. Besides, despite the overemphasis about the 'compulsory jurisdiction', the conclusions of WTO panels as well as of the AB result only in recommendations to the losing party for its future behaviour.[165] The defending party may choose to ignore such recommendations, if it can afford to cope with possible retaliatory countermeasures by the winning party, which turns the issue into a question of power than of principles. In the *United States-Trade Measures Affecting Nicaragua*, for example, the United States, claiming that the activities of the Government of Nicaragua constituted a threat to its national security, invoked GATT art XXI and banned almost all imports from and exports to Nicaragua. Although Nicaragua complained and a panel was established, it was of no avail. First, the Panel rightly decided that it cannot examine the validity or motivation for the invocation of art XXI:(b)(iii) by the United States (art XXI leaves no room for evaluating the substantive merit of the of members' measures).[166] Second, even if the Panel were to find the US measure to be inconsistent with its GATT obligations, the ultimate remedy Nicaragua would obtain would be waiver of its GATT obligations towards the United States, which had already been rendered meaningless by the two-way embargo.

It should be underlined, therefore, that there are structural issues that cannot be resolved through the dispute settlement, no matter how broadly the notion of conflict is defined. In particular, the conflict between the WTO and human rights is primarily normative, not

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165 According to Jackson, for example:

> the WTO operates an extraordinarily powerful dispute settlement system, which is basically unique in international law history. This system has rare characteristics for an international institution: mandatory jurisdiction and submittal to its procedures, as well as an appellate process …

Jackson, above n 105, 22.

166 GATT Panel Report, *United States — Trade Measures Affecting Nicaragua*, GATT Doc L/6053 (13 October 1986) [1.2].

technical in nature. As a result, even if WTO panels were willing and as powerful as they are often portrayed, there is little room for them to ensure that the pursuit of trade is consistent with human rights norms. It is well known, for example, that agricultural subsidy in rich countries shatters the livelihoods of millions of poor farmers in poor countries.[167] From a technical point of view, however, since export subsidy in agriculture is legitimate, the practice may not be successfully challenged merely because it ruins the lives and livelihoods of poor farmers in poor countries.[168] Similarly, a trade measure may not be held illegitimate under the WTO, even though it destroys millions of jobs. Although creating, rather than destroying jobs, is one of the ostensible goals of the WTO, the fact that those goals have not been translated into binding rules means there is little WTO panels can do to resolve the conflict between trade and employment issues. These are not technical issues amenable for judicial determination; they are profound normative conflicts that can be addressed only through political negotiations. It took political negotiations to ensure that 'TRIPS *does not* and *should not* prevent members from taking measures to protect public health'.[169]

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167 Peter Brabeck, former CEO of Nestlé, the world's largest food and beverages company, sums it up:

> In the industrialised countries, agricultural products are subsidised to the tune of US1 billion per day … We cannot consume all these products and so we create mountains of butter and milk. After that we export them at extremely low prices to developing countries. The local farmers do not stand a chance [to withstand the competition]. Why do all developing countries have these huge urban slums? Because their people can no longer find work in the countryside and must flee to the cities. Who is responsible? The agricultural subsidies.

Peter Brabeck, quoted by Jean Ziegler, (former) UN Special Rapporteur on the Right to Food, Report of the Special Rapporteur on the Right to Food, UN Commission on Human Rights, 62nd Session Agenda Item 10, UN Doc. E/CN.4/2006/44 (16 March 2006) [29].

168 While export subsidies in manufactured goods have been prohibited since 1955, export subsidy in agriculture continues to be legitimate, subject to the 'equitable share' provision of the GATT art XVI:3 and some specific requirements under the AoA.

169 Following a strong international campaign for access to essential medicines, WTO members finally declared that access to medicine has priority over TRIPS obligations. See Doha Declaration on the TRIPS Agreement and Public Health, WTO Doc WT/MIN (01)/DEC/2 (20 November 2001) [1]–[4]. It is apparent that this declaration does not constitute an amendment of the TRIPS. Yet, it is a

Importantly, the stated goals of the WTO must be reflected in the operative rules of the organisation. Absent concrete rules, no stretch of interpretation of 'conflict' can ensure that the WTO operates consistently with its own goals, much less with other norms of international law. It is based on such recognition that we shall approach the conflict between WTO system and human rights.

IV Conflict Between the WTO and Human Rights

The WTO's goals are well known and uncontroversial. As enshrined in the opening paragraph of the preamble of the agreement establishing the organisation, the WTO was set up for the purpose of:

> raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.[170]

Raising the living standards of people around the world sums up the WTO's raison d'être.[171] The trading regime, it is conventionally argued, is based on utilitarian ethos. The case for free trade is entirely based on 'consequentialist' arguments.[172] Expanding trade per se has never figured as a goal; it is just a means to an end. Even the staunchest defenders of free trade have not argued on non-instrumental grounds (ie, trade for its own sake). Some commentators

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remarkable political concession by WTO members that recognises the primacy of public good over private profit.

170 *Marrakesh Agreement*, Preamble para 1.

171 Apart from concerns for the environment and sustainability, and the issue of services, these were the same objectives GATT Contracting Parties sought to achieve. The premise is that expanding trade creates jobs and boosts real income, leading to higher standards of living.

172 Sen defines *consequentialism* as a component of *utilitarian* moral theory that judges the rightness of actions and choices 'entirely by the goodness of the consequent state of affairs'. Amartya Sen, *Resources, Values and Development* (Harvard University Press, 1984) 278.

regard Ernst-Ulrich Petermann as the lone champion of 'freedom to trade'.[173] However, even Petersmann advances his argument more by relying on the instrumentality of 'mutually beneficial economic cooperation among citizens across frontiers' for the fulfillment of human rights than by taking free trade as a freestanding value or right.[174] Indeed, neither Petersmann nor any other scholar has asserted the existence of 'a right to trade' as part of positive international law.[175]

Therefore, since the WTO's institutional existence is justified principally, if not solely, by the goal of raising standards of living around the world, its legitimacy must be judged entirely based on its consequence on the lives of people.[176] Whether and to what extent it helps enhance people's living standards should be the principal

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173 See, eg, Sarah Joseph, *Blame it on the WTO? A Human Rights Critique* (Oxford University Press, 2011) 33; see also generally Philip Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 *European Journal of International Law*.

174 He argues, for instance, that the

> UN human rights law must overcome its 'anti-market bias' and recognise that 'economic freedoms' (eg, to exchange private goods and services) are no less important for the survival and personal development of individuals than civil and political freedoms … On the other side, the emerging global integration law (eg, of the WTO) must be construed in conformity with the universal human rights obligations of the UN and WTO member states.

Ernst-Ulrich Petermann, 'Human Rights, Markets and Economic Welfare: Constitutional Functions of the Emerging UN Human Rights Constitution' in Frederick M Abbott, Christine Breining-Kaufmann, and Thomas Cottier (eds), *International Trade and Human Rights: Foundations and Conceptual Issues* (University of Michigan Press, 2006) 35.

175 Yet, although Petersmann argues mainly by drawing upon international human rights theory, his argument does not seem to sit well among human rights scholars. Some of his critics link his proposition to 'ordoliberlism', which may have 'extremely negative consequences' on human rights. See Alston, above n 173, 815; see also generally Robert Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 *European Journal of International Law* 651.

176 Even without such explicit references, the legitimacy of the WTO (or any institution for that matter) must ultimately be assessed by reference to the results in human terms.

yardstick to judge the WTO.[177] It must be stressed here that unlike terminologies, such as cooperation or discrimination, which carry different shades of meaning in the context of WTO law and that of human rights law, standard of living represents the same value in both contexts.[178]

The WTO goals draw striking similarity, both in language and essence, with human rights. Raising living standards is what it takes to ensure the realisation of the human right to adequate standard of living (and virtually all other socioeconomic rights). However, and this is paradoxical, critics label the WTO as a 'veritable nightmare' for the world's poor.[179] The trading regime is blamed for compromising human rights.[180] The vexing question thus is this: if the

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177 Indeed, other benefits of trade, such as the promotion of international peace are essentially derivative. Unlike what is commonly stated, the WTO was not established for the purpose of promoting international peace (a goal envisaged only by the Havana Charter). Yet, trade may still promote peace indirectly, as people who enjoy adequate standard of living may be less prone to be agitated by drums of war. That seems to be what US President Franklin D Roosevelt alluded to when he stated: 'People who are hungry and out of a job are the stuff of which dictatorships are made'. Franklin D Roosevelt Presidential Library and Museum, *State of the Union Message to Congress* (11 January 1944) <http://www.fdrlibrary.marist.edu/archives/address_text.html>.

178 See below Part IV(A).

179 It is the position of the UN that trade liberalisation is not an unmixed blessing; for all its benefits, it also undermines the enjoyment of human rights. One is reminded of one of the earliest and most provocative reports by UN Special Rapporteurs on globalisation and its impact on the full enjoyment of human rights that labelled the WTO as a 'veritable nightmare' to the world's poor. See J Oloka-Onyango and Deepika Udagama, *The Realization of Economic, Social and Cultural Rights: Globalization and its Impact on the Full Enjoyment of Human Rights*, Preliminary Report Submitted in Accordance with Sub-Commission Resolution 1999/8, 52nd sess, Agenda Item 4, UN Doc. E/CN.4/Sub.2/2000/13 (15 June 2000).

180 Note that the topic of *trade and human rights* almost always refers to the impact of trade on 'socioeconomic' rights. There is no evidence that trade liberalisation leads directly to, say, the suppression of free expression. There is substantial evidence, however, that free trade may lead to job losses and with that the loss of livelihoods, which, of course, may in turn effectively kill off other rights. That is the apparent reason why the issue of *trade and human rights* moves the poor more than the well-off.

WTO is created to enhance the aforementioned goals (that should ordinarily be disproportionately beneficial to the poor), how can the WTO be anti-poor? That is, how can raising living standards (which is the principal goal of the WTO) conflict with, say, the right to adequate standard of living? This is the fundamental question that we shall now turn to. Before that, however, it is important to dispel contentions on the existence of normative conflict between WTO law and human rights.

A *Dispelling Contentions*

The WTO itself concedes that in trade, like in any competition, some win while others lose, temporarily or permanently.[181] That is however generally considered as an incidental cost of liberalisation (not a human rights violation). But there should be no illusion here: if an individual loses their job permanently because of trade agreements, their rights are all but shattered.[182] The amount of aggregate gains derived to the rest of the society does not make such violation any more legitimate.[183] Yet, when the issue is characterised in normative terms, it becomes a subject of contention. Trade advocates generally deny the existence of normative conflict between trade liberalisation and human rights. There are two common (and contradictory) approaches of denying conflict: one is by secluding trade from human rights; the other is by confounding the two.[184] In other words, of the

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181 See WTO, 'World Trade Report: Trade in a Globalized World' (Report, 2008) 123.

182 It is a question of elementary justice that someone who has been made worse off by some positive action (in our context, a trade agreement) than they would have been otherwise has suffered injustice.

183 Proponents of liberalisation maintain that even though some sections of society may be victimised, opening markets is still the surest way to help the poor. However, there should be concrete mechanisms whereby individuals thus affected can be compensated. Otherwise, the whole enterprise will be illegitimate if some sections of society were to pay the price in order for others to reap the benefits. Trade, like other State policies, has to be reconciled with pre-exiting entitlements of individuals.

184 The first one is based on treating international trade as a separate regime from human rights or even the wider public international law. 'To many negotiators and other WTO experts in Geneva', Pauwelyn observes, 'the fact that WTO law

three criteria that must be fulfilled for conflict of norms to arise (discussed above) the existence of the two, ie, 'same subject matter' and 'incompatibility' is somehow contested. It is now in order to probe these claims in turn.

1 *Otherness Argument*

That the WTO is a self-contained regime, which should not be constrained by human rights considerations, had been the traditional line of argument along which its advocates brush aside human rights criticisms. However, the WTO treaty itself directs that WTO law should be clarified 'in accordance with customary rules of interpretation of public international law'.[185] Accordingly, the AB reaffirmed in its very first and much quoted report that the WTO agreements 'are not be read in clinical isolation from public international law'.[186] Such explicit position of the AB, one would expect, would cast away any doubts that the WTO is not a self-contained regime.[187] It did not. In practice, the WTO still operates in 'clinical isolation' from human rights law. Indeed, its former Director General openly declared: 'the WTO … does not take into account other international norms and other international organisations'.[188]

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was "just" a branch of the wider corpse of international law comes as a surprise'. Pauwelyn, above n 3, 26.

185 DSU art 3.2.

186 Appellate Body Report, *US — Gasoline*, WTO Doc WT/DS2/AB/R, AB-1996-1, 17.

187 According to Pauwelyn, the textual reference of the DSU to public international law 'is a death-blow' for those who maintain that the WTO is a self-contained regime. However, those who hold the opposite view remain unconvinced. See, eg, Malgosia Fitzmaurice and Panos Merkouris, 'Canons of Interpretation: Selected Case Studies from the World Trade Organization and the North American Free Trade Agreement' in Malgosia Fitzmaurice, Olufemi Elias and Panos Merkouris (eds), *Treaty Interpretation and the Vienna convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff Publishers, 2010) 160.

188 Pascal Lamy, WTO Director General, 'The WTO in the Archipelago of Global Governance' (Speech delivered at the Institute of International Studies, Geneva, 14 March 2006) <http://www.wto.org/english/news_e/sppl_e/sppl20_e.htm>.

However, do trade and human rights deal with entirely separate subject-matters? Are the objectives of trade in raising standards of living, increasing employment, and the like substantively dissimilar to the right to adequate standard of living, the right to employment, etc? Is a trade policy that results in loss of jobs and livelihoods not a violation of human rights? The answer to these questions very much depends on our conception of legal norms and normative conflict. From a formal (or technical) point of view, it may be argued that WTO law does not conflict with human rights law because its rules are crafted so carefully to shun human rights. However, conflict of norms is a question of substantive coherence as well. As such, not only formal rules, but also the principles and reasons that inform such rules should be taken into account.[189]

Arguments that highlight the separate nature of trade and human rights are underpinned by two related hypotheses: WTO is unrelated to the UN; and WTO law makes no reference to human rights. When subjected to scrutiny, each of these hypotheses runs into difficulties.

a) *The WTO is Unrelated to the UN*

Insinuated in this argument is this: whatever their obligations under the UN framework, human rights cannot be invoked to challenge trade measures of WTO members. The institutional separation of the WTO from the UN seems to have led people to believe that the WTO is somehow a secluded territory. However, the overriding character of the UN Charter makes this view problematic. Within or without the UN framework, bilateral or multilateral, all treaties must be consistent with the UN Charter.[190] Therefore, the absence of formal institutional relation between the UN and the WTO does not absolve member States of their human rights obligations. It must also be stressed that the WTO is but a forum where its members take all-important decisions.[191] There should be no illusion, therefore, that member

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189 See above Part III.

190 See above n 68.

191 The WTO is not a supranational entity that imposes its will on States. Although a full-fledged legal entity, the WTO is but a forum for member States to

States have the obligation to ensure that whatever they do through the WTO coheres with their obligations under international human rights law.

b) *WTO Law Makes no Reference to Human Rights*

It is true that even where nothing but human rights is at stake, non-human rights vocabularies are preferred at the WTO.[192] Shying away from human rights vocabularies does not, however, render human rights norms impertinent to the WTO. Indeed, common vocabulary is not a necessary condition for conflict of norms to arise. As indicated under art 30 of the VCLT, it suffices that two norms relate to the same subject matter and be incompatible. Few would be prepared to argue that the WTO's principal goal of raising living standards is an unrelated subject matter to the right to an adequate standard of living. Indeed, the 'separate subject matter' argument, presently seems to be displaced by a contrary claim: sameness. It is argued that trade and human rights are based on the same fundamental values; hence, there is little or no conflict between them. Interestingly, the shift in the premise does not seem to alter the conclusion.

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negotiate trade rules, settle trade disputes, etc. Contrary to popular perception of the WTO as a global powerhouse, it is member States that actually decide virtually everything at the WTO. Unlike other inter-governmental organisations, such as the World Bank that designs and executes projects all over the world, the trading regime neither makes laws nor conducts trade by itself. Hence, the *WTO and human rights* debate should not overlook the fact that the primary obligation to make WTO rules and operations consistent with human rights norms rests on States.

192 For example, the impact of TRIPS on individuals' right to health has always been at the heart of the trade *versus* human rights debate. However, while WTO members were in the end forced to agree that, in case of conflict, public health trumps over TRIPS, they, consistent to the tradition of avoiding human rights language, recognised Members States' right to protect public health (which in fact is an obligation rather than a right), rather than the human right to health. See Doha Declaration, above n 170, [4].

2 *Sameness Argument*

This approach trivialises the conflict between trade and human rights by amplifying the virtues of trade and how it links to and maximises freedom. Some even claim that trade is actually a human right in practice. Pascal Lamy, former WTO Director General, argued that human rights and trade are mutually supportive, thus much of the distrust between trade and human rights communities is simply the outcome of ignorance. He stated:

> The history of the relationship between trade and human rights is a history of suspicion, and to some extent of deliberate reciprocal ignorance … Yet, trade goes hand in hand with human right … One too often forgets that human rights and trade rules, including WTO rules, are based on the *same values*: individual freedom and responsibility, non-discrimination, rule of law, and welfare through peaceful cooperation among individuals. Not only are they based on the same fundamental values; they are also the result of common concerns. Both human rights and global trade rules were considered a key element of the post-World War II order, a rampart against totalitarianism. It is no coincidence that the seeds of the multilateral trading system were planted at the same time as the Universal Declaration on Human Rights was being drafted in the mid-1940s. Both were seen as indispensable to world peace … Human rights are essential to the good functioning of the multilateral trading system, and trade and WTO rules contribute to the realization of human rights.[193]

This claim that trade is almost human rights in practice marks a partial reversal from the traditional 'self-contained' regime argument. While the two are contradictory positions, they both downplay the existence of normative conflict between the two fields. The claim that both the WTO system and human rights are underpinned by common values of individual freedom, non-discrimination, rule of law, welfare, cooperation, and so on sounds appealing. However, closer scrutiny reveals that these terminologies represent different substantive values in the context of WTO than their ordinary

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[193] Pascal Lamy, 'Towards Shared Responsibility and Greater Coherence: Human Rights, Trade and Macroeconomic Policy' (Speech delivered at the Colloquium on Human Rights in Global Economy, Co-organized by the Council of Human Rights and Realizing Rights, Geneva, 13 January 2010) <http://www.wto.org/english/news_e/sppl_e/sppl146_e.htm> (emphasis added).

meaning. Indeed, if the WTO's consistent dissociation of itself from human rights is not a sufficient indication that human rights are actually seen as obstacles to the pursuit of trade, the fundamentally different values the above concepts promote in the context of the trading regime provide an unmistakable answer.

a) *Freedom*

For trade proponents, WTO law guarantees economic freedoms by ensuring, among others, freedom of contract, property rights and non-discrimination. This seems indeed the main thesis of Petersmann. It is argued that although WTO law is concerned only with economic liberties, they are fundamental and instrumental to the enjoyment of other freedoms.[194] 'Free trade' is thus all about freedom and prosperity. The difficulty begins when one asks: whose freedom?

Alston counters that the freedoms alluded to by Petersmann are in fact not rights conferred upon individuals, intellectual property rights being the only exception.[195] In fact, even in the case of intellectual property, WTO does not directly guarantee any right to the individual. Individuals do not have standing at the WTO. True, legal standing is one thing, substantive right is quite another. Yet, the fact remains that individuals do not have any right deriving directly from WTO agreements.[196] In *Pharmaceutical Manufacturers' Association of South Africa v the President of South Africa*,[197] for example, pharmaceutical companies challenged the government of South Africa mainly on the ground of unconstitutionality and violation of property rights under domestic law and only secondarily on the basis

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194 See generally Ernst-Ulrich Petersmann, 'Human Rights, International Economic Law and Constitutional Justice: A Rejoinder' (2008)19 *European Journal of International Law*.

195 See Alston, above n 173, 826.

196 It may be claimed that individual interests are protected indirectly through States that may bring claims when such interests are violated. But that depends less on individual interests per se than on the significance of the interest involved. In practice, States fight cases on behalf of their wealthy corporations.

197 [2000] 2 SA 674.

of inconsistency with the TRIPS.[198] In short, although WTO agreements are concluded essentially to facilitate trade between private entities, reciprocal rights and obligations accruing from such agreements go to member States, not individuals.[199] That individuals 'are seen as objects rather than as holders of rights' under the WTO, dispels the claim that free trade is almost the same as individual freedom.[200] Indeed, unlike the allusion quoted above, lopsided deals such as the TRIPS and the AoA are not aimed at promoting individual freedom.

In fact, the concept of freedom in 'free trade' refers to the reduction of trade restrictions so that goods and services can easily penetrate State borders. It guarantees the free movement of goods and services, not of people. It does not guarantee anything to the individual. Neither can it be invoked by individuals directly nor can it be a ground for complaint before a WTO Panel. It is all about goods and services, and traders (typically corporations) to trade freely, and that is entirely different from the fundamental freedoms of individuals guaranteed by human rights instruments.

b) *Non-discrimination*

Non-discrimination in the context of the WTO has nothing to do with the fundamental freedom of individuals to be treated without distinction on the grounds of race, sex, religion, nationality, status, etc, as guaranteed in the UN Charter, UDHR, and other human rights instruments. Again, it is not even about people. It is all about goods. It essentially refers to the MFN and NT clauses under GATT arts I and III respectively. The MFN clause obliges a WTO member to accord imported products no less favourable treatment than it accords

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198 See generally Holger Hestermeyer, *Human Rights and the WTO: The Case of Patents and Access to Medicines* (Oxford University Press, 2007) 13.

199 To be sure, trade presupposes property right, freedom of contract, etc. These rights are, however, beyond the proper ambit of the WTO. Although economic globalisation, of which trade is the core component, proceeds based on selective reading of Locke's justification for property right, a violation of property rights, may not, for example, lead to a complaint before the WTO Panel.

200 See Alston, above n 173, 826.

to like products originating from its most favoured nation (making trade concessions among members automatically multilateral), while NT principle prohibits WTO members from subjecting imported goods to internal taxes and charges in excess of those imposed on like domestic products. Article 4 of the TRIPS Agreement, for example, obliges WTO members to 'immediately and unconditionally' accord to IP holders (which typically means multinationals that effectively lobbied for the incorporation of TRIPS into the WTO system) 'any advantage, favor, privilege or immunity' they accord to their nationals.

The goal of non-discrimination that the WTO promotes is economic efficiency, not human rights. Its implication practically may even be that weaker domestic producers will be driven out of their local market by powerful international competitors.[201] Thus, contrary to human rights concept of non-discrimination that provides protection to the weaker, the principle of trade non-discrimination typically protects the interests of the stronger players. It is indeed only by deviating from the principle of non-discrimination that WTO members provide certain safeguards for their weaker traders. Crucially, the principle of non-discrimination, like other ethos of the WTO, emphasises on formal non-discrimination, as opposed to substantive non-discrimination. It is about, for example, applying the same rules on powerful agribusiness that influence trade policies and receive billions of dollars in government subsidies and voiceless poor farmers that struggle to feed their family. There can be no illusion on who wins in such a lopsided game; and the principle of non-discrimination only perpetuates the status quo. Veiled in such formal non-discrimination is, therefore, deep structural and substantive discrimination.[202]

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201 'Indeed, part of the point of the WTO is to drive the less advantaged out of business on the basis that they are less efficient than the more advantaged'. Joseph, above n 173, 39.

202 See generally, the Commission on Human Rights, *Analytical Study of the High Commissioner for Human Rights on the Fundamental Principle of Non-discrimination in the Context of Globalization*, Report of the High Commissioner, UN Doc E/CN.4/2004/40 (15 January 2004) [16]–[42].

c) *Rule of Law*

Rule of law is an essentially fluid concept. It may mean different things, and may serve different or even contradictory purposes. Take, for example, the following two statements. One, rule of law is the underpinning of the WTO system. Two, rule of law is a useless concept in the context of the WTO. No doubt, these two statements are contradictory. Yet, both may be somehow correct, depending on how one conceptualises rule of law. The first one is correct because the WTO is based on the recognition of the formal equality of its members, and in principle all members play by the same set of rules. Where a member breaks a rule, the affected member may obtain formal justice before a formally impartial panel that decide cases based on predetermined rules. Thus, although WTO Panel decisions are made in closed session by anonymous panelists, the process promotes formal rule of law.[203] On the other hand, the second statement may be correct not only because the rules of the game are essentially set by the dominant players,[204] but also because the kind of justice dispensed by a WTO Panel may practically be useless for

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[203] Art 14 of the DSU requires that panel proceeding shall be confidential. The full text of the provision is thus:

> Confidentiality,
> 1. Panel deliberations shall be confidential.
> 2. The reports of panels shall be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.
> 3. Opinions expressed in the panel report by individual panelists shall be anonymous.

[204] Joseph, above n 173, 63:

> The negotiating culture of the GATT served to exclude numerous Members from important aspects of deal-brokering. Policies and treaties were negotiated in notorious 'Green Room' meetings to which only certain Members were invited, and in which discussions were secret. Green Room decisions were then presented to other Members as *faits accomplis*.

See also UNDP, *Human Development Report: Deepening Democracy in a Fragmented World* (New York, 2002) 118. The Green Room is not a physical structure; it is a process in which heads of delegates (of the powerful few), under the Chairmanship of the WTO Director General, negotiate to curve an informal consensus: World Trade Organization, *How the meeting was organized* (July 2008) <http://www.wto.org/english/tratop_e/dda_e/meet08_org_e.htm>.

those that lack the power to take retaliatory countermeasures.[205] That is essentially the main reason why the weakest members of the WTO do not have recourse to the DSB. Substantive justice at the WTO depends more on economic power than principles. Rule of law at the WTO resembles a criminal justice system in which the judge passes a guilty verdict, and leaves the convict and their victim to fight a duel, if they wish to. And the credibility of a system of law that does not provide minimum guarantees for its weaker subjects is always open to question. Of course, there is a counter argument to this that essentially emphasises the distinction between judicial enforcement at domestic and international levels. It is argued, for example, that at the international stage, persuasion, not coercion is all that matters for even weaker countries are strong enough to resist coercion. It is argued that States are generally inclined to comply with juridical rulings for they have interest in the efficacy of the legal system they established.[206] Yet, it is not uncommon to see WTO member States ignoring panel recommendations.

The concept of rule of law depends on the role law is sought to play in a given society. If the aim is to ensure substantive justice, then that seems a far cry at the WTO. Importantly, rule of law in the context of the WTO concerns rules applicable in the treatment of products, not of people. Thus, it essentially guarantees nothing to human beings as such.

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[205] The WTO DSU is a significant improvement from the GATT dispute settlement system in which a panel ruling would be adopted only if all parties, including the defendant State agreed. With the establishment of the WTO, that tradition has basically been reversed. Now, a 'negative consensus' applies so that a ruling is adopted automatically unless all members, including the winning State are opposed to it.

[206] See, eg, Robert E Hudec, 'The Adequacy of WTO Dispute Settlement Remedies' in Bernard Hoekman Aaditya Mattoo and Philip English (eds), *Development, Trade, and the WTO: A Handbook* (World Bank, 2002) 82.

d) *Welfare*

Increasing economic welfare provides the overriding, or indeed, the sole justification for trade liberalisation. The idea that free trade in principle increases economic welfare is hardly contested. There are claims that a country may reap economic gains even from unilateral liberalisation. But then there is this fundamental question: if trade liberalisation, even unilaterally, generates economic gain, why is protectionism a universal phenomenon? This question is even more vexing in view of the fact that trade protectionism is higher in sectors that could generate higher welfare gains. For example, liberalising agricultural trade is estimated to generate up to 70 percent of the global welfare gains from merchandise trade.[207] Yet, agriculture remains the most protected sector. The fact that protectionism is markedly higher where the potential welfare gain is disproportionately higher flies in the face of the rhetoric about welfare gains of trade liberalisation.

Yet, this is not at all surprising. The issue mainly boils down to the question of distribution. First, in reality, each member State fights for its own traders, not to enhance aggregate global welfare.[208] Second, even in an ideal world where free trade maximises the economic welfare of every State, the welfare of individuals may not necessarily be enhanced.[209] Therefore, the WTO's characteristic emphasis on

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[207] Dominique van der Mensbrugghe and John C Beghin, 'Global Agricultural Reform: What is at Stake?' in M Ataman Aksoy and John C Beghin (eds), *Global Agriculture and Developing Countries* (World Bank, 2005) 116.

[208] It is well known that rich nations that otherwise preach the gospel of free trade actually push trade liberalisation selectively for products in which they have obvious comparative advantage, such as industrial goods and services, while maintaining impenetrable trade barriers, on sectors such as agriculture and textile in which developing countries have a comparative advantage.

[209] The traditional overemphasis on aggregate economic figures, rather than on the lives of people, conceals gross disparities in distribution. We live in a world where the number of billionaires and that of hungry people grow simultaneously. According to the World Bank, food price hike has plunged around 44 million more people into extreme poverty in 2010 alone, adding to the 1.2 billion people who already live below the poverty line of $1.25 a day. World Bank, 'Food Price Watch, Poverty Reduction and Equity' (Washington D.C, February 2011)

aggregate numbers and volumes proves almost nothing about human welfare. Even at the aggregate level, the economic record the WTO proudly claims credit for is highly suspect. Former WTO Director General, Mike Moore, for example, claimed that the multilateral trading system has probably done more to boost living standards and lift people out of poverty over the past 50 years than any other government intervention.[210] According to the World Bank, however, the number of people living under absolute poverty in the developing world declined from 1.5 billion in 1981 to 1.1 billion in 2004. Over the same period, China, which was a non-WTO member until 2001, has lifted half a billion people out of absolute poverty.[211] That means if one excludes China, there was no decline in absolute poverty in the developing world over that period. To be sure, trade may increase aggregate economic welfare, but it also shatters the welfare of individuals. And contrary to what its ordinary meaning suggests, the term welfare in the WTO context provides no guarantee for those who find themselves on the losing end of trade liberalisation.

e) *Cooperation*

Cooperation is yet another equivocal, even misleading, term routinely used in international trade. The hallmark of trade is competition, not cooperation. Cooperation in the WTO context is not much more than an agreement to facilitate the ground for traders to compete freely. In

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1. On the contrary, somewhat ironically, the number of millionaires has grown by a remarkable 14 per cent between 2008 and 2009 (the share of the top 0.5 per cent households alone jumping from 19 per cent to 21 per cent of the world's wealth, while the share of 83 per cent of the world's households declined from 14 per cent to 13 per cent). See Robert Frank, 'Millionaire Population Bounces Back to Pre-Crisis Peak' on Robert Frank, *The Wealth Report, Wall Street Journal Blogs* (10 June 2010) <http://blogs.wsj.com/wealth/2010/06/10/millionaire-population-bounces-back-to-pre-crisis-peak/>.

210 Mike Moore, 'Ministerial Roundtable on Trade and Poverty in LDCs' (Speech delivered at the World Trade Organization, London, 19 March 2001) <http://www.wto.org/english/news_e/spmm_e/spmm55_e.htm>.

211 Poverty Reduction and Economic Management Department, East Asia and Pacific Region, 'From Poor Areas to Poor People: China's Evolving Poverty Reduction Agenda — An Assessment of Poverty and Inequality in China' (Report, World Bank, March 2009) 5.

fact, the actual trading principally proceeds between private entities, typically corporations,[212] and it is profit, not cooperation, which derives corporations. The bananas trade saga discussed above provides glaring evidence that at the WTO corporate profit may actually trump development cooperation agreements. The relevance of the kind of international cooperation mandated by the UN Charter (art 56) to the WTO's *modus operandi* is at best negligible. Cooperation in the WTO context may even contradict the notion of cooperation envisioned in the UN Charter and other treaties. For instance, cooperation under art 11(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) requires disseminating technical and scientific knowledge necessary to improve methods of food production. On the contrary, cooperation under the TRIPS Agreement requires protecting technology from being disseminated to ensure the patent holder will reap profits, even if that means condemning millions to preventable starvation or death. That was exactly the issue in the case of *South Africa Pharmaceuticals*.[213] And trade deals are of course carved out of cut-throat negotiations and are understandably tailored to the interests of dominant players.[214] Crucially, despite the rhetoric about cooperation and fair trade, rich nations in practice erect an almost impregnable, even discriminatory tariff and nontariff barriers against imports from developing nations.[215]

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212 Despite the myth of free competition, trade in some sectors is actually dominated by a handful of vertically integrated corporations. For example, in the USA (the biggest agricultural exporter next to the EU), just three companies; namely, Cargill, ADM and Zen Noh control 82 percent of corn exporting, and four companies: Tyson, ConAgra, Cargill and Farmland Nation control 81 percent of beef packing. The same applies more or less to other OECD countries. See Food and Agriculture Organization of the United Nations (FAO), *Trade Reforms and Food Security: Conceptualizing the Linkage* (Rome, 2003) 119–20.

213 [2000] 2 SA 674.

214 See above n 205.

215 See UNDP Report, above n 32, 127:

> On average, low-income developing countries exporting to high-income countries face tariffs three to four times higher than the barriers applied in trade between high-income countries … The average conceals very large differences between countries and the very high tariffs on labor-intensive products of great importance for employment in developing countries. For example, while the average tariff on imports from

In sum, these lofty terminologies carry different substantive meanings in the context of the WTO than their ordinary meaning in human rights context. They do not guarantee anything tangible to individuals; yet, they are often invoked and amplified in trade circles, perhaps for their legitimising authority. Indeed, such divergence is not merely external; there is an obvious discrepancy between what the WTO claims to do and what it actually does; between declared goals and actual rules. We shall now turn to the incoherence from within the WTO.

B *Substantive Incoherence from Within*

In theory, the WTO was established to orchestrate the pursuit of trade towards raising living standards around the world, ensuring full employment, with due attention to the development needs of poor members, while complying with the imperatives of environmental sustainability. None of these goals conflicts with human rights. Yet, there is a basic but momentous question: is the WTO true to its own stated goals? That is, are these normative conceptions inserted simply as tools of legitimatisation or do they actually carry any substantive meaning? To what extent, if at all, are these goals reflected in the operative rules of the WTO? Are normative standards and institutional tools in place within or without the WTO to ensure that the pursuit of trade actually enhances these goals?[216] These are fundamental questions that the *WTO and human rights* discourse cannot afford to overlook.

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developing countries to high-income countries is 3.4%, Japan imposes a tariff of 26% on Kenyan footwear. Canada levies a 17% tariff on garments from Malaysia. Developing countries account for less than one-third of developed country imports but for two-thirds of tariff revenues collected. The effective US import duty for countries like Viet Nam and Bangladesh is some 10 times higher than for most countries in the European Union.

[216] To declare one thing and do another may be fraudulent. It is thus legitimate to ask whether the central goal of the WTO, which is lifting living standards of people, in reality, carries any normative force and whether there are institutional tools to ensure that trade is actually conducted consistently with this goal.

A perusal of WTO law reveals that, of the stated objectives of the organisation, only those that have merely instrumental value, such as tariff reduction, are selectively sanctioned. Fundamental goals of raising standards of living, ensuring full employment or the optimal use of the world's resources in accordance with the dictates of sustainability and poorer members' unique development needs have not been translated into concrete rules.[217] Obviously, the preamble is stated in exceedingly abstract language and, of course, it is not binding. Apart from the preamble, the phrase 'standard of living' has been mentioned only a few times under the GATT art XVIII (regarding some flexibilities and preferential treatment to poor nations) and a declaratory statement under art XXXVI.[218] None of the WTO agreements mention the organisation's ostensible goals: raising living standards or employment. There is no binding WTO provision that requires that the pursuit of free trade should promote or even be consistent with these goals. None of the above goals are seen as a yardstick to gauge if, and to what extent, the promises of free trade translate into the lives of people.

It may be argued that art 31 of the VCLT (applicable via art 3.2 of DSU) requires that the WTO treaties shall be interpreted in good faith in accordance with their object and purpose. Hence, WTO law may be interpreted in accordance with the goals stated in the preamble of the organisation's charter.[219] However, in the absence of concrete

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217 GATT art XX is often regarded as the exception in this regard. However, this provision has scant relation to the goals stated in the preamble of the WTO Agreement. While the preamble requires member States to pursue trade toward 'ensuring full employment', GATT Art XX does no more than prohibit prison labour (even then the concern is competitiveness rather than the rights of prisoners). Likewise, while the preamble envisions a trading regime that ensures optimal use of the world's resources, GATT art XX does not mandate conserving natural resources, but merely authorises member States to invoke exhaustible resources as justification for protectionist measures.

218 Art XXXVI(9) reads: 'The adoption of measures to give effect to these principles and objectives [on trade and development] shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly'.

219 In view of the fact that the *Marrakesh Agreement* (also informally called the WTO Charter) has constitutional character, as its art XVI(3) might suggest, the

rules that obligate member States to ensure that trade actually creates rather than destroys jobs or enhances rather than ruins individuals' living standards, it would be romantic to expect a WTO Panel to, through interpretation, create any such obligations. In practice, panels discernibly refer to the preamble only when the particular objective has received explicit expression in the operative rules of the WTO, as in the case of exhaustible natural resources.[220] In short, whereas the goals of enhancing living standards and employment have not been spelled out in the operative rules, the preamble alone may not be a sufficient ground to challenge a trade policy before DSB, no matter how deleterious to jobs or living standards of the poor the policy might be.

Practically, therefore, the above stated goals seem almost irrelevant to the life of the WTO. In reality, the difference between the WTO that claims to expand trade as a means to promote living standards of people and one that seeks to expand trade on purely mercantilist grounds (ie, trade for its own sake or to maximise corporate profit), is not so obvious. It cannot be emphasised enough that maximising trade is not synonymous with raising living standards. Even advocates of mercantilism believed in maximising trade; they just did not have much concern for the living standards of the poor, as powerfully exposed by Adam Smith.[221]

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argument that WTO agreements ought to be interpreted in light of the stated goals seems indeed cogent.

220 In *Indonesia — Autos* case discussed above, for example, the panel quotes a paragraph from the preamble of the WTO Agreement relating liberalisation. Yet, it ignores the paragraph concerning development needs of developing countries, although that was the crux of the dispute.

221 Adam Smith argued that mercantilism was a system that sacrifices the interests of the public in favour of business interests. He argued that merchants and manufacturers were the ones contriving to sustain mercantilism for they derive 'the greatest advantage' from the monopoly of the domestic market at the expense of farmers, labourers, smaller traders and the society at large. Adam Smith, *An Inquiry into the Nature and Cause of the Wealth of Nations* (Maruzen Company Limited, Tokyo, 1776/1940) 609.

The volume of trade is no yardstick to measure the successes of the trading regime, precisely because expanding trade per se is not the goal; the goals are raising living standards, creating employment, among others. The former is just a means; the latters the ends. Yet, at the WTO, there is no concrete, purposeful, and verifiable mechanism that connects means and end. If raising standards of living, ensuring full employment, and so on are the WTO's goals, the trading regime has betrayed its own goals by displacing them with expansion of trade (which in reality has become almost the sole objective of the WTO) or at best it has failed to translate those goals into concrete rules and devise tangible mechanisms to evaluate whether the pursuit of free trade promotes or is at least consistent with these goals. Such deliberate failure to connect means and ends in any concrete terms or, even confounding the two, it is argued here, lies at the root of much of the normative conflict between the WTO and human rights. Yet, contrary to the prevailing assumption, this is not a technical conflict that can be adequately addressed through the application of conflict resolution mechanisms.

Addressing normative conflict between WTO trade and human rights requires, first and foremost, ensuring consonance between the WTO's substantive rules and its raison d'être. That is a political decision for WTO members. Yet, it is also a legal obligation. Most WTO members are parties to one or another human rights treaty. They have thus the obligation to ensure that trade and other economic policies that they pursue (directly, or through organisations such as the WTO) are consistent with their human rights obligations. In fact, WTO members concede that public goods trump the pursuit of profit. That is evident not only from the numerous declarations they have made over the years, but also from concrete legal provisions, such as those under GATT art XX, and their more recent unanimous declaration that public health prevails over the TRIPS.[222] They have made similar declarations with respect to food security. Thus, there is not much dispute over the question of primacy. However, such general references to public health, food security, etc, show almost nothing

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222 See above n 169.

about what happens to the individual. They do not guarantee anything to the individual. While WTO members have traditionally eschewed human rights language, it should be clear that they cannot shy away from the issue. Not only because human rights have primacy over WTO rules, but also because the WTO is only legitimate in so far as it helps promote the rights of individuals to an adequate standard of living.

V CONCLUSION

The preceding analysis has shown that the current debate on conflict of norms between the WTO and human rights, which revolves mainly around techniques of conflict resolution and definition of terms, falls short of getting to the heart of the problem. This article has argued that while the conflict between the WTO system and human rights is real and veritable, the problem is not, however, technical in nature. The conflict does not typically arise from a direct clash between formal (positive) legal rules of the two regimes; but rather from a systemic disharmony between the WTO and human rights values. Accordingly, although raising living standards and creating jobs constitute the WTO's principal *raison d'être*, from a technical (legalistic) point of view, a trade policy that destroys jobs and shatters livelihoods may still be legitimate because WTO rules are crafted so carefully in such a way that they are technically disconnected not only from human rights values but also from the organisation's ostensible goals.

None of the rules of the TRIPS, for example, directly violate individuals' right to health. Yet, as the notorious *South African Pharmaceuticals case*,[223] has demonstrated, its systemic effect can be a matter of life or death for millions. It is common knowledge that agricultural subsidy in rich countries shatters the livelihoods of millions of subsistent farmers in poor countries. Yet, technically speaking, none of the rules of the AoA directly violate the rights of

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223 [2000] 2 SA 674.

poor farmers, and agricultural subsidy is in fact legitimate. The conflict between trade and employment, development, and other non-trade values is similar in nature. These are profound normative conflicts that arise primarily from deliberate policy decisions rather than technical complexity. Thus, without political negotiations, there is little that can be done through the application of conflict resolution mechanisms at the judicial level. That far-reaching goals stated in the preamble of the *Marrakesh Agreement* have not been translated into binding rules means that no stretch of interpretation can ensure that the WTO operates consistently with its own stated goals, much less with human rights norms.

TESTING WTO RETALIATION: IS IT REALLY WORKING FOR ALL?

DR SALEH AL SHRAIDEH*

Abstract

World Trade Organization — Dispute Settlement System — Developing Countries — Developed Countries — Retaliation — GATT

The dispute settlement system of the WTO has always been claimed to be one of the main achievements of the current trading regime. This system has introduced a compulsory rule-based approach to regulate trade disputes between Member states, which ought to be of a particular importance for developing countries' access and participation in the system, who generally lack both the political and economic power that usually play an integral role in consolidating a country's position in settling its trade disputes with others. In this regard, it is essential for the WTO, as an international organisation responsible for achieving the integration of countries into an open multilateral trading system, to create a common sense of security and predictability among its developing countries' Members. In achieving so, its operating system for the settlement of trade disputes has to act as a guarantor for their rights under the WTO law.

However, the operation of the World Trade Organization (WTO) dispute settlement system has been viewed by many developing

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country Members as unjust to developing countries and incompatible to their circumstances. This makes them the potential weaker party in any process of trade dispute settlement against other more developed parties, as a result of the economic and political powers, and financial and technical resources. This article discusses the option of retaliation as the ultimate remedy in the WTO dispute settlement system to counter non-compliance by offending Members with the outcome of any dispute settlement process. It focuses on the nature of the retaliation option and addresses the defects of the system when developing countries are involved.

I INTRODUCTION

The GATT (General Agreement of Tariffs and Trade) legal system provided very limited remedies. A complaining party subject to a GATT-related violation was merely entitled to a general recommendation that calls upon the violating party to comply with its obligations.[1] The complying process could extend for a long period of time as a result of the absence of timeframes in the order to comply. A failure to comply with the order, as a result of the defendant party's inability or unwillingness, entitled the complaining party to request an authorised retaliation. However, this authorisation was subject to a possible veto by the defendant due to the positive consensus rule, which was applied to all GATT procedures.[2]

By comparison, the WTO dispute settlement system (especially the rules of implementation), was thought, by observers, to be more appealing to developing country Members, as a result of the more adjudicative approach adopted in the new system. Precise timeframes and increased surveillance during the implementation stage were provided under the adjudicative dispute settlement system of the

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1 Robert Hudec, 'Broadening the Scope of Remedies in WTO Dispute Settlement' in Friedl Weiss (ed), *Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of Other International Courts and Tribunals* (Cameron May, 2000) 376.

2 Ibid.

WTO, in a clear contrast to the defects of the GATT system.[3] However, all of the aforementioned improvements of the WTO system, have not resolved the fact that a general recommendation of compliance is still the main remedy of the system.[4] Retaliation, which is no longer threatened by defendants' blockage as a result of the new negative consensus rule, is the ultimate remedy for non-compliance.[5] This remedy is subject to additional time consuming procedures that confirm non-compliance and the nature and amount of retaliation.[6] Retaliation is still a future-driven remedy, which makes its main focus achieving compliance in a way that ignores compensation for past damages regardless of the time the compliance process takes.[7] However, most importantly, the effectiveness of any authorised retaliation process by the retaliating party, which is supposed to pressure the violating party to correct its violating measures, is still closely connected with, and determined by, the economic retaliating power of that party. All of these existing elements do not interact very well with developing countries' participation in the process.

II RETALIATION AS A PROCEDURE

Under art 22 of the WTO Dispute Settlement Understanding (DSU), the complaining party is entitled to an automatic retaliation in case of the defendant party's failure to comply with the recommendations of the Dispute Settlement Body (DSB), within a reasonable period of implementation determined by the body. However, this entitlement is restricted by a third party review in terms of the determination of an appropriate economic sector to retaliate against, the extent of the

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3 Alban Freneau, *WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective* (LLM thesis, Manchester University, 2001) 35.

4 Hudec, above n 1, 376.

5 Ibid.

6 Ibid.

7 Ibid.

retaliation, and even the question of non-compliance itself if disputed.[8]

In this regard, retaliation, under art 22.3 of the DSU, is imposed in the form of the suspension of trade concessions, which should be applied to the same sector in the violating Member, as of that the DSB found to be violated in the retaliating Member. This suspension should target another sector under the same agreement, in case the suspension of concessions to the same sector is found to be ineffective or impractical. However, the suspension of trade concessions could also target a sector under another covered agreement, if the first two options are found to be unfeasible. In all cases, the extent of retaliation must be equivalent to and shall not exceed the level of nullification or impairment that resulted from the violating measure.[9]

III THE DEFECTS OF THE CURRENT RETALIATION AS A REMEDY

The concept of reciprocity is considered as the base from which the legal theory of WTO retaliation is derived. In this context, it means that the WTO system imposes an exchange of legal obligations among its members in a way that creates a balance of rights and obligations for WTO members. In other words, this balance dictates that the cost of the obligations is paid for by the gain from the rights. From an international trade point of view, the balance is interpreted to be between economic loss from imports and economic gain from exports.[10] Therefore, this created balance is disturbed by a WTO inconsistent trade measure, which violates the legal framework of the system, depriving an exporting country of exports (economic gain) and benefiting an importing country, through the reduction of its imports (economic loss), resulted from the violating trade restrictive

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8 Ibid 386.

9 Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 2 ('DSU') ('*Understanding on Rules and Procedures Governing the Settlement of Disputes*' art 22, para 4).

10 Hudec, above n 1, 387.

measure.[11] Therefore, the rationale of WTO retaliation is to restore the disturbed balance of such economic losses and gains by allowing the affected Member to use it as an incentive to comply.[12] It could be argued, however, that under the current retaliation system, developing countries are missing out on their chances to achieve a restoration of the interrupted balance of economic gains and losses where they are concerned. The fact that retaliation is a temporary, prospective procedure, conflicts with the notion of restoring the interrupted balance of obligations and rights or economic losses and gains to the future economic relations, as it ignores the economic losses of the affected party caused by the violating measure.[13] In economic terms, analysing the option of retaliation, which involves increasing trade restrictions by the violated Member against the violating Member, shows that such measures do not really benefit the violated party. On the contrary, the lost trade opportunities resulting from retaliation harm the violated Member's economy as well.[14]

An aim of retaliation is to present an incentive for compliance for the offending Member.[15] However, as previously discussed, the nature of the retaliation procedure could, in contradiction of its aim, provide an incentive for delaying the complying process with the WTO rules, or even fail it, as a result of the prospective approach it is applied through.[16] An example of this is a country forcing a complaining party to go through the procedures of art 21.5 of the DSU, by applying insufficient compliance measures in its efforts to enjoy a

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11 Ibid.

12 Ibid.

13 Hector Smitmans, 'Unresolved Issues in the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes', in Dencho Georgiev and Kim Van Brorght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May, 2006) , 255.

14 Ali Asim, 'Non-compliance and Ultimate Remedies under the WTO Dispute Settlement System' (2003) 14 *Journal of Public International Affairs* 13; ibid.

15 William Davey, 'Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions' (Illinois Public Law Research Paper No 05-16, The University of Illinois College of Law, 2005) 12.

16 Jacques Bourgeois, 'Sanctions and Countermeasures: Do the Remedies Make Sense?' in Dencho Georgiev and Kim Van Brorght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May, 2006) 42.

long period of implementation.[17] The fact that retaliation is subject to the equivalence restriction means that the level of retaliation is required to be equivalent to the level of nullification or impairment caused to the aggrieved Member. This introduces a valid concern of diverting the retaliation remedy from its role as an incentive to comply to become a long-term solution.[18] The requirement that the level of retaliation must be equivalent to the level of nullification or impairment implies that the violating country is not to be penalised for its failure to correct its inconsistencies.[19] It is fair to argue that the objective of retaliation is not to penalise the violating Member but to pressure it to end the inconsistent measure. However, the idea of not penalising the violating Member for its offending measure through allowing the retaliating party to retaliate with an amount that is higher than the level of nullification or impairment, might, as previously stated, encourage the offending Member to continue with its violating measure and consider retaliation as a long-term solution. This outcome would be expected if the disputed measure was of a strategic importance to the violating Member's economy, or backed by substantial domestic support.

Many may consider these views as a defect that impacts the participation of all WTO Members in the current dispute settlement system. However, the detrimental effect of these defects is expected to have a greater impact on developing countries. The prospective nature of retaliation, and its potential negative impact on the economy of the retaliating Member itself, represents a disincentive for developing countries to participate in the system in the first place. The existence of prospective retaliation deprives developing country Members of much-needed compensation for their past damages resulted from the WTO-inconsistent measure and also imposes additional costs on them.[20] These additional costs are a result of the implicit incentive the system provides for violating country Members to delay the process of implementation, and take a longer advantage

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17 Ibid.

18 Davey, above n 15, 13.

19 Ibid.

20 Ibid.

from the illegal barriers in the absence of any consequences or retaliation threat for past losses.[21] As a result, retaliation, which ignores losses since the establishment of the offending measure, is considered by most developing country Members as an unattractive outcome due to their limited financial, legal, and institutional resources. For developing countries, precious resources that would be consumed on a process with an unattractive outcome, like retaliation, could definitely be used elsewhere in their economies where they are desperately needed. In addition, the long-term benefits of retaliation that involve increased export opportunities, are more likely to be out of reach for developing countries, as they are simply unable to afford waiting that long in the presence of their limited resources. In the short-term, it is argued that retaliation is merely an option where both parties bear economic losses resulting from lost trade opportunities. Also, the fragile, limited, and less diversified economies of developing countries make it a costly option for them as well.[22] It could also be argued that the economic inefficiency, for both the retaliating Member and the retaliated against, is considered as one of the main shortcomings of the current system of WTO retaliation.[23] Under WTO retaliation, the retaliated against Member faces higher trade restrictions as a result of the retaliating Member's suspension of concessions, putting pressure on the exporting sector concerned. In addition, the retaliating Member would gain from increasing its tariffs, which would be a national income supplement. However, the suspension of concessions might have a detrimental impact on the retaliating Member in welfare terms.[24] Consumers in the retaliating country (the importing country) would be subject to more expensive or unavailable retaliated against products, or to more expensive, and

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21 Ibid.

22 Kym Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1(2) *World Trade Review* 123, 129.

23 Bryan Mercurio, 'Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding' (2009) 8(2) *World Trade Review* 315, 318.

24 Marco Bronckers and Naboth Broek, 'Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement' in Dencho Georgiev and Kim Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May, 2006) 43, 45.

probably less efficient, substitute products from other exporting countries.[25] The counter-productivity of WTO trade retaliation is problematic for developing country Members in particular.[26] Small developing countries tend to have a significant percentage of its total trade dependent upon its trade relationship with one large developed country.[27]

Therefore, the implementation of trade retaliation against this major trading partner could significantly affect the access of developing countries' consumers to goods that are subject to retaliation. This restricted access is due to the additional costs resulting from the retaliatory suspension of concessions, which leads to an overall detrimental impact on the consumers of developing country Members.[28] This scenario supports developing country Members' concerns over transforming the option of retaliation, when executed, into a long-term option, as many of them view the possibility of bearing additional damages, added to what was already suffered as a result of the violating measure, as a risk they simply cannot afford. This issue leads to the next key obstacle that faces developing country Members under the dispute settlement system of the WTO in their use of the retaliation option, which is the capacity to retaliate. Retaliation, as the ultimate mean of compensation in the system, is a self-enforcing bilateral remedy, which is conducted only by the complaining Member. Therefore, in order to counter the violating Member's refusal to abide by its obligations, and to reinforce compliance, the complaining Member must have the capacity to make bilateral retaliatory actions or threats that are effective in inducing compliance.[29] The effectiveness of retaliation, or the threat of it, depends on the amount of trade between the countries involved in a dispute.[30] This could warrant an argument that power relationships

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25 Ibid.

26 Ibid.

27 Mercurio, above n 23, 318.

28 Bronckers and Broek, above n 24, 46.

29 C Bown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes' (2004) *The World Economy* 59, 61.

30 Ibid; Freneau, above n 3, 40.

are still the main tools used to enforce compliance in the WTO dispute settlement system.[31] In this context, some could argue that the current WTO dispute settlement system is biased against developing countries. This argument was presented in the African Group Proposal,[32] when they argued that the system ignores developing country Members' small markets and limited value, volume, and variety of trade when considering the application of retaliation. Ultimately, this leads to their lack of the retaliation power that is necessary for an effective reinstatement of WTO compliance.[33] The scenario that best highlights the issue of developing countries' lack of retaliation power is having a dispute that involves a developing country as a retaliating Member and a developed country as a responding Member. In this scenario, any threat of retaliation or an actual retaliation of the developing country Member is more than likely not to represent a serious threat to, or have an impact on, the economy of the developed country Member, who is more than likely to have very low losses from retaliation, which would hardly affect the respondent developed country's behaviour towards removing the violating measure.[34]

In addition, in the current settings of international relations, retaliatory practices outside the scope of the WTO could be considered as counter actions against any retaliation authorised under the WTO system.[35] In this regard, many developing country Members are dependent on preferential trade agreements and aid arrangements provided by developed country Members. Any WTO-authorised

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31 Ibid.

32 *Proposal by the African Group*, WTO Doc TN/DS/W/15 (22 September 2002).

33 C Bown and B Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' (2005) 8(4) *Journal of International Economic Law* 861, 866.

34 Uche Ewelukwa, 'African States, Aggressive Multilateralism and the WTO Dispute Settlement System: Politics, Process, Outcomes and Prospects' (University of Arkansas School of Law, 2005) 37.

35 Fabien Besson and Racem Mehdi, 'Is WTO Dispute Settlement System Biased against Developing Countries? An Empirical Analysis' (Paper presented at the International Conference on Policy Modelling, Paris, France, 30 June–2 July 2004) 11.

retaliation by developing countries against their developed country partners might jeopardise those relations, an outcome that many developing countries cannot risk.[36] This situation adds another restriction on developing country Members' ability to utilise the option of retaliation effectively in the WTO dispute settlement system.[37] Such limitations are more likely to leave developing country Members with a meaningless win in any dispute against a developed country respondent, if the latter decides not to implement dispute's outcomes, and retaliation is left as the ultimate remedy for developing countries to counter such non-compliance.

Trade retaliation is also based on the notion of trade contraction, which makes it inconsistent with the aims and objectives of the WTO.[38] The fact that the WTO system promotes the expansion of liberalised trade as a tool to achieve growth, development, and poverty reduction, makes the introduction of retaliation, accompanied by procedures of higher trade barriers and reduction of trade between Members involved, contrary to the principles of trade liberalisation for which the WTO system stands.[39]

Another criticism often made against trade retaliation is that it damages the innocent, instead of offering relief to those actually damaged by the violating measure.[40] In other terms, the industry negatively affected by the violating measure does not necessarily benefit from the imposition of retaliatory measures, and in most cases, it is another sector that bears the effects from the retaliatory action despite the fact that it has no relationship to the sector concerned with the dispute.[41] This is clear in disputes, such as *EC-*

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36 Ibid.

37 Ibid.

38 Bronckers and Boek, above n 24, 45; Mercurio, above n 23, 319.

39 Ibid.

40 Bronckers and Broek, above n 24, 45.

41 Eleso Adelbukola, 'WTO Dispute Settlement Remedies: Monetary Compensation as an Alternative for Developing Countries' (Working Paper No 1378, Bepress Legal Series, 18 May 2006) 15.

Hormones,[42] when the EC ban on hormone-treated beef from the United States was countered by the latter's retaliation on confectionaries, flowers, and vegetables, which forced the EC producers of these retaliated against sectors to bear the cost of higher tariffs, while the concerned sectors continued to benefit from the ban. The same situation is clear in *EC-Bananas*,[43] when the US imposed retaliatory measures against sweet biscuits and cheese from the EC as a result of the EC decision to discriminate in favor of a number of banana growing countries to the detriment of the US banana industry.

This issue could have an even greater effect on small developing country Members. The fact that most developing country Members share the characteristic of small markets and limited international trade, gives a greater possibility that the offending measures could target one of very few competitive sectors in the country, resulting in great pressure on the economy of the developing country Member, as a result of the major losses to its trade in the affected sector.[44] The authorised retaliation in return, could benefit other sectors that lack the competitiveness or the economic sensitivity as that of the one facing violating restrictions.[45]

As discussed above, the negative impact associated with trade retaliation is greater on developing country Members than that on developed countries, making any threat of retaliation by developing country Members against their developed trading partners lack credibility.[46] This lack of credibility diminishes the compliance-inducing effect that retaliation is supposed to have, and gives the violating country Member no reason to withdraw its WTO-inconsistent measures.[47] Even if a developing country decides to

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42 Panel Report, *EC — Measures Concerning Meat and Meat Products (Hormones)*, WTO Doc WT DS6 (18August1997).

43 Panel Report, *EC — Regime for the Importation, Sale and Distribution of Banana*, WTO Doc WT/ DS27 (22 May 1997).

44 Mercurio, above n 23, 320.

45 Ibid.

46 Rafiqul Islam, *International Trade Law of the WTO* (The Law Book Company Ltd, 2006) 449.

47 Ibid.

retaliate despite the detrimental impact on its economy, the limited size and share of its market and international trade, respectively, make it unlikely that retaliation would create compliance-inducing pressure on the non-complying Member. This would be more distinct in cases where the violator is a developed country that enjoys a leverage in the size of its market and the share of its international trade, and simply has minimal trading ties with the developing country concerned.[48] This situation was recognised by the Arbitrator when it ruled on Ecuador's request for retaliation in *EC-Bananas*, when it was stated that:

> Given the difficulties and the specific circumstances of this case which involves a developing country Member, it could be that Ecuador may find itself in a situation where it is not realistic or possible for it to implement the suspension authorised by the DSB for the full amount of the level of nullification and impairment estimated by us in all of the sectors and/or under all agreements mentioned above combined.[49]

This ruling affirms the unsuitability of the current retaliation procedure, and the need of developing country Members for reforms in the remedial procedures of the dispute settlement system that acknowledge their limitations.

IV Possible Reforms of the Current DSU Remedies from a Developing Country Perspective

A number of proposals presented by the WTO developing country Members, identified and focused on the DSU remedies as a problematic issue in need of change. The next section discusses some concepts that have been outlined in some of these proposals, which attracted a degree of attention within the scope of the WTO trading system. The notion that these new concepts could be considered unpractical or approval-unfriendly for the approval of all WTO Members does not deprive them from their appeal to many developing country Members, as they tackle some of their persistent

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48 Adebukola, above n 41, 15; also, Bronckers and Broek, above n 24, 46.

49 *EC — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Arbitration by the EC under Article 22.6 of the DSU*, WT/DS27/ARB/ECU, para 177.

problems under the current system. The main concepts in this context include collective retaliation, punitive retaliation, and retroactive retaliation.

A *Collective and Punitive Retaliation*

The idea of collective retaliation is based on the argument that the current retaliation system is impractical for smaller developing countries. [50] The small and less diversified markets of many developing country Members would make retaliation, or a threat of retaliation, unlikely to represent a noticeable effect on developed country Members' large markets, while it is most likely to have a huge detrimental effect if practiced by a developed country against another developing country.[51] The circumstances that trade retaliation is operating under leave developing countries with a moral victory in the dispute but a useless remedy to enforce it.

Under the concept of collective retaliation, whether introduced in the WTO dispute settlement system as a special treatment rule for developing country Members or as a general rule to replace the current procedure, all or a number of Member countries would be authorised to deny market access to the violating country.[52] This form of retaliation would be regulated in a form that allows the amount of authorised retaliation to be divided among the participating Members according to the size of their markets. Despite the fact that the amount of collective retaliation would be equivalent to the amount otherwise authorised to the retaliation-seeking country, collective retaliation would introduce a new element represented in the strong sense of collective condemnation coming from all or a considerable part of WTO membership, which would present a pressuring tool to enforce compliance. Knowing that the full burden of the procedure under a system of collective retaliation would not be borne by one country, developing country Members would be better positioned to use

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50 Hudec, above n 1, 392.

51 Islam, above n 46, 449.

52 Hudec, above n 1, 393.

retaliation, or the threat of it, against their developed country Member counterparts. In this context, the negative impact on the economies of developing country Members that is normally carried along with retaliation would also be limited under a system of collective retaliation, as it would involve other Members to share the economic burden resulting from retaliation on the retaliating Member.

Collective retaliation could also minimise the possible politics associated with retaliation. In the current settings in international trade relations the economic and political outcomes resulting from any retaliatory action would likely affect the decision of most developing country Members in their use of retaliation, especially if it is taken against developed countries, considering the various economic aid arrangements and preferential trade agreements that govern their relations. The implementation of collective retaliation would establish a community-support-like atmosphere, which could isolate the offending Member and make it more reluctant to use counter-retaliatory measures against developing country Members.

However, there is a concern that the legitimacy of the WTO dispute settlement system might become negatively impacted by the introduction of collective retaliation.[53] This concern comes from the idea that, considering the detrimental effect trade retaliation imposes on the economic welfare of all parties concerned; its use should be limited to being used as a last resort after exhausting all other compliance-inducing measures.[54] Therefore, expanding the scope of retaliation through the collective approach, to include all WTO Members, would not mix well with the ideology of the WTO trading system as it involves greater scale trade limitations that threaten the trade liberalisation principles for which the system stands.[55] This argument could be accommodated through the introduction of another form of limited collective retaliation, where Members that are not

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53 G Bercero and P Garzotti, 'DSU Reform: What are the Understanding Issues?' in Dencho Georgiev and Kim Borght (eds), *Reform and Development of the WTO Dispute Settlement System* (Cameron May, 2006) 123, 144.

54 Ibid.

55 Ibid.

party to the original dispute, but negatively affected by an illegal measure, would be allowed to take part in retaliation, provided that the original complaining Member is the one requesting the authorisation of such retaliation.[56] The rationale of this option is to allow Members negatively impacted by the offending measure to be part of the authorised retaliation, without requiring the initiation of a new panel to rule against the already ruled on measure, as this requirement involves a waste of resources for the dispute settlement process.[57] Further, this form of limited collective retaliation would offer, even if partially, the compliance-inducing pressure associated with collective retaliation's multiple retaliating Members. Effectively it would limit the negative impact on trade liberalisation of the WTO trading system, which was considered as a shortcoming in a potential system of full-scale collective retaliation.

However, nullification or impairment is not 'one size fits all'. Allowing other affected Members to become part of the retaliation process, without a ruling from a panel to determine the existence of nullification or impairment on their trade, which seems to be in contradiction with the legitimacy argument mentioned earlier. A panel's finding that a certain WTO-inconsistent measure was the reason behind the nullification or impairment that affected the original complaining Member does not necessarily mean establishing an automatic link between such measure and damages caused to other Members. It is only reasonable for a dispute settlement system that is legitimate and sound to require that any requests of retaliation should be based on a panel ruling establishing the illegality of the measure and linking it to the nullification or impairment of a certain Member.

In addition, the idea that the negative economic impact of such form of limited collective retaliation on the trading system would be much less than the traditional form of collective retaliation is also questionable, as it has the potential of involving a large number of negatively affected Members. Overall, this would create an effect

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56 Ibid.

57 Ibid.

similar to that argued against full-scale retaliation. Collective retaliation, in its original concept, would not be subject to the element of variability in its pressuring effect on the violating Member, as its impact would not fluctuate depending on the number of retaliating country Members claiming to be negatively impacted by the measure. It would always have the pressure generated by all Members of the WTO, which would have a greater compliance-inducing effect, which would in turn, potentially impact on shortening the retaliation period and decreasing the negative effects that would otherwise last longer under inefficient retaliation.

Another possible form of collective retaliation could be through the introduction of punitive collective retaliation, under which the level of retaliation authorised against offending Members would be higher than the equivalent level of nullification or impairment and shared by all WTO Members. Introducing punitive collective retaliation would put greater pressure on the violating Member not to transform retaliation into a long-term solution by making the violating Member's losses greater than its gains from applying the violating measure, which in turn would improve the enforcement of the implementation process.[58] This approach would be of particular interest for developing countries, as the idea that their retaliation would be shared by other Members that impose greater retaliatory measures than otherwise authorised under the equivalence requirement, would add more power to their threat of retaliation, which is otherwise diminished by the limitation of the market size and economic power.[59]

Nonetheless, it could be argued that such punitive approach of collective retaliation would be in conflict with the ultimate purpose of retaliation represented in the maintenance of the balance of reciprocity in WTO obligations.[60] Such balance requires that the

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58 Hudec, above n 1, 391.

59 Ibid.

60 Robert Hudec, 'The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective', in Bernard Hoekman, A Mattoo and

amount of lost benefits to be equal to the level of retaliatory withdrawal of obligations in response to the violating measure.[61] This justification is reasonable, taking into account that the maintenance of such balance of benefits and obligations of the system is the rationale of establishing the dispute settlement system of the WTO in the first place.

In any case, as far as inducing compliance is concerned, collective retaliation, that is equivalent to the level of determined nullification or impairment resulted from the WTO-inconsistent measure, would be more likely to have the sought after effect on achieving compliance. The collective action of retaliation, which also serves as a joint condemnation, would spare the complainant from the full burden of retaliation without affecting its role as a pressuring tool on the violating Member to comply, which would be of vital importance for developing countries in their decision to utilise the retaliation remedy.

B *Retroactive Retaliation*

The concept of retroactive retaliation in the context of the WTO dispute settlement system refers to the inclusion of past losses that affected the complaining Member when calculating nullification or impairment, which is in clear contrast with the forward-looking evaluation of the current practice of prospective remedies. In spite of a possible criticism against the application of such concept within the WTO, which sees it as a tool with considerable additional burden on Members' obligations in the dispute settlement system, it could be of benefit to the utilisation and efficiency of its remedies.

Under a system of retroactive remedies, nullification or impairment could be determined to cover a period as early, for example, as the date the violating measure was imposed, the date of establishment of

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P English (eds), *Development, Trade and the WTO: A Handbook* (The World Bank, 2002) 86.

61 Ibid.

the panel, or the date of request of consultations. Such approach in the application of the WTO dispute settlement remedies would be more likely to ensure that the benefits obtained by the offending measure are offset by the amount of losses resulting from retroactive retaliation. As a result, it would not be in the interest of the offending Member to deliberately delay the proceedings, as the longer it delays, the more losses it suffers.[62] In this context, the significantly increased nullification or impairment under a retroactive retaliation would give less incentive for the non-complying Member to drag the process, than otherwise implicitly allowed under the current prospective remedy.[63] The role of a retroactive retaliation that redress past damages would also exceed its compliance-inducing effect to serve as a deterring instrument against possible violators not to adopt WTO-inconsistent measures.[64] All these factors are of particular benefit to developing Members, as their lack of financial and legal resources make them less able to utilise a long dispute settlement process efficiently and leaves them more sensitive to uncompensated losses in their economies.

However, there is a concern that the introduction of retroactive retaliation could result in significant financial liabilities out of WTO dispute settlements.[65] The unpredictability of such liability could affect Members' decision in accepting new commitments, or even in continuing their WTO membership. It could also become a factor in non-Member countries' decision against joining the WTO.[66] This concern is valid, but can be accommodated without abandoning the idea of retroactivity. One suggestion is to cap the determined amount of nullification or impairment that can be awarded in the dispute settlement to a certain amount.[67] Under this suggestion, a

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62 Davey, above n 15, 14.

63 Ibid; P Yang, 'Some Thoughts on a Feasible Operation of Monetary Compensation as an Alternative to Current Remedies in the WTO Dispute Settlement' (2008) 3 *Asian Journal of WTO and International Health Law and Policy* 423, 440.

64 Ibid.

65 Yang, above n 63, 443; Bronckers and Broek, above n 24, 67.

66 Ibid.

67 Yang, above n 63, 443.

considerable but agreed cap in the amount of nullification or impairment calculated in any dispute, would limit the amount of financial liability to Members, while keeping its objective of providing an incentive against non-compliance. Another suggestion that would be likely to achieve the same result is limiting retroactivity to a certain period under which the calculation of nullification or impairment would always start from; for example, the date the application of the violating measure first took place, or the date of filing a dispute.[68]

Another argument could be that retaliation involves a negative impact that affects not only the retaliated against Member, but also the retaliating Member, which would represent an obstacle when considering retroactive retaliation as a suitable procedure for developing countries. The increased amount of nullification or impairment, as a result of a potential system of retroactive retaliation, would lead to higher restrictions on the retaliating Member's market, which would increase the detrimental effect on both countries. If retroactive retaliation is to be introduced into the system as a general rule, applicable to both developed and developing country Members, developing countries could suffer an unbearable effect from such retaliation. This would be more likely to happen when they are in a respondent position, as they would struggle to cover trade damages that date back over a long period.

However, an argument like this would ignore the fact that it would be in the interests of developing country Members to end their disputes and correct the violating measure in the shortest time possible, as a result of their political and economic weaknesses, without having to reach the stage in which they would be subject to retroactive retaliation. Nonetheless, the fact that developing country Members are in a disadvantageous position in the current form of prospective retaliation, seems to be working reasonably well for developed country Members. This presents the idea of introducing retroactive retaliation as a special treatment procedure for developing country

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[68] Bronckers and Broek, above n 24, 67.

Members as a more appropriate option. The introduction of retroactive retaliation as a special treatment procedure would put developing country Members in a more credible position in disputes they initiate, as developed Members would have more at stake to lose than what they would have under the current prospective procedure.

Any possible introduction of retroactive remedies in the dispute settlement system should recognise the political sensitivity of such step in the WTO. Combating this could involve certain precautions, such as adopting a gradual introduction of the procedure into the system or adding limitations to the scope of its application, as previously discussed.[69] However introduced, retroactive retaliation represents a rational change to the current system of remedies when considering the overall advantage of consolidating the implementation process, and presenting a fair procedure that is more accurate in calculating the actual damage resulting from the WTO-inconsistent violation.

V CONCLUSION

The well-established implementation stage under the WTO dispute settlement system came as a result of some substantial changes in the system that witnessed the inclusion of clear timeframes for every stage of the procedure, more detailed mechanism of implementation, and most significantly, the automatism of the process, which was in clear contrast to the GATT years.

However, as discussed above, some problematic issues that existed under the GATT dispute settlement system continue to be part of the process under the WTO, with a particular negative effect on developing country Members' participation in the system. Dealing with developing countries' issues under the dispute settlement process is part of the overall obligation of the WTO dispute settlement system of achieving the satisfaction of all its Member countries and accommodate their different needs.

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69 Bonckers and Boek, above n 24, 68.

To conclude, what this article addresses of possible reforms may not be the panacea for overcoming the problem of participation of developing countries in the system by offering the answer to every problematic issue they have, or may not be received well within the current settings of international trade relations. However, if they were introduced into the system, these changes would play an important role in addressing some of the main restrictions that developing countries face in their attempt to participate in the WTO dispute settlement system.

TRADE HARMONISATION — HOW HARMONISED IS IT?

BRUNO ZELLER AND JANKO NIKOLIC*

Abstract

Trade Harmonisation — Free Trade Agreements — At-the-Border and Behind-the-Border Harmonisation — ASEAN Free Trade Agreements — Rules of Origin — Inter and Intra-Regional Trade Agreements — ATIGA Agreements

Trade between nations and block of nations is conducted on several levels without interlocking regulations. Trade agreements and international conventions are operating on different levels, hence the approach to harmonisation processes differ. Two possible models of trade harmonisation can be observed. The first one is achieved solely on a public laws level (exemplified by Australia's proliferation of FTAs), and the second is achieved, or attempted to be achieved, on a private law level (exemplified by the OHADA group of nations). This paper will compare and analyse the utility of two trade blocks, namely the ASEAN agreements, and the OHADA agreements. It will be seen that in the case of the ASEAN group of countries, the design of the FTAs has been a public policy failure. A behind-the-border unification has not been taken into account, despite the fact that

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business views harmonised laws as the second highest factor in saving costs. There is an evident lack of uniformity in regulations, which has substantially compromised the harmonisation of trade efforts and raised legitimate concerns over the past, present and future utility of such regulations. In context of the normative momentum towards trade harmonisation, the present disharmony within the regulatory realm in the ASEAN group of countries stands in stark contrast to the declared aims of its FTAs. Such a state of affairs needs to be addressed by a re-emphasis on private law harmonisation, which has proved to be a commendable remedy for past trade harmonisation challenges of the OHADA group of countries. Trade facilitation is not only driven by at-the-border legislation, it must reach behind-the-border.

I INTRODUCTION

The architecture of world trade has been reshaped since Ernst Rabel proposed a uniform sales law in 1932. Since then many conventions and model laws have influenced various areas of laws and created harmonised approaches to legal problems, such as in areas of sale of goods, and contract law in general. Conventions and model laws have been augmented by a relatively new phenomena of harmonisation, namely, the inter-regional and intra-regional trade agreements. The effect is that a two-tiered system is in place: free trade agreements (FTAs)[1] and conventions.[2]

This paper argues that trade between nations and block of nations is conducted on several levels without interlocking regulations. 'Domestic law enriched by international conventions and transplantations must be understood against the backdrop of bilateral or multinational trade agreements'.[3] However, trade agreements and

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1 This paper will refer to these developments as public law harmonisation.

2 This paper will refer to these developments as private law harmonisation.

3 Bruno Zeller, 'Facilitating Regional Economic Integration: ASEAN, *ATIGA* and the *CISG*' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity:*

international conventions are operating on different levels, hence the approach to harmonisation processes differ.

Two possible models of trade harmonisation can be observed. The first is where harmonisation is achieved on a public laws level only, as observed in Australia's proliferation of FTAs. Second, harmonisation is achieved, or attempted, on what best can be described as on a private law level, as in the OHADA group of nations that promulgated Uniform Laws but have not entered into bilateral or multilateral agreements with Australia.

The utility of harmonisation has been discussed at length and is not an issue in this paper.[4] However, the importance of FTAs is 'their increasingly comprehensive scope, which frequently includes treatment of border regulatory measures and complex behind-the-border regulatory issues'.[5] The Australian Government stated that:

> Across the globe, there is an expanding network of free trade agreements (FTAs). High-quality, comprehensive free trade agreements can play an important role in supporting global trade liberalisation and are explicitly allowed for under the World Trade Organization (WTO) rules.[6]

This paper will compare and analyse the utility of two trade blocks, the ASEAN agreements and secondly the OHADA agreements. The ASEAN block has negotiated a series of intra-regional and inter-regional agreements, mainly on a government-to-government level, dealing in effect with issues governed in WTO-plus and WTO-extra issues. OHADA on the other hand negotiated intra-regional uniform laws to regulate specific legal issues such as commercial law within the OHADA group of nations.

The 2nd Annual MAA Schlechtriem CISG Conference (Eleven Publishing, 2010), 255.

4 See, eg, Mads Andenas and Camilla Baasch Andersen (ed), *Theory and Practice of Harmonisation*, (Edward Elgar Publishing 2012).

5 David Kleimann, 'Beyond Market Access? The Anatomy of ASEAN's Preferential Trade Agreements' (Working Paper Law, European University Institute, January 2013) 1.

6 Department of Foreign Affairs and Trade, *Australia's Trade Agreements* <http://www.dfat.gov.au/fta/>.

The question this paper will attempt to answer is: what is the reason '[Australia] negotiated parallel and separate FTAs with individual ASEAN member states?'[7] This question is prompted by the view that 'a review of trade facilitation performance shows that there are great disparities among ASEAN countries and their FTA partners'.[8]

A related question is whether a trader is better served dealing with a country where commercial uniform laws are in place but no FTAs, or in a country where the reverse is applicable. There is no denying that the fundamental goal of any harmonised sales laws such as art 2 of the *Uniform Commercial Code* (*UCC*), the *Convention on Contracts for the International Sale of Goods* (*CISG*), and the *Common European Sales Law* (*CESL*) (as currently discussed in Europe), is to reduce 'transaction costs imposed on cross-border sales by non-uniform law in the jurisdiction whose law may potentially apply'.[9] The Export Council of Australia echoes this view in their Trade Policy Recommendations: '[there is a] need for Australia to reduce inefficiencies and red and green tape to help businesses compete in a rapidly evolving global market place. Being competitive is a must, not an option'.[10]

The reduction of costs and increased certainty in cases of disputes is of particular interest, especially for investors where an enforcement of disputes behind-the-border can cause problems. As it stands currently, investors can enliven the dispute resolution clause in a bilateral investment treaty (BIT) or a FTA between Australia and the host state. This avenue allows the investor to retain a degree of bargaining

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7 Kleimann, above n 5, 2.

8 Marn-Heong Wong and Marie Isobella Pellan, 'Trade Facilitation: The Way Forward for ASEAN and its FTA Partners' (Policy Brief No 2012-04, Economic Research Institute for ASEAN and East Asia, July 2012) 1.

9 Harry M Flechtner, 'The US Experience with the *UCC* and the *CISG*: Some Insights for the Proposed *CESL*?' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification*, (Sellier European Law Publishers, 2012) 5.

10 Export Council of Australia, *Trade Policy Recommendations 2013/14 — International Competitiveness Begins at Home*, 4 <http://www.export.org.au/eca/advocacy/trade-policy>.

power as it allows 'protected entities to bargain in the shadow of the law'.[11]

However, this avenue is blocked, as the Australian Government has not entered into BITs or FTAs with any of the OHADA nations, nor any African state for that matter. Even if the respective governments were to enter into an agreement in the future, it would not currently include investor-state dispute resolution procedures. The Gillard Government in April 2011, on the advice of the Productivity Commission, announced this shift of policy.[12] The advice was given to the government despite the Commission recording the steep growth of overseas investments by the Australian mining sector from 2001 to 2008.[13] The Commission noted however, that in the alternative, political risk insurance offered by both government and non-government providers will act as a tool to mitigate the risk of loss to investors, and importantly, underlying market conditions will drive the flow of investments.[14] In summary, the only avenue is to rely on the domestic law of the host country. This issue will not be discussed further as it is only a reminder that the design of future FTAs and BITs may change.

Part one of this paper will focus on the agreements between Australia and ASEAN as a trade block, as well as with its individual member states. The purpose is to examine significant variations between the agreements and point to problems, from a trader's point of view, which might be the result of the variations.

As the *ASEAN-Australian-New Zealand Agreement* (*AANZFTA*) is the most recent agreement it will be used as the 'control unit', and

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11 Jurgen Kurtz, 'Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication' (2012) 27 *ICSID Review* 65, 69.

12 Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (Policy Statement, April 2011) 14 <http://www.acci.asn.au/getattachment/b9d3cfae-fc0c-4c2a-a3df-3f58228daf6d/Gillard-Government-Trade-Policy-Statement.aspx>.

13 Productivity Commission, 'Bilateral and Regional Trade Agreements' (Research Report, November 2010) 33.

14 Ibid 240.

other FTAs and the *ASEAN Trade in Goods Agreement* (*ATIGA*) will be measured against it. Another reason is that '[t]he *AANZFTA* is the agreement with the most comprehensive trade facilitation content'.[15] This is significant considering that the Australian government notes:

> *AANZFTA* is Australia's first multi-country FTA. It is the first time Australia and New Zealand have been involved jointly in negotiating an FTA with third countries. It is the first time ASEAN has embarked on FTA negotiations covering all sectors including goods, services, investment and intellectual property simultaneously. This makes it the most comprehensive trade agreement that ASEAN has ever negotiated. *AANZFTA* will deliver real commercial benefit for Australian exporters and investors.[16]

The second part of this paper will investigate intra-regional agreements between ASEAN nations, specifically the *ATIGA* agreement. This is crucial as trade facilitation complements the reduction of transaction costs and 'it is especially significant for ASEAN … given the predominate nature of intra-regional trade that is driven by regional production networks'.[17] The question to be discussed is whether *ATIGA* merely duplicates the FTAs Australia has concluded with the trade block, or whether there are differences between the agreements. The purpose of this part is to highlight possible gaps of laws, which can only be filled by contractual agreements or by the application of the conflict rules.

The third part will address the design of uniform laws in the OHADA group from the point of view of a trader. This part will specifically address the issue of behind-the-border trade facilitation issues. It will be argued that business-to-business policies are playing an important part in facilitating trade. This is also noted by the Australian Government, stating that the benefits of an FTA are not just to:

> eliminate tariffs, they also address behind-the-border barriers that impede the flow of goods and services between parties, help to encourage

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15 Wong and Pellan, above n 8, 5.

16 *ASEAN-Australia-New Zealand Free Trade Agreement*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

17 Wong and Pellan, above n 8, 2.

> investment, enhance cooperation, and address other issues, such as intellectual property, e-commerce and government procurement.[18]

The question is whether behind-the-border harmonisation in the shadow of FTAs are sufficient to create a 'seamless harmonised trade' environment. It is argued that issues of behind-the-border barriers have not been raised officially, and it is a gap in the harmonisation efforts of trade related issues. This issue is of importance as Duval argued that non-trade specific business measures that reduce behind-the-border costs play an important role in impacting positively on trade.[19] He notes specifically that 'simplifying procedures for contract enforcement is found to have the highest impact on bilateral trade, as a small improvement in either of the trading country can increase bilateral trade by more than 6%'.[20]

Part four will address the issue of whether harmonised public law offers a better alternative to harmonised private laws regimes, or whether a combination of the two is the best outcome. Such an investigation is of importance as 'existing literature offers little evidence that an integrated approach is best'.[21]

Part five will summarise the discussion and will draw some conclusions.

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18 Department of Foreign Affairs and Trade, above n 6.

19 See Yann Duval and Chorthip Utoktham, 'Beyond Trade Facilitation: Impact of the Domestic Business Environment on Export Competitiveness in Asia and the Pacific' in Mia Mikic (ed), '*Rising Non-Tariff Protectionism and Crisis Recovery*', *Studies in Trade and Investment, United Nations Economic and Social Commission for Asia and the Pacific (ESCAP)* (UN ESCAP, 2010) 111.

20 Duval and Utoktham, above n 19, 124.

21 Ibid 124.

II PART 1

A *Free Trade Agreements*

Australia has concluded four FTAs; with Singapore,[22] Malaysia,[23] Thailand,[24] and ASEAN. The *AANZFTA*,[25] which overlays other agreements, includes Australia, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Thailand, and Vietnam.[26] As it can be seen, agreements with Singapore, Malaysia and Thailand run side by side with *AANZFTA*.

FTAs must be viewed in context, which is their aim to facilitate trade. However, an FTA cannot maximise trade facilitation on its own. Other tools need to be set in motion which complement the FTA. It is argued that at this stage too many gaps limit the effectiveness of the FTAs.

First, ASEAN treaties as indicated earlier are not consistent with each other and will be discussed below in relation to rules of origin (ROO). Second, obvious pathways and facilitation rules have not been put into place. Several examples will illustrate this point, specifically the lack of membership in the Authorised Economic Operator (AEO) program. Australia is the only developed country which is not a member and it is well known that the AEO countries are given priority and preference at customs.[27] It is interesting to note that the Export Council of Australia notes in relation to the AEO:

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22 *Singapore-Australia Free Trade Agreement*, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003).

23 *Malaysia-Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013).

24 *Thailand-Australia Free Trade Agreement*, signed 5 July 2004, [2005] ATS 2 (entered into force 1 January 2005).

25 *ASEAN-Australia-New Zealand Free Trade Agreement*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

26 See Department of Foreign Affairs and Trade, above n 6.

27 World Bank Group, *Trading Across Borders* (June 2013) Doing Business <http://www.doingbusiness.org/data/exploretopics/trading-across-borders>.

> Australia's decision has been raised as a concern at recent conferences held by the ECA, Shipping Australia and the Customs Brokers. It was purportedly based on the results of two Australian Customs and Border Protection Service (ACBPS) surveys, the validity of which are highly questionable. The ECA strongly rejects the conclusion that, 'industry believes the cost of implementing an AEO program will outweigh the associated benefits'.
>
> The ACBPS decision ignores the associated regulatory benefits, including the potential to achieve a higher level of visibility into, and control over, the supply chain. It also ignores the APEC Ministers' call for the introduction of AEO programs across the APEC economies.
>
> A WCO conference on the topic that attracted over 800 delegates from over 90 countries (Australian Government representation being notably absent) concluded that AEO is a key enabler to facilitate international trade and that Mutual Recognition is likely to emerge as a component of future FTA negotiations.[28]

Two points need to be made. First, the Department of Foreign Affairs and Trade (DFAT) and the Australian Customs and Border Protection Service (ACBPS) are two different departments and, arguably therefore, a whole of government approach is not observable. Hence the question can be raised of whether DFAT would take the ECA argument into consideration when advancing the *China-Australia FTA*, which in effect has stalled. Second, how can the ACBPS argue that that there are no benefits to the industry when, in effect, the affected industry argues the opposite?

If statistics and the views of external organisations are taken into consideration, the facts do speak against the views of the ACBPS and support the view that there is not truly a whole of government approach:

> In [poor] shape is Australia's 'Trading across Borders' ranking, which looks at the time and cost (excluding tariffs) associated with exporting and importing by ocean transport, and the number of documents necessary to complete the transaction. Here Australia ranks 44th, behind Hong Kong (2nd), the UK (14th), the USA (22nd) and New Zealand (25th), as well as the regional average for OECD high income nations which is 33. There is

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28 Ibid 13.

> therefore significant opportunity for Australia to improve our competitive position.[29]

Arguably therefore, from a public policy point of view, FTAs are not the result of a whole of government approach, as it appears that the negotiations and drafting are too much a result of individual 'players' instead of a 'team effort'. It is interesting to note that the United States, when represented at world bodies such as the United Nations Commission on International Trade Law (UNCITRAL), usually send a team of three, consisting of an academic, an industry representative and a government official.

B *Rules of Origin (ROO)*

Any importer/exporter has two basic choices at customs. The first option is to not note the agreement under which the goods are imported or exported, and hence pay general import duties. The second option is to indicate the FTA under which the goods are bought or sold, and hence be subject to the applicable import duty, if any. This suggests that the importer must not only be aware of the relevant ROO, but also of the compliance costs, as they can be different.

From the perspective of practical utility for both importers and exporters, it is warranted that comparative analysis of the ROO be undertaken. These rules indicate whether and to what extent economic integration is achieved between signatories.

The three main approaches to determining origin of goods are: change of tariff heading, value-added criteria, and specific manufacturing process-requirement. According to the change of tariff heading method, the final product must have a different tariff heading than the inputs used. The second approach defines that a minimum value is added in order for the final product to claim a change of origin classification. Finally, specific manufacturing processes can be required to be undertaken in the production of the good to be eligible

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[29] Ibid 7.

for preferences. Each of these rules has certain advantages and disadvantages with respect to other rules.[30]

1 *Originating Goods*

Article 3 of *ASEANANZ FTA* sets out which goods, for the purposes of art 2.1(a) (Originating Goods), shall be considered as wholly produced or obtained goods. These goods are listed in art 3(a)–(f). Article 6 provides that a good which is an originating good under art 2, and that is used in another Party as a material in the production of another good, shall be considered to originate in the Party where working or processing of the finished good has taken place.

The *Singapore-Australia FTA* in art 3.1 provides that goods shall be deemed originating goods of a Party where they are wholly obtained goods produced in the territory of the Party, and where they are goods wholly manufactured in that Party from products and materials listed in art 3.1(b)(i)–(iii).

The *Thailand-Australia FTA* covers ROO in art 402, in ch 4 of the Agreement. Goods are deemed as originating in the territory of a Party under art 402.1 if they are: the wholly obtained goods of that Party; *or* satisfy any applicable requirements of annex 4.1 on Product-Specific Rules of Origin, as a result of processes performed entirely in the territory of one or both of the Parties by one or more producers.

The *Malaysia-Australia FTA* covers ROO in ch 3 of the Agreement, stating in art 3.2 that a good shall be deemed to be an originating good of a Party if it: (a) is a wholly obtained or produced good of one or both of the Parties; (b) is produced entirely in the territory of one or both of the Parties; (c) satisfies all applicable requirement of annex 2 (Product Specific Rules Schedule), as a result of processes

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30 Miriam Manchin and Annette O Pelkmans-Balaoing, 'Rules of Origin and the Web of East Asian Free Trade Agreements' (Working Paper No 4273, World Bank, July 2007) 3–4 <http://www.wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2007/07/06/000016406_20070706154708/Rendered/PDF/wps4273.pdf>.

performed entirely in the territory of one or both of the Parties by one or more producers; *or* (d) otherwise qualifies as an originating good under the chapter, *and* meets all other applicable requirements of ch 3. Article 3.3 defines for purposes of art 3.2 a good that is wholly obtained or produced in the territory of one or both of the Parties.

It can be deduced that the *AANZFTA* (by operative provisions of art 2, art 3 and art 6) has the broadest and most liberal provisions on originating goods. The *Singapore-Australia FTA* (art 3.1) sets limitations by restricting the scope of originating goods. Similar regulatory restrictions are imposed in the *Thailand-Australia FTA*, by virtue of the requirement that 'goods not wholly obtained' must satisfy 'any applicable requirements' in annex 4 of the Agreement. The *Malaysia-Australia FTA* resembles the *Singapore-Australia FTA* and the *Thailand-Australia FTA*, but provides an additional alternative (art 3.2(d)) for deeming a good to be an originating good: a good may 'otherwise qualify' as an originating good under ch 3. In context of further trade liberalisation in the region, the *AANZFTA* provisions on originating goods appear to have greater regulatory utility than any corresponding provisions in the three alternative FTAs.

2 *'Goods not Wholly Produced or Obtained' Treated as Originating Goods*

(a) *AANZFTA*

Under art 4, goods not wholly produced or obtained shall be treated as originating goods if: (a) the good has a regional value content of not less than 40 percent of FOB, calculated using the formulae in art 5 (Calculation of Regional Value Content), and the final process of production is performed within a Party; or (b) all non-originating materials used in the production of the good have undergone a change in tariff classification in a Party.

For the purposes of art 4.1(a) the formula for calculating the regional value content will be either the Direct Formula in art 5.1(a) or the

Indirect/Build Down Formula in art 5.1(b). Where a claim for origin is based solely on a regional value content, art 7 sets out mandatory minimal operations and processes that must be undertaken and which shall not be taken into account in determining whether or not a good is originating. A good subject to Product Specific Rules shall be treated as an originating good if it meets those Product Specific Rules. For a good not specified in annex 2 of the Agreement (Product Specific Goods), a Party shall permit the producer or an exporter of the good to decide whether to use the regional value content provision or change in tariff classification method, as provided by art 4.1. A good that does not satisfy a change in tariff classification requirement under art 4.1(b) will nonetheless be an originating good if it satisfies art 8 (*De Minimis* provision). Article 8 will be satisfied if: (a)(i) the value of all non-originating materials used in the production of the good that did not undergo the required change in tariff classification does not exceed 10 per cent of the FOB value of the good; (a)(ii) for a good provided in chs 50 to 63 of the Harmonized System Code, the weight of all non-originating materials used in the production that did not undergo the required change of classification does not exceed 10 per cent of the total weight of the good, or the value of all non-originating materials used in the production of the good that did not undergo the required change in tariff classification does not exceed 10 per cent of the FOB value of the good; and (b) the good meets all other applicable criteria of ch 3 of the Agreement. Under art 8.2, the value of such material shall be included in the value of non-originating materials for any applicable regional value content requirement.

(b) *Singapore-Australia FTA*

A good partly manufactured in a Party shall be deemed an originating good of that Party if it satisfies *either* of two conditions. The first condition, as set out by art 3.1(c)(i) requires that (a) the last process of manufacture was performed in the territory of that Party by, or on behalf, of the principal manufacturer; and (b) the allowable cost to manufacture the goods is not less than 30% for the goods specified in annex 2D or 50% for all other goods. The second condition, as set out

by art 3.1(c)(ii), requires that for any goods (except those specified in annex 2C): (a) one or more processes of manufacture was or were performed in the territory of that Party, by, or on behalf of, the principal manufacturer; (b) one or more processes was or were performed in the territory of that Party, by, or on behalf of, the principal manufacturer immediately prior to export of the goods to the territory of the other Party; (c) the principal manufacturer in that Party incurred all the costs associated with any process performed in the territory of a non-Party; and (d) the allowable cost to manufacture the goods is not less than the 30% for the goods specified in annex 2D or 50% for all other goods. For the purposes of, and subject to, art 3 and art 4, arts 4 to 9 deal in a rather detailed manner with calculations of costs, with the principal aim of ascertaining the allowable expenditure on materials, labour, overheads, and overseas processing costs under the Agreement.

(c) *Thailand-Australia FTA*

Originating materials from the territory of a Party, used in the production of particular goods in the territory of the other Party, shall be, pursuant to art 402.2, considered to originate in the territory of the other Party. Those goods that do not satisfy the change in tariff classification requirement under annex 4.1 of Product-Specific Rules of Origin are nonetheless originating goods if the value of all non-originating materials used in the production of the goods that do not undergo the required change in tariff classification does not exceed 10% of the FOB value of the goods; *and* the goods meet all other applicable criteria of art 402. In instances where annex 4.1 (subject to arts 403 and 404) on Product-Specific Rules of Origin requires goods to have a regional value content, the regional value content of particular goods shall be calculated using the formula in art 403. Under art 404, for purposes of ch 4 on ROO, value of particular goods is to be ascertained by reference to arts 1 to 8, art 15, and the corresponding interpretative notes of the *WTO Customs Valuation Agreement*. In addition to goods being originating goods, pursuant to art 410 (Claims for Preferential Treatment) and art 412 (Origin Verification), further requirements may either be mandatory or

optional, before preferential tariff treatment is granted to the imported goods.

(d) *Malaysia-Australia FTA*

Article 3.4 on cumulation provides that a good which is treated as originating under art 3.2, and is used in the production of a good or goods in the territory of the other Party, shall be considered to originate in the territory of that other Party. Production that occurs in the territory of one or both of the Parties, by one or more producers, shall count as qualifying content in the origin determination of a good, regardless of whether that production was sufficient to confer originating status on the material used in the production of that good. The *De Minimis* provision in art 3.5 of the Agreement states that a good that does not satisfy a change in tariff classification pursuant to annex 2 (Product Specific Rules Schedule) shall nonetheless be treated as originating good if: (a) the value of all non-originating materials does not exceed 10% of the FOB value; (b) the weight of all non-originating materials does not exceed 10% of the total weight of the good *or* the value of all non-originating materials does not exceed 10% of the FOB value of the good; *and* the good meets all other applicable criteria of ch 3. Article 3.5 (*De Minimis* provision) is qualified by art 3.5(2), stating that the value of non-originating materials, shall, however, be included in the value of non-originating materials for any applicable regional value content requirement for the good. Calculation of the Value of the Good or Material is governed by intricately detailed art 3.12. In circumstances where annex 2 (Product Specific Rules Schedule) refers to a regional value content requirement, the regional value content of that good shall be calculated using either the Indirect Method or the Build-up Method found in art 3.11.

It stems from the above that 'goods not wholly produced or obtained' are likely to be more liberally treated as 'originating goods' under the *AANZFTA* than under the three other agreements under examination. It is worthwhile to observe some similarities between the *AANZFTA* and *Malaysia-Australia FTA*, as the formulae for the calculation of

regional value content *and* the *De Minimis* provision are identical in the two agreements. Conversely, the *Singapore-Australia FTA* and *Thailand-Australia FTA* lack the *De Minimis* provision. By virtue of a rather detailed process for ascertaining the allowable expenditure on materials, labour, overheads, and overseas processing costs, the *Singapore-Australia FTA* appears as scope-restrictive in treating 'goods not wholly produced or obtained' as originating goods. Arguably, with similar restrictive effect furthering trade and compliance uncertainty, the *Thailand-Australia FTA* has introduced the *WTO Customs Valuation Agreement* as one of the mechanisms for ascertaining value of particular goods. By virtue of what often appears to be (in drafting and structure of the three other agreements) a dubious alliance between evident omissions and regulatory complexities, the *AANZFTA* lends itself as a credible and preferable model for reassessing the regulatory trade framework in the region.

3 *Exporting party obligations*

For purposes of the *AANZFTA*, the annex on Operational Certification Procedures contains rules on issuance and verification of Certificates of Origin as well as other related administrative matters, including dispute settlement. These rules are to be observed by each party to the Agreement.

Under the scope of the *Singapore-Australia FTA*, art 10 stipulates that preferential tariff treatment shall apply only to originating goods of a Party which has met the consignment requirements of that article. Article 11 sets out detailed requirements on documentary evidence, to demonstrate (by way of declaration and certification) that goods are originating goods. In addition to the preceding provisions on originating goods, art 14 imposes further requirements, one of which (in addition to measures to establish the validity of the Certificate of Origin, Declaration or Confirmation) is that the eligibility of the goods for preferential treatment shall be verified in accordance with domestic laws and practices of the importing Party before preferential treatment is granted.

Under the *Thailand-Australia FTA*, detailed provisions on consignment, registration, certification of origin, exporter sanctions, and claims for preferential treatment are governed by art 406, art 407, art 408, art 409, and art 410 respectively.

Under the *Malaysia-Australia FTA*, art 3.17 sets out requirements that need to be met prior to the importing Party granting preferential tariff treatment to such a good. Article 3.20 establishes a detailed process for purposes of origin verification. It requires that the exporting Party shall fully cooperate in any action to verify eligibility, in addition to making it mandatory that producers and exporters cooperate in any action to verify eligibility. Similar to the *AANZFTA*, this agreement incorporates its own *Annex on Operational Certification Procedures*.

In principle, the four agreements are not substantially dissimilar in their provisions on exporting party obligations. Nonetheless, the merits of these provisions shall be assessed on the basis of their practical operational utility and relevance to a reasonable exporter. It appears worthwhile to consider whether substantial documentary evidence requirements are hindering trade in the region, and whether an alternative model of self-certification under common institutional oversight, as proposed by some authors, is to become a preferred regulatory option in foreseeable future.

4 *Observations*

From the preceding discussion, it is evident that there is no consistency between the ROO of the different FTAs as to ensure unhindered operational efficiency and relatively unchallenged trade certainty.

Provisions on: originating goods; goods to be treated as originating goods; cumulation; *De Minimis*; regional value content; calculation of the value of a good or material; claims for preferential treatment; and origin verifications are either substantially divergent or evidently lacking corresponding provisions between the different FTAs, to be deemed equivalent or, at least substantially similar for purposes of

intra-regional trade certainty, trade utilisation, and enterprise compliance. This situation is clearly not conducive to the justified normative (yet at times merely declaratory) aims of greater economic integration in the region.

It appears rather symptomatic that such complex, conflicting and divergent provisions on ROO would not be assisting enterprises that are not in a position to ensure compliance, without incurring either risk or a considerable opportunity cost. Medalla and Balboa, in arguing that the region should work towards a harmonised system of customs classification, stated that another challenge is to craft a system of ROO that would be small and medium enterprise (SME) friendly. One aspect of this is capability building to enable SMEs to comply with ROO requirement. [31]

The authors articulated a normative balancing act for transcending the present lack of consistency and certainty in ROO provisions under the different free trade agreements: 'the formulation of the ROOs should have both simplification and liberalization elements. At the same time, however, there should be adequate provisions that would control for potential abuse'.[32]

Some further suggestions for future reform of ROO frameworks included:

- More extensive usage of the *De Minimis* provision
- Self-certification for purposes of simplification and cost-reduction balanced by some monitoring system (and a least burdensome verification process) that would keep importers honest

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31 Erlinda M Medalla and Jenny D Balboa, 'ASEAN Rules of Origin: Lessons and Recommendations for Best Practice' (Discussion Paper No 2009-36, Philippine Institute for Development Studies, December 2009) 34 <http://dirp3.pids.gov.ph/ris/dps/pidsdps0936.pdf>.

32 Ibid 35.

- Special and Differential Treatment: devising ROO by taking into account the different levels of development of countries in the East Asia region.[33]

III PART 2

A *Intra-Regional Agreements — ATIGA*

Within the ASEAN countries, several multinational agreements have been formed of which *ATIGA* is of interest.[34] ASEAN countries adopted *ATIGA* in 2009, marking a further step in their economic integration. The agreement came into force on 17 May 2010.[35]

The preamble notes that the purpose of *ATIGA* is to realise the goals of ASEAN, namely, to establish a single market 'and production base characterised by free flow of goods'.[36] The goal of *ATIGA* has been reaffirmed in art 1, which states: 'The objective of this agreement is to achieve free flow of goods in ASEAN as one of the principle means to establish a single market and production base for the deeper economic integration of the region'.

One would be forgiven for assuming after reading art 1 that a free flow of goods would not only include at-the-border agreements, but would also include behind-the-border agreement on private law issues such as a single commercial code, as found in the OHADA group of nations. However, the agreement in essence operates in the shadow of WTO/GATT agreements, and operates on the same level as all the FTAs introduced by ASEAN with other states. Article 12, as an

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33 Ibid 34.

34 ASEAN's bid to create a common regional market — a process that started as early as 1992 with the launching of the ASEAN Free Trade Area — resulted in the creation of the *Common Effective Preferential Scheme* (AFTA-*CEPT*). While the *CEPT* focused mostly on tariffs, the *ATIGA* contains broader and more specific provisions on rules of origin, non-tariff measures, trade facilitation, and sanitary and phytosanitary (SPS) measures, among others.

35 Wong and Pellan, above n 8, 2.

36 *ASEAN Trade in Goods Agreement*, signed February 2009 (entered into force 17 May 2010) Preamble.

example, notes that '[a]rticle X of GATT 1994 shall be incorporated into and form an integral part of this Agreement, *mutatis mutandis*'.

At first glance, the state-to-state relationship has been managed in *ATIGA* but harmonised rules in relation to business-to-business relationships have been left out. However, tentative steps in regulating behind-the-border issues can be observed. Unfortunately these efforts are not concentrated on harmonising sales laws.

It must be noted that *ATIGA* has included articles which specifically facilitate trade between the ASEAN countries. Article 13, as an example, established the Trade Repository 'where trade and customs laws and procedures of all Member States shall be ... made accessible to the public through the internet'. The article in subs (2) is very specific, but not exhaustive, by describing the content of the Repository which is maintained by the ASEAN Secretariat. Of interest is that art 13(2) includes amongst the usual information such as ROO, information such as 'best practices applied by each Member State; and (ix) list of authorised traders of Member States'.[37]

Arguably the window to facilitate increased behind-the-border harmonisation has been slightly left ajar as art 45 introduces the 'Work Programme on Trade Facilitation and its Objectives'.[38] The point made in art 45 is of importance as it states that the work program needs to create a 'predictable environment for international trade transactions that increases trading opportunities and help businesses, including small and medium sized enterprises (SMEs) to save time and reduce costs'.[39]

The Principles on Trade Facilitation further note that:

> the authorities shall endeavour to facilitate and promote effective mechanisms for exchange with business and trading community,

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37 Ibid art 13(2).

38 Ibid ch 5.

39 *ASEAN Trade in Goods Agreement*, signed February 2009 (entered into force 17 May 2010) art 45(1).

> including opportunities for consultation when formulating. Implementing and reviewing rules and procedures relating to trade.[40]

Read in isolation it can be argued that not only public but also private law issues are to be included in negotiations. Notably, *ATIGA* is the only agreement[41] that calls for a 'Trade Facilitation Coordinating Committee or relevant focal point at the national level'.[42] Arguably, such committees could include private law issues in their deliberations, augmenting the existing public law regulations. However, read in its entirety, *ATIGA* is only devised to regulate public law issues. This is confirmed by art 89 which governs dispute settlements, indicating that any disputes between member states concerning the interpretation of *ATIGA* is subject to the *2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism*.[43] The Protocol sets out the coverage of the rules and procedures in art 1(1).[44] All agreements covered by the Protocol are listed in app 1 which includes 46 agreements dating from 1977 to 2004. However, all agreements were formed between states and do not affect investor-state dispute settlements.

What must be said is that trade facilitation provisions are increasingly used in trade agreements since 2005 in contrast to agreements signed before 2004.[45] Duval argues that this is because governments realised that further trade expansion depends on 'whether non-tariff barriers can be effectively tackled'.[46] However, art 46 in describing the scope of the Trade Facilitation Work Program (TFP) notes a classification predominantly consistent with WTO classifications, except that the

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40 Ibid art 47(b).

41 Duval and Utoktham, above n 19, 13.

42 *ASEAN Trade in Goods Agreement*, signed February 2009 (entered into force 17 May 2010) art 50(2).

43 Ibid art 89.

44 See *ASEAN Protocol on Enhanced Dispute Settlement Mechanism*, ASEAN, art 1(1) <http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>.

45 Yann Duval, 'Trade Facilitation in Regional Trade Agreements: Recent Trends in Asia and the Pacific' (Working Paper No 02/11, UN ESCAP, March 2011) 3.

46 Ibid 3.

article includes 'other areas as identified by the AFTA council'.[47] Chapter 5 does not however, include specific TFP measures, instead 'they are in line with what is found in many of the bilateral trade agreements'.[48]

It can be observed that *ATIGA* has gone beyond the simple declaration of unified public law issues and attached practical regulations to facilitate trade. Article 58 introduces rules to facilitate seamless trade, specifically by creating a regional single window system. Article 49 reads:

> Member States shall undertake necessary measures to establish and operate their respective National Single Windows and the ASEAN Single Window in accordance with the provisions of the *Agreement to Establish and Implement the ASEAN Single Window* and the *Protocol to Establish and Implement the ASEAN Single Window*.

In summary, it can be argued that *ATIGA* has established a regime of harmonised public law in order to facilitate trade, but has not seriously attempted to go the extra step and harmonise private laws as well. The issue which will be discussed below is whether *ATIGA* is in step with other FTAs signed by ASEAN or other ASEAN nations with Australia.

B *ATIGA and AANZFTA — Rules of Origin*

For purposes of examining trade ramifications flowing from the operative frameworks of *ATIGA* and *AANZFTA*, some comparative observations can be made.

Article 26 of *ATIGA* specifies the requirements for deeming a good to be an originating good. It refers to a 'wholly produced or obtained good' or a 'good not wholly obtained or produced', providing additional requirements have been met. This provision is replicated in art 2 of *AANZFTA*. The articles defining 'wholly obtained or

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47 *ASEAN Trade in Goods Agreement*, signed February 2009 (entered into force 17 May 2010) art 46.

48 Duval and Utoktham, above n 19, 6.

produced goods', art 27 of *ATIGA* and art 3 of *AANZFTA*, are virtually identical.

The process for treating '[g]oods not wholly produced or obtained' as originating goods is also virtually identical in *ATIGA* and *AANZFTA*. 'Goods not wholly produced or obtained' are almost identically defined in art 28 of *ATIGA* and art 4 of *AANZFTA*, imposing the same level of regional content of no less than 40 per cent. Article 29 of *ATIGA* and art 5 of *AANZFTA* use the identical formulae for the calculation of Regional Value Content. Cumulative rules of origin are covered in art 30 of *ATIGA* and art 6 of *AANZFTA*, and would have been identical but for the additional Regional Value Content criterion in art 30.2 of *ATIGA*, for instances where regional value content of the material is less than 40 per cent. Article 31 of *ATIGA* and art 7 of *AANZFTA* on Minimal Operations and Processes are substantially similar, however, art 7 of *AANZFTA* imposes some additional minimal operations and processes by virtue of art 7(d)–(f). The *De Mimimis* provision is substantially similar in both agreements, found in art 33 of *ATIGA* and art 8 of *AANZFTA*.

Article 38 of *ATIGA* stipulates that a claim that a good shall be accepted as eligible for preferential tariff treatment shall be supported by a Certificate of Origin. For purposes of *AANZFTA*, its annex on Operational Certification Procedures contains rules on issuance and verification of Certificates of Origin.

From the above it is observed that provisions on ROO in *ATIGA* and *AANZFTA* are harmonious, bordering on being identical. Such a state of affairs is not unexpected, given that both agreements are the resulting regulatory outcomes of the broader regional (multilateral) commitment on trade. *ATIGA* and *AANZFTA* are clearly going beyond and above any existing bilateral free trade agreements in the region.

IV PART 3

A *OHADA Uniform Acts*

1 *Introduction*

In contrast with ASEAN, the Australian Government has not entered into BITs or FTAs with any of the OHADA nations, nor any African state for that matter.[49] Hence the legal landscape differs greatly for any business attempting to conduct trade with African states. However, OHADA stands out. It was formally created in 1993 with the signing of the *Port-Louis Treaty*. In 2008,[50] the original treaty was amended by the *Treaty of Quebec*, which came into force in 2010. The meeting in Quebec aimed to reinforce OHADA and to perpetuate its activities by improving its institutions and its financing.

The idea was generated by the political will to strengthen the legal system, with the aim to harmonise business laws of the signatory states and to establish common rules which were simple, modern, and adaptable to all Member States.[51] Indeed the preamble to the Treaty states the aim as 'making progress toward African unity and creating a climate of trust in economic systems of the contracting States with a view to creating a new centre of development in Africa'.[52]

It is beyond doubt that the ensuing Uniform Acts are the core of the OHADA project.[53] As of today, nine Uniform Acts have been introduced and adopted by the Council of Ministers. These include:[54]

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49 OHADA (Organisation for the Harmonisation of Business Law) was created by 16 mostly French speaking African nations, and introduced supra-national *Uniform Laws*. The official language of OHADA is French.

50 The meeting took place in Quebec on 17 October 2008.

51 Keba Mbaye, 'L'histoire et les objectifs de l'OHADA' (2004) 205 *Les Petites Affiches* 4.

52 OHADA, signed 17 October 1993, (entered into force 18 September 1995) Preamble.

53 Renaud Beauchard and Mahutodji Jimmy Vital Kodo, 'Can OHADA increase Legal Certainty in Africa?' (Working Paper No 17/2011, World Bank, 2011) 15.

- *Uniform Act on General Commercial Law*
- *Uniform Act on Commercial Companies and Economic Interest Groups*
- *Uniform Act on Securities*
- *Uniform Act on Collective Proceedings for the Clearing of Debts*
- *Uniform Act on Simplified Recovery Procedures and enforcement Measures*
- *Uniform Act on Accounting for companies' private Account and also for combined and consolidated accounts*
- *Uniform Act on Arbitration*
- *Uniform Act on Contracts for the Carriage of Goods by Road*
- *Uniform Act on Cooperatives*

The Uniform Acts are directly applicable and override domestic laws of the individual countries.[55]

As the Uniform Acts are supra-national in character, specialised bodies need to be put in place. The main institutions are the Permanent Secretary located in Cameroon, the Regional School for the training of lawyers and judges in Benin (Porto-Novo), and the Common Court of Justice and Arbitration (CCJA). This court, situated in Abidjan, Ivory Coast, is the key institution and has a dual function.[56] It is a supra-national court as well as an arbitration institution.[57] It serves as a court of appeal and is tasked with achieving uniform judicial interpretations of the Treaty and Uniform Acts. Its second function is to serve as a forum for international

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54 Boris Martor et al, *Business Law in Africa: OHADA and the Harmonisation Process* (GMB Publishing Ltd, 2nd ed, 2007) 16.

55 Article 10 of the *OHADA Treaty* was adopted on 17 October 2008 in Quebec.

56 Mahutodji Jimmy Vital Kodo, 'Harmonisation of Business law: The Experience of Africa' in Mads Andenas and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar Publishing, 2012) 252.

57 Emilia Onyema, 'Arbitration under the OHADA regime' (2008) 11(6) *International Arbitration Law Review* 205, 206.

arbitration and a court of last resort for judgments and arbitral awards rendered within Member States.[58]

Article 14 of the revised version notes that:

> The Common Court of Justice and Arbitration is responsible for the uniform interpretation and uniform application of the Treaty, of the regulations promulgated to further the Treaty's implementation, of the Uniform Acts, and of other actions.
>
> The Court may be consulted by any Contracting Party, or by the Council of Ministers, on any question within the scope of the prior paragraph. The same ability to request consultative advice from the Court shall belong to national courts hearing a case pursuant to Article 13, above.[59]

It should also be noted that OHADA regulations sit on top of an already complex set of regional organisations forming other cooperative law initiatives to which OHADA adheres to.[60] These groupings are not always composed of all the OHADA states, as individual states can form their own alliances. As an example, the West African Economic and Monetary Union (UEMOA) has six of the OHADA group of nations as members, and the Economic Community of West African States (ECOWAS) is comprised of nine OHADA states and six non OHADA members. As one would suspect, the regulatory power of all the organisations can easily overlap, if not directly be in conflict, especially if OHADA extends the reach of the Uniform Acts.[61]

Simply put, it is a well-recognised fact that uniform laws reduce the risks posed by variations in sales legislations within a trading block, or for that matter of jurisdictions whose law might potentially apply. Within this context, it should also be noted that besides the OHADA uniform laws regime, art 2 'of the *UCC*, the *CISG*, and the *CESL* all share the same fundamental goals, which is to reduce the transaction costs imposed on cross-border sales by non-unified law in the

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58 Beauchard and Kodo, above n 53, 11.

59 OHADA, signed 17 October 1993, (entered into force 18 September 1995) art 14.

60 Beauchard and Kodo, above n 53.

61 Ibid 14.

jurisdiction whose law may potentially apply'.[62] Professor Lehn argued that cost savings through the introduction of uniform laws are impressive.[63]

A further point needs to be considered, namely, that uniform laws facilitate and strengthen the competiveness of the internal market as it creates a single window in relation to trade laws. This competiveness will flow onto the international markets, hence increasing international competiveness. The theory behind the utility of uniform laws was put succinctly by the European Parliament in their proposal for a *Common European Sales Law*:

> Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member States' markets. Consumers are hindered from accessing products offered by traders in other Member States.
>
> Currently, only one in ten of Union traders, involved in the sale of goods, exports within the Union and the majority of those who do only export to a small number of Member States. Contract law related barriers are one of the major factors contributing to this situation. Surveys show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.
>
> The need for traders to adapt to the different national contract laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.
>
> Additional transaction costs compared to domestic trade usually occur for traders in cross-border situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.

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62 Flechtner, above n 9, 5.

63 See Kenneth Lehn, *The CISG: Perspectives from an Economist* in Harry M Flechtner, Ronald A Brand and Mark S Walter (eds), *Drafting Contracts Under the CISG*, (Oxford University Press, 2007) 261.

…

In cross-border transactions between traders, parties are not subject to the same restrictions [as in consumer law contracts] on the applicable law. However, the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.

Traders are also exposed to increased legal complexity in cross-border trade, compared to domestic trade, as they often have to deal with multiple national contract laws with differing characteristics.

Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions. Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.

Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between traders. This can lead to

> a more limited choice of products at a higher price in the consumer's market.[64]

2 *OHADA — the Commercial Code*

Of interest is the *Uniform Act on General Commercial Law* (*CL*). The Act was first introduced in 1997 and revised in 2010. The Act includes five major areas of commercial law.[65] As it is not only an Act summarising domestic law, it was also devised taking note of global developments. The scope of the *CL* is found in art 1, which notes:

> Every trader, be he a natural or legal person including all commercial companies of which a State or a person governed by public law is a member, as well as every economic interest group, whose place of business or registered office is situated on the territory of one of the Contracting States to the Treaty on the Harmonization of Business Law in Africa, (hereinafter referred to as 'Contracting States'), shall be subject to the provisions of this Uniform Act.
>
> Besides, every trader shall be subject to the laws which are not contrary to the provisions of this Uniform Act applicable in the Contracting State of his place of business or registered office.[66]

The harmonisation efforts of OHADA have shown that the *CISG* is an important international instrument in the commercial sale area, and the *CL* basically mirrors the *CISG* in book VIII (art 234). Unfortunately, the *CISG* is not a code and hence does not cover all contracts or every aspect of a contract. As an example, art 4 of *CISG* specifically excludes 'the effects which the contract may have on the property in the goods sold'.[67] The problem, however, is that the *CL* did not rectify or close the gaps left by the *CISG*. It would have been

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64 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* [2011] Doc No 52011PC0635, 2–3.

65 These five areas are: Status of the Trader, Trade and Personal Property Credit Register, Commercial Lease and Business, Trade Middlemen, and Commercial Sale.

66 See *OHADA Uniform Act on General Commercial Law* <http://www.ohadalegis.com/anglais/audrtcomgb1.htm>.

67 *United Nations Convention on Contracts for the International Sale of Good*, UN Doc CN862, art 4(b).

advisable that the gaps and restrictive articles be replaced by the *UNIDROIT Principles*. Arguably, the application of both systems would have contributed to a more sophisticated international contract law. This is not to say that a *CL* taking note of the *CISG* is of no utility. On the contrary, it is an enormous step towards international harmonisation to include the *CISG* considering it has been ratified by all major trading nations except the United Kingdom.

However, the fact that book VIII, in effect, copied the *CISG* causes problems. The last paragraph of art 1 of the *CL* is of special importance as three states have ratified the *CISG*,[68] and the question of which document would prevail needs to be considered. To start with, it has been argued that unification or harmonisation efforts should not be precluded from being relevant just because some states have ratified the *CISG*.[69] However, the question is whether in these three states the *CISG* is considered to be contrary to the provisions of the *CL*, and hence whether the *CISG* potentially prevails over the *CL*.

The answer is to be found in the final provisions. To that extent, art 90 has been advanced as it deals with the conflict of conventions, but arguably gives rise to disputes. The article notes that the *CISG* does not prevail over any 'international agreement', but is restricted to agreements which 'contain provisions concerning the matter governed by this convention'. The problem is that the issues depend on whether the *CL* is classed as being international. Arguably the *CL* is not an international agreement as it is restricted to the OHADA countries. However, it could also be argued that any agreement as soon as it affects two or more independent states is international in character. This paper argues that intra-regional agreements cannot be termed to be international as by definition they are not open to other countries except those within the trade block. For a document to be termed international, arguably every state in the world must have the

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68 The states are Benin, Gabon and Guinea.

69 Franco Ferrari, '*CISG* and OHADA Sales Law' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification*, (Sellier European Law Publishers, 2012).

opportunity to ratify the instrument. This is not the case in this instance.

Tellingly, Ferrari points out that the *CL* only prevails over the *CISG* in respect of intra-regional sales, but only if the *CL* is considered to be an agreement under art 90.[70] This is so as the last part of art 90 notes that 'the parties [must] have their places of business in States parties to such agreement'. Arguably therefore, art 1 of the *CL* must be interpreted in this light. The fact that every 'trader shall be subject to the laws which are not contrary to the provisions of the Uniform Act' only deal with domestic laws which fill gaps within the *CL* or at best track the *CL*. However, the *CISG* prevails over domestic laws and hence the *CISG* will prevail in the three states only. However, as noted by Ferrari, this argument is contingent on the definition of 'agreement'.

Article 92 and art 94 do not apply either as none of the three states have made any declarations in relation to the requirements of the two articles. If one or all of the states would have made an art 94 declaration Flechtner argues that:

> While the reservations permitted by Articles 93 and 94 do not change the text of the Convention in a literal sense, they produce what amounts to an alteration in the meaning of the term 'Contracting State' for purposes of the scope provision (Article 1) [of the Convention].[71]

If that had been the case, the *CISG* would not apply in the three states.

Therefore, in summary it can be argued that if both parties reside in a *CISG* state the *CL* will apply as the *CISG* does not apply to domestic situations. The *CL* will also apply between two non-*CISG* OHADA states. However, the problem arises when one of the states is a *CISG* state. In this situation, as seen above, the *CISG* will overrule the *CL* as the *CL* is not an international agreement.

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70 Ibid 88.

71 Harry Flechtner, 'The Several Texts of the *CISG* in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)' (1998) 17 *Journal of Law and Commerce* 187, 194.

Despite the problems arising from the existence of a dual sector of sales laws, the other uniform laws do not pose any controversies. The only issue which may be a problem is the fact that the Common Court of Justice and Arbitration (CCJA) , being a supra-national court, on occasion is not consulted despite the issues dealt with in art 14 of the OHADA Treaty. This as a result could diminish the harmonisation efforts.

With the passing of time, national judges do indeed contribute towards the building of a new harmonised law. However, the legitimacy of giving the CCJA power is questionable as it, in effect, diminishes the power of national judges.[72] Unfortunately, the CCJA was turned into a *Cour de Cassation* by the drafters, instead of a Supreme Court, resulting in administrative difficulties.

It needs to be said that national courts do indeed settle cases involving the Uniform Acts, and most of the court decisions apply the correct law. The issue is that they are not made by the correct court, the CCJA.[73] Arguably therefore, litigants can maintain a certain level of confidence that the court system is arriving at correct or, at least reasonable decisions, despite the persistent teething problems. This view is confirmed as precedent shows a trend emerging whereby national courts are referring matters relating to Uniform Laws to the CCJA. Kodo notes several cases where national courts refer matters dealing with Uniform Acts to the CCJA, such as the Court of Appeal of Abidjan and the Supreme Court of Cameroon. The attitude of the Supreme Court of Niger has also changed with several cases having been transferred to the CCJA.[74]

In summary, it can be observed that the behind-the-border system of uniform supra-national laws is workable and deserves attention by law makers. As noted by the European Parliament:

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72 Kodo, above n 56, 254.
73 Ibid 260.
74 Ibid 262–3.

> Surveys show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.[75]

V PART 4

A *ASEAN behind-the-border harmonisation*

It is obvious that the two trade blocks have approached harmonisation efforts differently. ASEAN relies on FTAs dealing not only with other trading partners but also within the group as discussed above. OHADA, on the other hand, relies on behind-the-border regulations and, as noted above, has not entered into any FTAs.

The issue is that the harmonisation process, in any region, is always subject to diverse and pluralistic legal backgrounds. This is not only true in the OHADA group of nations, but specifically so in the ASEAN group. The establishment of an ASEAN free trade area through *ATIGA*, bolstered with ASEAN+ agreements, are the result of the ASEAN countries attempting to steer the community into the global economic world. However, the FTAs, being an at-the-border harmonisation effort, are lacking a supra-national body which would guarantee the functioning of such a regime. Arguably, there are attempts to move in this direction, especially in *ATIGA*, through the creation of an ASEAN single window. However, the efforts have stopped short of creating a supra-national authority to guarantee the functioning of a uniform regime. Furthermore, in 1997 ASEAN Vision 2020 was launched, which aimed to create closer economic integration within ASEAN. The process however has since stalled[76].

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75 *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law* [2011] Doc No 52011PC0635.

76 Samuel Hutabarat, 'Remodelling ASEAN Contract Law: By Creating ASEAN's Own Contract Law or by Adoption the *UNIDROIT Principles*' (2012) 7(2) *Law Review* 215, 216.

This paper argues that an absence of a supra-national body seems to imply 'that member countries' commitment to ASEAN goes no further than a form of open regionalism'.[77] The result is that each country still views their interests as being paramount. Hardjowahono argues that:

> Regional unification or harmonisation of transnational legal issues depends on interplay among diverse national interests and values promoted by each participating country. Unfortunately ASEAN's loose regionalism leaves each member State a high degree of freedom to pursue its unique national legal development agenda and place any scheme tending towards regional integration well within the bounds of such a domestic agenda.[78]

Arguably, the fact that the creation of a supra-national body may be the stumbling block in introducing behind-the-border harmonisation, does not stop other possible avenues of harmonisation. In one way it is understandable, as the ASEAN countries, due to their colonial past, either are common law or civil law based. OHADA on the other hand belongs, to a great extent, to the same legal family, namely the civil law.[79] However, it must also be recognised that many, if not all, efforts to harmonise transnational law is a compromise between civil and common law traditions, and hence arguably acceptable to all.

As an example, the *CISG* has been ratified by 81 nations, with the only exception of a major developed country being the United Kingdom. Singapore is the only country in the ASEAN group who has ratified the *CISG*, whereas the important ASEAN+ trading partners such as China, Japan, Australia, the European Union, and New Zealand are all *CISG* countries.

Furthermore, the *UNIDROIT Principles*, though being a model law, is widely known and used frequently in arbitrations. It is in this area in

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77 Bayu Seto Hardjowahono, 'The *UNIDROIT Principles* and the Law Governing Commercial Contracts in Southeast Asia' (2002) 7(4) *Uniform Law Review* 1005, 1007.

78 Ibid.

79 Cameroon is an exception in that both common law and civil law systems operate in the country.

which comprehensive legal unification should start as the blue prints are already in existence. The OHADA commercial code is an example where the sales law is closely modelled on the *CISG*. Understanding that all partner countries in the ASEAN+ group are signatories to the *CISG* would suggest that transaction costs by the developed partner countries would be decreased if they could operate through a legal system which is relatively familiar to all concerned. This issue has not gone unnoticed and the UNCITRAL secretariat receives regular updates on the progress made by various ASEAN states towards the adoption of the *CISG*.[80]

Specifically, the *UNIDROIT Principles* being soft law are eminently suitable to bridge the gap within the culturally and legally diverse systems. The *UNIDROIT Principles*, as well as the *CISG*, are not rigid regimes, allowing for variations and reservations which could accommodate legal differences and issues which are uniquely ASEAN.

However, Bell argues that Islamic law poses challenges in the creation of a common uniform commercial law. He specifically notes:

> the *CISG* as it stands, is incompatible with many aspects of Islamic commercial law and particularly with the requirements of the law of Islamic finance … [and] that many Asian countries may have values that are different from the Western values embodied in both the civil and common law …[81]

The statement on its own arguably could be correct, however, considering that in most ASEAN countries commercial law is based on either the common law or civil law due to the colonisation process, a transplantation process has already taken place. As this is the case, adoption of an international law could not be too difficult if it is

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80 Renaud Sorieul, 'Foreword' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven Publishing, 2010).

81 Gary F Bell, 'New Challenges for the Uniformisation of Laws: How the *CISG* is Challenged by "Asian Values" and Islamic Law' in Ingeborg Schwenzer and Lisa Spagnolo (eds), *Towards Uniformity: The 2nd Annual MAA Schlechtriem CISG Conference* (Eleven Publishing, 2010).

accepted that domestic law harmonisation must take account of regional differences. As Goode noted, 'the law of contract is responsive to the social, cultural and economic background of a country'.[82]

What can be said is that there is no ASEAN commercial law as such because there are no common Asian values. Furthermore, of all the ASEAN members, only three are Islamic states. It is also of interest to note that in OHADA, despite Islamic countries being members, the *CISG* has been taken as a model to create the 'uniform commercial code'. There appears to be no problem in the African states and hence, considering the makeup of ASEAN, the same could apply.

It is suggested that Bell's arguments might be true in relation to Islamic banking. It does not follow however, that the same can be said in case of contract law. The mere fact that transplantation has taken place means the seeds of 'Western' laws have been sown and, arguably, a repetition of the process is feasible. The mere fact that the Asian approach to contract is relational and not transactional is not a hindrance to harmonising contract law.[83] It is true that the *CISG* did not take into account 'Asian values' and attitudes towards laws, nor did it take into account Islamic law.[84] However, arguably, international trade is without borders and in the end the economic benefits derived by both parties will determine the governing law. Unification of laws removes one obstacle of divergence from the negotiations and furthermore, both parties are knowledgeable in regards to the applicable law. In other words, one party is not required to take a leap of faith in relation to an aspect of an international transaction, specifically in relation to behind-the-border requirements.

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82 Roy Goode, 'Contract and Commercial law: The Logic and Limits of Harmonisation' (2003) 7(4) *Electronic Journal of Comparative Law* <http://www.ejcl.org/ejcl/74/art74-1.html>.

83 Bell, above n 81, 17.

84 Ibid 29.

It should be pointed out that the FTAs are based on international norms requiring them to be compatible with WTO and GATT requirements, in essence a Western construct.

Unsurprisingly, in 2007 the ASEAN leaders affirmed their commitment to establish an ASEAN community and signed the *CEBU Declaration on the Acceleration of the Establishment of an ASEAN Community*:[85]

> The ASEAN Community is comprised of three pillars, namely the ASEAN Political-Security, ASEAN Economic Community and ASEAN Political-Cultural Community … [and] each pillar has its own Blueprint.[86]

It appears that ASEAN has recognised that once a single market is created and business transactions become 'borderless', within the border harmonisation follows. As a result, commercial law needs to be harmonised and, to that end, clear contract rules need to be created. As noted above, ASEAN contract law, simply put, is predominantly influenced by civil and common law rules, and hence different approaches can be produced. This paper will only look at contract law as noted above as it sets the course of commercial transactions, especially when international trade is concerned. The problem is that internal ASEAN trade, as well as trade by individual ASEAN countries with say Australia, is classed as being international in character.

B *ASEAN Contract Law*

The ASEAN charter explicitly stipulates that a unified legal tradition will become an important issue.[87] However, there is no evidence that the ASEAN leaders are contemplating the creation of a supra-national court to deal with intra-ASEAN commercial matters. If harmonisation of commercial law, and specifically contract law, is attempted by *ATIGA* as an intra-ASEAN body, two paths are open for discussion.

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85 Hutabarat, above 76, 217.

86 Ibid.

87 Ibid 219.

Firstly, any harmonisation must be driven by individual states or be the result of an ASEAN summit reaching the consensus that each state will change their commercial contract laws simultaneously, perhaps on the lines of the *UNIDROIT Principles*. Alternatively, ASEAN states could adopt a convention, such as the *CISG*, which governs international contracts. This option can be refined by including a clause indicating that intra-ASEAN sales are not to be considered international. Such a solution would not require a rewrite or change to the national laws and hence could be deemed to be more palatable and easier to implement. China is an example of this, as not only is their domestic sales law modernised, they also include the *CISG* to govern international sales. Furthermore, Australia is another example as the *CISG* was adopted by all states after the Federal Government became a signatory to the *Convention* without abandoning the contract law as in force in each individual Australian state.

It is of interest to note that in East Asia a private initiative by scholars trying to harmonise rules of contract law has gathered momentum. The aim is to create a model law called *Principles of Asian Contract Law* (*PACL*).[88]

1 *Harmonised ASEAN contract law*

It has been argued that '[r]egional harmonisation, which underpins the gradual process of social, cultural and economic values of ASEAN countries, is more promising as ASEAN countries share an understanding of each other'.[89]

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88 Shiyuan Han, 'Principles of Asian Contract Law: An Endeavour for Regional Harmonisation of Contract Law in East Asia' (2013) 58 *Villanova Law Review*, 589.

89 Azimon Abdul Aziz et al, 'Towards Harmonisation of the ASEAN Contract Law: The Legal Treatment of Unfair Consumer Contract Terms Among Selected ASEAN Member States' (2011) 2 *Asian Journal of Accounting and Governance* 61, 62.

Considering that there is no 'Asian law' as such, and that the ASEAN countries belong to the civil law or common law tradition, such a statement is not correct. It is also equally incorrect to argue that, '[a]s the international principles might not serve the common interests of ASEAN member states, regional principles will be more suitable for regional contracting parties'.[90]

Firstly, it is obvious for example, that the definitions of contract and issues of enforcement vary between civil and common law traditions. Words have different connotations. For example, art 1313 of the *Indonesian Civil Code* uses the word 'Agreement'. Agreement is defined as 'an act of two or more persons who bind themselves top one or more persons'.[91] In contrast, an agreement in common law language is not a contract as it lacks the important element of consideration.[92] This fact alone would suggest that compromises must be sought and hence it would be easy to look seriously at the *UNIDROIT Principles* which are a product of civil and common law compromises. However, as Bell argued above, Professor Han also suggests that '[f]or East Asian people, it is still necessary for Asian scholars to produce an Asian voice'.[93] That might be true but history shows a different picture.

It is not the first time that a country adopted segments of the *UNIDROIT Principles* or the *CISG*. Examples include, Estonia, Germany and Russia. Estonia for instance, relied heavily on the *CISG*, which formed the basis not only of sales contracts, but was also an important source used to draft general contract provisions.[94] Varul cautions however, as he notes:

> it is natural that differences between countries and regions persist, arising first and foremost from different cultural and ethnic backgrounds. Harmonisation of contract law fosters international integration and co-

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90 Ibid 62.

91 Hutabarat, above n 76, 224.

92 See *Contracts Act 1950* (Malaysia) as amended by *Act A329 1976* (Malaysia).

93 Han, above n 88, 591.

94 Paul Varul, '*CISG*: A Source of Inspiration for the Estonian Law of Obligations' (2003) 8(1) *Uniform Law Review* 209, 209.

> operation; however, the levelling out of different cultures and traditions should not be the objective.[95]

Such a view conforms to the idea of ASEAN values, and it conforms to their ambitions. One point needs to be considered. Very few members of the ASEAN legal or academic community have participated in the drafting of the *UNIDROT Principles*. Arguably there is a lack of either understanding or desire to harmonise ASEAN contract law using a ready-made model law. The question therefore is whether ASEAN principles of contract law exist on which a harmonised law can be built. However, it has been argued that:

> [ASEAN] is affected by a lasting inability to promote a regional legal integration in the absence of common political good-will of the foundation in this direction. It thus appears difficult to identify a block of general principles of rights and obligations common to these countries of Southeast Asia.[96]

An analysis of the ASEAN FTAs suggests that the main objective was primarily a political and economic one. This is in contrast with OHADA, where the political legal objective drove the economic integration. However, at the heart of every transaction in goods and services is a contract, hence an ASEAN 'obligational identity' would enhance the economic development of ASEAN countries. Bell in an earlier article argued strongly that as there is nothing particular Asian about the laws of sale, there is no good reason to try to harmonise sales laws regionally. He specifically notes:

> Does it make sense to have a set of harmonised laws governing contracts between Asian merchants (a new Asian harmonised law of sale) and a potentially different harmonised law (the *CISG*) for contracts between Asian and non-Asian merchants?[97]

It is interesting to note that 'since the *CISG*, the *PECL*, the *PICC*, and the *Draft Common Frame of Reference* (*DCFR*) already exist, the *PACL*, as a latecomer, should have a distinguishing feature to

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95 Ibid 210.

96 Roland Amoussou-Guenou, 'Perspectives of ASEAN Principles of Contract Law' (2005) 5 *International Business Law Journal* 573, 578.

97 Gary Bell, 'Harmonisation of Contract Law in Asia — Harmonising Regionally or Adopting Global Harmonisations — The Example of the *CISG*' [2005] *Singapore Journal of Legal Studies* 362, 368.

demonstrate its necessity'.[98] Thinking regionally, the statement has some merits, however, from a global point of view it does not make sense. It makes more sense if global traders have their affairs governed by a uniform law as was envisaged by Rabel in 1932. Unfortunately regional unification attempts are still looking for the elusive golden flies.

In summary, it is argued that a harmonised ASEAN law does not make sense as there are no distinct ASEAN values and to introduce a new contract system into the workings of the existing FTAs would not reduce transaction costs; on the contrary the costs would increase.

2 *Adoption of International Uniform Law*

In the Asian context, the most important country is China. ASEAN could take note of how China not only successfully modernised their domestic contract law by taking note of the *CISG* and other harmonised laws, but how it was one of the first countries to ratify the *CISG*. This paper therefore argues that the Chinese approach to contract law should be followed. ASEAN should introduce a harmonised law which deals with intra-state contracts but allows each state to keep their own domestic laws. As an example, in Australia all the states independently included the *CISG* into their domestic legal framework as the Constitution declares that contract law is part of the state's power and not the Federal Parliament's.

Bell is absolutely correct in noting that '[i]t remains therefore that for the international sale of goods within Asia, we should probably try to harmonise, not our different and diverse cultural values, but our formal, Western-based laws of sale. The *CISG* does just that'.[99]

It must be remembered that in 1980 Burma, Philippines, Singapore, and Thailand signed the final Act of the *CISG* but failed to ratify the

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98 Han, above n 89, 597.

99 Bell, above n 97, 368.

convention. Of interest is the comments made by Mr MEHDI (Pakistan) who said:

> the Conference would bear the stamp of its President, who had succeeded in reconciling diverging views. The importance of the Convention which had been adopted could not be denied, but it should be noted that, although some of Pakistan's views had been taken into account, the views of the third world countries had not always been given sufficient consideration, although harmony between them and the other nations was a prerequisite for any progress. He could not foresee what attitude his Government would adopt, but hoped that the Convention would enable more rational relationships between buyers and sellers to be established and would contribute to the creation of a more just economic and social order. On behalf of the Asian countries, he thanked the Secretariat, the Austrian Government, the President of the Conference and its officers.[100]

Therefore, arguably at least some ASEAN states did participate at the conference, however without taking the final step and ratifying the *CISG*, except Singapore. Unfortunately there has only been one case reported from Singapore.[101] What is encouraging is that anecdotally the *CISG* has been used in Singaporean based arbitrations, and has been noted in a Vietnamese court.[102]

UNCITRAL unfortunately had only one member from Singapore on the working group for the 2010 *Principles*, and not a single member on the UNIDROIT Governing Council. This indicates that ASEAN lawyers and government officials have, at this stage, only seen law from a domestic perspective. However the proliferation of FTAs should indicate that behind-the-border harmonisation is long overdue.

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100 Vienna Diplomatic Conference, *Conference Summary* (12 Plenary Meeting, 11 April 1980) <http://www.cisg.law.pace.edu/cisg/plenarycommittee/summary12.html>.

101 *Chwee Kin Keong et al v Digilandmall.com Pte Ltd* [2004] 2 SLR 594 (High Court of Singapore).

102 *Ng Nam Bee Pte Ltd v Tay Ninh Trade Co* [1996] 74/VPPT (People's Supreme Court of Vietnam, Appeals Division).

VI CONCLUSION

There is no doubt that the *CISG* and the UNCITRAL model law have played an important part in the modernisation and harmonisation of sales laws. Trade facilitation is not only driven by at-the-border legislation, but it must also reach behind-the-border. A harmonisation of contract laws would be the first step in that direction. It is correct to argue that the *CISG* might not be the ideal instrument as it is not complete and only deals with sale of goods. Arguably the *UNIDROIT Principles* are an advance of the *CISG* but they are only a model law and hence do not have the force of law unless it is incorporated into a contract.

It is not within the power of Australia to force or suggest changes to domestic laws in another country. The ASEAN countries, most likely working through *ATIGA,* would need to introduce a common contract law. Unfortunately, from a political point of view, it appears impossible for Australia to include a model clause as to the governing law into new FTAs such as the *CISG* or the *UNIDROIT Principles*.

As the OHADA group of nations has shown, where there is political will, the creation of a harmonised sales law is possible. However, to create a mandatory sales law within an FTA is simply unattainable. The fact that few countries within ASEAN have even ratified the *CISG* is an ideation that a harmonised sales law is a far off dream despite the clear knowledge that transactions costs would be reduced. It will be interesting to see whether China, Japan and Korea, all *CISG* countries, can agree to the creation of a harmonised sales law. If it only takes on the mantle of a model law its success is rather doubtful, as the uptake of the *UNIDROIT Principles* has shown and the frequent exclusion of the *CISG* in standard form contracts.

Uniformity of laws is of importance as the ROO demonstrates the issue of complexity well. There is a clear contrast between the intra-regional 'single approach' and the Australian outcomes. Perhaps the precursor to simpler ROO (and custom's administration of those rules) is the ability to rely on strong consistent transaction

arrangements in cross border trade. Incoterms have tried to achieve this but can't achieve the necessary depth.

POTENTIAL INCONSISTENCY BETWEEN CHINA'S GATS OBLIGATIONS AND RELEVANT DOMESTIC LEGISLATION

SIYU TAO*

Abstract

GATS-inconsistency — China — Domestic Legislation — Express Delivery — Religious Education — Market Access (art XVI) — National Treatment (art XVI) — General Exceptions (art XIV)

A consequence of China's accession to WTO has been a highlighting of the tensions between its domestic legislation and WTO obligations. With regard to GATS, there were six disputes involving China as the respondent. Apart from the previous GATS inconsistencies, this paper attempts to identify whether certain domestic measures are still inconsistent with, and prevent China complying with, its GATS obligations. The comparison of China's GATS commitments and relevant domestic legislation reveals two potential inconsistencies in mail courier services and religious education services. Based on the discussion of alleged issues of the former six GATS disputes against China, this paper analyses whether domestic legislation on mail courier and religious education services are consistent with market access (art XVI), national treatment (art XVII) and general exception (art XIV). Then, it concludes that the measures at issue are inconsistent with China's GATS obligations. In order to solve GATS-

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inconsistencies prior to a GATS dispute against China, this paper suggests the Chinese Government either amends domestic measures or modifies China's GATS schedule.

I INTRODUCTION

Accession to World Trade Organisation (WTO) is a major milestone in China's economic development, modernisation and integration into the global economy.[1] The robust trade in goods promoted economic growth and helped catapult China to become the second largest economy in the world. In contrast to goods trade, trade in services in China is of a smaller scale (see Figure 1)[2] and has long been in deficit (see Figure 2).[3]

A number of economic studies demonstrate that the development of trade in services could promote trade in goods and even a country's economic growth beyond service sectors.[4] Furthermore, the status of service industry and trade in services continues to increase globally

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1 Elena Ianchovichina and Will Martin, 'Trade Liberalisation in China's Accession to WTO' (2001) 16(4) *Journal of Economic Integration* 421, 421.

2 See below, Figure 1 1995–2010 The Proportion of Trade in Services in Total Trade. The proportion of services trade in total trade in China is lower than the world's average proportion, especially from 2002 to the present. Taking the year of 2005 as an example, China's trade in services made up only 11 per cent of the sum of total trade, which was far below the average world level of 19 per cent.

3 See below, Figure 2 1990–2010 Deficit of Trade in Services in China. Since 1992, when trade in services presented a trade deficit for the first time, it has remained in deficit every year except 1994. The deficit has grown sharply from 2002 to the present, especially in 2009 and 2010.

4 Alan V Deardorff, 'International Provision of Trade in Services, Trade, and Fragmentation' (2001) 9(2) *Review of International Economics*; Ronald W Jones and Henryk Kierzkowsk, 'The Role of Services in Production and International Trade: A theoretical Framework' in Ronald W Jones and Anne O Krueger (eds), *The Political Economy of International Trade* (Cambridge University Press, 1990); Jagdish N Bhagwati, 'International Trade in Services and its Reliance for Economic Development' in Jagdish N Bhagwati (ed), *Political Economy and International Economics* (The MIT Press, 1991); Aaditya Mattoo, Randeep Rathindran, and Arvind Subramanian, 'Measuring Services Trade Liberalisation and its Impact on Trade Growth: an illustration' (Working Paper No 2655, World Bank Policy Research, August 2001).

(see Table 1)[5] and it is the trend to promote trade in services. In order to follow this tendency, most countries formulate tactics to stimulate the development of trade in services.[6] China is not an exception to this.

In recent years, China has lost its advantage in the traditional manufacturing industry because of the rising costs of material and labour, but trade in services still has ample room for growth. In order to achieve sustainable development and balanced growth, the Chinese Government regards the development of the service industry and trade in services as an important way to 'promote the rationalization of economic structure, transform the economic development mode and the foreign trade development mode, as well as create job opportunities'.[7] The policy of developing service industry and trade in services can be found in China's 11th and 12th Five-Year Plans.[8]

However, 23 disputes cite the General Agreement on Trade in Services (GATS) in the request for consultation, and China has been involved in six disputes as a respondent. These disputes prove that inconsistent domestic legislation stands in the way of compliance with, and enforcement of, China's GATS obligations. In the

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5 See below, Table 1 1980–2011 Development of Global Trade in Services.

6 Carolyn Deere Birkbeck and Meg Harbourd, 'Developing Country Coalitions in the WTO: Strategies for Improving the Influence of the WTO's Weakest and Poorest Members' (Working paper No 63, Global Economic Governance, 2011).

7 Ying Fan, 'Services Policy Reform in the People's Republic of China: before and after the global financial crisis' (Working Paper No 304, Asian Development Bank Institute, August 2011).

8 The Five-Year Plans of People's Republic of China (中国五年计划) are a series of social and economic development initiatives. The 11th Five-Year Plan was from 2006 to 2010, in which the government intended to develop trade in services through expanding services export, encouraging foreign investment, building up bases of service outsourcing, furthering the opening-up of services, and setting up a supervision and promotion system. The 12th Five-Year Plan is from 2011 to 2015, and it restated the expansion of opening up service sectors, the promotion of service exports, and the development of service outsourcing basis. The plan also emphasised the need to increase the proportion of trade in services compared to the proportion of foreign trade, further the export of emerging industries, and advance the international level of service sectors

transitional review reports, other WTO Members also consider that China still has problems that frustrate the efforts of foreign supply of legal services, insurance, express delivery services, telecommunications, and other services.[9]

In this sense, this paper attempts to identify whether China's domestic legislation complies with its GATS obligations. Thousands of domestic regulations and rules affecting trade in services have been promulgated by the State Council, ministries, departments, even an agency of a ministry, and also local governments. Thus, this paper is not ambitious to expose all measures inconsistent with China's GATS obligations, but to prove the existence of legal issues affecting the compliance of GATS obligations. The selection of pertinent legislation comes from the Regularly Updated Lists of Measures Affecting Trade in Service[10] and legislation posted on the official website 'China's Trade in Services'.[11]

This paper takes a comparative approach to explore the differences between China's commitments to GATS and relevant domestic legislation. The explanatory method and secondary scholarship are used to explicate GATS articles. Then, the evaluative method is used to assess the consistency between GATS commitments and domestic legislation. Moreover, legal sources, including scholars' research, international treaties, Panel and Appellate Body reports, government reports, and WTO documents are analysed to obtain background information, theories and viewpoints supporting, or in opposition to, this paper.

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9 European Commission Directorate-General for Trade Committee on Services, *Communication from the European Communities China's Transitional Review Mechanism 2004* (2004); European Union Statement, *Fourth Trade Policy Review of China* (2012); United States Trade Representative, *2012 Report to Congress on China's WTO Compliance* (2012).

10 *Transitional Review Mechanism under Section 18 of the Protocol on the Accession of the People's Republic of China Information Required by Annex 1A*, WTO Doc S/C/W/344 S/FIN/W/83 (28 October 2011) (Communication From China).

11 China's Trade in Services <http://tradeinservices.mofcom.gov.cn/en/index.shtml>.

In order to achieve the research objective, this paper summarises alleged issues under the six GATS disputes against China to predict potential GATS-inconsistent measures. Then, a comparative study between China's GATS commitments and relevant legislation reveals differences on mail courier services and religious education services. Based on the alleged issues summarised in section one, the second section analyses domestic measures on these two service subsectors, and then concludes that these domestic measures are inconsistent with China's GATS obligations. The third section endeavours to provide some suggestions on solving the GATS-inconsistencies.

II GATS DISPUTES AGAINST CHINA

Upon accession to WTO, China amended numerous pieces of legislation to comply with WTO rules. However, there were six disputes against China pursuant to GATS: *China — Value-Added Tax*, [12] *China — Publications and Audiovisual Entertainment Products*, [13] *China — Financial Information* (DS372 complainant European Union, DS373 complainant United States, DS378 complainant Canada), [14] and *China — Certain Measures Affecting*

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[12] *China — Value-Added Tax on Integrated Circuits*, DISPUTE DS309, complainant — the United States, respondent — China, the European Community, Japan, Mexico and Separate Customs Territories of Taiwan, Penghu, Kinmen and Matsu joined in the consultation; request for consultation was received on 18 March 2004; mutually agreed solution was notified to the DSB on 6 October 2005.

[13] *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, DISPUTE DS363, complainant — the United States, respondent — China, the European Community joined in the consultation; request for consultation was received on 10 April 2007; on 12 August 2009, the panel report was circulated to Members; on 21 December 2009, the Appellate Body report was circulated to Members.

[14] *China — Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, DISPUTE DS372, complainant — the European Communities, respondent — China; request for consultation was received on 3 March 2008; DS373, complainant — the United States, respondent — China; request for consultation was received on 3 March 2008; DS378, complainant — Canada, respondent — China, request for consultation was received on 20 June 2008; on 4 December 2008, China and the European

Electronic Payment Services.[15]

The disputes listed above prove that WTO-inconsistent domestic measures still exist after the regulatory reform begun prior to, and continued after, China's WTO accession. Alleged issues under these disputes may appear in other service sectors or subsectors; thus, they will be summarised to predict potential WTO-inconsistent measures in this section. Then, the Panel and Appellate Body reports will be referenced in Part III to examine whether or not domestic measures are consistent with China's GATS obligations.

A *Consistency with Market Access, National Treatment, the Protocol and Working Party Reports*

Regarding these GATS disputes against China, the relevant domestic legislation may be inconsistent with the commitments on market access and national treatment, and with the trading rights committed to in the Accession of the People's Republic of China (the Accession Protocol or the Protocol)[16] and Report of the Working Party on the Accession of China (Working Party Report).[17]

At the heart of GATS, Part III provides a structure for the process by which members can make specific commitments in relation to national treatment and market access.[18] Thus, a Member's commitments should list the service sectors being committed to

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Communities, the United States and Canada informed the DSB that they had reached an agreement in relation to this dispute in the form of a Memorandum of Understanding.

15 *China — Certain Measures Affecting Electronic Payment Services*, DISPUTE DS413, complainant — the United States, respondent — China; request for consultation was received on 15 December 2010; on 16 July 2012, the panel report was circulated to Members.

16 *Accession of the People's Republic of China*, WTO Doc WT/L/432 (23 November 2001) (Decision of 10 November 2001).

17 *Report of the Working Party on the Accession of China*, WTO Doc WT/ACC/CHN/49 (1 October 2001).

18 Christopher Arup, *The World Trade Organisation Knowledge Agreements* (Cambridge University Press, 2008) 103.

opening, the limitation or extent of market access being given in those sectors, and also any limitations on national treatment.[19]

The general principle of market access is laid down in art XVI:1 as follows:

> With respect to market access through the modes of supply identified in Article I, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

The standard 'no less favourable' treatment is the minimum treatment under the 'terms, conditions, and limitation' that is established by reference to the specific commitment inscribed in the market access column of a Member's schedule.[20] Article XVI:2 of GATS lists six categories of restrictions:

- limitations on the number of service suppliers;
- limitations on the total value of service transactions or assets;
- limitations on the total number of service operations or on the total quantity of service output;
- limitations on the total number of natural persons;
- limitations on specific types of legal entity or joint venture; and
- limitations on the participation of foreign capital.

These limitations are the only types of market access restrictions prohibited by art XVI:1 and cannot be maintained or adopted unless a Member inscribes them in its schedule under the market access column.[21] Article XVII stipulates that services and service providers from other Members must not be discriminated against compared with national services and service providers. Similar to market access,

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19 WTO Information and External Relations Division, *Understanding the WTO* (WTO Information and External Relations Division, 5th ed, 2011) 34.

20 Report of the Panel, *United States — Measures Affecting the Cross-border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.263].

21 Ibid [6.298].

limitations on national treatment shall be listed to provide cover for inconsistent measures.

The Panel's report on China-Electronic Payment exemplifies how domestic measures are deemed as inconsistent with market access and national treatment. First, the Panel examined whether China had undertaken market access and national treatment commitments by interpreting the commitments.[22] Then, the Panel examined whether the measures at issue were inconsistent with art XVI, and whether China had national treatment commitments that applied to China's relevant measures. With regard to art XVI, the Panel considered within which part of art XVI:2(a) to (f) the relevant measures fell, and then examined whether these measures were inconsistent with the scope of art XVI:2 and art XVI:1. Relating to art XVII, the Panel examined whether China's measures affected the supply of services and accorded less favourable treatment.

Paragraphs 5.1 and 5.2 of the Protocol and paras 83(d) and 84(a) and (b) of the Working Party Report refer to the obligations of China in respect of the right to trade as 'trading right commitments'.[23] The trading rights are explained thus: 'All foreign individuals and enterprises … shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade'.[24] In *China — Publications*, the Panel stated:

> the Accession Protocol may impose obligations on China that are not imposed on other Members under the WTO Agreement, or are stricter than those that are applicable to other Members.[25]

The trading rights with other commitments in the Accession Protocol do not apply to the original WTO Members, but are included in the

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22 See below, C *Interpretation*.

23 Report of the Appellate Body, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/AB/R (21 December 2009) [133].

24 China's Accession Protocol, above n 16, [5.2].

25 Report of the Panel, *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc WT/DS363/R (12 August 2009) [7.281].

accession documents of acceding countries.[26] Thus, acceding Members are required to adopt two types of access measure: WTO normal obligations contemplated under the agreements and WTO-plus obligations not contemplated under the agreements.[27] The WTO-plus obligations are special provisions that prescribe obligations exceeding the existing requirements of WTO.[28] Although special provisions can fill a void in WTO law and set a new standard for WTO rules and trade liberalisation,[29] some scholars[30] criticise the negative implications of the WTO-plus obligations. They believe that they place a further burden on acceding Members, especially the least developed countries, undermine the WTO's special and differential treatment measures, break the uniformity of WTO rules, and pose undesirable constraints on the dispute settlement system.[31] No matter what the positive or negative implications of WTO-plus obligations may be, they have already been involved in WTO rules, and both the Panel and Appellate Body of China-Publication affirmed that Members cannot violate them.

B *Relevant Domestic Measures*

The alleged measures show that the scope of GATS applies to measures by Members affecting trade in service, including law,

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26 Xiaohui Wu, 'Case Note: China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products' (2010) 9(2) *Chinese Journal of International Law* 415, 425.

27 Nhan Nguyen, 'WTO Accession at Any Cost? Examining the Use of WTO-plus and WTO-minus Obligations for Least-developed Country Applicants' (2008) 2(1) *Temple International and Comparative Law Journal* 243, 243; also see Julia Ya Qin, 'The Challenge of Interpreting WTO-plus Provisions' (2010) 44(1) *Journal of World Trade* 127, 129.

28 Julia Ya Qin, 'WTO-Plus Obligations and Their Implications for the World Trade Organisation Legal System: An Appraisal of the China Accession Protocol' (2003) 37(3) *Journal of World Trade* 483, 483.

29 Ibid 512.

30 See also, Nhan Nguyen, above n 27; Ya Qin, above n 28; Simon J Evenett, 'Summary of Participant's Remarks and Recommendations, Accession to WTO: Country Experiences and Technical Assistant' (paper presented to a joint BMZ BMWA GTZ World Bank Conference, Berlin, 19 November 2004).

31 Nhan Nguyen, above n 27, 244.

regulation, rule, procedure, decision, administrative action, or any other form. In China's GATS disputes, alleged measures specifically include regulations, notices, decisions issued by the State Council, and opinions, decisions and rules promulgated by a ministry, commission and agency of the State Council (for example, the Ministry of Commerce, the China Banking Regulatory Commission, the People's Bank of China, Xinhua News Agency, and so on). Owing to the nexus between trade in services and investment, alleged measures refer not only to measures in service sectors but also to investment regulations (see Regulations on Guiding the Orientation of Foreign Investment,[32] Several Opinions of the State Council on Further Doing a Good Job in the Utilization of Foreign Investment,[33] and the Guideline Catalogue of Industry with Foreign Investment).[34] The former GATS disputes against China show that WTO inconsistencies exist mainly in administrative regulations and departmental rules, which are more specific than laws, and local decrees and local governmental rules are not mentioned in these disputes because they are not applicable to the whole territory of China but only to certain regions. Regarding relevant measures, this paper will compare China's GATS commitments with relevant measures to find out whether there are any inconsistencies between China's legislation and its GATS obligations.

C Interpretation

Article XX:3 of GATS provides that WTO Members' schedules 'shall be annexed to this Agreement and shall form an integral part

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32 《指导外商投资方向规定》[Provisions on Guiding the Orientation of Foreign Investment] (People's Republic of China) the State Council, Decree No 346, 11 February 2002.

33 《国务院关于进一步做好利用外资工作的若干意见》[Several Opinions of the State Council on Further Doing a Good Job in the Utilization of Foreign Investment] the State Council No 9, 6 April 2010.

34 《外商投资产业指导目录》[Guideline Catalogue of Industry with Foreign Investment], the State Development and Reform Commission and Ministry of Commerce, the first Guideline was promulgated in 1995, and has been revised for five times until now (in 1997, 2002, 2004, 2007, 2011, 2012, 2013).

thereof', which means 'the task of identifying the meaning of a concession in a GATS schedule is like the task of interpreting any other treaty text'.[35] Article 3.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) ruled that GATS schedules must be interpreted according to the 'customary rules of interpretation of public international law', which is well stated in arts 31 and 32 of the Vienna Convention on the Law of Treaties (Vienna Convention).[36] Thus, a Member's GATS schedule must be interpreted according to arts 31 and 32 of the Vienna Convention as interpreting the GATS agreement itself.

In China-Electronic Payment, the Panel explained four ways of interpretation under arts 31 and 32:[37] (1) ordinary meaning of the term: common dictionary, specific dictionary, and glossaries; (2) ordinary meaning in light of the context: comprises the rest of words in the same column, the subheading of service subsector, commitments in other modes of supply, GATS annex (art XXIV of GATS), the structure of GATS, and schedules of other WTO Members; (3) ordinary meaning in light of the object and purpose of the treaty: the object and purpose of GATS are listed in the preamble, including transparency, security, predictability and so on; and, (4) resource to supplementary means of interpretation: the CPC and 2001 Scheduling Guideline. The ways of interpretation can also be found in the Panel and Appellate Body reports on China-Publications.[38] Based on these ways of interpretation, China's commitments could be interpreted properly and then compared with relevant measures to test their consistency.

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35 Report of the Appellate Body, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/AB/R (7 April 2005) [160].

36 *Vienna Convention on the Law of Treaties*, signed at Vienna on 23 May 1969, 1155 UNTS 331 (entered into force on 27 January 1980); Report of the Panel, *China — Certain Measures Affecting Electronic Payment Services*, WTO Doc WT/DS413/R (16 July 2012) [7.8].

37 Ibid [7.73]–[7.207].

38 Report of the Panel, *China — Publication*, above n 25, 357–6; and, Report of the Appellate Body, *China — Publications*, above n 23, 145–59.

D *The Necessity to Protect Public Morals or Orders*

In China-Publications, China argued that the challenged measures were consistent with its right to regulate trade under the provision of art XX(a) of General Agreement on Tariffs and Trade (GATT). Both the Panel and Appellate Body analysed the application of this article and the necessity of protecting public morals.

Article XX:(a) states 'necessary to protect public morals'. The concept of 'public morals' can 'vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values', so that Members 'should be given some scope to define it in their respective territories, according to their own systems and scales of values'.[39] Since the Appellate Body in Korea-Beef interpreted for the first time the word necessary in art XX, the necessity test has been referred to as a process of measuring the requirements of exception.[40] Measures at issue aiming to protect public morals have to pass the necessity test because the word necessary is not limited to the meaning 'indispensable', but is 'a process of weighing and balancing a series of factors' to determine whether a measure is 'necessary' within the meaning of art XX.[41]

The Panel of China-Publications elaborated three factors to determine the necessity to protect public morals by recalling relevant guidance from the Appellate Body of US-Gambling and Brazil-Tyres:[42]

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39 Report of the Panel, *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004) [6.465], [6.461]; and, Report of the Panel, *China — Publications*, above n 25, [7.759].

40 Federico Ortino, 'The Principle of Non-discrimination and it Exceptions in GATS: Selected Legal Issues' in Kern Alexander and Mads Andenas (eds), *The World Trade Organisation and Trade in Services* (Martinus Nijhoff Publishers, 2008) vol 5, 187.

41 Report of the Panel, *China — Publications*, above n 25, [7.782]; and also, Report of the Appellate Body, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc WT/DS161/AB/R (11 December 2000) [161], [164].

42 Report of the Appellate Body, *US — Gambling*, above n 35, [306], [307]; and Report of Appellate Body, *Brazil — Measures Affecting Imports of Retreated*

- The contribution of the measure on the realisation of the ends pursued by it;
- The restrictive impact of the measure on international commerce; and
- In light of the importance of the interests at issue, a comparison between the challenged measure and possible alternatives should be taken.

With these factors in mind, the Panel examined the measures at issue and the alternatives proposed by the United States, and concluded that none of the provisions of China's measures are necessary and under the meaning of art XX(a).[43] In light of this conclusion, the Panel decided not to examine whether the relevant measures satisfied the chapeau of art XX.[44] Moreover, the Appellate Body also analysed the contribution of China's measures to the protection of public morals, the restrictive effect of the measures, and reasonably available alternative measures, and decided to uphold the Panel's conclusion.[45]

Regarding the contribution of the measures to the protection of public morals, the Appellate Body analysed 'the contribution of the state-ownership requirement, the provisions excluding foreign-invested enterprises, and the state plan requirement'.[46] With regard to the restrictive effect of the measures, both the Panel and Appellate Body thought that the necessity test should weigh not only the restrictive impact on relevant international trade but also the restrictive effect on beneficiaries wishing to engage in international trade.[47] Quoting the Appellate Body report of *US — Gambling*, the Appellate Body examined whether China could reasonably be expected to employ an alternative measure. Specifically, an alternative measure should not be merely theoretical in nature, should not cause prohibitive costs or substantial technical difficulties, and should achieve the objectives

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Tyres, WTO Doc WT/DS332/AB/R (3 December 2007) [178]; Report of the Panel, *China — Publications*, above n 25, [7.787], [7.788].

43 Ibid [7.911].

44 Ibid [7.912].

45 Report of the Appellate Body, *China — Publications*, above n 23, [415].

46 Ibid [254].

47 Ibid [308], and Report of the Panel, *China — Publications*, above n 25, [7.788].

pursued by the measure at issue.[48]

As art XIV of GATS sets out the general exceptions from obligations in the same manner as art XX of GATT,[49] the three factors regarding the examination of art XX:(a) could also be adopted in applying art XIV:(a).

To summarise, measures at issue could be inconsistent with China's commitments on market access and national treatment, and also the trading right under the Protocol and Working Party Report, and they could be domestic laws, administrative regulations and departmental rules which apply to the whole territory of China. Since measures at issue should be compared with China's commitments to examine the consistency, the ordinary meaning of GATS schedule must be interpreted according to arts 31 and 32 of the Vienna Convention. If China claimed to apply art XIV of GATS to eliminate its obligations, the necessity test should be undertaken. Based on these legal points, Part III will examine whether there is any inconsistency between Chinese measures and its GATS obligations, and then discuss why they are considered as GATS inconsistencies.

III Inconsistencies between China's GATS Obligations and Relevant Domestic Legislation

Some people may wonder why this paper looks for GATS-inconsistencies 10 years after China's WTO accession, especially after the Trade Policy Review[50] and a special Transitional Review Mechanism.[51] Until now, the WTO Secretariat has reviewed China's

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48 Report of the Appellate Body, *China — Publications*, above n 23, [319].

49 Report of the Appellate Body, *US — Gambling*, above n 35, [291].

50 'Surveillance of national trade policies is a fundamentally important activity running throughout the work of the WTO. At the centre of this work is the Trade Policy Review Mechanism (TPRM). All WTO members are reviewed; the frequency of each country's review is varying according to its share of world trade' from 'Trade Policy Review' (visited on 2 June 2014) WTO <http://www.wto.org/english/tratop_e/tpr_e/tpr_e.htm>.

51 'To ensure China's implementation of its extensive commitments, a special transitional review mechanism was set up to monitor its compliance. Under this

trade policy four times[52] and Members have concluded the final Transitional Review Mechanism on China.

In the 2012 Trade Policy Review, the Secretariat reviewed eight sectors or subsectors, including financial services, telecommunications, transport, tourism, environmental services, postal and courier services, distribution services, and logistics services. However, this report provided only a brief review on the market, recent developments and the regulatory framework of the service sectors mentioned above. For example, the report indicated that domestic express delivery services are prohibited to foreign services suppliers but did not analyse whether this prohibition is consistent or inconsistent with China's obligations. Since the Secretariat reviewed trade and investment broadly but not in depth, so that it did not cover the trade policies of all service sectors and education services were not mentioned in the report at all.

With regard to the traditional review mechanism, the European Union stated that restrictions in the investment Catalogue continue to limit the access of 'foreign companies to key sectors of the economy, while high capital requirements, branching restrictions, or cumbersome or non-transparent licensing requirements reduce or effectively prevent market access in several services sectors'.[53] The service sectors affected could be legal services, express delivery services, telecommunications, construction services, distribution, financial services, and tourism, which were questioned by the European Commission in China's Transitional Review Mechanism.[54] In the

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mechanism, China's practice is subject to annual review by other members during the first eight years after its accession, followed by a final review before the end of the tenth year'. From Julia Ya Qin, 'Trade, Investment and Beyond: The Impac of WTO accession on China's Legal System' (2007) 191 *The China Quarterly* 720; Also see, China's Accession Protocol, above n 16, s 18.

52 The Secretariat has provided reports of Trade Policy Review on China in 2006, 2008, 2010, and 2012.

53 *Fourth Trade Policy Review of China*, European Union Statement (12 and 14 June 2012).

54 European Commission Directorate-General for Trade Committee on Services, above n 9.

tenth and final transitional review, the United States concentrated on the point that China still has problems that frustrate the efforts of foreign suppliers of banking, insurance, express delivery, telecommunications, legal and other services.[55] These Members also questioned the transparency, uniform application and judicial review.

Since the former GATS disputes against China proved that inconsistencies existed in questioned financial and distribution service sectors, it is necessary to examine the contentious issues concerned. However, because of the trade benefits to them, Members may encourage China to open wider its services to foreign investment, so that WTO-inconsistencies may not exist in all the questioned service sectors. Therefore, this paper compares China's GATS commitments with relevant domestic legislation, focusing on those questioned service sectors but also including other service sectors. The comparison reveals two potential inconsistencies in mail courier services and religious education services.

A *Mail Courier Service*

GATS Services Sectoral Classification List classifies postal and courier services as a subsector of communication services, which also includes telecommunications and audiovisual services.

In 1998, the State Post Bureau was established and separated from telecommunications,[56] which is now under the Ministry of Transport. After the WTO accession, China committed to opening the courier service market and allowed foreign service suppliers to establish joint

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55 Michael Punke, 'Remarks by the United States Ambassador to the World Trade Organisation on the China Transitional Review of the Protocol of Accession to the WTO Agreement (Geneva, Switzerland)' (2 June 2014) Office of the United States Representative <http://www.ustr.gov/about-us/press-office/press-releases/2011/november/remarks-united-states-ambassador-world-trade-orga>.

56 《国务院关于部委管理的国家局设置的通知》[Notice of the State Council on the Setup of National Bureau Administered by Ministries and Commissions] (People's Repubic of China) the State Council No 15, 19 March 2013.

venture enterprises and wholly foreign-owned subsidiaries. [57] However, at that time, the China Post Bureau was not only a state-owned enterprise, but also had administrative rights that included approving and authorising licences. In 2005, aiming to separate government functions from enterprises, the State Council issued the project of reforming post system, which reorganised the State Post Bureau as an administrative organ and established China Post Group Corporation (China Post) and Postal Savings Bank. China Post is owned solely by the State and is the Chinese postal authority by law. It provides universal postal services and offers special postal services entrusted by the Chinese government, while having commercial management over competitive lines of postal business. [58] On 1 October 2009, China's new Postal Law came into force, replacing the old law issued in 1986.

The United States had urged China to remove the discriminatory exclusion of foreign suppliers from a major segment of China's domestic express delivery market. [59] Although the Chinese Government has started authorising foreign companies to provide domestic express package delivery services in China, limitation and discrimination regarding mail courier services still exists. According to art 51 of the Postal Law, foreign companies may not invest in or operate domestic mail courier services. On top of that, arts 55 and 56 ruled that domestic courier enterprises may only operate mail courier services that are not specifically reserved for Chinese postal authorities by law. The same regulations can also be found in art 10 of Measures for Administration of Express Delivery Business

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57 *Trade in Services Schedule of Specific Commitments of the People's Republic of China*, WTO Doc GATS/S/C/135 (14 February 2002) 2. Communication Services B Courier Services.

58 'Introduction to China Post Group' China Post (2 June 2014) <http://English.chinapost.com.cn/html/Home/node/3-1.htm>.

59 United States Trade Representative, *2012 Report to Congress On China's WTO Compliance* (2012) 121.

Permits [60] and art 11 of Measures for the Supervision and Administration of Security of the Postal Industry.[61] Thus, foreign companies cannot conduct domestic mail courier services, but domestic courier companies can engage in certain domestic mail courier services.[62]

This issue has been included in the 2012 Trade Policy Review reported by the Secretariat[63] as '[f]oreign investors are not allowed to engage in domestic mail express delivery; this service is in the "prohibited" category in 2011 Catalogue for the Guidance of Foreign Investment Industries'.[64] Then, the report drew attention to the domination of four international integrators[65] on international express delivery business in China without further discussion of the prohibition.

Are these regulations inconsistent with China's commitments on market access and national treatment or other WTO obligations? In order to answer this question, this paper first interprets China's commitments on courier services, according to treaty interpretation principles used several times in GATS disputes. Then, it examines whether measures at issue are consistent with the market access commitments, national treatment commitments, and trading rights under the Accession Protocol and Working Party Report.

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60 《快递业务经营许可管理办法》[Measures for Administration of Express Delivery Business Permits] (People's Republic of China) the Ministry of Transport No 12, 1 September 2009.

61 《邮政行业安全监督管理办法》 [Measures for the Supervision and Administration of Security of the Postal Industry] (People's Republic of China) the Ministry of Transport No 2, 4 January 2011.

62 After the new Postal Law entered into force, Regulations of the State Council on the Specialized Scope of Postal Enterprises had listed in the legislative plan, but it has not been promulgated until April 2013, therefore the scope of courier services specifically reserved for Chinese postal authorities is not clear.

63 Trade Policy Review, WTO Doc WT/TPR/S/264 (8 May 2012) (Report by the Secretariat China) IV (5) (vii).

64 Ibid [323].

65 FedEx, DHL, UPS, and TNT: ibid [323].

1 *Interpreting China's Commitments*

As stated in the first section of this chapter, China's schedule will be interpreted in good faith and with regard to four aspects: the ordinary meaning, the context, the object and purpose, and the supplementary means of interpretation pursuant to arts 31 and 32 of the Vienna Convention.[66] Regarding China's commitments under sector 2, subsector B (see Table 2), the following paragraphs will interpret 'CPC75121, except for those currently specifically reserved to Chinese postal authorities by law' codified in the Vienna Convention. The interpretation will discuss the four aspects as a whole rather than analyse them separately, as in disputes reports.

The ordinary meaning of 'except for those currently specifically reserved to Chinese postal authorities by law' is that China's commitments on courier services exclude the service reserved to Chinese postal authorities by domestic law. As mentioned above, China Post is the Chinese postal authority and offers special postal services entrusted by the Chinese Government. However, it is not clear what courier service is reserved to China Post, so the domestic law will be used to interpret the scope of the reserved service. Since the word 'currently' is used in this sentence, the exception shall be the reserved service regulated by 'currently' active regulations at the time of China's WTO accession.

In 2001, regulations relating to postal services were the old Postal Law issued in 1986 and Rules for the Implementation of the Postal Law.[67] Article 8 of the old Postal Law stated that mail and other articles with characteristics of mail are to be operated exclusively by postal enterprise (China Post) except as otherwise provided by the State Council. Article 4 of the Rules also ruled:

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66 Report of the Panel, *China — Electronic Payments*, above n 36, [7.74]. See above, II.C *Interpretation*.

67 《中华人民共和国邮政法实施细则》[Rules for the Implementation of Postal Law of the People's Republic of China] (People's Republic of China) the State Council No 65, 12 November 1990.

> Without the entrustment by the postal enterprises, no unit or individual may operate posting and delivery of letters, postcards or other articles with characteristics of mail, except as otherwise provided by the State Council. The letters refer to those carriers which transit information by using sealed envelopes. The other articles with characteristics of mail refer to those carriers which transmit information by using such forms as symbols, images, or sounds.

It is clear that the exception reserved to China Post is the delivery of mail and other articles with the characteristics of mail, no matter whether they are delivered by postal services or courier services.

Regarding the CPC75121 in front of the sentence, the United Nations Central Product Classification is used as part of the context for the interpretation of China's commitments.[68] In *US — Gambling*, the United States wanted to rely on the other Members' schedules, not the CPC, for the interpretation of its own schedule, because the 1993 Scheduling Guideline[69] stipulated that Members were free to use or not to use the CPC.[70] However, the Panel was of the view that, 'even if it is not binding, the CPC, through the context of W/120 and the Scheduling Guideline, remains relevant for the interpretation of the United States schedule'.[71] Furthermore, as CPC75121 is listed in China's schedule, it is obvious that China chose to use the CPC to classify service sectors and subsectors.

According to the CPC classification, China made a commitment only on courier services (CPC7512), not on postal services (CPC7511). Four subclasses[72] are under postal services and two[73] under courier

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68 See above, II.C *Interpretation*: supplementary means of interpretation, the CPC and 2001 *Scheduling Guideline* were used as the supplementary resource to interpret the ordinary meaning in the *China — Electronic Payments* dispute.

69 *Schedule of Initial Commitments in Trade in Services*, WTO Doc MTN.GNS/W/164 (3 September 1993) (Explanatory Note), ('1993 Scheduling Guideline').

70 Report of the Panel, *US — Gambling*, above n 39, [6.98].

71 Ibid [6.90].

72 Postal Services include: postal services related to letters (CPC75111), postal services related to parcels (CPC75112), post office counter services (CPC75113), and other postal services (CPC75119).

services. In postal services, the subclass 'postal services related to letters' (CPC75111) refers to the delivery of letters and other articles with the characteristics of mail, and they can only be delivered by the national postal administration. [74] However, according to the explanatory notes of the multi-mode courier services (CPC75121), [75] the term also refers to the delivery of letters by courier whether for domestic or foreign destinations. Pursuant to the CPC, letters can be delivered by both postal and couriers services, yet only postal services letters (CPC75111) have to be delivered by the national postal administration. [76] Because mail courier services are not exclusively delivered by the national postal administration, China listed the reservation on mail courier services under CPC75121 in the GATS commitments.

Another question needs to be answered: why has China listed the exception? Pursuant to the regulations on mail delivery under the 1986 Postal Law and Rules for Implementation, postal and courier deliveries of mail were provided by the national postal administration and reserved to the China Post and Telecommunication Bureau (Youdian Ju) at that time. The historical background can be used to analyse the object and scope of these articles.

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73 Courier Services include: multi-mode courier services (CPC75121) and other courier services (CPC75129).

74 *Detail Structure and Explanatory Notes: CPCprov code 75111* (2 June 2014), United Nations Statistic Division <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=75111>.

75 'Services consisting of pick-up, transport and delivery services, whether for domestic or foreign destinations of letters, parcels and packages, rendered by courier and using one or more modes of transport, other than by the national postal administration. These services can be provided by using either self-owned or public transport media. Exclusions: Courier services for mail by air are classified in subclass 73210 (Mail transportation by air).'
Explanatory Note of CPC75121 Multi-modal courier services (2 June 2014), United Nations Statistic Division <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=75121>.

76 *Detail Structure and Explanatory Notes: CPCprov code 75129* (2 June 2014) United Nations Statistic Division <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=9&Lg=1&Co=75129>.

As mentioned above, China's postal system has been reformed twice: post and telecommunication were split in 1998, and the State Post Bureau was reorganised and China Post established in 2005. At the time of issuing the old Postal Law (1986) and the Rules for Implementation (1990), the Post and Telecommunication Bureau was the sole state-owned enterprise and also the administrational department. It was not specified whether the exception was for domestic or foreign destinations and whether the exception was for domestic courier companies or foreign-investment companies. In light of the above, the object of reserving mail courier services is not solely to exclude foreign companies but also all non-state-owned courier enterprises.

To conclude, the ordinary meaning of 'CPC75121, except for those currently specifically reserved to Chinese postal authorities by law' is that China made a commitment on courier services, but claimed a restriction on mail courier services applicable to both foreign courier suppliers and private courier enterprises without foreign participation, whether or not the destination was domestic or foreign. In this sense, Chinese measures cannot apply the exception to prohibit foreign companies operating mail courier services without the same prohibition applying to domestic courier enterprises.

Since the new Postal Law replaced the old law, it is necessary to examine the consistency of China's active measures with its GATS commitments.

2 *Market Access and National Treatment*

Article XVI of GATS obliges WTO Members to treat foreign services and service suppliers in accordance with the commitments in their schedules.[77] The second paragraph of art XVI lists six limitations that

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[77] Markus Krahewski, *National Regulation and Trade Liberalisation in Services* (Kluwer Law International, 2003), 82.

cannot be maintained or adopted unless a Member inscribes them in its schedule under the market access column.[78]

In the courier service subsector, China's commitments regarding market access set up specific requirements only on the types of legal entity or joint venture,[79] and do not inscribe limitations on the number of service suppliers, the total value of service transactions, the total number of natural persons, and the participation of foreign capital. The prohibition of foreign companies on investing in or operating domestic mail courier services relates to the scope of operation or the capability of foreign services suppliers, but does not belong to one of the six limitations under art XVI:2. Thus, the measures at issue do not maintain or adopt limitations under art XVI.

Regarding art XVII of GATS, services and service providers of other Members must not be discriminated against compared with national services and service providers. In China-Publications, the Panel discussed four elements to assess the consistency of a Member's measures concerning art XVII:[80]

- Whether the services at issue are inscribed in China's schedule;
- Whether the services at issue affect the supply of these services;
- The extent of China's national treatment commitment, including any conditions or qualifications, with respect to these services entered in its Schedule; and
- Whether these measures accord less favourable treatment to service suppliers of other Members, in comparison to domestic suppliers.

In China-Electronic Payment, the Panel combined two of the four elements into one and applied a 'three-part test to assess whether a

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78 Report of the Panel, *US — Gambling*, above n 39, [6.298].

79 See below, Table 1.

80 Report of the Panel, *China — Publications*, above n 25, [7.1272].

Member's measure is inconsistent with Article XVII'.[81] This paper will use the Panels' reports in these two disputes as reference when deciding whether regulations under the Postal Law and two Measures are inconsistent with art XVII.

First, China has committed 'none' on national treatment in Mode 1 (cross-border supply), Mode 2 (consumption abroad), and Mode 3 (commercial presence) of courier services, but the measures on prohibiting foreign companies investing in and operating domestic mail courier services involve only Mode 3. The mail delivery is a remote supply, but the remote supply amounts only to cross-border when the services supplier and the consumer are located in the territory of different Members.[82] The measures prohibit foreign companies providing mail courier services only within the territory of China where the supplier and consumer are both located in China. In this sense, measures at issue are not applicable to Mode 1. Mode 2 refers to a service that is supplied in the territory of one Member to the consumer of another Member, where the measures at issue are also not applicable. Mode 3 refers to where a service supplier of one Member establishes a commercial presence in another Member's territory to provide services, which is applicable to foreign courier companies in the territory of China. The full national treatment means that any limitations or restrictions on services or service suppliers from other Members can be regarded as a violation of China's GATS obligations.

Second, measures at issue actually limit the scope of operation of foreign courier companies, and they also have an effect on competition between foreign companies and domestic companies. Thus, measures have an effect on the supply of courier services by suppliers of other Members.

Third is the issue of whether measures prohibiting foreign companies from providing domestic mail courier services constitute less

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81 Report of the Panel, *China — Electronic Payments*, above n 36, [7.641].

82 Report of the Panel, *United States — Gambling*, above n 39, [6.32].

favourable treatment than the measures China accords to 'like services and service suppliers'.

GATS provides no definition of 'like services and service suppliers', but the Panel of China-Electronic Payments indicated that the provisions of art XVII 'further suggest that like services are services that are in a competitive relationship with each other'.[83] Meanwhile, the Panel also considered that 'determinations of like services and like service suppliers should be made on a case-by-case basis'.[84] On the other hand, 'being classed in separate subsector in the services classification may be regarded as a sufficient condition for unlikeness'.[85] In this case, measures at issue all refer to mail courier services under the classification of CPC75121, no matter whether provided by foreign companies or by domestic courier enterprises. Therefore, foreign companies (in art 51 of Postal Law) and courier enterprises (in arts 55 and 56) are like suppliers of courier services and they provide like services.

The concept of 'less favourable treatment' is clarified by art XVII:3 where it states that formally identical or different treatment is deemed less favourable 'if it modifies the conditions of competition in favour of services or service suppliers of the Member compared to like services or service suppliers of any other Member'. Articles 55 and 56 state that domestic courier enterprises may operate mail courier services except for those specifically reserved to Chinese postal authorities by law, which means courier enterprises without foreign investment can operate certain domestic mail courier services. In contrast, art 51 implies that foreign companies, including joint venture enterprises and wholly foreign-owned subsidiaries, are forbidden to provide domestic mail courier services. The measures de facto set up formally different treatments and modify the conditions of competition for foreign companies in relation to those for courier enterprises without foreign investment.

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83 Report of the Panel, *China — Electronic Payments*, above n 36, [7.700].

84 Ibid [7.701].

85 Aaditya Mattoo, 'National Treatment in GATS-Corner Stone or Pandora's Box' (1997) 31(1) *Journal of World Trade* 107, 128.

In light of the above, arts 51, 55 and 56 of Postal Law and similar regulations under two Measures are inconsistent with China's commitments on national treatment.

It may be argued that China has already listed mail courier services as the exception so that its commitments on national treatment are not applicable to mail courier services. But, as indicated above, the ordinary meaning of the exception is to prohibit all non-authorised enterprises from providing mail courier services, whether they are foreign suppliers or domestic suppliers, and China Post as the Chinese postal authority by law should be the only enterprise providing mail courier services. However, the new Postal Law allows domestic enterprises to provide certain mail courier services, which disagrees with the ordinary meaning of the exception. In this sense, applying the exception to discriminate against foreign and domestic suppliers is improper.

Nevertheless, the Chinese Government insists that art 51 is consistent with China's GATS commitment. Yuci Wang, Deputy Director of China's Postal Office, gave a speech during a press conference about the new Postal Law, in which he claimed that the regulations in the new Postal Law did not violate China's commitments to GATS.[86] Wang explained that except for the courier services that were specifically reserved to Chinese postal authorities by law and art 8 of the old Postal Law, the delivery of mail and other articles with the characteristics of male were the exclusive responsibility of Postal Enterprises. Moreover, the old Postal Law was still effective when China made its commitments to GATS. Therefore, the prohibition on foreign companies investing and operating domestic mail courier services did not violate China's commitments to GATS. This viewpoint is controversial.

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[86] Xiaoxia Zheng, 'The Regulation of 'Prohibiting Foreign Companies on Domestic Letter Courier Services does not Violate Commitments to WTO', *Sohu News* (2009) <http://news.sohu.com>.

In the new Postal Law, there is no regulation referring to those courier services 'currently specifically reserved to Chinese postal authorities'. If a foreign enterprise is willing to invest in courier services within the territory of China, the investor may check China's current Postal Law. The investor may not find an article or a clause about the range of reserved courier services other than a rule in art 51 that directly prohibits the participation of foreign enterprises in mail courier services. In the current and operative law, there is no evidence that mail courier services are reserved to Chinese postal authorities, and, in China's commitments, mail courier services are also not listed as prohibited to foreign enterprises. From the new law and commitments, it cannot be concluded that mail courier services are reserved to China Post. Furthermore, as discussed above, the object of listing the exception in China's schedule is to reserve mail courier services to the Chinese postal authority and to exclude the operation of foreign and private courier enterprises. In contrast, the new Postal Law provides less favourable treatment to foreign companies than to private courier enterprises without foreign involvement, which is inconsistent with the original object of listing the exception and also inconsistent with China's commitments on national treatment.

B *Religious Education*

Pursuant to the version 1.1 classification of the CPC, education services include primary education services (CPC921), secondary education services (CPC922), higher education services (CPC923), adult education services (CPC924), and other education services (CPC929), to which China has committed. Excluded education services in China's schedule are 'special education services, eg, military, police, political and party school education' and 'national compulsory educations'.[87]

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[87] China's Schedule of Specific Commitments, above n 57, 5. Educational Services, the column of sector or sub-sector.

According to China's commitment that 'joint schools will be established, with foreign majority ownership permitted',[88] Chinese-foreign joint schools, with or without foreign majority ownership, may provide primary, secondary, higher, adult and other education in the territory of China except for the exclusions listed in the schedule. However, under the Regulations on Chinese-Foreign Cooperation in Running Schools,[89] art 7 stipulates that Chinese-foreign cooperatively run schools shall not offer religious education. As already stated, the exception in China's commitments on education services does not include religious education. In this sense, the consistency of GATS in this measure needs to be examined.

1 *Consistency or Inconsistency*

It is obvious that the measure forbids foreign services and suppliers of religious education services. Thus, the test of consistency focuses on whether the religious education service is one of the exceptions.

In China's schedule, the exceptions include special education services and national compulsory education. According to art 2 of Compulsory Education Law,[90] compulsory education is a nine-year education, implemented uniformly by the state and received by all school-age children and adolescents. However, religious education is not part of compulsory education. Is the religious education one of the special education services? In this sense, the concept and scope of special education services decide whether the measure at issue is consistent with China's GATS obligations.

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88 Ibid, the Column of Liminations on Market Access, mode 3.

89 《中华人民共和国中外合作办学条例》[Regulations of the People's Republic of China on Chinese-Foreign Cooperation in Running School] (People's Republic of China) the State Council Decree No 372, 1 March 2003.

90 《中华人民共和国义务教育法》[The Compulsory Education Law of the People's Republic of China] (People's Republic of China) the Standing Committee, adopted at the 4th session of the 6th National People's Congress on 12 April 1986, and revised at the 22nd session of the 10th National People's Congress on 29 June 2006.

Apart from its mention in China's schedule, the term 'special education services' is also listed in Mexico's schedule with language education and commercial training to describe other education services (CPC 9290).[91] According to the explanatory note on CPC9290, the subclass includes education services for adults and sports instructors, tuition for driving licences, flying certificates and ship licences, management training, and education services not definable by level.[92] In Mexico's schedule, special education, language education and commercial training are not specified in the subclass of CPC9290, but are listed in the supplement. In this case, the term 'special education services' is used to embrace education services that are not listed in the sectoral classification. However, special education services are not classified as a service subsector by the CPC and are also not defined by the GATS document Education Services Background Notes by the Secretariat.[93]

As the scope of special education services is unclear, special education services in China's schedule were exemplified as military, police, political and party school education. Because the exemplification listed four types of education without the words 'and so on', it indicated that the excluded special education services involve only military, police, political and party school education and does not include any other services. Based on the ordinary meaning in the light of its context and purpose, the excluded special education services do not include religious education services. Therefore, the measure at issue prohibiting foreign services and service suppliers from supplying religious education services is inconsistent with China's GATS commitments.

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91 *Mexico-Schedule of Specific Commitments*, WTO Doc GATS/SC/56 (15 April 1994).

92 *Detail Structure and Explanatory Notes: CPC Ver. 1.0 Code 92900* (2 June 2014) United Nations Statistic Division <http://unstats.un.org/unsd/cr/registry/regcs.asp?Cl=3&Co=92900&Lg>.

93 *Education Services Background Notes by the Secretariat,* WTO Doc S/C/W/49 (23 September 1998).

2 *Protect Public Morals or Public Order Under art XIV (a) of GATS*

The Chinese Government may defend that the restriction on religious education is under art XIV(a) of GATS relating to the protection of public morals or orders. The provisions under art XIV allow Members to enact trade-restrictive regulatory measures, despite general obligations to liberalise trade under WTO.[94] However, it is necessary to assess whether the measure falls within the scope of art XIV(a). First, does the measure address public morals or public orders? Second, is the measure necessary?[95] Then, it has to ensure that the measure is applied to the legal standard under the chapeau of art XIV.

a) *Measure to 'Protect Public Morals' or to 'Maintain Public Order'*

The first question will be answered by one, examining whether the measure falls within the scope of public morals or public order as defined textually, and two, examining the specific measure in question to ensure that it is legitimately directed at that moral interest.[96]

Given the absence of a public order exception under GATT, an attempt is made here to decide whether morals and order should be defined individually or be fixed alike for all Members.[97] As well, the

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94 Jeremy C Marwell, 'Trade and Morality: The WTO Public Morals Exception after Gambling' (2006) 81 *New York University Law Review* 802, 804.

95 Elanor A Mangin, 'Market Access in China-Publications and Audiovisual Materials: A Moral Victory with a Silver Lining' 25 (2010) *Berkeley Technical Legal Journal* 279, 297. Also See, Report of the Appellate Body, *US — Gambling*, above n 35, [292]; Report of Panel, above n 20, [6.455].

96 Marwell, above n 94, 814.

97 Nicolas F Diebold, 'The Morals and Order Exceptions in WTO Law: Balancing the Toothless Tiger and the Undermining Mole' (2007) 11(1) *Journal of International Economic Law* 43, 45. See generally, Christoph T Feddersen, 'Focusing on Substantive Law in International Economic Relations: The Public Moral of GATT's Article XX(a) and Conventional Rules of Treaty Interpretation' (1998) 7 *Minnesota Journal of Global Trade* 75, 94; Miguel A Gonzalez, 'Trade and Morality: Preserving "Public Morals" without Sacrificing the Global Economy' (2006) 39 *Vanderbilt Journal of Transnational Law* 939,

Panel of *US — Gambling* applied the Vienna Convention to interpret art XIV(a). Although the Panel of *US — Gambling* suggested, 'Public order refers to the preservation of the fundamental interests of a society as reflected in public policy and law'[98] in conjunction with footnote 5[99] of GATS, the Panel concluded that, '[t]he content of these concepts (public morals and public order) for Members can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical, and religious values'.[100] Therefore, Members have the right to 'define and apply for themselves the concepts of "public morals" and "public order" in their respective territories, according to their own systems and scales of value'.[101]

Since the broad approach would be likely to allow Members to undermine the system of GATS,[102] Members need to prove that 'policy objective does indeed pursue the objective of protecting domestic public morals or public orders'.[103] The Appellate Body of *US — Gambling* indicated that a sufficient nexus between the objective of the measure and art XIV could be 'specified in the language of the paragraphs themselves, through the use of terms such as "relating to" and "necessary to"'.[104] Article 7 of the Regulation does not use the terms mentioned above in protecting public morals, but art 5 states that Chinese-foreign cooperation in running schools must comply with Chinese public morals and must not damage state

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970; Albena P Petrova, 'The WTO Internet Gambling Dispute as a Case of First Impression: How to Interpret Exceptions under GATS Article XIV(a) and How to Set the Trend for Implementation and Compliance in WTO Case Involving "Public Morals" and "Public Order" Concerns?' (2006) 6 *Richmond Journal of Global Law and Business* 45, 63.

98 Report of the Panel, *US — Gambling*, above n 20, [6.467].

99 Footnote 5 of GATS: 'The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society'.

100 Report of the Panel, *US — Gambling*, above n 20, [6.461].

101 Ibid [6.461].

102 Marwell, above n 94, 815, 816.

103 Diebold, above n 97, 74.

104 Report of the Appellate Body, *US — Gambling*, above n 35, [292]. Also see, Report of the Panel, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/R (29 January 1996) [16].

sovereignty, security and social interests. On this basis, the measure at issue falls within art XIV(a), and the prohibition of religious education aims to protect public morals or public order within the meaning of art XIV(a).

b) *Necessity of the Measure*

Based on the Appellate Body reports of *Korea — Beef*[105] and *EC — Asbestos*,[106] the Appellate Body of *US — Gambling* assessed the legal standard necessary in three aspects, which were applied in *China — Publications*,[107] and stated in the first section of this paper.

Regarding the contribution of measures to protect public morals and maintain public order, there is no doubt that extreme religious education controlled by foreigners could harm public morals, public interests, and even state sovereignty. Although the contribution of the measure is not immediately observable, the prohibition on religious education may prevent the potential damage caused by extreme religious education. For example, the Chinese Government strictly controls religious activities and education in Tibet and Xinjiang to ensure repression of national separatism.[108] In practical terms, regulation may, to some extent, address concerns about public morals and public order.

With regard to the restrictive effect of the measure on international commerce, the services trade on religious education is not really weighty. However, the measure's restrictive impact on trade should not be weighed only on trade of services, but also on those potential

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105 Report of the Appellate Body, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R (11 December 2000) [178].

106 Report of the Appellate Body, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R (12 March 2001) [172].

107 Report of the Appellate Body, *China — Publications*, above n 23, [252]; also see Report of the Appellate Body, *Korea — Beef*, above n 41, [163].

108 Daniel L Overmyer, 'Religion in China Today: Introduction' in Daniel L Overmyer (ed), *Religion in China Today* (Cambridge University Press, 2003) 1, 22.

service suppliers in the future, in particular on their right to trade.[109] The Appellate Body of *China — Publications* also stated that the assessment of the restrictive effect extended to 'the specific obligation of the covered agreements that the measure infringes'.[110] On the one hand, the measure imposes a restriction on foreign service suppliers who may engage in religious education and joint schools; on the other hand, because religious education was not listed as an exception, infringement of the measure also leads to a restrictive effect on the specific obligation of China's commitments on education.

Furthermore, if a WTO-consistent measure is reasonably available to China as an alternative means of realising its objective of protecting public morals or public order, the measure at issue is not under the meaning of art XIV. Article 36 of China's Constitution and Regulations on Religious Affairs[111] rules that Chinese citizens have freedom of religious belief, but no one may make use of religion to engage in activities that disrupt public order, impair the health of citizens, or interfere with the educational system of the State. Religious education services as one form of religious activity could also be governed by the Constitution and the Regulations on Religious Affairs. Only if foreign service providers disrupted public morals or public order, or injured state sovereignty, security or social interests through providing religious education services, could foreign services and service providers be prohibited from doing so. Moreover, regulations under the Constitution and the Regulation on Religious Affairs are existent and applicable now, so, as an alternative means, they would not impose an undue financial and administrative burden on China.

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109 Report of the Panel, *China — Publications*, above n 25, [7.788]. 'Specifically, we think that we should weigh not only the restrictive impact the measures at issue have on imports of relevant products, but also the restrictive effect they have on those wishing to engage in importing, in particular on their right to trade'.

110 Report of the Appellate Body, *China — Publications*, above n 23, [307].

111 《宗教事务条例》[Regulations on Religious Affairs] (People's Republic of China) the State Council, 7 July 2004.

To summarise, the measure contributes to protect public morals or maintain public order and leads to restriction on international commerce, but WTO-consistent measures are reasonably available as alternatives; therefore, the measure is not necessary to protect public morals or orders and not under the meaning of art XIV(a).

c) *The Legal Standard of the Chapeau of art XIV*

In *China — Publications*, the Panel and the Appellate Body decided not to examine whether the relevant measures satisfied the requirements of the chapeau, as the measures were not necessary to protect public morals and they were still not under the meaning of art XX. [112] However, China may claim that the Regulation on Chinese-Foreign Cooperation in Running Schools meets the requirements of the chapeau of art XIV. Thus the legal standard under the chapeau will be discussed.

The chapeau of art XIV means that the measures at issue are not 'applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on trade in services'.[113] Pursuant to the demonstration in the Appellate Body reports on *US — Gasoline*[114] and *US — Shrimp*,[115] the Panel of *US — Gambling* considered that the chapeau of art XIV aims to prevent the abuse of the exception and identifies three standards: arbitrary discrimination, unjustifiable discrimination, and disguised restriction on trade.[116] There is a certain amount of overlap of these standards, as 'a "disguised restriction" may be read as embracing restrictions amounting to arbitrary or

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112 Report of the Panel, *China — Publications*, above n 25, [7.912]; Report of the Appellate Body, above n 23, 614.

113 Report of the Panel, *US — Gambling*, above n 39, [6.570].

114 Report of the Appellate Body, *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc WT/DS2/AB/R (23 August 2001) [22], [25].

115 Report of the Appellate Body, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R (21 November 2001) [150], [156], [158].

116 Report of the Panel, *US — Gambling*, above n 39, [6.581].

unjustifiable discrimination in international trade'.[117] As well, 'the chapeau restricts not only overly discriminatory measures but also facially non-discriminatory measures whose application creates a discriminatory effect'.[118] Whatever standards the measure falls under, the measure must result in discrimination. Therefore, the measures under the meaning of art XIV should be non-discriminatory. The non-discriminatory requirement was the basis for the Panel and Appellate Body's ruling against the United States in *US — Gambling*,[119] and is most effective as a check on protectionism.[120]

In the specific situation of China, the prohibition on Chinese-foreign cooperation schools is discriminatory towards foreign services and service suppliers. In the light of China's commitments, the joint school is the only commercial presence providing education services in the territory of China, so prohibition on the joint school limits religious services provided by foreign service suppliers. Furthermore, domestic education institutions are not completely prohibited from providing religious education. Although there are about 4000 mosques in China, each of which in theory has a school,[121] there are no schools with foreign investment providing Islamic education. In higher education, institutions operated by religious organisations to train personnel are providing religious education, which is similar to an undergraduate university education, for example the China Islamic Institute and the Chinese Buddhist Academy.[122] Thus, the Regulation prohibiting religious education in joint schools is a discriminatory measure and satisfies the requirements of the chapeau.

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117 Ibid [6.580].

118 Mark Wu, 'Free Trade and the Protection of Public Morals: An Analysis of the Newly Emerging Public Morals Clause Doctrine' (2008) 33 *The Yale Journal of International Law* 215, 230.

119 Report of the Panel, *US — Gambling*, above n 39, [6.607], and Report of the Appellate Body, above n 35, [369], [371].

120 Marwell, above n 94, 830.

121 Elisabeth Alles, *Muslim Religious Education in China* (2 June 2014) China Perspectives <http://chinaperspectives.revues.org/230?&id=230>.

122 Hirotaka Nanbu, 'Religious in Chinese Education: From Denial to Cooperation' (2008) 30(3) *British Journal of Religious Education* 223, 232.

To conclude, the prohibition of Chinese-foreign cooperation running schools on religious education is inconsistent with China's GATS commitments and is not under the meaning of art XIV(a).

IV Conclusion and Suggestions

Realising the importance of trade in services to China's economy, the Chinese Government launched a succession of policies for promoting trade in services. In addition, aiming to encourage integration of trade in services and enhance competitiveness, China has made extensive trade in services commitments in its accession to WTO. However, the development of trade in services has not been as significant as trade in goods, and the six former GATS disputes against China show the tensions between China's GATS obligations and relevant domestic measures. Therefore, this paper aims to identify whether or not there are potential GATS-inconsistencies within China's domestic legislation which might impact China's trade in services. This paper, applying the comparative and evaluative research methods, provides original research on China's GATS obligations and domestic measures, and reveals the GATS-inconsistencies in mail courier services and religious education services. The discussion may help China's legislative and administrative organs to realise the shortcomings of the GATS-compliance on one hand, and on the other hand this paper tries to provide practical solutions and suggestions pointing at revealed GATS-inconsistencies instead of suggesting in principle.

With regard to the inconsistency on mail courier services, it can be assumed that if art 51 of the Postal Law is revised to say, 'Foreign courier enterprises may operate mail courier services except for those specifically reserved for Chinese postal authorities by law' (referring to arts 55 and 56), this conflict would be resolved. In this way, foreign courier enterprises would enjoy the same rights as domestic enterprises.

Article 55 specifies only official documents should be reserved to China Post and does not mention other services exclusively provided

by postal enterprises. A relevant judicial interpretation of the new Postal Law or a new regulation could be made to explain art 55 and define what 'exclusive courier services' are. After the establishment of the new Postal Law, reserved courier services became a hot issue and Provisions of the State Council on the Scope of Services Exclusively Provided by Postal Enterprises was listed in Notice of the General Office of the State Council on Issuing the Legislation Plan of the State Council (2009).[123] Provisions aimed to implement the amended Postal Law and clarify the scope of services exclusively provided by postal enterprises. However, although opinion was sought from domestic and foreign courier enterprises, provisions have still not been promulgated.

Regarding religious education services, if the Chinese Government insists on prohibiting Chinese-foreign running schools providing religious education, it should add religious education as one of the excluded special education services. The modification of China's schedule shall accord to art XXI of GATS and the procedures established by the Council for Trade in Services.

A Member can modify or withdraw its schedule when the following conditions and procedures are satisfied: (1) Article XXI is not applicable to 'new commitments, improvements to existing ones, or rectifications or changes of a purely technical character'[124] because the modification and rectification are governed by slightly different procedures.[125] (2) Three years must have elapsed from the date of entry into force of that commitment.[126] (3) A Member should notify

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123 《国务院办公厅关于印发国务院 2009 年立法工作计划的通知》[Notice of the General Office of the State Council on Issuing the Legislation Plan of the State Council (2009)] (People's Republic of China) the General Office of the State Council No 2 [2009], 7 January 2009.

124 *Procedures for the Certification of Rectifications or Improvements to Schedules of Specific Commitments*, WTO Doc S/L/84 (18 April 2000) (Adopted by the Council for Trade in Services) [1].

125 Mary E Footer, *An Institutional and Normative Analysis of The World Trade Organisation* (Martinus Nijhoff Publishers, 2006), 237.

126 *Procedures for the Implementation of Article XXI of The General Agreement on Trade in Services*, WTO Doc S/L/80 (29 October 1999) (Modification of

the Council for Trade in Services no later than three months before the modification, and the Secretariat would distribute the notification to all other Members in a secret document.[127] (4) The affected Member should communicate its claim in writing within 45 days after the date of the Secretariat's notification, and the modifying member may be free to implement the modification if no member has submitted a claim.[128] (5) The modifying Member should negotiate with the affected Member to reach agreement on any necessary compensation adjustment within three months following the date of a claim,[129] and then should send a joint letter and a report to the Secretariat.[130] (6) The affected Member might request arbitration, if agreement on compensation adjustment could not be reached by the end of the period of negotiations.[131] (7) If no affected Member submitted a timely arbitration, the modifying Member may be free to implement the modification.[132] (8) The modifying Member should implement modification in conformity with the findings of the arbitration and on a most-favoured-nation basis,[133] otherwise the affected Member may implement modification or withdraw in conformity with those findings of arbitration and solely with respect to the modifying Member as an exception of art II.[134]

Since China accessed WTO as a developing country, the arbitration body should include at least one arbitrator from a developing country Member if China requests it.[135] A vivid example of applying art XXI to modify the schedule is the United States' compensation offer and negotiations regarding gambling services. After the Appellate Body's report on the *US — Gambling* dispute, to maintain the ban on internet

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Schedule, Adopted by the Council for Trade in Services) [para.1], and art XXI:1(a).

127 Ibid [1], and art XXI:1(b).

128 Ibid [3].

129 Ibid [4], and art XXI:2(a).

130 Ibid [5].

131 Ibid [7], and art XXI:3(a).

132 Ibid [7], and art XXI:3(a).

133 Ibid [9], and arts XXI:2(b) and 4(a).

134 Ibid [16], and art XXI:4(b).

135 Ibid [10].

gambling, the United States chose to initiate the procedure under art XXI and withdraw its market access commitment with respect to cross border gambling services.[136] Although the United States took steps to modify its GATS commitments, Antiqua and the United States have not agreed on the compensation agreements. However, the European Community was successful on the withdrawal of the notification resulting from the enlargement of the European Community to include Austria, Finland and Sweden, which illustrated that art XXI provides 'a certain degree of flexibility to WTO Members to change and modify the impact of the Agreement on their regulatory regimes'.[137]

This paper does not guarantee that provided suggestions are practical. However, the provided suggestions can be regarded as some of the possible solutions to the GATS-inconsistencies. After all its advances, China's legislation concerning trade in services will develop step by step and will take some time.

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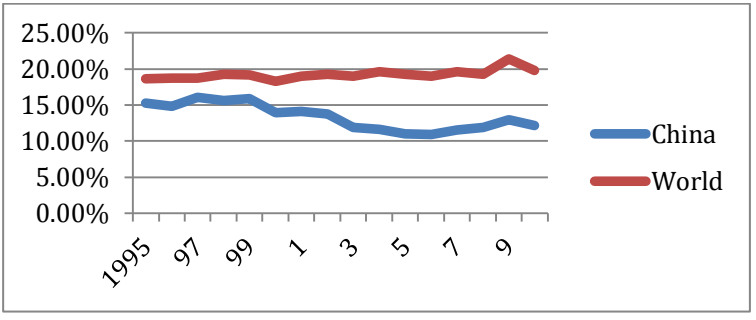
136 Isabel Feichtner, *The Law and Politics of WTO Waivers:Stability and Flexibility in Public International Law* (Cambridge University Press, 2012) [292]; Also see, *Minutes of Meeting on 22 May 2007 Statement of the Representative of the United States*, WTO Doc WT/DSB/M/232 (25 June 2007) [57].

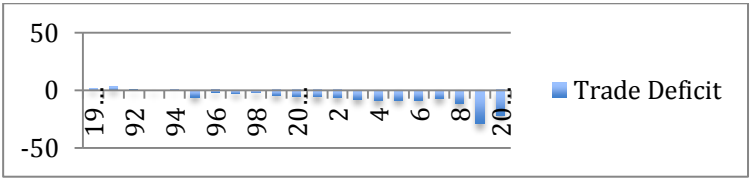
137 Nartova, 'Article XXI GATS Modification of Schedule' in Riidiger Wolfrum, Peter-Tobias Stoll and Clemens Feinäugle (eds), *WTO-Trade in Services* (Martinus Nijhoff Publisher, 2008), 477.

Figure 1 1995–2010 The Proportion of Trade in Services in Total Trade



Data from: WTO International Trade and Tariff Data; imports and exports of trade in services exclude government service, and imports and exports of merchandise trade.
<http://www.wto.org/english/res_e/statis_e/looking4_e.htm#summary>

Figure 2 1990–2010 Deficit of Trade in Services in China (billion US dollars)



From: 《China's Statistics of Trade in Services 2011》 Data Group; Source: The WTO's International Trade Statistics Database, data released by the Ministry of Commerce, PR China; According to the definition of trade in services by WTO, China's trade in services data do not include government services.

Table 1 China's Exports and Imports Proportion by Sectors, 2010

	Export	Import
Transports	20.1%	32.9%
Tourism	26.9%	28.6%
Communication	0.7%	0.6%
Construction	8.5%	2.6%
Insurance	1.0%	8.2%
Finance	0.8%	0.7%
Computer & Information	5.4%	1.5%
Royalties & License Fee	0.5%	6.8%
Consulting	13.4%	7.9%
Advertising, Media	1.7%	1.1%
Film, Audiovisual	0.1%	0.2%
Other Business Services	20.9%	8.9%

From: 《China's Statistics of Trade in Services 2011》 Data Group; Source: released by the Ministry of Commerce, P.R. China; According to the definition of trade in services by WTO, China's trade in services data do not include government services.

Table 2 China's Commitments on Courier Services

Sector or subsector	*Limitations on market access*	*Limitations on national treatment*	*Additional commitments*
B Courier Services (CPC 75121, except for those currently specifically reserved to Chinese postal authorities by law)	(1) None (2) None (3) Upon accession, foreign service suppliers will be permitted to establish joint ventures with foreign investment not exceeding 49%. Within 1 year after China's accession, foreign majority ownership will be permitted. Within 4 years after China's accession, foreign service suppliers will be permitted to establish wholly foreign-owned subsidiaries (4) Unbound, except as indicated in horizontal commitments	(1) None (2) None (3) None (4) Unbound except as indicated in horizontal commitments.	

RECENT TRENDS IN THE ENFORCEMENT OF AWARDS IN THE SOUTH-EAST ASIAN REGION

PETER MEGENS AND ANDREA STAUBER*

Abstract

Arbitration — International Commercial Arbitration — Enforcement of Awards — Recent Trends in the Enforcement of Awards in Australia — Recent Trends in the Enforcement of Awards in South-East Asia — Interference of the Courts in the Arbitral Process — Pro-Enforcement Bias — Procedural Discretion of Arbitral Tribunals — Pro-Arbitration Jurisdictions

In the context of commercial international arbitration, the grounds on which a domestic court may refuse to uphold and enforce an international arbitral award are limited. This is to ensure finality in the arbitration process. Courts faced with an application to challenge the enforcement of an international arbitral award must distinguish whether that challenge is genuine, or whether it is merely a disguised appeal on the merits. This article examines recent trends in how courts of various jurisdictions in Australia and South-East Asia

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approach their role in respect of the enforcement of international arbitral awards, and how those limited grounds of refusing to enforce awards have been applied on a case-by-case basis. While it can be said that a pro-arbitration bias continues to develop across the board, recent cases show that some jurisdictions are yet to adopt a stricter pro-enforcement approach if they wish to fall in line with the region's leading arbitration venues.

I INTRODUCTION

Arbitral awards are only as good as their enforceability. It is one of the major reasons that there exists an international framework of treaties and legislation that seeks to assure the recognition of arbitration agreements and the enforcement of foreign arbitral awards. The United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* is the most well-known of these.

Although the countries which are parties to the *New York Convention* should, in theory, apply standardised principles and approaches to enforcement, in practice this is not always the case. Different legal and political systems, as well as diverse social values, mean that different trends in the application of recognition and enforcement principles ultimately emerge. The grounds for denying enforcement of awards, which are found in art V of the *New York Convention*, have not always been uniformly interpreted. In particular, the public policy exception to enforcement has enabled countries to introduce an element of nationalist subjectivity which is not welcome to many in the arbitral community but which nevertheless exists.

In this paper, the authors will discuss the current trend in Australia in the enforcement of international arbitral awards, and compare this to the enforcement trends emerging in the South-East Asian region including Singapore, Hong Kong, Indonesia and Malaysia.

II EXCEPTIONS TO THE ENFORCEMENT OF ARBITRAL AWARDS

By far the most significant instrument which exists in relation to the trans-national recognition and enforcement of arbitral awards, at least for those of its 149 signatory countries that have ratified it, is the *New York Convention*.[1] This multilateral treaty underpins the international arbitration framework, and with the help of the United Nations Commission on Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the 'Model Law'), it has in theory established a common approach for commercial arbitration around the world.

A *The New York Convention*

The *New York Convention* essentially allows a successful party to seek recognition and enforcement of an international arbitral award in any of the signatory countries (referred to as 'Convention countries') in which the unsuccessful party may have assets to satisfy the award.

The majority of arbitral awards are enforced under the *New York Convention* without issue. However, art V of the *New York Convention* sets out the limited grounds on which a court of a Convention country *may* refuse to recognise or enforce an international arbitral award:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or,

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[1] See *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) (the '*New York Convention*'). New York Convention Countries (2009) New York Arbitration Convention <http://www.newyorkconvention.org/contracting-states/list-of-contracting-states>.

failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decision on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

B *The Model Law*

In the absence of an art V exception being established by the party seeking to resist enforcement of an award, a court in a Convention country should, in theory, recognise and enforce the foreign award.

The principles relating to recognition and enforcement, and importantly, exceptions to recognition and enforcement, are also captured in ch VIII (arts 35 and 36) of the UNCITRAL Model Law. Its provisions give effect to the *New York Convention* with a view to harmonising international arbitration laws in the arbitration regimes of Convention countries.

The grounds on which an enforcing court may refuse recognition or enforcement of an arbitral award are set out in art 36, and are identical to those listed in art V of the *New York Convention* (as set out above).

Article 34 of the Model Law provides that the same art V grounds may also be grounds for a supervising court to set aside an arbitral award. Given that art 34 concerns the same grounds and principles as those relating to recognition and enforcement of awards, this paper will also refer to recent matters in which award debtors have sought to have arbitral awards set aside either as an alternative argument, or in addition to an application to oppose enforcement. Such setting aside applications should only take place in the supervising courts, usually the courts of the seat, but there have been occasions when the enforcing court has also decided, when refusing enforcement, to purport to set aside the award.[2] As with the *New York Convention*, the Model Law may be enacted by a Convention country by way of domestic legislation. In doing so, Convention countries may amend or adapt how the Model Law will apply in domestic law. It is always important to consider whether there are any amendments or additional provisions in the particular jurisdiction in which the Model Law has been adopted.

III THE AUSTRALIAN POSITION

A *Legislative Framework*

The Commonwealth *International Arbitration Act 1974* (the '*International Arbitration Act*') ratifies the *New York Convention* and gives the force of law to the Model Law in Australia in relation to international arbitrations. The *New York Convention* requirements, adapted slightly for Australian conditions, can be found in pt II (ss 3 to 14) of the *International Arbitration Act*.

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2 See *Transfield Philippines, Inc v Luzon Hydro Corporation* (Supreme Court of the Republic of the Phillipines, GR No 146717, 22 November 2004), where the court purported to do just that, although Singapore was the seat.

Although parties were able to 'opt-out' of the Model Law prior to the significant amendments made in 2010, the Model Law now applies to all international arbitrations conducted in Australia. Wholly domestic arbitration disputes are governed by the *Commercial Arbitration Acts* of each State and Territory.[3] The *International Arbitration Act* incorporates the Model Law in pt III (ss 15 to 30A) with various modifications and adaptions for Australian requirements.

The *International Arbitration Act* limits the grounds on which enforcement of a foreign international award should be refused to those set out in the *New York Convention* and the Model Law. Section 8(3A) of the *International Arbitration Act* provides that the court has no residual discretion to refuse enforcement of a foreign international arbitral award on any grounds other than those provided in ss 8(5) and 8(7), being the grounds set out in art V of the *New York Convention*. Article 36 of the Model Law makes provision, in addition and on the same basis, for enforcement of non-*New York Convention* awards or for domestic international arbitral awards.[4]

B *Recent Enforcement Decisions in Australia*

Generally speaking, Australia is recognised as an arbitration-friendly venue with a desire for a harmonious development of international arbitral law. The decisions discussed below highlight that, on the whole, Australia is continuing to progress as a pro-arbitration jurisdiction, despite the continuing debate as to whether the Federal Court should have exclusive jurisdiction over international arbitral awards, both foreign and domestic, to the exclusion of the State and Territory Supreme Courts. A review of some recent decisions is set out below.

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3 At the time of writing, the Australian Capital Territory was still to enact the new *Commercial Arbitration Act* to fall in line with the other Australian States and Territories which had already done so.

4 *International Arbitration Act 1974* (Cth) s 3 defines foreign award to mean 'an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the New York Convention applies'.

1 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC*[5]

A Mongolian arbitral tribunal made an award in favour of Altain Khuder LLC ('Altain Khuder') (a Mongolian company) against IMC Mining Inc ('IMC Mining') and a related Australian entity, IMC Mining Solutions Pty Ltd ('IMC Solutions').[6] When both IMC Mining and IMC Solutions failed to make payment in accordance with the award, Altain Khuder applied to the Victorian Supreme Court for an enforcement order against both IMC Mining and IMC Solutions. A central issue in the case was how the Australian entity, IMC Solutions, had come to have an award made against it when it did not clearly appear to be a party to the underlying contract (and therefore, to the arbitration agreement). IMC Solutions relied on ss 8 and 9 of the *International Arbitration Act* and art V of the *New York Convention*.

At first instance, the Supreme Court made an order for enforcement against both respondents, delivering a very pro-arbitration judgment.[7] The court noted that under the *New York Convention* and the *International Arbitration Act*, the party resisting enforcement has the 'heavy' onus of showing that the award went beyond the scope of the arbitration clause.[8] The learned judge rejected IMC Solutions' argument that it was not bound by the arbitral award. IMC Solutions had claimed it was not a party to the arbitration agreement, had not been given notice of the arbitration and therefore had not had an opportunity to be heard. On the evidence, his Honour was not satisfied of these matters, in respect of which he held that the party resisting enforcement had the burden of proof. Further, his Honour found that IMC Solutions were estopped from raising points that it could have made either in the arbitration or by way of a challenge in

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5 (2011) 282 ALR 717; [2011] VSCA 248 ('*IMC v Altain Khuder*').

6 By the time of the appeal, IMC Mining Solutions Pty Ltd had changed its name to IMC Aviation Solutions Pty Ltd.

7 *Altain Khuder LLC v IMC Mining Inc* (2011) 276 ALR 733; [2011] VSC 1.

8 Ibid [61]–[63].

the Mongolian courts. In a separate judgment,[9] the learned judge also awarded indemnity costs against IMC Solutions, holding that an unsuccessful enforcement challenge to arbitral awards is one category of special circumstances which allows a court to exercise its unfettered discretion to award indemnity costs. In doing so, his Honour followed Hong Kong authorities to the same effect.

On appeal, the Victorian Court of Appeal overturned the first instance decision, finding that the Mongolian arbitral tribunal had exceeded its jurisdiction by making an award against a non-party and refusing enforcement on those grounds. The Court of Appeal held that it was able to fully rehear jurisdictional questions on an enforcement application if permitted by ss 8 and 9 of the *International Arbitration Act*, thereby adopting the approach in *Dallah Real Estate and Tourism Holding Company v Ministry of Religious Affairs, Government of Pakistan*.[10] Following a review of the Mongolian law, the court ruled that IMC Solutions was not a party to the arbitration agreement. The court also allowed the appeal on the basis that it would be a breach of the rules of natural justice and against public policy in Victoria to permit enforcement of the award, especially in the face of what it saw to be inadequate reasons in the award. Finally, the court commented that an unsuccessful challenge to the enforcement of an arbitral award generally does not warrant an order of indemnity costs and that costs should be dealt with in the usual fashion.

Importantly, in their joint judgment, the majority found that to invoke the court's jurisdiction to enforce an arbitral award, an award creditor must establish on a prima facie basis that:

- an award has been made by a foreign arbitral tribunal granting relief to the award creditor against the award debtor;
- the award was made pursuant to an arbitration agreement; and

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9 *Altain Khuder LLC v IMC Mining Inc (No 2)* [2011] VSC 12.

10 [2011] 1 AC 763.

- the award creditor and the award debtor are parties to the arbitration agreement.

If these three issues are not readily apparent from the face of the award and the arbitration agreement, the award creditor must establish these matters on the balance of probabilities. Once it has done so, the onus is then on the award debtor to prove, again on the balance of probabilities and not some heavier onus, that there is a ground on which enforcement should be refused. The decision appears to be at odds with jurisprudence in other jurisdictions about how the *New York Convention* should be applied, and may be seen to be generally out of step with the Federal Court approach which the authors will comment on below.

2 *Westport Insurance Corporation v Gordian Runoff Ltd*[11]

Notwithstanding that this case relates to Australia's domestic arbitration regime, this decision sparked concerns by Australian and international commentators alike about whether its judgment concerning the form and quality of reasons required in an award would flow through to attempts to enforce an international arbitral award in Australia.

Gordian Runoff Ltd ('Gordian') had been successful in obtaining an arbitral award against Westport Insurance Corporation ('Westport') in relation to a dispute about entitlements under a reinsurance contract. Westport sought to set aside the arbitral award on the basis that there was a broad error of law in the arbitral award arising from the tribunal's allegedly incorrect interpretation and application of s 18B of the *Insurance Act 1902* of New South Wales.

At first instance, the NSW Supreme Court set aside the arbitral award for reasons which included that the three experienced arbitrators who constituted the tribunal 'were clearly wrong in their approach to the

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[11] (2011) 244 CLR 239; 281 ALR 593 (*Westport v Gordian*) on appeal from *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74; [2010] NSWCA 57.

proper construction and application of s 18B [of the *Insurance Act 1902*]'.[12] The court was not satisfied with the reasons given in the award by the tribunal in reaching its conclusions.

The first instance decision was overturned by the Court of Appeal, where it was held that 'though succinct, and perhaps to a degree translucent', [13] the reasons delivered by the arbitral tribunal sufficiently revealed the arbitrators' approach and indicated to the parties why they had reached the conclusions to which they came. In particular, the Court of Appeal found that the tribunal had satisfied the requirements of s 29 of the pre-amendment *Commercial Arbitration Act 1984* of New South Wales that an arbitral award must include 'a statement of the reasons for making the award'.[14] In doing so, the Court of Appeal did not follow the decision of the Victorian Court of Appeal in *Oil Basins Ltd v BHP Billiton Ltd:*[15]

> Although this was a domestic arbitration matter, the Court of Appeal reviewed and considered authorities and commentary on international commercial arbitration as well as the Model Law, and found that there was no express support for the requirement that arbitral awards be reasoned to the standard of a judge in a common law system. The majority stated that the requirements of s 29 of the *Commercial Arbitration Act* are satisfied if the arbitrator provided a 'crisp summary'[16] along the lines set out by Lord Justice Donaldson in the English Court of Appeal decision of *Bremer Handelsgesellschaft mbH v Westzucker GmbH (No 2)*,[17] namely that:
>
> > 'All that is necessary is that the arbitrators should set out what, on their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. That is all that is

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12 *Westport Insurance Corporation v Gordian Runoff Ltd* [2009] NSWSC 245, [105].

13 *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74; [2010] NSWCA 57, [186].

14 See *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74; [2010] NSWCA 57, [203].

15 [2007] VSCA 225.

16 *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74; [2010] NSWCA 57, [220].

17 [1981] 2 Lloyd's Rep 130 ('*Bremer*').

> meant by a reasoned award.[18]

The High Court overturned the Court of Appeal decision and found that, in the circumstances, the arbitrators did not give sufficient reasons. It had applied the *Bremer* test, but reached a different outcome to that of the Court of Appeal. The majority of the High Court held that:

- the nature and extent of reasons for an award depends on the circumstances of the particular dispute;
- if the dispute involves a complex question of law, reasons akin to a judicial standard may be required;
- inadequate reasons constitute a manifest error of law on the face of the award for the purposes of the *Commercial Arbitration Act 1984* (NSW);
- in this case, the arbitrators were obliged to explain the reasons why each of the criteria in the relevant Act were met (and failed to do so); and
- generally, the remedy for inadequate reasons is to remit the matter back to the arbitral tribunal for further reasons (although in this case, it was appropriate to set aside the award).

Westport v Gordian remains authority for the principle that the standard of reasons required to be given by an arbitrator in an Australian domestic arbitration is not a 'judicial standard', but will depend on the particular circumstances of the case. This includes having regard to, amongst other things, the complexity of the issues in dispute and the amounts at stake.[19]

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18 *Bremer* [1981] 2 Lloyd's Rep 130, 132–3.

19 See *Thoroughvision Pty Ltd v Sky Channel Pty Ltd* [2010] VSC 139 for an attempt by the Supreme Court of Victoria to reconcile the *Gordian* and *Oil Basins* decisions.

3 *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd*[20]

This matter related to a dispute between Chinese-registered company TCL Air Conditioner (Zhongshan) Co Ltd ('TCL') and Australian-registered company Castel Electronics Pty Ltd ('Castel') in relation to an alleged breach of an exclusive distribution agreement by TCL. In July 2008, Castel submitted the dispute to arbitration before a three-member tribunal seated in Melbourne, Australia. In December 2010, the tribunal rendered two awards in Castel's favour; the first was an award for AUD2.8 million in damages, and the second was an award for costs in the amount of AUD732 500.

Following TCL's failure to pay the awarded amount, Castel applied to the Federal Court in March 2011 to enforce the awards. TCL opposed the enforcement sought by Castel, on the grounds that:

- The Federal Court lacked jurisdiction to enforce arbitral awards. TCL argued that as the awards were rendered in Australia, they did not fall within the *International Arbitration Act*'s definition of 'foreign awards' and were instead 'non-foreign awards'. TCL argued that under the *International Arbitration Act*, the Federal Court and the State and Territory Supreme Courts only have jurisdiction to enforce foreign awards, but not non-foreign awards.
- The awards should not be enforced because of an alleged breach of natural justice by the tribunal (and enforcement would therefore be against public policy). TCL contended that the tribunal's rejection of evidence given by the parties' experts and instead coming to a finding that was allegedly not directly supported by expert evidence was a breach of both the no evidence rule (ie, there is no evidence to support the tribunal's

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[20] *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd* [2012] FCA 21 ('*Castel Electronics v TCL*'); See *Castel Electronics Pty Ltd v TCL Air Conditioner (Zhongshan) Co Ltd (No 2)* [2012] FCA 1214 ('*Castel Electronics v TCL*').

factual finding) and the hearing rule (ie, TCL was not given a reasonable opportunity to address the relevant findings of the tribunal given that those findings were not based on any argument put before it).

In an initial judgment in January 2012, Justice Murphy dealt with the jurisdiction ground.[21] His Honour held that given that the *Judiciary Act 1903* confers on the Federal Court jurisdiction in any matter arising under any federal law, it follows that the Federal Court has jurisdiction to enforce both foreign and non-foreign awards made under the Model Law. His Honour's finding is in part based on the 2010 amendment to s 21 of the *International Arbitration Act* which removed the parties' ability to 'opt-out' of the Model Law, which amendment was found to apply retroactively to arbitration agreements entered into prior to when the 2010 amendments came into effect.

In a further judgment in November 2012,[22] Justice Murphy rejected TCL's submission that the award should be set aside, holding that there had been no breach of natural justice and the enforcement would not be contrary to public policy. In doing so, his Honour:

- found that 'public policy' has a similar meaning in relation to both an application to set aside an award and one to enforce an award;
- confirmed that the wording of arts 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law (being the art V grounds) provide that a court *may* set aside an award or refuse enforcement if it finds that the award is in conflict with or contrary to public policy, and therefore the powers to set aside an award or refuse enforcement on grounds of public policy are discretionary; and
- looked to how other Convention countries have approached matters of public policy, with a view to achieving international uniformity in the meaning and operation of 'public policy'.

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21 See *Castel Electronics v TCL* (2012) 201 FCR 209; [2012] FCA 21.

22 See *Castel Electronics v TCL* [2012] FCA 1214.

As to the alleged breach of the no evidence rule, Justice Murphy found that the tribunal was entitled to disregard TCL's expert evidence as it was based on incomplete data and incomplete evidence, and further entitled to arrive at the factual finding that it made. As to the alleged breach of the hearing rule, his Honour confirmed that an arbitrator is not entitled to decide a matter by taking into account evidence or arguments extraneous to the hearing without giving the parties notice and an opportunity to respond. However, his Honour held that in these circumstances, it was reasonably foreseeable to a reasonable litigant that the reasoning of the type that led to the tribunal's findings was possible. Ultimately, Justice Murphy found that even if there had been a breach of the rules of natural justice, such a breach was minor and not one that could be described as offending fundamental notions of fairness or justice.[23]

His Honour noted that there is international support in favour of Convention countries adopting a narrow approach, and agreed that a court should not exercise its discretion to refuse enforcement unless the award seeking to be enforced is an 'offence to fundamental notions of fairness and justice'.[24]

4 *TCL Air Conditioner (Zhongshan) Co Ltd v The Judges of the Federal Court of Australia*[25]

Arguably the most significant recent decision relating to the enforcement of international arbitral awards in Australia is the constitutional challenge that arose out of *Castel Electronics v TCL*. Prior to the Federal Court's decision being handed down, TCL applied to the High Court seeking orders restraining the Judges of the Federal Court from enforcing the awards and/or orders quashing Justice Murphy's judgments in relation to the Federal Court proceedings.

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23 Ibid [178].

24 Ibid [50]. This decision was appealed to the Full Federal Court, which dismissed the appeal and upheld the learned judge's decision. At the time of writing, the Full Federal Court's reasons for its decision have not been published.

25 (2013) 295 ALR 596; [2013] HCA 5.

In summary, TCL contended that the *International Arbitration Act*, through the Model Law:

- effectively forces the Federal Court to carry out a purely administrative 'rubber stamping' exercise of enforcing arbitral awards even when there is a prima facie error of law, which substantially impairs the court's institutional integrity; and
- impermissibly vests the judicial power of the Commonwealth (conveyed by ch III of the *Constitution*) on the arbitral tribunal that made the award, by making the tribunal's award a binding order of the Federal Court without review by the court of its legal correctness.

In March 2013, a seven-member bench of the High Court unanimously rejected TCL's arguments and upheld the constitutional validity of the *International Arbitration Act*. All Justices of the High Court (in two separate joint judgments) pointed to the distinction between an arbitrator deciding what the rights of the parties are, and a court considering the successful party's right to enforce the arbitrator's decision. The High Court found that by agreeing to arbitrate, the parties inherently agree to accept the arbitrator's binding decision, be it right or wrong. Therefore, the Federal Court is not 'rubber stamping' the arbitrator's decision, but rather exercising judicial power to compel the parties to comply with the arbitrator's decision as per their agreement.

The High Court's decision is important as it signifies the judiciary's support for Australia's international arbitration system, and confirms the Federal Court's jurisdiction to enforce arbitral awards.

5 *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd*[26]

In this case an award was made by an arbitral tribunal seated in

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[26] *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468; [2013] FCAFC 109 on appeal from *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882.

London in favour of a Singaporean company against an Indian company and it's managing director. An application was made to enforce the award in the Federal Court of Australia. The award debtors held shares in Australian companies and orders were sought in aid of enforcement, for receivers to be appointed over the shares in question in order to avoid their dissipation.

The award debtors resisted enforcement of the award on two grounds. First, it was submitted that they were denied a reasonable opportunity by the tribunal to present their case in the arbitration proceedings (in breach of s 8(5)(c) of the *International Arbitration Act*). Second, in the alternative, they submitted that the said failure by the tribunal was a breach of the rules of natural justice and that therefore an enforcement of the award would be contrary to the public policy of Australia (that is, ss 8(7)(b) and 8(7A)(b) of the *International Arbitration Act*).

In the Federal Court, Justice Foster briefly reviewed the facts and found that the award debtors had been given a reasonable opportunity to present their case. His Honour also found that, as the award debtors had sought to set aside the award on the same grounds in the seat of the arbitration, there was an issue estoppel which precluded the debtors from raising the same arguments to resist enforcement in another jurisdiction. Justice Foster said:

> The English High Court of Justice is the court of the seat of the arbitration. Under the Convention and the [*International Arbitration Act*], any application to set aside the Award must be made in that Court. Even if there were no issue estoppel or *res judicata*, it would generally be inappropriate for this Court, being the enforcement court of a Convention country, to reach a different conclusion on the same question as that reached by the court of the seat of the arbitration. It would be a rare case where such an outcome would be considered appropriate.[27]

Justice Foster's decision was upheld by the Full Court of the Federal Court on appeal.[28] The Full Court found it unnecessary to determine

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27 *Coeclerici Asia (Pte) Ltd v Gujarat NRE Coke Ltd* [2013] FCA 882, [103] (emphasis in original).

28 *Gujarat NRE Coke Ltd v Coeclerici Asia (Pte) Ltd* (2013) 304 ALR 468; [2013] FCAFC 109.

whether issue estoppel applied in this case, but noted that the issue is 'one of importance and difficulty [and] is not resolved in a clear way by an authority binding on this court'.[29] The Full Court noted that it will generally be inappropriate for an enforcement court of a Convention country to reach a different conclusion on the same question of asserted procedural defects as that reached by the court of the seat of arbitration.[30]

The *New York Convention* and the Model Law do not expressly recognise the concept of issue estoppel or *res judicata*. This matter shows that the Australian Federal Court is willing to go one step further if necessary to ensure international harmonisation.

6 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)*[31]

In this matter, Justice Foster of the Federal Court considered an application by a Luxembourg company, Traxys Europe SA, to enforce an award made in England against the respondent Balaji Coke Industry Pvt Ltd, an Indian corporation. The respondent resisted the enforcement on three grounds, one of which was that the court should refuse to enforce the award as to enforce it would be contrary to public policy. The respondent argued that enforcement of the award was against the public policy of Australia because it would allow a party to commence and to maintain a futile application to enforce a foreign award, and do so in circumstances where there is an unresolved application to set aside the award before the Indian courts. Considering the scope of the public policy exception to enforcement, Justice Foster noted:

> Clearly the pro-enforcement bias of the Convention, as reflected in the [*International Arbitration Act*], requires that the public policy ground for refusing enforcement not be allowed to be used as an escape route for a defaulting award debtor. That ground should not be made available too readily, lest it undermine the purpose of encouraging and facilitating the

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29 Ibid [64].

30 Ibid [65].

31 *Traxys Europe SA v Balaji Coke Industry Pvt Ltd (No 2)* (2012) 201 FCR 535; [2012] FCA 276.

> enforcement of foreign arbitral awards embodied in the Convention and in the [*International Arbitration Act*]. As previously observed, arbitration facilitates international trade and commerce by providing an efficient and certain dispute resolution process to commercial parties. If the enforcement of awards is to be subjected to the vagaries of the entire domestic public policy of the enforcement jurisdiction, there is the potential to lose all of the benefits of certainty and efficiency that arbitration provides and which international traders seek.[32]

His Honour noted that it is the public policy of the enforcement state which matters, and that there is no express reference to any concept of international or transnational public policy.[33] His Honour concluded that the expression 'public policy', particularly when used in s 8(7)(b) of the *International Arbitration Act*, means:

> those elements of the public policy of Australia which are so fundamental to our notions of justice that the courts of this country feel obliged to give effect to them even in respect of claims which are based fundamentally on foreign elements such as foreign awards under the [*International Arbitration Act*].[34]

His Honour then went on to clarify that:

> the scope of the public policy ground of refusal is that the public policy to be applied is that of the jurisdiction in which enforcement is sought, but it is only those aspects of public policy that go to the fundamental, core questions of morality and justice in that jurisdiction which enliven this particular statutory exception to enforcement. The public policy ground does not reserve to the enforcement court a broad discretion and should not be seen as a catch-all defence of last resort. It should not be used to give effect to parochial and idiosyncratic tendencies of the courts of the enforcement state.[35]

In the same matter, his Honour found that it was not a condition of being granted leave to enforce the award in Australia that the applicant had to prove that the respondent had assets in Australia.[36]

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32 Ibid [90].
33 Ibid [94].
34 Ibid [96].
35 Ibid [105].
36 Ibid [79]–[86].

7 *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd*[37]

Eopply New Energy Technology Co Ltd commenced proceedings in the Federal Court to enforce an arbitral award made in China against the respondent, Australian-registered company EP Solar Pty Ltd. One week later, the respondent had liquidators appointed. Justice Foster of the Federal Court had to consider whether leave to enforce should be granted in light of s 500(2) of the *Corporations Act 2001* (Cth), which provides that no action or other civil proceeding is to be proceeded with against a corporation after the passing of a resolution for the voluntary winding up of that company without the leave of the court.

His Honour granted leave to enforce the foreign judgment relying upon three considerations. First, granting leave would cause virtually no additional expense or inconvenience for the respondent, as judgment would be entered immediately.[38] Second, given the pro-enforcement objectives of the *International Arbitration Act*, it is preferable for the court to allow for easier recovery by the award creditor by granting leave to enforce the award, rather than leaving the award creditor 'to the vagaries of the proof of debt process'.[39] Third, the liquidators did not oppose the application for enforcement.[40]

8 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd*[41]

The applicant, Dampskibsselskapet Norden A/S, sought to enforce two arbitral awards against the respondent, Beach Building & Civil Group Pty Ltd, under the *International Arbitration Act*. The arbitration had been seated in London under the auspices of the Rules of the London Maritime Arbitrators Association. The respondent resisted enforcement on two grounds: first, that it was not a named

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37 *Eopply New Energy Technology Co Ltd v EP Solar Pty Ltd* [2013] FCA 356.
38 Ibid [23].
39 Ibid [23].
40 Ibid [17], [23].
41 (2012) 292 ALR 161; [2012] FCA 696.

party to the arbitration agreement contained in the Charterparty and therefore it was not bound by the awards; and second, that the arbitration agreement was invalid because of s 11 of the *Carriage of Goods by Sea Act 1991* (Cth).

Justice Foster of the Federal Court upheld the finding of the arbitrator, namely, that it was clear that the respondent was the proper party and had merely been misdescribed on the Charterparty agreement, and that the arbitrator had been within his rights to correct the misnomer.[42]

Of particular interest is his Honour's discussion about the requirements under s 9(1) of the *International Arbitration Act* for an award creditor to produce the arbitration agreement under which the award purports to be made. His Honour preferred the approach of the English courts over the approach of the Victorian Court of Appeal in *IMC v Altain Khuder*,[43] finding that the requirements of s 9(1) were satisfied when the applicant simply tendered copies of the two arbitral awards and a copy of the Charterparty agreement, under which the awards were 'purported' to be made.[44] His Honour found that once the applicant had established the s 9(1) requirements, the burden shifts to the respondent to establish one of the grounds specified in ss 8(5) and 8(7) of the *International Arbitration Act* to succeed in resisting enforcement of the awards.[45] To do that, the respondent was required to do more than just point to the name stated on the Charterparty agreement and note that it was different to its own (as it had essentially done in this case).[46]

Ultimately, leave to enforce was denied on the basis that the

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42 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161; [2012] FCA 696, [96]–[97].

43 Ibid [75]; in particular, the approach by Mance LJ in *Dallah Real Estate v Ministry of Religious Affairs* [2010] 2 Lloyd's Rep 691.

44 *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* (2012) 292 ALR 161; [2012] FCA 696, [73]–[74].

45 Ibid [77].

46 Ibid [76].

arbitration agreement was in fact invalid under the *Carriage of Goods by Sea Act*, s 11 of which provides that an agreement in a 'sea carriage document' which purports to limit or exclude the jurisdiction of an Australian court is invalid, unless it provides for arbitration in Australia.

9 *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd*[47]

The appellant, PRC-based company Rizhao Steel Holding Group Co Ltd ('Rizhao'), appealed a decision by the WA Supreme Court which granted the Australian respondent company ('Koolan') leave to enforce two arbitral awards against Rizhao. The grounds of appeal were that the primary judge erred by dealing with the application for enforcement under the *Commercial Arbitration Act 1985* (WA), when the only source of jurisdiction to enforce the awards was under the *International Arbitration Act* and the Model Law.

The relevant dispute resolution clause under the sale and purchase agreement between the parties provided that the dispute be referred to arbitration in accordance with Western Australia's *Commercial Arbitration Act 1985*. The parties fell into dispute in late 2008, an arbitrator was appointed in February 2009, and an award of USD114 million plus costs and interest in favour of the respondent was rendered in Australia in August 2010 (being shortly after the amended *International Arbitration Act* came into force).

Rizhao's arguments were somewhat technical, but essentially boiled down to whether the amended *International Arbitration Act* (in particular, s 21 which removes the parties' power to opt out of the Model Law) applies retrospectively. Rizhao argued that:

- the pre-amendment *International Arbitration Act* did not allow the parties to opt out of the Model Law provisions relating to the recognition and enforcement of awards because parties could only opt out until such time as the

[47] (2012) 43 WAR 91; [2012] WASCA 50.

dispute was 'settled'. It argued that the dispute is 'settled' at the time of the award, and beyond that, the parties no longer had any scope to opt out of the Model Law; and

- the parties no longer had power to opt out of the Model Law once the amended *International Arbitration Act* came into force (namely, during the arbitration and prior to the final award and the commencement of the enforcement proceedings).

The respondent argued that Rizhao should not be allowed to raise the jurisdictional points on appeal as it had not raised them at first instance. The Court of Appeal agreed, dismissing the appeal on the basis that 'it would be antithetical to the interests of justice for this court to now entertain a point which Rizhao chose not to raise before the primary judge'.[48]

The WA Court of Appeal did however go on to make the following significant findings:

- even if the trial judge had been wrong to enforce the award under the *Commercial Arbitration Act*, the State Supreme Court had, in any event, power under the *International Arbitration Act* to enforce non-foreign international arbitral awards;[49]
- the pre-amendment s 21 of the *International Arbitration Act* allowed parties to opt out of the Model Law until the time of the 'final satisfaction of the disputed claim', which was held to include recognition and enforcement steps following the making of the award;[50] and
- the amended *International Arbitration Act* did not apply retrospectively to the parties' pre-amendment arbitration agreement and decision to opt out of the Model Law in

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48 *Rizhao Steel Holding Group Co Ltd v Koolan Iron Ore Pty Ltd* (2012) 43 WAR 91; [2012] WASCA 50, [87].

49 Ibid [66], [74].

50 Ibid [110]–[111].

> circumstances where the dispute had been referred to arbitration prior to the commencement of the amended Act.[51]

On the whole, the Australian courts have shown a commendable pro-enforcement bend and the broad Australian approach is quite supportive of international trends in favour of a pro-enforcement bias.

IV Enforcement Trends in the South-East Asian Region

A *Singapore*

In three recent judgments, the Singapore High Court has affirmed its long-standing non-interventionist and pro-arbitration stance while providing some useful guidance on the standards to which international arbitrators should be held.

Two of the cases discussed below, *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*[52] and *BLB v BLC*,[53] show that there is a strong emphasis on the limited supervisory role that the Singaporean courts should play. The judges in both cases acknowledged that it is the court's (difficult) role to uncover the genuine challenges to arbitral awards from those which are merely an appeal on the merits.

The court in *PT First Media TBK v Astro Nusantara International BV*,[54] repeatedly noted, in no uncertain terms, that the primary object of the Singapore *International Arbitration Act* is to give effect to the Model Law. The Court of Appeal's decision enforces an intention to ensure that Singapore's international arbitral law develops consistently with the Model Law regime. When faced with uncertainty as to how a provision of the Singapore *International Arbitration Act* should be interpreted, the Singaporean courts are

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51 Ibid [133].
52 [2013] SGHC 186.
53 [2013] SGHC 196.
54 [2013] SGCA 57.

likely to review jurisprudence from other Model Law jurisdictions and attempt to develop law in line with the purpose and objectives of both the Model Law and the *New York Convention* as well as recognising the autonomy of the parties.

1 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd*[55]

Justice Chan Seng Onn of the High Court declined to set aside an arbitral award on the basis that the award was in breach of the rules of natural justice, and the arbitrator had allegedly exceeded his jurisdiction. As to the allegations of breach of natural justice, his Honour considered the arbitrator's duties which the applicant alleged had been breached, namely, the duty to give reasons, to understand the parties' submissions, to deal with every argument presented and to not look beyond the parties' submissions. The appellant failed on all grounds.

The duties owed by arbitrators in determining an arbitral dispute and rendering an award, as held by Justice Chan, can be summarised as follows:

- Arbitrators have a duty to use their particular expertise and experience for which they were selected, which means that arbitrators are not straight-jacketed to only adopt in their conclusions the premises put forward by the parties.[56]
- All that is required is that the arbitral tribunal turns its mind to and deals with the 'essential issues' in its award. It does not need to deal with every point made in an arbitration, or every argument canvassed under each of the essential issues. Further, arbitrators should be given a long reign in determining what the essential issues are.[57]

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55 [2013] SGHC 186 ('*TMM*').

56 *TMM* [2013] SGHC 186, [65].

57 Ibid [73].

- Arbitrators are not obliged to set out each step by which they reached their conclusion. However, ultimately, the parties must be informed about the matters on which the decision is based.[58]

As to the arbitrator's duties to give reasons, Justice Chan referred to the Australian High Court decision in *Westport v Gordian* and noted that the *International Arbitration Act* of Singapore also did not contain any provision that requires arbitrators to give reasons of a judicial standard. However, his Honour noted that as the rules of natural justice must be applied as rigorously in arbitration as they are in court litigation, the standards applicable to judges are *assistive indicia* to arbitrators.[59] Ultimately, this must be weighed against the important factors of promptness and price.

Notably, Justice Chan made some strong general observations which reflect the pro-arbitration and non-interventionist stance that has been so evident in the Singaporean courts. His Honour noted that over-zealous scrutiny of the arbitral tribunal's decision by the courts would encourage parties to use the courts to frustrate and delay the enforcement of arbitral awards and ultimately subvert the integrity and efficacy of the arbitral system,[60] and that the real task is for the court to sieve out the 'genuine challenges from those which are effectively appeals on the merits'.[61] In fact, his Honour's judgment begins with the following observation:

> However good or bad in the eyes of a party, the decision of an arbitral tribunal with the requisite jurisdiction is final and binding. This general proposition of law is a manifestation of the fundamental principle of interest *reipublicae ut sit finis litium* or finality in proceedings. Arbitration will not survive, much less flourish, if this core precept is not followed through by the courts. The integrity and efficacy of arbitration as a parallel dispute resolution system will be subverted if the courts

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58 Ibid [104]–[105].
59 Ibid [103].
60 Ibid [125].
61 Ibid [2].

> appear unable or unwilling to restrain themselves from entering into the merits of every arbitral decision that comes before it.[62]

It appears to be generally settled law in Singapore that the courts should limit themselves to looking at the evidence on the record to determine the merits of the challenge, and such a process does not necessarily require a court to sift through the entire record of the arbitral proceedings 'with a fine-tooth comb'.[63] Justice Chan noted that the immense material that was put before him was 'both unnecessary and unsatisfactory', and that '[a]ny real and substantial concern should be demonstrably clear on the face of the record without the need to pore over thousands of pages of facts and submissions'.[64]

2 *BLB v BLC*[65]

This case involved an application to set aside an arbitral award rendered by a sole arbitrator relating to an unsuccessful joint venture in Malaysia, on the basis of a purported failure to decide a counterclaim that was submitted to arbitration. Justice Belinda Ang Saw Ean of the High Court found that the tribunal had in fact failed to consider and decide the essential issue of the counterclaim, and that the failure was one that could have reasonably resulted in prejudice to the plaintiffs. Her Honour set aside the portion of the award to which the counterclaim related and remitted that aspect for reconsideration by a new tribunal.

Her Honour made similar comments to those of Justice Chan in *TMM* in relation to the difficult balancing act entrusted to courts when faced with challenges to enforcement of arbitral awards:

> The parties' opposing positions embody a tension that is becoming increasingly apparent in the context of curial challenges to arbitral decisions. On one hand, the supervisory function of the court requires it to step in to provide relief in cases of genuine challenges. On the other

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62 Ibid [1] (emphasis in original).
63 Ibid [42].
64 Ibid [125].
65 [2013] SGHC 196.

> hand, the linked principles of minimal curial intervention and finality in proceedings demand that this power of intervention be exercised warily and only in meritorious cases where statutorily prescribed grounds for setting aside have been established. This tension is further heightened when the losing party attempts to air its grievances before the court as complaints of breaches of natural justice or other established grounds of challenge and in doing so attempts to re-open the arbitration or traverse over the issues in the arbitration. The court must firmly resist any such attempts.[66]

Her Honour again agreed with Justice Chan in respect of the degree of review that is appropriate in challenges to arbitral awards, which:

> is ultimately a matter dependent on the type and nature of the challenge. Even so, the review should not involve a re-argument or re-trial of the arbitration. I must emphasise that it is not the role of the court to rake through the award and the record fastidiously with the view to finding fault with the arbitral process. Instead, 'an award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied'.[67]

While Justice Ang noted that although courts will exercise their power to set aside arbitral awards without hesitation if a statutory prescribed ground is clearly established, her Honour also stated that in 'a borderline case the benefit of doubt would invariably favour the tribunal'.[68] This is another example of the non-interventionist stance of the Singaporean courts.

3 *PT First Media TBK v Astro Nusantara International BV*[69]

A string of recent cases that have caused a stir in Singapore and around South East Asia are those related to a SIAC arbitration between companies within a Malaysian media group ('Astro Group') and companies belonging to an Indonesian conglomerate ('Lippo Group') in relation to a failed joint venture. A three-member arbitral tribunal seated in Singapore rendered five awards totaling USD303 million in favour of the Astro Group, which then sought leave from the High Court of Singapore to enforce the awards. Two

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66 *BLB v BLC* [2013] SGHC 196, [2].
67 Ibid [35].
68 Ibid [3].
69 [2013] SGCA 57.

enforcement orders were granted to that effect (collectively referred to as the 'Enforcement Orders').

One of the arbitral awards, namely the 'Award on Preliminary Issues', contained an interim finding by the arbitral tribunal that it had the power to join the 6th to 8th respondents to the arbitration, notwithstanding that those three entities had not been parties to the arbitration agreement. The four subsequent awards were made on the basis of the Award on Preliminary Issues. The tribunal ordered award payments for around USD250 million in Astro's favour, including payments to be made to the 6th to 8th respondents.

One of the Lippo Group entities, PT First Media TBK ('FM'), sought to set aside the Enforcement Orders on the basis that there was never any arbitration agreement between it and the 6th to 8th respondents, and that the Award on Preliminary Issues should not be enforced because by that time, the Supreme Court of Indonesia had ruled that the arbitral award violated the sovereignty of the Republic of Indonesia.[70]

The Judge dismissed the application without going into the merits of FM's arguments, having found that it was no longer open to FM to resist enforcement in reliance on grounds in which it could have, but did not, raise in challenge to the Award on Preliminary Issues at the time it was rendered under art 16(3) of the Model Law. The section provides:

> Article 16. Competence of arbitral tribunal to rule on its jurisdiction
> …
> (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this Article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in Article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

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[70] The Indonesian proceedings are discussed in more detail below.

FM appealed to the Singapore Court of Appeal. The threshold question was whether FM was entitled to raise its objection to the joinder of the 6th to 8th respondents as a ground for setting aside the Enforcement Orders, in circumstances where it had not challenged the Award on Preliminary Issues under art 16(3). In turn, this raised the following two issues:

- Whether the courts have a power to refuse enforcement of an award under s 19 (Enforcement of Awards), and if so, what the ambit or content of that power is.
- Whether art 16(3) is a 'one-shot remedy' with the corollary that FM's failure to challenge the preliminary ruling in the Award on Preliminary Issues precludes it from raising an issue when trying to set aside the Award later on.

First, the court considered the legislative background of s 19 of the Singapore *International Arbitration Act*, which provides:

> An award on an arbitration may, by leave of the High Court or a Judge thereof, be enforced in the same manner as a judgment or an order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

It was held that the content of the power to refuse enforcement under s 19 must be construed in accordance with the purpose of the Singapore *International Arbitration Act*, which is to embrace the Model Law.[71] As to the ambit of the power of refusal, the Court of Appeal stated:

> Given that de-emphasising the seat of arbitration by maintaining the award debtor's 'choice of remedies' and alignment with the grounds under the *New York Convention* are the pervading themes under the enforcement regime of the Model Law, the most efficacious method of giving full effect to the Model Law philosophy would, in our view, be to recognise that the same grounds for resisting enforcement under art 36 are equally available to a party resisting enforcement under s 19 of the [Singapore *International Arbitration Act*].[72]

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71 *PT First Media TBK v Astro Nusantara International BV* [2013] SGCA 57, [53]–[55].

72 Ibid [84] (emphasis added).

That is, the court's power to determine the grounds on which it could refuse enforcement of domestic international awards under s 19 are not restrained and it remains open to the courts to align the exercise of that discretion with the grounds under art 36. This was found to be in keeping with the spirit of the Model Law.

The court then descended into a detailed analysis of whether art 16(c) of the Model Law conveys a 'choice of remedies', that is, whether it gives respondents the option to either challenge a preliminary ruling under art 16(3) (referred to as the 'active remedy') or to later apply to set aside the award under art 34 (referred to as the 'passive remedy'). The court examined a myriad of background materials relating to the Model Law and determined that art 16(3) was not intended to be a 'one-shot' remedy, nor is it intended to affect the availability of defences at the stage of recognition and enforcement.[73] The Court of Appeal held that:

> we are compelled to conclude that Art 16(3) is neither an exception to the 'choice of remedies' policy of the Model Law, nor a 'one-shot remedy'. Parties who elect not to challenge the tribunal's preliminary ruling on its jurisdiction are not thereby precluded from relying on its passive remedy to resist recognition and enforcement on the grounds set out in Art 36(1). That having been said, we are of the tentative view, as noted above, that the position might not be the same in relation to whether such a party may raise such a ground to initiate setting aside proceedings under Art 34.[74]

Given that art 16(3) is not a 'one-shot remedy', FM was entitled to apply to set aside the Enforcement Orders (ie, to resist enforcement) pursuant to s 19 of the Singapore *International Arbitration Act* on any of the grounds which are found in art 36(1).[75]

Having established that the court has the power under s 19 of the Singapore *International Arbitration Act* to refuse enforcement of domestic international awards if one or more of the grounds under art 36 of the Model Law are established, the court then considered

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73 Ibid [111].

74 Ibid [132].

75 Ibid [99].

whether the joinder of the 6th to 8th respondents fell within the art 36 grounds, and if so, whether the application should be decided in FM's favour.

The arbitral tribunal had ruled that it had the power to join non-parties to the arbitration by interpreting r 24(b) of the SIAC Rules, which provides:

> Rule 24: Additional Powers of the Tribunal
> 24.1 In addition and not in derogation of the powers conferred by any applicable law of the arbitration, the Tribunal shall have power to:
> …
> (b) allow other parties to be joined in the arbitration with their express consent, and make a single final award determining all disputes among the parties to the arbitration.

The arbitral tribunal held that 'other parties' for the purposes of r 24(b) referred to parties outside of the arbitration agreement, who could be joined without consent by all the parties to the reference. The Court of Appeal found, on the other hand, that for the purpose of r 24(b), 'other parties' referred to other parties to the agreement to arbitrate that had not been hitherto joined or involved in the arbitration.[76] This view was based on a number of considerations, including that a proposed forced joinder of non-parties would be a 'major derogation from the principle of party autonomy', which their Honours found to be of 'foundational importance'.[77] It followed from this that FM's objection to the tribunal's assertion of jurisdiction over the claims of the 6th to 8th respondents was sustainable as the tribunal had indeed improperly exercised its power by joining those respondents.[78] The Award on Preliminary Issues was incorrect, as the tribunal did not have the power to join the 6th to 8th respondents. Therefore it also did not have the jurisdiction to make awards in favour of the 6th to 8th respondents.

Although FM was entitled to resist the enforcement of the Awards pursuant to s 19 of the Singapore *International Arbitration Act* as it

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76 Ibid [198].
77 Ibid [188].
78 Ibid [198].

then related to the 6th to 8th respondents given that there was no arbitration agreement between FM and those two respondents, the Court of Appeal maintained the Enforcement Orders against the remaining award creditors. The Awards happened to be sufficiently independent and not intertwined in a manner that would prevent severance and partial enforcement.

B *Hong Kong*

A line of authorities arising out of a dispute between Pacific China Holdings Ltd ('Pacific China') and Grand Pacific Holdings Ltd ('Grand Pacific') reflects Hong Kong's pro-enforcement stance by developing the principle that courts should be slow to interfere with procedural decisions of arbitral tribunals and arbitral awards in line with international standards.

Pacific China applied to set aside an arbitral award made pursuant to the International Chamber of Commerce (ICC) Rules, in which the arbitral tribunal ordered Pacific China to pay in excess of USD55 million (plus interest) to Grand Pacific in relation to a dispute over a loan agreement. The Court of First Instance ordered the award to be set aside for alleged violations of art 34(2)(a) of the Model Law, relating to procedural unfairness resulting from the tribunal's departure from the agreed timetable and from allegedly preventing Pacific China from properly making and responding to legal submissions.[79]

The Court of Appeal overturned the decision by the Court of First Instance and instead reinstated the award.[80] In its unanimous judgment, the Court of Appeal:

- found that as a result of the tribunal's wide case management powers, no procedural irregularity had

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79 *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2011] HKCU 1249.

80 *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2012] HKCU 971.

occurred and art 34(2) of the Model Law had not been breached;

- held that an arbitral award may only be set aside on due process grounds when the procedural breaches alleged under art 34(2) are 'serious' or 'egregious' in nature;
- confirmed that the courts should not set aside an award unless a breach, if established, would reasonably have affected the outcome of the dispute; and
- held that the burden to show that it has been prejudiced by the conduct of the tribunal lies with the party seeking to set aside the award.

The Court of Final Appeal refused to interfere with the Court of Appeal's decision, which now stands as the authoritative statement of the law in relation to setting aside arbitral awards in Hong Kong.[81] The Court of Final Appeal endorsed the Court of Appeal's findings, stating that:

> In our view, the Court of Appeal was entirely correct to hold that the complaints advanced by [the appellant] do not constitute viable grounds for setting aside the award under [art 34(2)]. The rulings complained of were made by the tribunal in the proper exercise of its procedural and case management discretions, reflecting its assessment of the requirements of procedural fairness as appropriate to the circumstances. There is no basis for interference by the Court. No reasonably arguable basis has been disclosed for granting leave to appeal.[82]

The Court of Appeal's judgment highlights the wide scope of procedural discretion available to arbitral tribunals seated in Hong Kong, which provides arbitrators with assurance of their power to make robust case management direction where appropriate. Further, it sends a message that the Hong Kong courts will not lightly interfere with the procedural discretion of arbitral tribunals, which is wide.

Notably, and in direct contrast to the Australian approach in *IMC v Altain Khuder* as discussed above, the Court of Appeal handed down

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81 *Pacific China Holdings Ltd (in liq) v Grand Pacific Holdings Ltd* [2013] HKCFA 13.

82 Ibid [5].

a separate judgment which confirmed that the Hong Kong courts can order indemnity costs against parties who unsuccessfully challenge arbitral awards. In doing so, it relied on the approach previously established in *A v R*[83] and *Gao Haiyan v Keeneye Holdings Ltd (No 2)* [84] being that as the parties had agreed to arbitration, applications to set aside or resist enforcement of awards should be exceptional events. Consistent with this, a party who brings a challenge should expect to pay costs on a higher basis if it is unsuccessful.

It is interesting to note the Court of Appeal's careful consideration of *IMC v Altain Khuder*, which was referred to in the applicant's submissions. The Hong Kong Court of Appeal found that notwithstanding the matters decided in the Australian decision, the courts in Hong Kong can and should order costs on an indemnity basis for unsuccessful challenges. This decision to allow indemnity costs acts to discourage parties from applying to the courts seeking unmeritorious challenges to arbitral awards.

C *Malaysia*

The Malaysian *Arbitration Act 2006* adopts the UNCITRAL Model Law. The substantial amendments made in 2011 exemplify the importance placed on party autonomy as well as the necessity of finality of arbitration awards with minimal court intervention.

The Malaysian *Arbitration Act* applies to both domestic and international arbitrations. However, pt III (which provides for greater intervention by the courts, for example, by allowing parties to refer a question of law to the court, and allowing a court to extend the time imposed for commencement of arbitral proceedings or the delivery of an award) applies by default to domestic arbitrations unless the parties exclude its applications in writing (ie, 'opt out'). Conversely, pt III does not apply to international arbitrations unless the parties

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83 [2009] 3 HKLRD 389.

84 [2012] 1 HKC 491.

agree so in writing (ie, 'opt in').

1 *The Government of India v Cairn Energy India Pty Ltd*[85]

The appellant and the respondents entered into an oil and gas joint venture and executed a production sharing contract in relation to the development of an area described as 'Ravva Field', situated off the coast of India. A dispute arose between the parties in relation to cost recoveries claimed by the respondent, and the respondent's calculations of rates of return. In keeping with various articles of the contract, the matter proceeded to UNCITRAL arbitration seated in Kuala Lumpur, with Indian law as the proper law of the contract, and English law as the law to govern the arbitration proceedings.[86]

The arbitral tribunal had decided four points of reference in favour of the appellant, and two in favour of the respondent. The matter was appealed through the High Court and then the Court of Appeal, and India was ultimately granted leave of appeal to the Federal Court on five questions.

The first two questions related to choice of law, in particular whether, given that English law was the substantive law of the arbitration but the arbitration was seated in Kuala Lumpur, the parties' intended curial law was that of England or of Malaysia. The Federal Court held that Malaysian courts, like English courts, can give effect to the agreement of parties to apply foreign law (ie, the chosen substantive law) as opposed to curial law unless the application of the foreign law runs contrary to the sense of justice or decency.[87]

The court maintained the current position of the law, which is that the seat of the arbitration is the place where challenges to an award are made.[88] The Federal Court found that it was clear that the English

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85 [2012] 3 MLRA 1.

86 *The Government of India v Cairn Energy India Pty Ltd* [2012] 3 MLRA 1, [18].

87 Ibid [18]–[19].

88 Ibid [23], referring to *Lombard Commodities v Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 137, which in turn refers to the English case of *A v B*

Court of Appeal holds that the curial law ought to be the law of the seat of the arbitration, and that in this case, the juridical seat of the arbitration is Kuala Lumpur which in turn means that the curial law is the law of Malaysia.[89]

The appellant also argued that the Federal Court should depart from a long line of authorities that establish a common law distinction between a specific reference and a general reference for arbitration in determining the scope of intervention by the courts. The court was not persuaded, and maintained that:

> where a specific matter is referred to arbitration for consideration, it ought to be respected in that 'no such interference is possible upon the ground that the decision upon the question of law is an erroneous one'. However, if the matter is a general reference, interference may be possible 'if and when any error appears of the face of the award' (see Sharikat Pemborong Pertanian [[1971] 2 MLJ 210]).[90]

In this case, the relevant issue (being the issue of the proper construction of an agreement) was held to be a question of law, rather than a question of fact. It followed that if the construction of an agreement is the sole matter referred to arbitration, it is generally not open for challenge for reasons other than extremely limited circumstances such as where an award is tainted with illegality.[91] The Federal Court found no illegality in this case.[92] The appeal was dismissed with costs.

2 *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd*[93]

This case involved appeals against two decisions of a High Court judge to dismiss applications to set aside or vary two arbitral awards

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[2007] 1 Lloyd's LR 237 in which it was decided that challenges are to be made at the courts of the seat of arbitration.

89 *The Government of India v Cairn Energy India Pty Ltd* [2012] 3 MLRA 1, [23].

90 Ibid [30].

91 Ibid [36].

92 Ibid [55].

93 *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 2 CLJ 395.

in favour of the respondent, on the ground that the arbitral tribunal had no jurisdiction to hear the arbitration. The appellant argued there was no written agreement between the parties to arbitrate their dispute within the meaning of 'arbitration agreement' under the relevant Palm Oil Refiners Association of Malaysia (PORAM) Rules and s 9(5) of the Malaysian *Arbitration Act*, the latter of which provides:

> A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

The tribunal adopted a broad interpretation of s 9(5) and found that an arbitration agreement existed between the parties; it consisted of four unsigned sales contracts, and standard terms and conditions that were incorporated by reference. The standard terms and conditions contained an arbitration clause.

The High Court, and subsequently the Court of Appeal, agreed with the findings of the tribunal. In a judgment delivered by Ramly Ali JCA, the Court of Appeal maintained its pro-arbitration approach by reaffirming the very narrow circumstances in which a court may set aside an arbitral award under s 37 of the Malaysian *Arbitration Act*:

> Section 37(1) of the [Malaysian *Arbitration Act*] provides for the various grounds on which an arbitral award may be set aside. The onus is on the party making the application to provide proof. The court discretion in setting aside arbitral award is now limited to the narrowly defined circumstances in line with the modern international arbitral practice. The effect of the present ss 8, 9, 37 and 42 of the [Malaysian *Arbitration Act*] is that the court should be slow in interfering with an arbitral award. The court should be restrained from interference unless it is a case of patent injustice which the law permits in clear terms to intervene. Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator and restrain from approaching the court to set it aside. Constant interference of the court as was the case in the past will defeat the spirit of the [Malaysian *Arbitration Act*] which is for all intent and purpose to promote one-stop adjudication in line with the international practice (see: *Taman Bandar Baru Masai v Dinding*

> *Corporation Sdn Bhd* [2010] 5 CLJ 83; and *Lesotho Highland Development Authority v Impregilo Spa* [2005] UKHL 42).[94]

The court cited a number of authorities in support of the position that an arbitral award is final, binding and conclusive and can only be challenged in exceptional circumstances.[95] It was held that an error in drawing a wrong inference of facts from the evidence, as was alleged in this case, was not in itself a sufficient basis to set aside an arbitral award. In any event, the court was not of the view that the arbitral tribunal had in fact drawn an incorrect finding of fact, and agreed that a binding arbitration agreement did in fact exist. It was sufficient that the terms of the contract executed by the parties (in this case, a sales contract) included a reference to an incorporated document that contained the arbitration agreement (in this case, the respondent's standard terms and conditions):

> this is imputed knowledge that the terms of the document incorporated are binding as if it was written into the contract itself … whether [the parties] take the trouble of reading them or not.[96]

The Full Court of Appeal upheld the findings of the lower courts, maintaining the broad interpretation of what constitutes an arbitration agreement for the purposes of the PORAM Rules and the Malaysian *Arbitration Act*.[97]

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94 Ibid [13].

95 Ibid [14]–[15]:

> The law regarding the effect of arbitration's award is well settled in that the award is final, binding and conclusive and can only be challenged in exceptional circumstances. As such if an Arbitrator had erred by drawing wrong inferences of fact from the evidence before him be it oral or documentary that in itself is not sufficient for the setting aside of his award;

Intelek Timur Sdn Bhd v Future Heritage [2004] 1 CLJ 743:

> It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood';

Sharikat Pemborong Perumahan v Federal Land Development Authority [1969] 1 LNS 172; [1971] 2 MLJ 210.

96 *Ajwa For Food Industries Co (MIGOP), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 2 CLJ 395, [17].

97 *Ajwa For Food Industries Co (Migop), Egypt v Pacific Inter-Link Sdn Bhd* [2013] 4 AMR 789.

D *Indonesia*

Indonesia ratified the *New York Convention* by issuing Presidential Decree No 34 of 1981, and enacted the *Arbitration and Dispute Resolution Act* ('*Indonesian Arbitration Act*') in 1999, which applies to both domestic and international arbitration.

International arbitration awards require recognition and execution orders from the District Court of Central Jakarta to be enforceable in Indonesia. Enforcement of international arbitral awards may be refused if the award fails to meet the requirements of art 66 of the *Indonesian Arbitration Act*, one of which is that the award must not violate public order.

'Public policy', or 'public order', are defined by art 66(c) of the *Indonesian Arbitration Law* as something that:

- is not against the foundations of the entire legal system and societal system in Indonesia;
- is not in violation of the prevailing laws and regulations; and
- is not against the State and legal sovereignty of the Republic of Indonesia.

Commentators have noted that the Indonesian courts tend to employ the public policy exception to enforcement as justification to reject applications for execution orders. In a recent article,[98] Fifi Junita of the Law Faculty of Airlangga University in East Java discussed Indonesia's approach to the concept of public policy and noted that 'the concept of public policy in Indonesia is so broad that it [is] frequently confused with [the] state's political interests'.[99] Further, Fifi Junita opined that Indonesia's concept of public policy is based on domestic considerations representing fundamental local policies and principles of domestic law, which is in contrast to the

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98 Fifi Junita, 'The Concept of Public Policy Exception to the Enforcement of Foreign Arbitral Awards: The Indonesian Perspective' (2013) 16(5) *International Arbitration Law Review* 148.

99 Ibid 152.

international narrow approach to public policy and therefore not conducive to the establishment of a pro-enforcement culture.[100]

A good example of the Indonesian courts' approach to public policy is the recent enforcement proceedings in relation to the arbitration between the Astro Group and the Lippo Group as discussed above. The Astro Group brought an enforcement application in the Central Jakarta District Court, in circumstances where there were pending proceedings before the South Jakarta District Court involving some of the parties that were also parties to the arbitral award.[101] Further, the arbitral award itself ordered two of the parties, PT Ayunda Mitra and FM, to stop funding and pursuing the pending or future Indonesian Court proceedings.

The Central Jakarta District Court refused to enforce the awards, on the basis that the arbitral awards clearly amounted to foreign interference with the Indonesian judicial process, which is banned by Indonesian law. The court also found that the arbitral award was a violation of prevailing Indonesian principles relating to the individual's right to defend his or her interests. On appeal, the Supreme Court of Indonesia upheld the Central Jakarta District Court's decision to reject enforcement of the awards, and the awards remain unenforced in Indonesia.

V CONCLUSION

Overall, the recent trend in decisions relating to enforcement of international arbitral awards in Australia and the South East Asian region could be described as going 'two steps forward, one step back'. While there is a general trend towards pro-enforcement and the desire to harmonise international arbitration law with respect to the enforcement of awards, it cannot yet be said that all Convention countries are equal in their approach and this is undoubtedly the

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100 Ibid 160.

101 Note that the South Jakarta District Court proceedings were commenced prior to the commencement of the SIAC arbitration.

reason why commercial parties seeking to enforce a foreign arbitral award are choosing certain 'hubs' over other venues. The major arbitration venues in the region remain at the forefront of enforcing international arbitral awards and of adopting a judicial climate which is pro-arbitration.

THE 'ANTI-ISDS BILL' BEFORE THE SENATE: WHAT FUTURE FOR INVESTOR-STATE ARBITRATION IN AUSTRALIA?

LUKE NOTTAGE*

Abstract

International Law — Investment Law — Dispute Resolution — Arbitration — Commonwealth Law — Legislative Process — Australia — Korea — Asia-Pacific

This paper highlights an unusual recent development in Australia on a topical issue regionally and world-wide. On 6 August 2014, the Senate's Foreign Affairs, Defence and Trade Legislation Committee held public hearings on The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014, introduced on 3 March by Senator Peter Whish-Wilson of the Australian Greens Party. His very short private Member's Bill seeks to prevent the Australian government from entering into any future treaties containing provisions on investor-state dispute settlement (ISDS). This article (i) briefly provides some background to the Bill, (ii) reproduces my

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written Submission urging instead carefully negotiated and drafted ISDS and substantive investment treaty provisions, and (iii) adds my Responses to Questions on Notice (supplemented by an online Appendix comparing provisions in Australia's recently-signed Free Trade Agreement with Korea, compared to earlier FTAs with Chile and ASEAN). A further Appendix provides an edited transcript of my oral evidence presented at the Senate's public hearings. The article ends with (iv) a brief overview and extracts from the Committee's Report on 28 August 2014, which agreed that the Bill should not be enacted.

I INTRODUCTION

On 6 August 2014, the Senate's Foreign Affairs, Defence and Trade Legislation Committee held public hearings on *The Trade and Foreign Investment (Protecting the Public Interest) Bill 2014*,[1] introduced on 3 March by Senator for Tasmania, Peter Whish-Wilson of the Australian Greens Party.[2] His private Member's Bill seeks to prevent the Australian government from entering into any future treaties containing provisions on investor-state dispute settlement (ISDS). These are designed to provide an additional option for foreign investors to directly enforce substantive commitments made by host states, such as non-discrimination and compensation for expropriation.[3] Australia now has ISDS provisions with 29 economies, derived from:

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1 Parliament of Australia, *Inquiry into the Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014>.

2 Parliament of Australia, *Biography for Whish-Wilson, Peter Stuart* (2014) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22handbook%2Fallmps%2F195565%22;querytype=;rec=0>. Before entering Parliament, the Senator was a banker and broker (1992–2003), wine grower and business owner (2004–12) and lecturer at the University of Tasmania (2005–12).

3 Mark Mangan, 'Australia's Investment Treaty Program and Investor-State Arbitration' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (Federation Press, Sydney, 2010) 191–221.

- all 21 bilateral investment treaties (BITs) presently in force, signed since 1988;
- four out of eight bilateral free trade agreements (FTAs), signed since 1982; and
- Australia's sole regional FTA, signed in 2009 with the Association of Southeast Asian Nations (ASEAN, thus adding ISDS protections between Australia and four more states — Brunei, Cambodia, Malaysia and Myanmar).[4]

The Gillard Government negotiated the omission of ISDS in the investment chapters in FTAs with New Zealand (signed in 2011) and Malaysia (2012). By contrast, since gaining power on 7 September 2013 the Abbott Government has officially reverted to the inclusion of ISDS on a case-by-case assessment. It agreed to ISDS in the FTA with Korea (signed on 8 April 2014),[5] but seemingly was not pressed as hard to include the procedure in the FTA subsequently agreed with Japan (signed on 8 July 2014).[6] Even if Senator Whish-Wilson's present private member Bill passes the Senate, it will have no chance of passing the lower House of Representatives unless the Abbott Government abandons its current policy. But this discussion in the Australian Parliament may anyway impact on the FTA with Korea (KAFTA), which was tabled on 13 April 2014 and must be reviewed by the Joint Standing Committee on Treaties (JSCOT).[7]

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4 James Morrison and Luke Nottage, 'Australia' in Simon Greenberg, Christopher Kee and J Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective* (Kluwer, 2nd ed, forthcoming) Part 10; with a longer version forthcoming via Social Science Research Network, *Nottage, Luke R's Scholarly Papers* (2014) <http://ssrn.com/author=488525>.

5 Luke Nottage, 'Arbitration Rights Back for the South Korea-Australia FTA' on *East Asia Forum* (1 January 2014) <http://www.eastasiaforum.org/2014/01/01/arbitration-rights-back-for-the-south-korea-australia-fta/>.

6 Luke Nottage, 'Why No Investor-State Arbitration in the Australia-Japan FTA?' on *East Asia Forum* (9 April 2014) <http://www.eastasiaforum.org/2014/04/09/why-no-investor-state-arbitration-in-the-australia-japan-fta/>.

7 Submissions on KAFTA were due by 13 June 2014. On 4 September the majority Report recommended ratification, see Parliament of Australia, *Report 142* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/

Accordingly, the recent Committee hearings on the Bill have broader national and international significance.[8] I was invited to give evidence based on my written Submission dated 2 April 2014, opposing the Bill and edited in Part II below.[9] The video recording of public hearings held on 6 August 2014 is available online,[10] together with transcripts — including my oral evidence edited in the Appendix below. My subsequent written Responses to Questions on Notice for the Committee are reproduced below in Part III. A related Appendix

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Joint/Treaties/13_May_2014/Report_142>, but with two dissenting Reports (as mentioned in Part IV below).

8 As mentioned in Part III below, the European Commission has been holding Public Consultations on ISDS in the context of the FTA being negotiated between the EU and the US. For a detailed response for the Dutch Government, co-authored by two professors expert in international investment law, see Christian Teitje and Freya Baetens, 'The Impact of Investor-State Dispute Settlement (ISDS) in the TTIP' (24 June 2014) available at Rijksoverheid, *Documenten en publicaties* (2014) <http://www.rijksoverheid.nl/documenten-en-publicaties/rapporten/2014/06/24/the-impact-of-investor-state-dispute-settlement-isds-in-the-ttip.html>.

9 See Submission 21, available via Parliament of Australia, *Submissions* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions>.

10 Official Recording of Senate Committee Proceedings from the Australian Parliament, 'Foreign Affairs Defence & Trade [Part 1]' *Foreign Affairs*, *Defence and Trade Legislation Committee*, 6 August 2014, <http://parlview.aph.gov.au/mediaPlayer.php?videoID=233409&operation_mode=parlview>. My evidence was given by videolink together with that of my colleague Associate Professor Kimberlee Weatherall (beginning from 2.09 hours through to 3.09 hours), who opposes ISDS to the extent that intellectual property rights are protected by investment treaties (Submission 88). We were preceded in the hearings by Tracey Tipping of Eternal Source Pty Ltd (Submission 84), then ANU's Dr Kyle Tienhaara (Submission 86) and Dr Matthew Rimmer (Submission 104). Afterwards, this video records the evidence of Dr Patricia Ranald for the Australian Fair Trade and Investment Network (Submission 105). All four supported the Bill. A separate video, at Official Recording of Senate Committee Proceedings from the Australian Parliament, 'Foreign Affairs Defence & Trade [Part 2]' *Foreign Affairs*, *Defence and Trade Legislation Committee*, 6 August 2014 <http://parlview.aph.gov.au/mediaPlayer.php?videoID=233460>, records the evidence later given by Mr Andrew Percival for the Law Council of Australia (Submission 90) and two officials from the Department of Foreign Affairs and Trade (Submission 135), both essentially opposing the Bill.

provided with those Responses, comparing key ISDS and investment chapter provisions of KAFTA with two FTAs concluded by the former Rudd Government (namely, with Chile in 2008 and ASEAN in 2009), is available online.[11]

The Committee heard oral evidence from 9 witnesses,[12] based on 141 Submissions — including many short ones from private individuals. The internet was also mobilised by supporters of the Bill:[13]

> The committee has received over 11 000 emails from individuals using an online tool asking people to express their opposition to investor state dispute settlements under trade agreements to the committee. Due to the large number of emails received, it is not possible for the committee to accept them as submissions and publish them on the committee's website. The committee, however, has agreed to accept the emails as correspondence.

Readers of this article are further encouraged to view the Senator's Second Reading Speech,[14] along with a critique by Dr Sam Luttrell and Dr Romesh Weeramantry (experts in international arbitration who also opposed the Bill).[15] The Chief Justice of Australia has weighed in recently on this topic as well,[16] referring to the Bill and

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11 My Responses, with the comparison chart Appendix, can be found at: Parliament of Australia, *Additional Documents* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Additional_Documents>. That Appendix is also available in the manuscript version of this article, available at Luke R Nottage, 'The "Anti-ISDS Bill" Before the Senate: What Future for Investor-State Arbitration in Australia?' (Research Paper No 14/76, Sydney Law School, 20 August 2014) <http://ssrn.com/abstract=2483610>.

12 Parliament of Australia, *Public Hearings* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Public_Hearings>.

13 Above n 1.

14 Ibid.

15 Submission 106, available at Parliament of Australia, *Submissions* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions>.

16 Chief Justice RS French AC, *'Investor-State Dispute Settlement — A Cut Above the Courts?'* (Paper presented at the Supreme and Federal Courts Judges'

my Submission extracted in Part II below. Even if this Bill does not pass, which seems almost inevitable in light of the recommendation of the Committee in its Report of 28 August 2014 (summarised in Part IV below), ISDS is likely to remain an important topic of public debate. It will certainly be a significant issue in Australia's pending FTA negotiations, especially for major regional treaties such as the Regional Comprehensive Partnership Agreement (or 'ASEAN+6' FTA) and the expanded Trans-Pacific Partnership Agreement.[17]

II SUBMISSION OPPOSING THE BILL

The Bill simply provides, in cl 3, that:

> The Commonwealth must not, on or after the commencement of this Act, enter into an agreement (however described) with one or more foreign countries that includes an investor-state dispute settlement provision.

The Explanatory Memorandum provides no guidance as to the background to this proposal, or its pros and cons. However it seems to be aimed at reinstating the policy shift announced by the April 2011 'Gillard Government Trade Policy Statement'. That is no longer found on Australian government websites and is inconsistent with the present Government's policy on ISDS, which allows for such provisions on a case-by-case basis[18] (as evidenced by the recent Korea-Australia FTA).

The Bill, like the previous Trade Policy Statement in this respect, may be well intentioned, but it is premature and misguided. Treaty-

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Conference, Darwin, 9 July 2014). <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf>.

17 Leon Trakman, 'Investor-State Arbitration: Evaluating Australia's Evolving Position' (2014) 15 *Journal of World Investment and Trade* 152.

18 Department of Foreign Affairs and Trade, *Frequently Asked Questions on Investor-State Dispute Settlement (ISDS)* (2014) <https://www.dfat.gov.au/fta/isds-faq.html>; Australian Government, Department of Foreign Affairs and Trade, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (Report, Australian Government, Department of Foreign Affairs and Trade, 2011) <http://blogs.usyd.edu.au/japaneselaw/2011_Gillard%20Govt%20Trade%20Policy%20Statement.pdf>.

based ISDS is not a perfect system, but it can be improved in other ways — mainly by carefully negotiating and drafting (BITs) and (FTAs).[19] This may also have the long-term benefit of generating a well-balanced new investment treaty at the multilateral level,[20] which is presently missing and unlikely otherwise to eventuate.

The treaty-based ISDS system is particularly important when dealing with developing countries, where local courts and substantive rights may not meet widely accepted global standards, although ISDS is also now found in some treaties among developed countries. Reflecting concerns about the capacity of national courts to deal with specialised cross-border investment disputes, BITs and FTAs also commonly include inter-state arbitration procedures. However, these are very infrequently invoked, because they require the home state to run the case for its investor against the host state that has illegally interfered with the investment. This involves financial costs to the home state as well as delays and potential diplomatic embarrassment. Due to similar problems, Australia and other countries have recently begun to conclude double-tax treaties that *require* the two states to resolve the matter by arbitration if the double-taxed firm so requests.[21]

Because of its advantages over other existing and immediately foreseeable international dispute resolution mechanisms, the treaty-based ISDS system is increasingly accepted by Australia's major

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19 Luke Nottage and Kate Miles, 'Back to the Future for Investor-State Arbitrators: Revising Rules in Australia and Japan to Meet Public Interests' in Luke Nottage and Richard Garnett (eds), *International Arbitration in Australia* (The Federation Press, Sydney, 2010) 222–52 <http://ssrn.com/abstract=1151167>; Christian Campbell, Sophie Nappert and Luke Nottage, 'Assessing Treaty-Based Investor-State Dispute Settlement: Abandon, Retain or Reform?' (Research Paper No 13/40, Sydney Law School, 2013) <http://.com/abstract=2280182>.

20 Gary Hufbauer and Sherry Stephenson, 'The Case for a Framework Agreement on Investment' (Working Paper No 116, Columbia FDI Perspectives, 3 March 2014).

21 Micah Burch and Luke Nottage, 'Novel Treaty-Based Approaches to Resolving International Investment and Tax Disputes in the Asia-Pacific Region' (2011) 18 *Australian International Law Journal* 1, 127–140.

existing and potential treaty partners, including both developed and developing countries in the Asia-Pacific region.[22] It is more responsible therefore for Australia to keep engaging with the system by negotiating specific improvements in future treaties. This is also the approach taken recently by the European Commission and US government,[23] which have been reassessing ISDS as well.

Otherwise, there is also a serious risk of preventing — or at least seriously delaying — the conclusion of any future FTAs. Those include several major treaties currently being negotiated by Australia, including the FTA with Japan, the Trans-Pacific Partnership Agreement and the Regional Comprehensive Economic Partnership ('ASEAN+6').[24]

Opposition to ISDS in Australia appears to derive from an uneasy alliance between many on the 'political' left and some on the 'economic' right. The latter, epitomised by the majority opinion in the Productivity Commission's 2010 report on trade policy,[25] argue in particular that (i) there is no clear evidence that offering ISDS significantly increases inbound FDI, and (ii) Australia's outbound investors do not rely on or need treaty-based ISDS protections.

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22 Micah Burch, Luke Nottage and Brett Williams, 'Appropriate Treaty-based Dispute Resolution for Asia-Pacific Commerce in the 21st Century' (2012) 35(3) *University of New South Wales Law Journal* 625, 1013–40.

23 European Commission, *Factsheet on Investor-State Dispute Settlement* (3 October 2013) <http://trade.ec.europa.eu/doclib/docs/2013/october/tradoc_151791.pdf>; Office of the United States Trade Representative, *The Facts on Investor-State Dispute Settlement: Safeguarding the Public Interest and Protecting Investors* (27 March 2014) <http://www.ustr.gov/about-us/press-office/blog/2014/March/Facts-Investor-State%20Dispute-Settlement-Safeguarding-Public-Interest-Protecting-Investors>.

24 See Luke Nottage, 'Throwing the Baby with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) *Asian Studies Review* 1, 253–72; Luke Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"' (Research Paper No 11/32, Sydney Law School, 2011) <http://ssrn.com/abstract=1860505>.

25 Productivity Commission, *Research Report: Bilateral and Regional Trade Agreements* (November 2010) <http://www.pc.gov.au/__data/assets/pdf_file/0010/104203/trade-agreements-report.pdf>.

However, regarding (i) the econometric evidence remains mixed, and should anyway be focused on Australia's actual and potential treaty partners (rather than aggregate world-wide FDI). Regarding (ii) there is now evidence that Australian outbound investors do avail themselves of ISDS (eg, in India, Indonesia and Pakistan), and political risks insurance (or legal technical assistance to developing countries) is an inadequate substitute. In other words, there appear to be more such benefits for Australia in treaty-based ISDS than hypothesized by the Productivity Commission in 2010.

Another potential benefit is to provide fewer incentives for Australia's outbound investors to instead privately 'manage' risks by bribing foreign officials or parties. This is often contrary to Australian law and international treaties, but recent cases show that enforcement is still inadequate. Although a bigger 'stick' is needed in that respect, protecting FDI through ISDS-backed investment treaties provides an additional and useful 'carrot' for foreign investors and host states to behave properly.

The Commission in 2010 also queried the potential costs or risks involved for Australia as a whole when agreeing to ISDS. This concern is also emphasised by those on the political left keen to preserve national sovereignty and to avoid 'regulatory chill'. However, there has only ever been one claim brought against Australia (by Philip Morris, regarding our tobacco plain packaging legislation) and it may well fail.[26] A recent ICSID arbitration tribunal has also held that Australia's 1993 BIT with Indonesia (and indeed, by implication, several other Australian treaties) did not provide full advance consent to ICSID arbitration.[27] Anyway, the extra potential 'regulatory chill' from ISDS is likely to be minimal for a country like

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[26] Luke Nottage, 'Consumer Product Safety Regulation and Investor-State Arbitration Policy and Practice after *Philip Morris Asia v Australia'* (2011) 22 *Australian Product Liability Reporter* 154–8.

[27] Luke Nottage, 'Do Many of Australia's Bilateral Treaties Really Not Provide Full Advance Consent to Investor-State Arbitration? Analysis of *Planet Mining v Indonesia* and Regional Implications' (Research Paper No 14/39, Transnational Dispute Management, 14 April 2014) <http://ssrn.com/abstract=2424987>.

Australia which is subject to numerous (often successful) public law claims every year through its national courts.

The concerns raised by the Productivity Commission, as well as other community groups and scholars, are certainly worth exploring further — and risks inevitably associated with ISDS can and should be managed more effectively, especially through more careful treaty drafting. In fact, I have received major federal government funding through the Australian Research Council (with colleagues at UNSW, ANU and UMelbourne) to examine such issues in greater detail, from empirical, theoretical and 'black-letter law' perspectives.[28] But it is premature and ill-advised for Australia to reverse its longstanding treaty practice by refusing to include any form of ISDS in future treaties. No other developed country adopts such a stance.

If anything, the Australian government should seek to improve the drafting of old treaties (especially as they come up for renewal or may be supplanted by FTA investment chapters) and to consider developing and publicising a well-balanced Model Investment Treaty (along the lines of many of our major treaty partners). No Act of Parliament is needed to pursue such alternatives.

Anyway, the present Bill is curiously worded. For example, cl 3 encompasses investor-state mediation as well as investor-state arbitration, even though only the latter process automatically produces a binding outcome — impacting much more on host states. The Bill also only refers to treaties with 'foreign countries', which may not include entities such as the European Union or Hong Kong SAR — potential FTA partners for Australia.[29]

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[28] Shiro Patrick Armstrong et al, 'The Fundamental Importance of Foreign Direct Investment to Australia in the 21st Century: Reforming Treaty and Dispute Resolution Practice' (Research Paper No 13/90, Sydney Law School, 1 December 2013) <http://ssrn.com/abstract=2362122>.

[29] The DFAT Submission (No 108, available via Parliament of Australia, *Submissions* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions>; adds this further technical issue with the wording of the Bill:

III Responses to Questions on Notice from the Committee

A general Question can be paraphrased as: whether the investment chapter of the Korea-Australia Free Trade Agreement (KAFTA) provides adequate safeguards and transparency. I believe it generally does, by the standards of contemporary treaty drafting, and I will explain this below by reference first to two specific Questions (also paraphrased) as to the scope of the obligations to accord foreign investors 'fair and equitable treatment' (FET) and compensation for (indirect) expropriation. I will then make some general comments on other safeguards and transparency, referring especially to a recent public 'Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP)', coordinated through the University of Kent Law School.[30] Senator Whish-Wilson highlighted this document during our hearings, and my colleague Associate Professor Kimberlee Weatherall conveniently refers to it as the 'EU Academics Report' in her own Responses to Questions on Notice.[31]

> As drafted, it would prevent Australia from entering into a plurilateral agreement which contains ISDS, whether or not Australia agrees to be bound by that particular provision. This does not recognise the possibility that an agreement could contain ISDS provisions which apply between a subset of the parties (and not to Australia). It is not clear if this is the intended operation, however DFAT considers it would be undesirable to prevent Australia from entering into an agreement on this basis.

(Note that Australia negotiated such an exemption with respect to New Zealand in their FTA with ASEAN concluded in 2009.) In oral evidence from DFAT, and also the LCA, see Transcript at Parliament of Australia, *Foreign Affairs, Defense and Trade Legislation Committee* (2014) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0000%22>, it was also argued that the Bill's wording could also unfortunately prevent Australia renegotiating new ISDS wording as its many investment treaties came up for renewal.

30 Kent Law School, *Statement of Concern about Planned Protection and Investor-State Dispute Settlement (ISDS) in the Translantic Trade and Investment Partnership (TTIP)* (2014) University of Kent <https://www.kent.ac.uk/law/isds_treaty_consultation.html>.

31 Parliament of Australia, *Additional Documents* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_a

I will also refer in passing to:

- recently concluded treaties such as Korea-Canada FTA and an earlier draft of the just-signed Canada-EU FTA (CETA), helpfully matched up with KAFTA by Professor Weatherall in her Table 1;
- as well as Australia's two previous FTAs containing ISDS (concluded in 2008 with Chile and in 2009 with ASEAN, under the Rudd Government, which are tentatively matched up with KAFTA in my online Appendix);[32] and
- some (model) US treaty provisions that have directly or indirectly found their way into Australian treaty wording.

However, the EU Academics Report needs to be contextualised in three significant respects. First, its signatories are overwhelmingly from or based in the European Union, where there already exists a far-reaching free trade and investment arrangement among its (now 28) member states, dating back to the 1958 Treaty of Rome. That guarantees free movement of capital as well as setting up a supranational executive body (the European Commission) and a supranational judiciary to enforce member states' substantive commitments. From this basis, the EU Academics Report responds to a public consultation process initiated by the Commission, arguing that the latter 'should be working towards redefining its policy on Investment Treaties, both new and existing, in ways that make it compatible with the founding values of the European Union'.[33] Australia has no such baseline and is not party to any comparable

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nd_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Additional_Documents>.

32 Above n 11.

33 European Commission, 'Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)' (2014) <http://trade.ec.europa.eu/consultations/index.cfm?consul_id=179>.

regime, which already provides significant discipline on EU member states.

Second, the EU Academics Report seems to urge the omission of investor-state arbitration only with respect to the TTIP being negotiated among developed countries (EU member states and the US). By contrast, this Senate Bill would prevent Australia from agreeing to any form of ISDS (including investor-state mediation, a process where the third-party neutral cannot give a binding decision) even with a developing 'country', where investor-state arbitration is particularly relevant (and widely adopted in treaties entered into respectively by EU states and the US).

Third, few of the EU Academic Report's signatories are known for their scholarship or experience specifically in international investment law and arbitration. By contrast, my online 2012 survey of those familiar with that field found that none (out of 25) favoured totally abandoning ISDS. Most did however favour various mechanisms to balance private and public interests in ISDS or substantive rights provisions. Respondents were also given the opportunity to present graduated responses to specific reform options (unlike the EU Academics Report, which is presented for signature on a 'take it or leave it' basis), and there was considerable agreement on some of those mechanisms — already often found in Australia's treaties, including now KAFTA.[34]

A *Even if Treaty Wording Limits FET to the Minimum Standard of Customary International Law (CIL), Could CIL Now Anyway Encompass a (Broader) FET Obligation?*

This would frustrate the aim of such treaty wording, namely, to limit the scope of the FET. Such criticism of a safeguard often drafted into contemporary investment treaties, as suggested by Dr Tienhaara,[35] by

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34 Campbell, Nappert and Nottage, above n 19.

35 Submission 86, available via Parliament of Australia, *Submissions* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_A

reference to two articles published in 2002 and 2007, involves a risk that seems far-fetched. More recent commentary in leading journals[36] and international arbitration jurisprudence[37] confirms that FET remains distinct from CIL, which requires the claimant to prove both (a) widespread state (treaty) practice and (b) acquiescence in that practice out of a sense of legal obligation. The latter requirement (b) is particularly problematic for the argument now advanced by Dr Tienhaara.

Accordingly, the reference to (distinct, lower protective standards of) CIL in KAFTA art 11.5 (reinforced by Annex 11-A) should be effective in limiting the scope of FET. My online Appendix[38] shows that similar wording was included already in Australia's FTAs with Chile and ASEAN. It is also found in the FTA with the USA (2004), derived from the latter's Model BIT publicised that year, in turn reflecting an interpretative statement of 2001 issued by the three states party to NAFTA. Such treaty wording has therefore been around for over a decade, yet the argument suggested by Dr Tienhaara has not prevailed.

She also raises that 'the possibility that investors may be able to access more ambiguous references to (FET) in earlier agreements through a most favoured nation (MFN) clause', with footnote 63 remarking that this 'was the strategy of Chemtura Corporation in its NAFTA Chapter 11 case against Canada'. Yet Dr Tienhaara fails to mention that Canada went onto win resoundingly, and that the distinguished arbitral tribunal:[39]

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ffairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions>, 23.

36 Hussein Haeri, 'A Tale of Two Standards: "Fair and Equitable Treatment" and the Minimum Standard in International Law' (2011) 27(1) *Arbitration International* 27, 42–4.

37 *Glamis Gold Ltd v US*, UNCITRAL (NAFTA) Award, 8 June 2009, [609].

38 Above n 11.

39 Luke Peterson, 'Arbitrators in Chemtura v Canada NAFTA Arbitration take economical route in finding no treaty breaches', *Investment Arbitration Reporter* (online), 15 September 2010 <http://www.iareporter.com/articles/20100916_11>. The tribunal included Cambridge University Professor James Crawford (former

> deferred to the wishes of the three NAFTA parties, Canada, the USA and Mexico, who had each argued in the Chemtura case that the MFN clause could not be used in this fashion so as to detour around the parties' earlier efforts to clarify the content of Article 1105.

Thus, there is little risk of the 'possibility' raised by Dr Tienhaara adversely impacting on Australia, despite KAFTA art 11.4 including a 'standard' MFN provision.[40]

B *Can Indirect Expropriation Arise if the Host State's Measure has Only a Disproportionate Impact on Foreign Rather than Local Investors, Despite No Discriminatory Intent?*

Investment arbitration jurisprudence and commentary generally accepts that an inquiry into indirect expropriation can assess not only (a) the measure's effect on foreign investors, but also (b) the 'expropriatory' intent of the host state, and/or the (c) state's regulatory purpose in implementing the measure (as in the Chemtura award). Factor (c) includes, for example, whether measures pursue environmental or health-related goals, the measure's transactional characteristics (eg, a tax compared to a subsidy), and the context for implementing the measure (eg, during a social or political crisis).[41] It

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Dean of Sydney Law School) and Professor Gabrielle Kaufmann-Kohler (appointed to the UNCITRAL Rules arbitration brought by Philip Morris Asia against Australia).

40 In addition, consistently with earlier treaties, footnote 35 clarifies a more debatable point for which there were adverse arbitral decisions, by expressly preventing investors from invoking ISDS procedures provided in other Australian treaties. However, if and when Australia decides in future treaties to further tighten the exceptions and other safeguards for host state regulatory discretion, the MFN provision will need careful drafting with respect to the substantive protections offered to foreign investors. The European Commission's consultation document (above n 33, Q2, emphasis omitted) mentions (with reference to the draft CETA provisions) that: "the EU seeks to clarify that MFN does not allow procedural or substantive provisions to be imported from other agreements".

41 Esme Shirlow, 'Deference and Indirect Expropriation: Analysis in International Investment Law' (2014) 29(3) *ICSID Review* 595, 599 (advance copy provided to the Committee with my Responses as 'correspondence').

is rare nowadays to find arbitral decisions that consider only factor (a), the effects on the foreign investor.

Even when the tribunal focuses on such effects, it may defer to host state sovereignty by assuming that states should be able to regulate unless measures impose an unacceptably high burden on investors. A very recent article by an AGD Senior Legal Officer, based on a paper submitted for her LLM degree at Cambridge University, carefully analyses how a representative sample of awards rendered over 1999–2010 do almost always consider 'effects' on the foreign investor (usually along with other factors), but with varying degrees of deference to host state sovereignty at this 'scope of review' stage.[42] (Esme Shirlow also goes on to helpfully discuss other related legal issues, such as the test appropriate to balancing between factors such as effects, state's intent and/or regulatory purpose, as well as the level of deference to be accorded to host state's regulatory decisions during the balancing exercise.)

One way to provide additional guidance to arbitral tribunals assessing claims of indirect expropriation would therefore be to expressly provide that these only arise if the measure's burden on foreign investors is very high. Footnote 53 of KAFTA is useful in this respect, albeit curiously only 'for Korea'. It refers to a 'special sacrifice' by the investor, in annex 11-B defining 'Expropriation' (in more detail than art 11.7) with accompanying footnotes:

> 4. The determination of whether an action or a series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including:
>
> a. the economic impact of the government action, although the fact that an action or a series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
> b. the extent to which the government action interferes with distinct, reasonable investment-backed expectations;[52] and

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42 Ibid 13, 614–18 (emphasis added).

> c. the character of the government action, including its objectives and context.[53]
>
> 5. Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.[54, 55, 56]
>
> [52] For greater certainty, whether an investor's investment-backed expectations are reasonable may include consideration of the nature and extent of governmental regulation in the relevant sector.
>
> [53] For Korea, a relevant consideration could include whether the investor bears a disproportionate burden such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest.
>
> [54] For greater certainty, the list of 'legitimate public welfare objectives' in paragraph 5 is not exhaustive.
>
> [55] For greater certainty and without limiting the scope of paragraph 5, such regulatory actions to protect public health include regulation, supply and reimbursement with respect to pharmaceuticals, diagnostics, vaccines, medical devices, health-related aids and appliances and blood and blood products.
>
> [56] For Korea, real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households), does not constitute indirect expropriation.

The main text of this Annex can be traced back to Australia's FTA concluded in the United States in 2004, and the latter's Model BIT that year. Dr Tienhaara's Submission asserts that 'this new type of arbitration provision is untested in arbitration'.[43] To determine whether that is correct, one would need to review extensive publically available arbitral case law on such provisions not just in US treaties, but also in treaties concluded by other countries which have adopted identical or similar language (including Australia, Chile etc); and interview lawyers and arbitrators to see if the provisions were 'tested', even if awards did not end up ruling on the question. But even if Dr Tienhaara is correct, it would suggest that such provisions are in fact proving effective — they are not being tested, because

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[43] Above n 35, 24.

investors are accepting that the provisions do adequately preserve host state regulatory discretion.

Dr Tienhaara also argues that some 'observers are not optimistic that all potential loopholes have been filled',[44] but again referring to an older (2007) article, rather than the more recent analyses of indirect expropriation law and practice mentioned for example by Ms Shirlow. In addition, Dr Tienhaara points out that various environmental organisations criticised wording along the lines of the Annex during the review of the 2004 US Model BIT, without mentioning that the US government nonetheless decided to retain the wording in the 2012 Model BIT.[45] Similar points can also be made about her criticism of 'the use of the ambiguous terminology "rare circumstances"',[46] citing at an article dating back to 2006.

Dr Tienhaara also mentions some US NGOs' critique of the reference to an investor's 'legitimate expectations' in the Annex elaborating the scope of indirect expropriation. Yet footnote 52 in KAFTA's investment chapter provides some useful clarification on this point, reflecting developments arbitral case law like that surveyed by Ms Shirlow. Those developments also reinforce footnotes 54–56 clarifying indirect expropriation more generally (although again only with reference to Korea in footnote 56, perhaps because real estate stabilisation measures are topical only in that country).

Dr Tienhaara is concerned that wording like that found in the United States 2004 Model BIT (and then Australia's FTAs dating back to that era, including now KAFTA) has not prevented claims being initiated. But there is a big difference between claims being filed and claims being won by investors. Note also that the two examples she

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44 Ibid. The more recent article by Shirlow is cited above n 41.

45 Cf *2012 US Model Bilateral Investment Treaty*, <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>; and generally Mark Kantor, 'The New US Model BIT: "If Both Sides Are Angry with You, You Must Be Doing Something Right"' (2012) 7 *Transnational Dispute Management* <http://www.transnational-dispute-management.com/article.asp?key=1915>.

46 Above n 35, 24.

provides are both against developing or low-income countries, and recently filed.

This is not to say that over future years, global best practice in treaty drafting may continue to evolve to provide even further limitations to the scope of protection for indirect expropriation. The Australian government might already consider and seek views on the European Commission's suggestion that for the TTIP, presently being negotiated between the EU and the USA, wording should be adopted along the following lines proposed for the recently-signed Canada-EU FTA (emphasis added):

> For greater certainty, except in the rare circumstance where the impact of the measure or series of measures is *so severe* in light of its purpose that it appears manifestly excessive, non-discriminatory measures by a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriations.

The EU Academics Report criticises this rewording, but their analysis appears to proceed on the flawed assumption that indirect expropriation cannot even arise provided the host state has introduced measures for some public purpose.

In the meantime, however, the wording of the text and footnotes of KAFTA provide safeguards consistent with those widely accepted by treaty negotiators and drafters world-wide, including developed countries recently. The risks of Australia being subjected to successful claims for indirect expropriation are far less than hypothesised by Dr Tienhaara — especially given the expertise available within the Australian government evidenced by the recent article by Ms Shirlow.

This Committee should also remember that similar issues, as to how to assess and balance discriminatory effect versus intention or purpose, arise in the context of WTO disputes anyway (especially with regard to National Treatment, also typically promised under investment treaties — as under KAFTA art 11.3). The Australian government can adapt its expertise in that field, although this needs to

be done carefully,[47] when negotiating appropriate treaty wording as well as defending any eventual claims. An advantage with investment treaties compared to WTO Agreements, furthermore, is that it is far easier to renegotiate them given the fewer state parties involved, if and when a particular provision has clearly become inadequate.

C *How Does KAFTA Compare Regarding other Safeguards/Exceptions and Transparency Rrovisions?*

1 *Expropriation Claims Regarding Taxation or Intellectual Property Rights*

Taxation is an area where states have tended to jealously guard sovereignty and discretion, albeit with extensive informal collaboration among national and international tax officials and leading academics. Both the UN and the OECD also actively promote bilateral treaties to avoid double taxation, with the latest OECD Model Treaty allowing the double-taxed taxpayer to force the two states to go to binding arbitration if bilateral negotiations to remove the double taxation fail after two years. Australia has recently agreed to such tax treaty arbitration provisions, including with developed countries such as New Zealand,[48] but this Bill unfortunately might prevent this development in future treaties if the mechanism is conceptualised as a (weak) form of ISDS.

Against this historical backdrop, as mentioned in my evidence at this Bill's hearings, special provisions regarding taxation measures are also found in investment treaties — including Australia's FTAs. Thus, KAFTA annex 11-I provides helpful additional detail, not found in Australia's previous treaties, on what does or does not constitute compensable expropriation in the context of host state's

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47 Jurgen Kurtz, 'Balancing Investor Protection and Regulatory Freedom in International Investment Law: The Necessary, Complex and Vital Search for State Purpose' (2014–15) *Yearbook of International Investment Law and Policy*, (forthcoming).

48 Burch and Nottage, above n 21.

taxation measures.[49] KAFTA's Investment Chapter does not have a specific analogue to art 22.3 or art 25 of Australia's FTAs with Chile or ASEAN, respectively, but it can be found instead in the General Provisions and Exceptions Chapter (namely, art 22.3.5) which adds a raft of other limits regarding claims over taxation measures. KAFTA art 11.22 allows the home and host states to effectively suspend a foreign investor's claim by both agreeing that the taxation measure does not amount to an expropriation (or indeed any other violation, eg, of the FET commitment) — as discussed in Part 3.2 below.

KAFTA art 11.7.5 also contains a carve-out for expropriation claims involving certain IP rights. Similar provisions are found in Australia's FTAs with ASEAN, and especially Chile as well as earlier with the US (again, consistently with the US Model BIT of 2004, unchanged on this point in 2012). Although such provisions have therefore been around for at least a decade, without giving rise to problems in (reported) practice, Professor Weatherall rightly highlights two potential issues with the wording:

- investment treaty arbitrators (not necessarily IP law experts) may need to rule on whether the IP rights measure adopted by the host state are 'consistent' with the WTO TRIPS Agreement and/or the FTA's IP chapter, which she perceives to be heavily slanted in favour of the rights holder; and
- the host state may have the burden of proof to prove such consistency.[50]

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49 Curiously, this Annex is not directly cross-referenced in the text, but it does refer to the general factors delineating expropriation in annex II-B (linked expressly to art 11.7) and is anyway part of the treaty.

50 Submission 88, available via Parliament of Australia, *Submissions* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Submissions>, 6–7. See also the transcript of her oral evidence and Response to Questions on Notice, referring to the following article (especially at Part 3.4): Henning Ruse-Khan, 'Litigating Intellectual Property Rights in Investor-State Arbitration: From Plain Packaging to Patent Revocation' (Working Paper No 2014–21, Max Planck Institute for Innovation &

In practice, these problems can probably be addressed even under the present KAFTA provisions. Under the chosen Arbitration Rules, parties or the default appointing authority can select arbitrators with expertise in IP and WTO law, as well as international trade and investment law generally. To further assist the tribunal, in addition to appointing experts under the applicable Rules, KAFTA art 11.24 allows the tribunal (even on its own initiative) to appoint experts on factual issues relating to 'scientific matters'. Questions of evidentiary burden can be specified at the tribunal's preliminary hearing, now required under (2010) UNCITRAL as well as ICSID Arbitration Rules.

Ideally, future treaties could add more tailored provisions addressing both concerns above. However, it is difficult to pin down precise rules as to the burden (and standard) of proof in international economic law, as evidenced by the complicated WTO case law.[51] It also makes sense to ensure that measures impacting on IR rights comply with other substantive treaty commitments (such as non-discrimination). The real problem seems to arise because those commitments may overly favour the rights holder, a matter that should be addressed directly; the investment chapter provisions themselves are a secondary issue.

2 *Binding Joint Interpretations by States*

KAFTA art 11.22 provides that an interpretation of the host and home states binds an ISDS tribunal. That can also then bind the investor which has brought the claim, effectively suspending it if the states agree that the treaty has not been violated. At a minimum, such provisions allow the states to reassert control over the scope of the substantive commitments they make to foreign investors, if arbitral jurisprudence evolves in unexpected ways or regulatory concerns evolve over time.

Competition, 2014) <http://ssrn.com/abstract=2463711>.

[51] See generally, eg, Yasuhei Taniguchi, 'The WTO Dispute Settlement As Seen By A Proceduralist' (2009) 42(1) *Cornell International Law Journal* 1.

Similar provisions are found in Australia's FTAs with Chile and ASEAN, with analogues also in Canadian and US (model) treaties, but unfortunately not in the 1993 Australia-HK BIT which is presently being invoked by Philip Morris Asia. They were also proposed for CETA and more generally by the European Commission.[52]

The EC Academics Report is critical even of this attempt to reinforce 'shared' state sovereignty over the ISDS process, arguing that it shows that the Commission has little confidence in arbitral tribunals. But such provisions have been around for many years now. They are hardly ever invoked by states party, which suggests that they do not find arbitral tribunals to be too capricious or the treaty wording to have become too out-dated and inappropriate to address contemporary issues.

3 *(Further)* '*Right to Regulate*'

The EU Academics Report is also critical of the European Commission's discussion of how best to carve out host state discretion to introduce appropriate prudential regulation, especially in financial markets.

KAFTA annex 11-C includes specific safeguards allowing regulation of capital movements to address serious balance-of-payments and other financial crises.[53] Similar provisions are found instead in the

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52 Above n 33, at Q10. See also Tomoko Ishikawa, 'Keeping Interpretation in Investment Treaty Arbitration "on Track": The Role of States Parties' 2014 1 *Transnational Dispute Management* <http://www.transnational-dispute-management.com/article.asp?key=2048>. Ideally the provision should clarify in advance that the states can agree to a binding interpretation over a pending claim by an investor, but this is arguably achieved anyway.

53 However, as noted by Shotaro Hamamoto and Luke Nottage, 'Japan' in Chester Brown (ed), *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013) 347, 375, Japan's 2002 BIT with Korea had (exceptionally) the following provisions:

General Exceptions chapter of Australia's FTAs with Chile and ASEAN.

KAFTA art 22.1.3 also adds specific safeguards regarding non-discriminatory measures including with respect environmental protection, which go beyond those set out in the prior two FTAs.[54]

The Australian and Korean governments have also agreed, by exchange of Side Letters, that 'for Korea, the cross-border trade in gambling and betting services is not subject to Chapter 7 (Cross-Border Trade in Services) and investment in gambling and betting services is not subject to Chapter 11 (Investment)'.[55] This also preserves regulatory space in a sensitive sector, although curiously only for one state.

Article 7(7) prevents the investor submitting the dispute to arbitration procedures under Article 7(3) (and indeed 'any applicable, previously agreed dispute-settlement procedures' otherwise provided in Article 7(2)), for measures falling within the scope of Articles 17–18. [These cover, respectively, exceptional interference with cross-border capital transactions (if notified, temporary, proportionate, and consistent with the IMF Agreement) and prudential measures with respect to financial services (if the non-conforming measure does not serve as means of avoiding obligations on the host State).] However, the home State can request consultations 'as to the application of the provisions' of this Article 7(7), which might encourage the host State to provide consent to arbitration after all or to alter the measures taken. If ISA is not forthcoming, it seems that the home State may invoke the inter-State process (under Article 14) or possibly seek a consensus recommendation from the 'Joint Committee' comprising representatives of both States. But even this sort of investment dispute still 'shall, if possible, be settled by consultation or negotiation' between the investor and the host State (Article 15(2) first sentence).

54 However, similar treaty wording for general exemptions based on those found in WTO agreements, as proposed recently by the EU, is criticised by Dr Andrew Lang. See Andrew Lang, 'TTIP and Article XX' on Andrew Lang, *International Economic Law and Policy Blog* (2 July 2014) <http://worldtradelaw.typepad.com/ielpblog/2014/07/ttip-and-article-xx.html>, as elaborated with Associate Professor Jurgen Kurtz for a joint Submission to the EU Consultation dated 13 July 2014; above n 33.

55 Australian Government — Department of Foreign Affairs and Trade, *Korea — Australian Free Trade Agreement* (2014) <http://www.dfat.gov.au/fta/kafta/>.

4 *Dispute Resolution Process*

The EU Academics Report also responds to the European Consultation on various topics related to dispute resolution process. Those are (or should be) the primary concern of this Committee considering a Bill proposing to prohibit the use of ISDS as an additional dispute resolution process in Australia's future treaties.

(a) *Transparency*

KAFTA adds detailed provisions for extensive third party access to proceedings and documentation related the ISDS procedure. For example, art 11.21.2 provides for public access to hearings (as in Australia's FTA with Chile,[56] but not with ASEAN).[57] Article 11.20.5 has specific provisions on *amicus curiae* submissions, not found in the earlier treaties. The host state must also pass on arbitration documents (including transcripts) to the home state of the investor, and to the general public.[58] The Korean and Australian governments also agreed, by separate exchange of Letters, to consult (within 12 months of KAFTA coming into force) on 'the future application' of the new UNCITRAL Transparency Rules for any ISDS proceedings,[59] if investors choose UNCITRAL Arbitration Rules instead of other options such as the ICSID Arbitration Rules.

These provisions put the ISDS process under KAFTA on a basis similar to the WTO (inter-state) Dispute Settlement Understanding, and largely achieve the specific recommendations for transparency in Australian investment treaties that Dr Miles and I advanced in

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[56] This principle is subject to safeguards for commercially sensitive information etc, as approved by the tribunal (and ultimately an inter-state committee, under KAFTA — cf the FTA with Chile).

[57] The private nature of ISDS hearings is also an unfortunate characteristic of other ASEAN investment treaties.

[58] Not even 'at their cost' as provided in art 10.22(1) of Australia's FTA with Chile, at <http://www.dfat.gov.au/fta/aclfta/Australia-Chile-FTA-10.html>.

[59] See above n 55. This means that the governments have opted out of the Transparency Rules, which otherwise apply to treaties concluded from 1 April 2014 providing for UNCITRAL Arbitration Rules, but may later opt back in.

published work in 2009.[60] On this point, KAFTA is well ahead of EU treaty practice, which the Commission wishes to develop but which is (yet again) criticised by the EU Academics Report.

(b) *Multiple Claims and Domestic Proceedings*

KAFTA art 11.18 includes a standard 'fork in the road' provision, essentially requiring the foreign investor to choose between ISDS and national court proceedings. This provision was unfortunately omitted in Australia's basic 1993 BIT with Hong Kong, resulting in two-track claims by Philip Morris, but it is found in more recent treaties concluded by Australia as well. So are provisions to consolidate multiple ISDS claims, as in KAFTA art 11.25, aimed at minimising costs and delays.

KAFTA does not include a requirement for prior 'exhaustion of local remedies' by foreign investors, a possibility raised by Dr Miles and myself in 2009 and very recently by the Chief Justice of Australia.[61] This preliminary step was traditionally required under CIL, but it was seen as unnecessarily causing delays and extra expense, and is now rarely found in investment treaties. One advantage of reinstating 'exhaustion of local remedies' (with a sensible time limit) before allowing ISDS would be to reduce concerns that foreign investors are being given greater procedural rights than local investors.[62] It may be particularly apposite if the counterparty is a developed country with a very reliable legal system. However, in my 2012 survey of those familiar with international investment law, exhaustion of local remedies was not one of the possible reforms to ISDS, which attracted widespread support.[63]

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60 Nottage and Miles, above n 19.

61 Above n 16.

62 However, those rights would ultimately remain different, which can be justified on the different realities facing foreign and local investors, including for example the latter group's greater familiarity with local legal systems and capacity to influence government action through the political process.

63 Campbell et al, above n 19, 4 (responses to Question 2.c).

(c) *Reducing Frivolous Claims*

The EU Academics Report also criticises the European Commission's proposals on this procedural improvement in ISDS, focusing on the threshold test allowing for expedited dismissal of claims that are 'manifestly without merit'. However, unlike Australia's FTA with ASEAN (art 11.25.3) but instead like that with Chile (art 10.20), KAFTA art 11.20.6 does not require such a high threshold. This improvement further reduces costs, expenses and risks for Australia as a potential host state respondent.

(d) *Arbitrators*

The EU Academics Report is on stronger ground in identifying issues with the selection, qualifications and ethics of arbitrators in ISDS proceedings. It rightly highlights 'issue conflict', whereby an arbitrator end up on a tribunal ruling on an issue (such as the scope of the FET obligation) being raised in another case (at least generally) where the individual is serving as counsel. This problem becomes more acute as more and more arbitral decisions become publically available, resulting in the emergence of a de facto system of (persuasive, but not binding) precedent in investment treaty law.

This is something that indeed could be usefully regulated directly in investment treaties. But a growing awareness of this problem anyway makes it more likely that arbitrators in such situations will be challenged for (at least apparent) bias, under the applicable Arbitration Rules and background laws or framework conventions (like the 1965 ICSID Convention). The parties themselves, through their freedom to appoint arbitrators, can also minimise (if not necessarily avoid) this problem. It should also be noted that a similar problem could arise in WTO or FTA inter-state arbitration processes, which involve the appointment of ad hoc panellists. Yet the Code of Conduct found in KAFTA annex 20-A for such panellists does not attempt to deal specifically with 'issue conflict', instead setting broader ethical and legal requirements for such adjudicators.

The EU Academics Report is also critical of European proposals to establish a Roster or panel, with candidates closely vetted by the states, from which tribunal chairpersons can be appointed for ISDS cases. Yet this would be a useful mechanism, already found in some recent treaties concluded by other states (not yet Australia), which could be set up anyway among states without necessarily any treaty provision. The Report is not impressed by the Commission's suggestion that for such rosters retired judges may be among those best qualified, cynically and rhetorically asking: 'does not *everyone* — such as a retired judge — who works in the system and wants to continue doing so have an apparent economic interest to encourage more claims?' But at least in the Australian context, domestic court judges generally take a pay cut to stop working as counsel and join the judiciary, which indicates that they are generally not driven by pecuniary motives; and anyway the parties to ISDS can exercise significant control over arbitrator fees. There are also clear benefits from involving national court (former) judges to join arbitral tribunals that deal with ISDS cases involving more public interests than regular commercial arbitrations. They are more used to addressing such public interest cases, and involving them in ISDS is another way to bring the international procedure closer to that of domestic proceedings.[64]

(e) *Appellate Mechanism*

Finally, the EU Academics Report applauds the Commission's proposal to introduce an appellate review mechanism for ISDS arbitral decisions, but urges clarification especially in the context of

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[64] Query also Report's cynical assertion that: the investment arbitration community is composed overwhelmingly of international commercial arbitrators, with the addition of a few international law professors and a handful of former (and, imprudently, current) ICJ judges. Cf, eg, the popular investment treaty arbitrators listed at Investment Arbitration Reporter, *Arbitration Profiles* (2014) <http://www.iareporter.com/categories/profiles>; Sergio Puig, 'Social Capital in the Arbitration Market' 25(2) *European Journal of International Law* 387 (especially the 'core' group of ICSID arbitrators depicted at 412), at <http://www.smh.com.au/comment/clive-palmer-and-his-senate-colleagues-are-a-creation-of-the-main-parties-making-20140822-107b6i.html>.

EU law. Like the CETA reference text, KAFTA art 11.20 and annex II-E already envisage the possibility of an appellate mechanism, and in fact requires the Annex requires both Korea and Australia to consult within three years on establishing a bilateral mechanism.

D *Conclusions*

The Responses above, like much of the hearings, deal primarily with substantive rights afforded to foreign investors, rather than the ISDS procedure itself, which is ostensibly the subject of this Bill. Of course, substantive commitments and exceptions can also be relevant to this subject, if the former are hopelessly vague and/or slanted in favour of investors (or host states); then, adding ISDS compounds the problem, although it still exists under inter-state arbitration processes invariably agreed under investment treaties anyway. My analysis above suggests that Australia's recent treaties, notably KAFTA, do not fall so short in terms of the balance achieved in the agreed substantive rights so as to justify the complete exclusion of ISDS. KAFTA instead usefully extends Australia's investment treaty practice aimed at achieving an adequate balance, particularly over the last decade, by adopting and elaborating provisions commonly adopted by other developed countries (including the US) and in some respects going further in deference to transparency and host state interests (compared for example with respect to past treaties concluded by EU member states).[65] Accordingly, rather than prohibiting henceforth any ISDS provisions in future treaties, as proposed in this Bill, Australia should continue down its path of carefully negotiating and drafting both substantive protections and ISDS procedures, especially when concluding agreements with countries where there may be concerns about the scope of rights and avenues of recourse offered through local courts.

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[65] See also various other clarifications in KAFTA, listed in the last Row of my online Appendix; including a carve-out from ISDS under annex 11-G regarding Australian government decisions 'whether or not to refuse, or impose orders or conditions on, an investment that is subject to review under Australia's foreign investment policy'.

Anyway, the present Bill should not focus on assessing Australia's public interest in ratifying one treaty, such as KAFTA. Under Australia's current parliamentary system, that task is being undertaken by the Joint Standing Committee on Treaties. It would be highly unusual to alter established parliamentary procedures by passing a Bill like this which severely constrains in advance the executive branch of government's capacity to engage in international treaty negotiations. Further, from a global perspective, passing this Bill would make Australia unique among developed countries, and reinforce some unfortunate tendencies in other fields (such as human rights) for Australia not to engage fully with the international law system.

Instead, Australia would be better to initiate a non-parliamentary public consultation process (as now in the EU) identifying specific issues associated with both ISDS and substantive investment treaty rights. One aim could be to develop its own Model Investment Treaty or at least specific provisions which could be used as a basis for engaging effectively in Australia's future treaty negotiations, and to contribute to ongoing improvements in international investment law more generally.

IV COMMITTEE REPORT RECOMMENDING AGAINST ENACTMENT

On 28 August 2014, the Committee duly reported back to the Senate.[66] The (five) Coalition Senators and the (two) Labor Party Senators recommended against enactment of the Bill, with the Labor Senators providing some Additional Comments. But the (two) Greens Party Senators provided a Dissenting Report, unsurprisingly urging that Senator Whish-Wilson's Bill be passed.

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66 Parliament of Australia, *Report, Trade and Foreign Investment (Protecting the Public Interest) Bill 2014* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/Trade_and_Foreign_Investment_Protecting_the_Public_Interest_Bill_2014/Report>.

Assuming that the other Labor Senators follow the same line as their Committee colleagues when the Bill goes to a vote, as do the other Coalition Senators, the Bill will fail resoundingly. This will be so even if Senator Clive Palmer (a maverick mining billionaire, suddenly xenophobic about Chinese investors in Australia)[67] and his PUP Senators side with the Greens and some independent Senators, who hold the balance of power in the upper House in the more usual scenario where Coalition and Labor Senators cannot reach agreement.

Both Labor and especially Coalition Senators on the Committee acknowledged that the ISDS retains some significant benefits. The Labor Senators did put greater emphasis on potential risks, and also highlighted that it is 'not desirable to radically constrain the executive's treaty-making power in the manner proposed'.[68] This may therefore eventually allow a revival of a looser 'policy' opposed to ISDS in future Australian treaties, as under the Gillard Government, if and when the Labor Party regains power at the next general election (to be held by or before January 2017). However, the Additional Comments also welcomed 'current empirical research being conducted by leading Australian academics' into the impact of ISDS on investment flows, referring to our (broader) ARC project over 2014–16.[69]

The main report concluded:

> 2.59 On balance the committee is not convinced that legislation is the best mechanism by which to address the concerns raised about risks associated with ISDS provisions. *The committee agrees with Professor Nottage and others that the risks associated with ISDS can and should be managed more effectively and in ways which do not require legislation, including careful treaty drafting (of both old and new agreements) and development of a well-balanced Model Investment Treaty*.

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67 Peter Hartcher, 'Clive Palmer and his Senate Colleagues are a Creation of the Main Parties' Making', *The Sydney Morning Herald* (online), 22 August 2014 <http://www.smh.com.au/comment/clive-palmer-and-his-senate-colleagues-are-a-creation-of-the-main-parties-making-20140822-107b6i.html>.

68 Above n 66, Additional Comments, para 1.18.

69 Above n 28.

> 2.60 The committee is of the view that many of the alleged risks to Australian sovereignty and law making arising from the ISDS system are overstated and are not supported by the history of Australia's involvement in negotiating trade agreements. While the committee acknowledges that past experience may not be an accurate guide to the future in terms of potential ISDS claims against Australia, it stresses that the investment treaty arbitration field is evolving in positive ways to enable countries, including Australia, to put exclusions in place, limit the application of ISDS to the investment sections of agreements, and generally tighten up the wording of agreements. The committee is of the view that it is far more important for Australia to manage any risks associated with ISDS provisions than to reverse its longstanding treaty practice and opt out of the ISDS system altogether.
> 2.61 The committee accepts the view that the ISDS system has improved significantly over recent years both in the way treaties are drafted in relation to ISDS clauses and in the way that cases are argued and how arbitrators decide cases. Australia therefore stands to gain more by remaining actively engaged with the international investment law system, including where ISDS provisions apply. The committee is concerned that were Australia to legislate for a blanket ban on ISDS provisions in trade agreements, it would be sending a message to existing and potentially new trading partners that Australia was turning inward-looking and distancing itself from the international law system.
> 2.62 The committee is of the view that a blanket ban on ISDS would impose a significant constraint on the ability of Australian governments to negotiate trade agreements that benefit Australian business. It is for this reason that the committee considers the current case-by-case approach to ISDS is in Australia's long-tern national interest and a sound policy for weighing the risks and benefits of ISDS provisions in trade agreements.

Accordingly, on 3 September 2014, I wrote on behalf of my ARC co-researchers to the Trade Minister and Federal Attorney-General, indicating our willingness to assist with a public consultation aimed at developing a Model Investment Treaty (and/or clauses) for Australia, as agreed by the Committee. There remains much hard work to be done in this field.

In addition, the issue will certainly not go away. Having lost their day in Parliament, arch-critics of all forms of ISDS have turned back to the court of public opinion, with *The Age* newspaper in Melbourne already reporting on 30 August: 'Trade treaties expose Australia to

costly litigation, experts warn'.[70] ABC National Radio also focused on ISDS in the context of the Trans-Pacific Partnership negotiations, in an extended feature broadcast on 14 and 16 September 2014.[71]

Further, on 4 September 2014 the Parliament's JSCOT issued its Report on KAFTA, with dissenting Reports from two Labor committee members as well as Greens Senator Whish-Wilson recommending against ratification of that treaty partly because of their objections to ISDS.[72] Because the Coalition no longer has a majority in the Senate, to appease Labor Senators and get KAFTA implementation legislation passed,[73] the Australian government might even have had to attempt renegotiation of its treaty signed with Korea to seek the removal of the ISDS provisions. If Korea had then changed its stance and eventually agreed to exclude ISDS, this would have had significant implications especially for Australia's other ongoing treaty negotiations, both bilateral and regional.

However, in the Senate on 1 October 2014, Labor Party Senators ultimately agreed to vote in favour of the Customs Tariffs

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70 Georgia Wilkins, 'Trade treaties expose Australia to costly litigation, experts warn', *The Age, Business Day* (online), 30 August 2014 <http://www.theage.com.au/business/trade-treaties-expose-australia-to-costly-litigation-experts-warn-20140828-109ht7.html>; Cf eg Alison Ross, 'Don't rule out ISDA, says Australian Senate committee', *Global Arbitration Review* (online), 3 September 2014 <http://globalarbitrationreview.com/news/article/32936/dont-rule-isds-says-australian-senate-committee/>.

71 ABC, *ISDS: The Devel in the Trade Deal* (14 September 2014) <http://www.abc.net.au/radionational/programs/backgroundbriefings/isds-the-devil-in-the-trade-deal/5734490>.

72 Parliament of Australia, *Report 142: Treaty tabled on 13 May 2014* (2014) <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties/13_May_2014/Report_14>. Curiously, Whish-Wilson noted, 65, that 'Recently the Greens introduced a bill to the Senate to have such clauses banned from all future trade deals', but did not acknowledge that the Committee heard further evidence specifically on ISDS and recommended on 28 August that this Bill not be passed.

73 See Peter Martin, 'Korean trade pact fails to impress panel', *The Sydney Morning Herald, Business Day*, (online), 4 September 2014 <http://www.smh.com.au/business/korean-trade-pact-fails-to-impress-panel-20140904-10cly6.html>.

Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014, despite continuing to voice misgivings of ISDS.[74] The day after the Korean National Assembly approved KAFTA on 2 December, the Australian Government also exchanged Notes confirming that the treaty would come into force from 12 December 2014.[75] Nonetheless, there may be even more obstacles in the path towards ratification of Australia's FTA with China, which was substantially agreed on 17 November 2014 and apparently also will include ISDS protections,[76] not to mention regional FTAs such as the Trans-Pacific Partnership Agreement.

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74 For progress on the Customs Tariffs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014 (Cth) (including Royal Assent on 21 October 2014), see *Customs Tariffs Amendment (Korea-Australia Free Trade Agreement Implementation) Bill 2014* (2014) Parliament of Australia <http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5330>.

75 Media Release, *Robb announces Korea FTA to take effect in 9 days* (3 December 2014) Minister for Trade and Investment <http://trademinister.gov.au/releases/Pages/2014/ar_mr_141203.aspx>.

76 Media Release, *Landmark China-Australia Free Trade Agreement* (17 November 2014) Minister for Trade and Investment <http://trademinister.gov.au/releases/Pages/2014/ar_mr_141117.aspx?ministerid=3>.

V APPENDIX: TRANSCRIPT OF ORAL EVIDENCE AT SENATE HEARINGS

Foreign Affairs, Defence and Trade Legislation Committee — 06/08/2014 — Trade and Foreign Investment (Protecting the Public Interest) Bill 2014

Edited from an online transcript of the Foreign Affairs, Defence and Trade Legislation Committee Hearing.[77]

NOTTAGE, Professor Luke Richard, Private capacity

WEATHERALL, Associate Professor Kimberlee Gai, Private capacity

Evidence was taken via teleconference—

CHAIR: The committee will resume. I welcome Professor Luke Nottage and Associate Professor Kimberlee Weatherall. Thank you both very much for your submissions, which we have as Nos 21 and 88 respectively, and for appearing before the committee today via teleconference. If you would like to make a brief opening statement each, starting with whoever you have selected, and we will then go to questions.

[Prof WEATHERALL: …].

CHAIR: Thank you. Professor Nottage, we do have in front of us your paper, *ISDS: do not be afraid*—to confirm that we do have that. Go ahead.

Prof NOTTAGE: Thank you very much for this opportunity and also for having a look at those few slides, which I will be presenting tomorrow in Sydney at a conference, at the invitation of the Public Health Association. I think it is very important to have informed debate about all aspects of international law, including the question of investor-state dispute settlement.

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77 Parliament of Australia, *Foreign Affairs, Defemce and Trade Legislation Committee* (6 August 2014) <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=COMMITTEES;id=committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0003;query=Id%3A%22committees%2Fcommsen%2F005e1654-540c-4b63-927c-3cb1c149b1a1%2F0000%22>.

As I put in my earlier written submission, I believe that the bill is well intentioned in the sense that the ISDS treaty-based system, treaty-based investment law and international law are actually not perfect and should be reviewed. In fact, I am a strong advocate of enhancing consumer protection both domestically and via international cooperation, using international instruments to promote consumer protection. I have made submissions to this parliament to reform the Australian Consumer Law and I have made many submissions to government to improve consumer protection.

But I am afraid no system is ever perfect, especially in the case of international law. We have a lot of players worldwide. The ISDS system, I think, has improved significantly over the last few years, both in the way treaties are drafted in relation to ISDS clauses and in the way that cases are argued, and therefore in the way arbitrators are deciding cases. So I think it is better for Australia to remain engaged in that ongoing process of reforming the international investment law system, including provisions as to ISDS.

In fact, I think they should continue to negotiate specific improvements in future treaties as well as having a closer look at some of the many older treaties that Australia entered into, including notoriously now the old treaty concluded in the early 1990s with Hong Kong, which has led to the first-ever case where the Australian government has had to defend a claim, but also to have a closer look at some of the treaties concluded by Australia since the early 1990s with countries like Indonesia, where a recent arbitral tribunal decision has decided that the wording in relation to ISDS is so narrow as to prevent foreign investors making claims against host states under those investor-state arbitration provisions.

So I cannot support this bill, which I think takes a position of rejecting completely ISDS, which would make Australia unique among developed countries and put us in the company of a very few countries, even among developing countries, mainly a few very Leftists regimes in South America. I think it would torpedo future trade and investment treaty negotiations to which the major parties in Australia have long been committed, as well as potentially inhibit the development of multilateral initiatives and international investment law. I think it would also reinforce a sense I have, shared among public international law colleagues in Australia, that Australia is turning very inward looking. I think that is obvious, for example, in the field of international human rights, unfortunately, and I think it is very dangerous for this sort of bill to go along with that trend. It may reinforce the sense in Australia that we should not be part of the international law system. Those are my main points.

I would also like at some stage to present some reasons for why I think the Australian government, through the Productivity Commission in 2010, made a recommendation to be much more cautious about engaging

in ISDS. I am involved in a very large Australian Research Council project over the next few years with researchers from UNSW, ANU and the University of Melbourne to look more closely at those policy recommendations but I will leave those to raise when you ask questions.

CHAIR: I wonder if one of you or both of you could assist the committee to give us an overview of how the process works. We have the circumstance with Philip Morris, using it as an example. Could you describe to us where the process goes to legally from here — who meets, who determines? We understand from a previous witness there are no grounds for appeal once an international arbitrator makes the decision. Could you explain that to us?

Prof NOTTAGE: Yes. Obviously it depends on the particular forum and process that the host states have agreed on in the treaty. So in the case of the early treaty with Hong Kong, which has been invoked by the first claim ever against Australia since it started entering these investment treaties and free trade agreements with the investment chapters containing ISDS from 1988, the forum selected here was an ad hoc international arbitration process under UNCITRAL arbitration laws. That is quite a common option given to foreign investors to make a direct claim against a state for violations of commitments made by the host state in the investment treaty and is found in all of Australia's subsequent treaties, to my knowledge. The other possible forum, which is also often included in Australia's subsequent investment treaties, is the International Centre for the Settlement of Investment Disputes, which was established under convention in 1965 under the auspices of the World Bank. The main administration is, therefore, in Washington. In the case that I mentioned recently where an Australian investor is claiming expropriation of its coalmining investment against Indonesia, that has been brought instead under the auspices of ICSID under those arbitration rules.

After the parties select the international arbitrators under the applicable rules — either UNCITRAL rules or the ICSID rules — the first question before the arbitrator is often whether they have full jurisdiction to hear the dispute. In the case of Philip Morris, the Australian government is saying that, as a threshold issue, the appointed arbitrators, the agreed arbitration tribunal, does not have jurisdiction to hear the case because one of the key requirements under the investment treaty — namely, the scope of covered investment — is not satisfied. In particular, the Australian government is saying that Philip Morris has in effect forum shopped, moved its assets deliberately into Hong Kong to take advantage of this old and, by my standards, poorly drafted investment treaty so as to bring a claim against Australia, and this violates the words, if not the

spirit, of that treaty. So, on that ground, the case should not proceed to a substantive hearing.

Senator WHISH-WILSON: Could I just stop you for a point of clarification. You did say that it was poorly drafted, and we have had that evidence from a number of witnesses. Would the carve-outs, for example, in the Korean deal still preclude Philip Morris from bringing the same ISDS case against the Australian government if they are doing it for their own strategic reasons?

Prof NOTTAGE: I think their case would be stronger. For example, even though the old Hong Kong treaty was concluded shortly before Australia and many other countries concluded the WTO agreements, including that agreement, the Hong Kong treaty that we signed did not have an express public health exception. The Australian government, in its submissions, which are publicly available on the Attorney-General's website, has argued that this should not decide the case. Australia can of course rely on customary international law defences to protect the public interest.

Senator WHISH-WILSON: Professor, if I could just be a bit clearer: I understand that the legal case can go on for some time. I am asking whether the new carve-outs would preclude them even launching a case, let alone whether they even have a chance of success.

Prof NOTTAGE: No, so the current provisions in the KAFTA agreement have an express public health exception, like Australia's more recent treaties and agreements like the WTO agreements.

[Prof WEATHERALL : … Senator WHISH-WILSON: … Prof Weatherall : …]

CHAIR: We have further a clarification and then I am going to bring some order back. Have you finished the point you were making, Professor Nottage? If you have, I will go to Senator Gallacher for a point of clarification and then to Senator Fawcett.

Prof NOTTAGE: Can I make a quick final comment in response to your question about the process, Chair. You asked specifically whether there was any scope for appeal of arbitrators' decisions in investor-state arbitration. Again, it depends on whether the state parties have agreed to allow UNCITRAL arbitration rules, for example, or the ICSID rules process. In the case of UNCITRAL rules, like in the Philip Morris case, there can be a review of the arbitrator decision on specified grounds at the agreed or nominated seat of the arbitration, which the parties in this

case — Philip Morris based in Hong Kong and the Australian government — have agreed to be Singapore. However, the key point is that, under modern arbitration legislation like we have in Singapore and which is also based on a UN model law which Australia has adopted into its International Arbitration Act, there is no appeal solely for an error of law by the arbitrator. So, in that sense, there is more limited ground for appealing an international arbitration order for that system. Under a procedure like the one involving the Australian claim against Indonesia at the moment, there is very limited scope to contest the arbitrator's award for purely an error of law. That would be a difference from the domestic court procedures of many countries.

Senator GALLACHER: I am struggling to understand whether ISDS makes potential litigation clearer. In the absence of ISDS is there just a miasma of legal options that people may want to take?

Prof NOTTAGE: The two other options that are available for foreign investors in the absence of investor-state dispute settlement are either an interstate arbitration or litigation process, typically spelt out in the particular treaty. In all of Australia's treaties there is that option as well. The Australia-Malaysia FTA investment chapter concluded in 2012 under the Gillard government trade policy statement, which for a few years said that Australia would not enter into any treaties containing ISDS; there is still the option of a foreign investor triggering an interstate process for a binding decision for the process under that treaty.

It is also possible, of course, to turn to multilateral trade agreements like GATT under the WTO system, which also involves interstate processes. In fact, Australia is being sued under those processes in Geneva now by countries like Honduras, Ukraine, Dominican Republic and now Indonesia in relation to its plain packaging legislation. So that is one other alternative.

The second alternative is to claim in front of domestic courts in the host state in particular. The big problem with that, of course, is that, particularly in developing countries, the court process may not meet the standards that are widely accepted in Australia and other developed legal systems. But the substantive rights afforded to foreign investors also may not meet those standards or the standards entrenched through international treaties these days and for many decades. An extreme example would be Vietnam, where its constitution does not apply to foreigners at all, so the protections against expropriation of assets in Vietnam are simply not available in Vietnamese courts. In other situations there may be protection provided to foreign investors as well as local investors but the standard may be much lower and the court process may be much more difficult.

CHAIR: Thank you. Senator Fawcett.

Senator FAWCETT: Thank you for your contribution today. To get a counter position, I have a few questions for you stemming from the evidence that has been raised by other witnesses. There has been some talk about the fact that the last 25 years of experience is not a predictor of the future in terms of lack of ISDS actions against Australia — partly because of the growing market for international lawyers and the fact that firms are seeing that this is now an option. The fact that we have had very little action does not actually mean anything in terms of what will come in the future. Would you care to comment on that point of view and whether we can in fact use the lack of action against Australia in the past as any kind of predictor for the future?

Prof NOTTAGE: I agree that the investment treaty arbitration field is evolving. In fact, back in 2009 I co-authored an article with my then colleague Dr Kate Miles, who is now at the University of Cambridge, suggesting Australia should include in its treaties various forms of new drafting that allowed tailored sets of rules that would help speed up the process and reduce costs. Already back then there were concerns being raised about that. I think we are seeing more and more of those measures written into treaties by countries that are now more conscious of that problem and how to address it through specific treaty drafting. I think, though, that the main way to address too many claims being brought at too great an expense is to be very clear in relation to the substantive commitments, the substantive rights that are agreed between the states in these treaties. A senator previously asked whether a Philip Morris type case would be precluded by the KAFTA regime. The answer is 'no' under the current wording. If that sort of claim by tobacco companies is a particular concern, the obvious way to preclude it completely is to have a carve out for measures in relation to tobacco.

[Prof WEATHERALL : …]

Prof NOTTAGE: Or measures in relation to public health, although then it becomes a question of whether the measure is actually designed to public health purposes.

The other way to do it is to have a carve out where you say that, more specifically, if there is a claim in relation to tobacco regulation, it can only be dealt with by the other alternative provided in the treaty, which is the [inter-state] arbitration process or domestic court proceedings.

Another way to address the concern by focusing on substantive rights would be to try to draft in the treaty the sorts of protections that are available anyway under Australian domestic law. For example, have a definition of expropriation which follows closely or completely the wording used in Australia. We know from the decision of the High Court of Australia in the parallel claim that was before the court against Australia under the Constitution that our definition is comparatively narrow — narrower than some other countries and most international treaty wording. If Australia could put those sorts of provisions in their treaties and negotiate that with the other party, that would then mean that the risk for Australia of extra liability exposure is much reduced and yet Australia would still get the benefit of taking some protection against expropriation when Australian outbound investors went into countries like, for example, Vietnam, which otherwise through the domestic legal system does not provide adequate protections for foreigners.

I think that is the best way to ensure that we do not see more and more claims being brought against countries, including developed countries like Australia.

[Prof WEATHERALL : …]

Senator FAWCETT: I have a question on notice for you. I would value your opinion as to whether in fact in the clauses of KAFTA that has been appropriately inserted. I am happy for you to take that on notice.

[Prof WEATHERALL : …]

Senator FAWCETT: Professor Nottage, in your submission you talked about — I am not sure if it is a fact or a proposal — how two states like Korea and Australia could agree that an investor's case does not have validity and suspend that claim by agreeing there was no treaty violation by the host state. Could you clarify? Is it a fact that that exists or is that one of your proposals for how FTAs could be improved?

Prof NOTTAGE: That is a provision that is found in investment treaties, including at least one that Australia entered into: the ASEAN-Australia-New Zealand Free Trade Agreement, signed in 2009. It actually has a longer history. In the particular area of taxation measures, where, of course, nation states have tended to more jealously guard their sovereignty, have their own ways of doing things and are more susceptible to domestic political pressures at the time, they have developed their own dynamic in relation to, for example, trying to minimise problems of double taxation of individuals and companies and

their own networks of informal cooperation between countries. In investment treaties, as a result, you quite often see provisions that say that, when there is a question as to whether taxation measures amount to expropriation, those things cannot be decided under the investor-state dispute settlement provision or the home state and the host state can agree that the measure does not amount to an expropriation.

So that is another useful mechanism at the level of substantive rights for state parties to agree on a more tailored special regime to protect their respective public interests. In fact, I think it is a particularly useful mechanism which could lead to trade an investment treaties leading to countries trading up to a higher regulatory standard. Imagine if we had had that sort of provision in the Australia-Hong Kong treaty that Philip Morris is now invoking. The Australian government would then have approached the Hong Kong government and said, 'Look, would you agree that what Philip Morris is claiming — namely that this tobacco plain packaging legislation amounts to an expropriation — is not in fact an expropriation?' If the Hong Kong government then agreed under a provision that was added under the treaty in the first place, that would in effect suspend Philip Morris's claims. It would preclude it, in the words of the Senator from Tasmania. Moreover, it would then get the Hong Kong government and its citizens thinking, 'Maybe the Australian regime for tobacco plain packaging is something worthwhile; maybe we should have it in our own country as well.' So that sort of provision not only has the short-term effect of protecting the policy space of a host state for a legitimate public health matter which it can persuade the other state was enacted for that purpose; but it could also lead to positive ripple effects in the other state.

Senator FAWCETT: Free trade is about equality of access or agreeing terms of access for international players into your domestic market. Is it a defence if the legislation that is passed by government has an equal impact on domestic suppliers into that same market space as it does on international suppliers — so it is nothing to do with discriminatory access against an international player, which was the purpose of establishing the FTA? Does that give credibility to the defence that this is a health measure or for the public good as opposed to something that is a trade barrier?

Prof NOTTAGE: That is a good question. It also goes, interestingly, to the question of substantive rights and substantive defences to claims. As you can see, it is not really connected to the procedure — namely ISDS versus, say, the treaty based interstate arbitration claim. The same question could be posed under either procedural regimes.

It is very hard to give a short answer to that question, because, again, it will depend on the precise treaty wording that has been used but also the

evolving background customary international law and the evolving standards applied by international arbitrators.

Senator FAWCETT: Could I ask you to perhaps take that on notice, which will free up the chair's job in trying to save time, and perhaps give us a considered answer on that question.

CHAIR: …].

Senator WHISH-WILSON: Professor Nottage, you are optimistic about being able to improve ISDS clauses and you have given us some good ideas today and in your submission. Do you accept that the Korean deal and the carve-outs in ISDS are not sufficient or do you think they are sufficient given the debate we are having around improving ISDS?

Prof NOTTAGE: Particularly in relation to IP I would say my colleague Professor Weatherall makes a compelling case that it is not well drafted and we should look closely at alternative forms of wording used by, say, Canada, which like Australia has had a lot of public discussion about ISDS and investment treaties more generally. In relation to other provisions, again I think it is a question that has been put on notice for us but comparing even KAFTA drafting with the drafting of, say, the Australia-Chile FTA and AANZFTA concluded with ASEAN in 2009 by a Labor government — I cannot remember which one; it must have been before the Gillard government — the wording in the Korea agreement struck me as tighter. However, obviously the EU is also interested in looking at ways to nail down the substantive rights and the exceptions and we should do the match-up that Professor —

Senator WHISH-WILSON: I did attempt to read the document that I just referred to from the 100 [EU] academics. As I am not a lawyer I found it very hard going. It was highly technical in nature. You are a legal academic. Do you have any comments about the concerns of those 100 legal academics? Correct me if I am wrong, but I think the conclusion at the end of that report is that we should abandon ISDS.

Prof NOTTAGE: I will have to have a closer look at that report to give you a response.

Senator WHISH-WILSON: If you could.

Prof NOTTAGE: But I would say that there have been a number of earlier shorter open letters signed by various legal academics and past

and present judges, for example, from various countries in relation specifically to ISDS, to the procedure rather than substantive rights that states sign up to in the defence of those rights or exceptions. In relation to ISDS and open letters, we have to be a little bit cautious. If someone puts before you an open letter describing a system in very general terms or in a particular way and says, 'What do you think of this? Do you want to sign it or not?', a lot of people will just then say, 'That sounds awful and I'm going to sign'. And of course many others may be approached and not do that.

Senator WHISH-WILSON: I respect what you are saying, but I just reflect again: I read that and I could not understand hardly any of it. It was very technical and, clearly, it had a lot of legal opinion in it, so I did not see it as a general open letter. The conclusion may have been seen that way, but the arguments behind it were highly technical and legal in nature. I just put that on the record. It did not seem like an emotive document to me at all—quite the opposite.

Prof NOTTAGE: But I think it does make an important point, which is that this area of law is complicated, like many other areas of law. If you read a report, for example, on WTO agreements that Australia has been a party to since 1994 in relation to things like the general exception or the safeguard in relation to public health under article 20 of GATT, that is also very technical and evolving. Even with an appellate body of permanent judges, a review for error of law — that area of law is still evolving; it is still not 100 per cent clear. Unfortunately, that is the nature of law and in particular international law.

I would say that the general trend, both in treaty drafting and in an arbitral awards, has been to give more weight to host state discretion in regulatory measures that are non-discriminatory and put genuine public health or environmental protection benefits. We cannot look at old cases decided in the early days of NAFTA — the North American Free Trade Agreement — and say, 'Look how badly those arbitrators decided the system and ISDS exacerbated the problem'. Those old cases, some of which are cited in submissions on this bill, are no longer representative of the trend. That is why I think the paper you mentioned about the various types of safeguards more recently is complicated because the law has changed. It has moved on from some of those earlier cases.

Senator WHISH-WILSON: But certainly those academics expressed opinions about future risks. We use the word 'risks' rather than stating any facts here, but they still firmly believe that this system presented significant risks.

You use the word 'non-discriminatory'. We had evidence earlier from Dr Rimmer that 'non-discriminatory' is very broad in its interpretations as it stands in carve-outs and in relation to a whole range of issues. We talked about food labelling, local procurement, bans on GMO products et cetera. Do you accept that there are criticisms with the standing exceptions or carve-outs?

Prof NOTTAGE: The biggest tension is the extent to which something can be said to be discriminatory or not when there is no obvious intention to discriminate, but it has that differential impact on foreign investors or traders compared to local traders and so on. This is an issue that is not specific to international investment treaty law. The WTO system has been grappling with this and continues to grapple with this. In fact, international investment arbitration tribunals refer to that sort of conceptual framework developed in the WTO system. There are some debates about whether that can be easily transported over into the international treaty space, but that is a major reference point.

It goes back to one of my responses to an earlier question: what is the alternative if you just completely banned ISDS and essentially very much limited the scope for future investment disputes emerging through international tribunals? It could backfire in the sense that we no longer benefit from an evolution of the understandings of international investment law experts — the tribunal members chosen by the host states, the drafters of treaties and so on; the lawyers involved when they have to get involved. No, because at the moment there is a rich literature evolving that we can refer to. In the absence of that, if we get rid of ISDS completely we will get to a situation where we will never really know and we will just have to rely on, to the extent it is possible, some WTO type jurisprudence and so on.

Senator WHISH-WILSON: Can I ask you a question about that? On page 4 of your submission you talk about your study you have got from the Australian government with colleagues at UNSW, ANU and Melbourne. You are looking at the Productivity Commission recommendations. On page 4 you mention that you can see benefits to ISDS. How far are you into that work? Have you done the economic modelling and the work to support that conclusion?

Prof NOTTAGE: So there are three aspects in particular that we are working on. One is to do a proper econometric study tailored to the Australian environment and to Australian policymakers such as yourself, looking at whether offering various types of investor-state dispute settlement — because there are various gradations possible ranging from full-on investor-state arbitration through to some partial substitutes and

also some investor-state mediation provisions — lead to an increase in inbound FDI and the extent to which those different types of provisions actually do that. Australia and many other countries in the region desperately need increased inbound FDI, for example to promote infrastructure in particular in developing countries. So we are in the process of doing that this year, but we will not have results until next year. It is a very difficult process, and it is one the Productivity Commission did not attempt. They referred to a working paper at the time, published through the WTO, but we want to do a proper study. It will take time. We are working with Dr Shiro Armstrong at the ANU.

The second thing we are doing, which we will be able to present some results on more quickly, is precisely in relation to the questions this committee has raised in relation to safeguards and so on: the degree to which exceptions can and are being applied by arbitral tribunals in investor disputes. That is a matter of going through that growing literature of decisions of arbitral tribunals and related commentary, the sorts of detailed reports like the one that you are having difficulty with. We are going through all of that and trying to distil it so that we see clearly the trend and whether or not host states like Australia are subject to greater risk.

Senator WHISH-WILSON: Sorry, Professor Nottage, but I have just been told by the chair I have only got three more minutes. You do use the words in your submission:

… there appear to be more such benefits for Australia in treaty-based ISDS than hypothesized by the Productivity Commission — and that is obviously the basis you are exploring in your report. But what evidence do you have that there appears to be these benefits at this point if you have not done the work yet?

Prof NOTTAGE: There is, for example, in the Productivity Commission's own cited literature a finding in it from econometricians cited that actually investor-state arbitration provisions did lead to an increase in inbound investment on a global basis, on an aggregate basis, on one form of regression analysis. That is one thing we want to explore. It is not highlighted by the Productivity Commission: they actually cite that proposition in that paper only for the contrary view, which was that there was no significant statistical benefit. Another thing I have mentioned before is we now know, unlike the Productivity Commission, that Australian investors are using the system to protect their outbound investments. For example, the claim against Indonesia at the moment by an Australian mining company; there was an earlier arbitration that was actually going on at the time of the Productivity Commission did its study, but which was not reported because it was under the UNCITRAL rules. That was where an Australian investor successfully claimed

against India. So we now know that there are Australian companies benefitting tangibly from the system and it is working the way it was designed to work.

Senator WHISH-WILSON: When did you receive the funding and the go-ahead for that report? Was it December? I notice your reference says December, but did you receive that from the government recently or a while back?

Prof NOTTAGE: It was formally notified around November last year. We put in the application, of course, earlier in —

Senator WHISH-WILSON: Thank you. Can I get your opinion on whether you think the system that we have seen in Europe, where the whole ISDS issue has been opened up to three months of public submission, is something we should consider doing in this country given that you feel that there is room for evolution in these investment clauses. You also talk about a model investment treaty. Or are you happy with the way the system is at the moment, where DFAT tends to make these decisions or government departments make these decisions internally?

Prof NOTTAGE: I have been saying for several years that Australia should be looking to develop its own model international investment treaty, like many of our trading partners do, both developed countries and developing countries. The EU, of course, is a special case because it involves several dozen member states with different levels of development and it has a very complicated semi-constitutional structure. So, of course, their consultations are going to take a longer time and have to be done in a particular way. But I think there would be a lot of benefit in more structured public discussion led by the government about not only investor-state dispute settlement but also the broader international investment treaty regime, including the substantive rights, which I notice we have been spending most of our time talking about. That, I think, is the more important question.

However, I must say that I do not think a bill along these lines, which proposes just to get rid of all forms of ISDS and prevent Australia from engaging in that process with its counter-parties and even domestically after that if the bill is passed, is the constructive way forward. I think a better way would be for politicians such as you to please engage with other politicians on all sides of politics and try to get responsible ministers to direct their government officials towards a broader public discussion where there can be consultation about the range of options available to try to improve the system.

Senator FAWCETT: I would like to come back to a comment you made earlier about the developing body of law. We have had some comments from other witnesses — and, again, I am just seeking to get a counterbalance here. The US has made a fair bit of moving away from the broad statement of 'fair and equitable' and coming down to requiring people to consider the body of existing international law and interpretations. The concern has been that that body of international law is now starting to include some of the outcomes from various panels. I wonder if you share that concern and if you think that traditional interpretation is starting to change such that that is no longer a suitable path for states to go down in drafting these agreements.

Prof NOTTAGE: I have noticed that argument. I would have to go back and see what other academics have written specifically about that sort of point more recently. In principle, I think the provisions added to Australia's treaties and many others around the world over recent years — in fact, going back more than a decade — have tried to limit the scope of fair and equitable treatment to the customary international law standard. That was intended to rein in the scope of application of that obligation by states. Perhaps there is an argument that the customary international law has expanded as a result of earlier arbitral tribunals. In theory that is possible, but the question would be: how are current arbitral tribunals dealing with that question? There are many treaties now that have sort of provision; how are they actually deciding it? So it is an empirical question and it is something where I am sure there is some good literature that tests the hypothesis. I think Dr Tienhaara made the assertion or put the hypothesis, but it requires some actual hunting around to test it.

Senator FAWCETT: Sure. I am happy for you to come back on notice.

Prof NOTTAGE: I will try to find something that might assist you in that.

Senator FAWCETT: Thank you. I have two final questions. First, the concern has been raised about 'regulatory chill' and a reluctance of nations to pass legislation. I am just wondering whether you would care to comment on that. Second, there has been concern about a lack of transparency around ISDS provisions. Specifically looking at the KAFTA as the current example, do you have a comment on the KAFTA agreement, how it is drafted and the degree of transparency in it, specifically around the ISDS provisions?

Prof NOTTAGE: First, on regulatory chill, again, it is a theory that makes some intuitive sense. But, again, it is a matter that needs to be tested empirically. The difficulty here is that it is hard to prove a negative. We are trying to find examples of where a government has not introduced a measure because of the concern about foreign investor claims — in fact, the extra concern of investor claims facilitated through ISDS provisions. It is very hard to find such examples — clear examples. Dr Tienhaara has done a lot of work trying to find such examples, and she has not come up with many clear ones, because at that level of policy there is not a lot of publicly available information. In our project that we have embarked on we are planning to interview not just foreign investors who are considering accessing foreign markets from Australia but also government officials in different countries, including Australia. We may be able to get, on a confidential basis, an anonymised basis, some examples that prove or disprove this hypothesis.

But I would say — and this is a point I made in my written submission — that already developed countries, in particular, like Australia, are subjected to regulatory chill anyway, because our courts are full of cases where concerned citizens and corporations are challenging government action or inaction through our court system. We are also subject to regulatory chill from interstate dispute settlement processes, including the WTO claims, including in relation to investment in services sectors under the *General Agreement on Trade in Services* — GATS. So, especially in developed countries, the extra regulatory chill could well be overstated. But, again, it is a matter that needs to be tested.

Finally, on transparency, as I wrote with Dr Kate Miles in published work in 2009, I think Australia should continue down the line that it was already going down in agreements with Chile, for example, of enhancing transparency. We see some of those being picked up in the KAFTA, most recently. It is a concern also in other developed countries to enhance the transparency of proceedings. I predict that the EU and the US will retain ISDS in some form but certainly with enhanced transparency, which they have already started to introduce in some of their treaties, which will take them perhaps to the next level. I think that is the sort of thing Australia should be engaging in and doing as well, rather than just getting rid of ISDS completely, as proposed in this bill.

[Prof WEATHERALL : …]

CHAIR: Thank you for that, and thank you both for your submissions and for appearing. If senators have any other questions I am sure they will put them on notice through the secretariat. Again, thank you for your interest in appearing today.

THE ART OF ADVOCACY BEFORE COMMON LAW AND CIVIL LAW COURTS: FINDING THE GOVERNING LAW

ONDREJ CHVOSTA*

Abstract

Advocacy — Common Law and Civil Law — Equity — Legal Certainty — Conflict of Laws — Choice of Law Rules — The Convention on the Law Applicable to Contractual Obligations (Rome Convention) — Rome I Regulation — Rome II Regulation — Restatement (Second) of Conflict of Laws

This article focuses on the differences in advocacy before common law and civil law courts. The first section of the article discusses the different principles typical for the two legal systems: equity for common law, and legal certainty for civil law. The second section looks at how these principles appear in common law and civil law 'choice of law' rules. The final section takes a closer look at two 'conflict of laws' cases, one arising in a common law court, and one in a civil law court. Both courts apply the same provision of an international convention, but arrive at different conclusions. The text then examines the courts' differing reasoning, and explains how

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litigators ought to alter their arguments to increase their chances of persuading a common law, or a civil law court respectively.

I INTRODUCTION

This article contemplates the different approaches lawyers need to take in order to successfully advocate before common law and civil law tribunals respectively. I have selected a rather narrow area of law to demonstrate these differences: the determination of governing law in the absence of an explicit choice of law.

This problematic, yet very important area of law will serve as a useful example for the purposes of this article for two reasons. First, as the question of choice of law commonly arises in disputes with an international element (eg, the parties are from different countries, the place of performance is in a foreign country, or the place of accident is in a foreign country), it often implicates the interaction between civil law and common law. Second, the differences between civil law and common law sources of law containing applicable 'choice of law' rules are good examples of the different methods common law and civil law systems employ when prescribing authoritative legal norms. As discussed below, a skilled advocate needs to be aware of these differences when he or she is arguing a case.

A common law court is more likely to be persuaded by different arguments than a civil law court — both at the trial level and at the appellate level.[1] A successful advocate needs to know what points he or she needs to raise in order to persuade the presiding judge. To make the proper argument, a lawyer needs to be aware of the different quintessential guiding principles that characterise the two main legal systems that have developed in the western civilisations and spread

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[1] While there are — without a doubt — important differences in effective advocacy before trial courts and appellate courts, these are beyond the scope of this article.

around the world. These guiding principles are; one, 'equity' for the common law and two, 'legal certainty' for the civil law.[2]

This article will first discuss the principles of 'equity' and 'legal certainty' and their relationship to one another. Following that is a brief overview of selected sources of law containing 'choice of law' rules applicable in the United States and in the European Union respectively. These norms showcase the major differences between both the common law and civil law approaches to conflict of laws and to legal rules in general. These distinct approaches are then analysed through two European cases, both applying the *Convention on the Law Applicable to Contractual Obligations* ('*Rome Convention*').[3] The equity-influenced approach chosen by an English court is clearly distinguishable from the approach taken by a Dutch civil law court steadfastly adhering to the principle of 'legal certainty'. Finally, the article then proceeds to offer suggestions on how to best utilise the two prominent legal principles in advocacy before common law and civil law tribunals.

II Equity and Legal Certainty

'Equity' and 'legal certainty' are both important and — in a way — very basic principles of law. They are both difficult to grasp and over-broad, yet they permeate into each and every aspect of common law and civil law respectively. Because scholars do not always agree on how to define the concepts of 'equity' and 'legal certainty', it is necessary to explain how these terms are going to be used here.

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2 For an introductory discussion of Legal Certainty, see Aleš Gerloch, *Teorie Práva* [Theory of Law], 277–93 (Aleš Čeněk, 4th ed, 2007); Viktor Knapp, *Teorie Práva* [Theory of Law], 198–211 (CH Beck, 2nd ed, 1994); see also G M Razi, 'Reflections on Equity in the Civil Law Systems' (1963–64) 13 *American University Law Review* 24 (describing the principle of Equity and its more limited role in civil law countries).

3 *Convention 80/934/ECC of 19 June 1980 on the Law Applicable to Contractual Obligations* [1980] OJ L 266 ('*Rome Convention*').

By equity I mean '[f]airness; [i]mpartiality; the body of principles constituting what is fair and right'.[4] At the most abstract level, it is the belief that law in general, and as applied to specific circumstances, should be just — that it ought to be fair. It is therefore not meant to refer to the body of law originating in England and created by the Court of Chancery to counter the rigidity of common law, or the subsequent dichotomy between equity and common law.

According to Antonin Scalia, one of the most prolific Justices of the US Supreme Court, trial judges 'focus on achieving the proper result in one particular case, not on crafting a rule of law that will do justice in the generality of cases'.[5] In other words, to maximise the chances of success in litigation before a common law judge, equity requires that the attorney appeals 'not just to rules, but to justice and common sense'.[6] Similarly, Lord Denning, arguably the most important English judge of the 20th century,[7] believed that 'the role of the judge was to do justice [or Equity] between the parties before him'.[8] Lord Denning went on to state:

> If there is any rule of law [that] impairs the doing of justice, then it is the province of the judge to do all he legitimately can to avoid that rule — or even change it — so as to do justice in the instant case before him. He need not wait for the legislature to intervene: because that can never be of any help in the instant case.[9]

The jurisprudence of Lord Denning 'was known for its willingness to sacrifice precedent to perceived individual justice'.[10] While these

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4 *Black's Law Dictionary*, 619 (Deluxe 9th ed, 2009); see also Razi, above n 2, 25. Offering similar, natural law based definitions of Equity by famous legal scholars.

5 Antonin Scalia and Bryan A Garner, *Making Your Case: The Art of Persuading Judges* 7 (Thompson West, 2008).

6 Ibid 26.

7 See, eg, Brady Coleman, 'Lord Denning & Justice Cardozo: The Judge as Poet-Philosopher' (2001) 32 *Rutgers Law Journal* 485.

8 Lord Denning, *The Family Story* (Butterworths, 1st ed, 1981) 174; see also, quoting Lord Denning, Scalia and Garner, above n 5, 26.

9 Lord Denning, above n 8, 174.

10 Coleman, above n 7, 486. Describing the jurisprudence of Lord Denning, as well as another common law giant, Justice Benjamin N Cardozo.

characterisations of 'equity' may appear rather broad and perhaps even a little vague, the application of the principle of Equity to a specific case will be illuminated later in this text, especially when contrasted with 'legal certainty'.

Now, let us contrast the equitable common law approach with the quintessential civil law principle of legal certainty. While 'legal certainty' is not entirely unfamiliar to common law jurists, civil law legal doctrine relies much more heavily on this principle.[11] It is not an understatement to say that 'legal certainty' is the alpha and the omega of civil law.[12] One only needs to consider the definitions of legal certainty that civil law jurists have developed over the centuries. One such definition provides that the essence of legal certainty is that:

> everyone can rely on the fact that the state will effectively protect his rights, that the state will aid him in executing his rights when someone illegally hinders the execution of these rights, and also that the state is going to enforce the legally prescribed — and no other — penalty if he breaks the law, and finally that the state will not enforce any penalty against him, unless he breaks the law.[13]

According to Aleš Gerloch, the former Dean of the Charles University in Prague, Faculty of Law, and professor of Constitutional Law and Legal Theory, 'legal certainty' has the following attributes:

- a certainty that only good law shall be made;
- a certainty that no person will be limited in his or her rights;
- a certainty that acquired rights shall be protected;
- a certainty that everyone can assert their legal rights; and

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11 See, eg, Zdeněk Kučera, *Mezinárodní Právo Soukromé* [Private International Law], 38–42 (Aleš Čeněk, 7th ed, 2009). Emphasising the importance of legal certainty in Conflict of Laws and criticising most American approaches to choice of law for lack of Legal Certainty.

12 See generally, Knapp, above n 2, 205–7.

13 Ibid 205 [Ondrej Chvosta trans].

- a certainty that everyone breaking the law will receive a just penalty.[14]

These definitions of 'legal certainty' are far-reaching and it is easy to see how the ideal of 'legal certainty' can be employed in all areas of law — it is all-encompassing. The notion that law must be clear, knowable (ie, made available to everyone in advance of its actual applicability) and ideally provide for every eventuality is crucial to the legal culture of civil law nations. What is often said to be at the very core of 'legal certainty', what it all comes down to, if one is to characterise this civil law principle in a single concise sentence, is that 'everyone can rely on the fact that similar situations shall be resolved similarly and different situations differently'.[15]

Nonetheless, it needs to be emphasised that 'equity' and 'legal certainty' are not mutually exclusive. After all, the supreme maxim of civil law — ie, that 'everyone can rely on the fact that similar situations shall be resolved similarly and different situations differently'[16] — is also inherently *equitable*. It is only fair to treat similarly situated parties similarly. The main difference between the two legal systems is in the emphasis they place on 'equity' and 'legal certainty'. For civil law, 'legal certainty' — the predictability of law and the protection of parties' legitimate expectations — is more important than for the particular dispute to be resolved in the most just way imaginable. The idea under civil law is that '[a]rmed with the code, the intensive code training in law school, and with access to the doctrine for the occasional trick problem, the civil lawyer and judge is ready to confront whatever problem walks through the door'.[17] The civil lawyer or judge should not improvise.

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14 Gerloch, above n 2, 283 [Ondrej Chvosta trans].

15 Knapp, above n 2, 206.

16 Ibid.

17 Richard B Cappalli, 'At the Point of Decision: The Common Law's Advantage over the Civil Law' (1998) 12 *Temple International and Comparative Law Journal* 87, 97.

Under common law, 'equity' — or fairness — requires that each situation, each set of circumstances, be evaluated and assessed on its own merits. This approach necessarily requires an *ex post* review of the facts. The general premise here would be that each situation, each set of facts is unique, and any adjudication needs to reflect that.

The difference between 'legal certainty' and 'equity' is twofold. First, legal certainty looks to the future and determines, or at least it tries to determine, what the rule will be for a given situation *ex ante*. Equity, on the other hand, requires that a situation be reviewed individually ex post. Second, for 'legal certainty' it is essential that there exist generally applicable legal norms that provide for every possible eventuality. Under equity, courts look at each case individually and attempt to reach a decision that would be the most equitable for that particular situation without directly contradicting applicable statutory law.

These differences stem from the fact that civil law, in its most pristine form, is greatly influenced by positivist thinking and the notion that there is an objective truth, which is readily and mechanically discoverable.[18] This general belief has allowed civil law countries to develop a legal framework where the idea is that the legislature creates a meticulous logical set of substantive and procedural rules, and a properly trained civil law judge only needs to mechanically apply these rules to arrive at the appropriate and desired outcome.

Common law jurists are much less inclined to accept this positivist proposition, because the prevailing idea is that '[r]eality is uncertain [and] contingent; the subject of debate'.[19] Common law leaves the fate of the trial more squarely in the parties' hands. 'The [common law judges'] role's passive character may give the US judge an aura of being "above the fray" in contrast to the "hands-on" civil law

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18 See generally Gerloch, above n 2.

19 Oscar G Chase, 'American "Exceptionalism" and Comparative Procedure' (2002) 50 *American Journal of Comparative Law* 277, 300.

judge.'[20] Civil law purists would view this approach as legal heresy. But the common law judge, by being 'above the fray', is in a better position to hand down an equitable decision, based on the facts of the case as presented by the parties.

III SOURCES OF LAW IN THE UNITED STATES AND THE EUROPEAN UNION

The differences between common law and civil law are also evidenced by the legal rules adopted in the two legal systems. While common law nations are more likely to articulate a list of factors for the judge to consider when handing down a decision, the civil law judge most often has very little discretion in the application of predominantly hard bright-line rules. In describing this difference, commentators have observed that 'much of what American approaches endeavor to do judicially, European systems endeavor to do legislatively'.[21] This section first looks at the American majority approach (ie, the '*Restatement (Second) of Conflict of Laws'* approach)[22] to 'choice of law' in the absence of an explicit choice. It then proceeds to examine the body of law developed by the European Communities and the European Union, where the vast majority of member states are civil law jurisdictions.

A *Equity and The Restatement (Second) of Conflict of Laws*

'Choice of law' rules in the United States are almost entirely a matter of State law, which necessarily means that the approaches to determining the governing law are going to differ from state to state.[23] This article is going to focus only on the prevailing approach

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20 Scott Dodson and James M Klebba, 'Global Civil Procedure in the Twenty-First Century' (2011) 34 *Boston College International and Comparative Law Review* 1, 12.

21 Peter Hay et al, *Conflict of Laws* (West Academic Publishing, 5th ed, 2010) 62.

22 See S C Symeonides, *American Private International Law*, (Kluwer Law International, 1st ed, 2008) 225.

23 See, eg, ibid 46.

embodied in the *Restatement (Second) of Conflict of Laws*[24] ('*Second Restatement*'), which has been adopted by at least 24 States for contract conflicts and 22 States for tort conflicts.[25] Instead of providing hard 'choice of law' rules, the *Second Restatement* gives a list of policy considerations and factors that the court should consider when deciding on the governing law. '[T]his mode of treatment leaves the answer to specific problems very much at large and reduces certitude, but its greater flexibility accords sensitivity in judgment to important values.'[26] In other words, the *Second Restatement* values the flexibility necessary for equitable rulings over 'legal certainty'. To best comprehend the way equity is reflected in the *Second Restatement*, one only needs to look at the 'rules' contained therein.

The most important provision of the *Second Restatement* is § 6(2), which lists the factors that need to be considered in both contract and tort cases:

> the factors relevant to the choice of the applicable rule of law include:
>
> (a) the needs of the interstate and international systems;
> (b) the relevant policies of the forum;
> (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
> (d) the protection of justified expectations;
> (e) the basic policies underlying the particular field of law;
> (f) certainty, predictability and uniformity of result; and
> (g) ease in the determination and application of the law to be applied.[27]

These factors are not laid out in a hierarchical order and the list is not exhaustive (note the use of the word 'include' at the end of the first line of the quoted provision). Therefore, the judge has a very broad

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24 American Law Institute, *Restatement (Second) of Conflict of Laws* (1971) ('*Second Restatement*').

25 Symeonides, above n 22, 112.

26 David P Currie et al, *Conflict of Laws: Cases — Comments — Commentaries* 202 (8th ed, 2010) (citations omitted) 202.

27 *Second Restatement* (1971) § 6(2) (emphasis added).

discretion in choosing the factors most pertinent to the factual situation before the court.

It is also important to note that sub-ss (d) and (f) of § 6(2) indicate that 'legal certainty' is an important consideration even for a common law court subscribing to the principle of equity. However, the authors of the *Second Restatement* made clear that '[i]n a rapidly developing area, such as choice of law, it is often more important that good rules be developed than that predictability and uniformity of result should be assured through continued adherence to existing rules'.[28] The authors were therefore aware of the importance of 'legal certainty', but they still believed that 'equity' and the flexibility it affords was more essential to the American common law system.

Section 188 of the *Second Restatement* then provides the general default 'choice of law' rule for contracts:

> (1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s 6.
>
> (2) In the absence of an effective choice of law by the parties (see § 187), the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation and place of business of the parties.[29]

Thus, under § 188(2), the contacts are to be evaluated according to their relative importance with respect to the particular issue. Again, just like with § 6, the contacts in § 188 are not listed in a hierarchical manner and the list is not exhaustive (note again the use of the word 'include' in § 188(2)). Each of the contacts enumerated in § 188 is to be examined through the lens of the factors listed in § 6.

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28 *Second Restatement* (1971) § 6, cmt (i).

29 *Second Restatement* (1971) § 188(1), (2).

The provision setting out the basic 'choice of law' framework for torts is § 145 and it follows a pattern similar to § 188:

> (1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.
>
> (2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:
>
> (a) the place where the injury occurred,
> (b) the place where the conduct causing the injury occurred,
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
> (d) the place where the relationship, if any, between the parties is centered.[30]

As with § 188, the contacts enumerated in § 145 are not listed in a hierarchical manner and the list is not exhaustive (the term 'include' is used yet again). Again, when considering these contacts, the court needs to view them through the lens of the factors contained in § 6.

While the *Second Restatement* provides a number of rebuttable presumptions for more specific contracts and torts,[31] these are all easily overcome by the connecting factor of 'most significant relationship'.[32] The American judge is therefore afforded remarkably broad discretion because he or she considers all the relevant connections and the factors in § 6 so as to reach a decision that is the most equitable under the particular circumstances. The legal framework itself — the *Second Restatement* — *encourages* this approach. The judge need not look for loopholes to hand down an equitable decision; he or she only needs to look to the *Second Restatement* to find the tools that will aid him or her in upholding the common law principle of equity.

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30 Ibid § 145(1), (2).

31 See, eg, *Second Restatement* (1971) §§ 189–199, 146–155.

32 See ibid.

B *Legal Certainty and the Law of the European Communities and the EU*

European Conflict of Laws (or to use the prevalent civil law term '*Private International Law*') has been largely codified in two significant EU regulations:

- Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations [2008] OJ L 177/6 ('Rome I'); and
- Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations [2007] OJ L 199/40 ('Rome II').

While *Rome II* is the first such regulation governing non-contractual obligations (or in common law language 'torts'), *Rome I* was preceded by the *Rome Convention*.

The *Rome Convention* is, strictly speaking, an international convention — ie, it is not an EU source of law. However, the *Rome Convention* was a 'closed convention restricted to Member States of the European Community'.[33] For the purposes of this text, only art 4 — titled 'Applicable Law in the Absence of Choice' — is of importance. Because the draftsmen of art 4 were both common law and civil law jurists, the provisions of that Article reflect a compromise between civil law and common law.[34]

The basic 'choice of law' principle of art 4 is that of 'the closest connection'. However, that principle alone was too vague for civil law lawyers, so they insisted on inserting rebuttable presumptions that would help civil law jurists determine the governing law.[35]

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33 See Richard Plender and Michael Wilderspin, *The European Private International Law of Obligations* (London Sweet & Maxwell Thomson Reuters, 3rd ed, 2009) 13.

34 Ibid 167.

35 Ibid.

The pertinent provisions of art 4 of the *Rome Convention* read as follows:

> 1. To the extent that the law applicable to the contract has not been chosen […], the contract shall be governed by *the law of the country with which it is most closely connected*. […]
>
> 2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country *where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration*. […]
>
> 5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded *if it appears from the circumstances as a whole that the contract is more closely connected with another country*.[36]

The *Rome Convention* art 4 compromise therefore seems to combine both equity and legal certainty in that it sets out a very general principle of the 'closest connection', but it also establishes the presumption that contracts have the closest connection with the place where the party that is to effect the performance characteristic of the contract has its domicile. This text takes a closer look at how common law and civil law courts differ in interpreting art 4 of the *Rome Convention* in section III.

While the *Rome Convention* is the most important source of law for the purposes of this paper, it is useful to briefly discuss subsequent developments in the area of European conflict of laws (namely, regulations *Rome I* and *Rome II*) because these pieces of EU legislation demonstrate Continental Europe's steadfast adherence — at least in theory — to the principle of 'legal certainty'.

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[36] *Rome Convention* [1980] OJ L 266, art 4 (emphasis added).

Rome I is largely based on the *Rome Convention*, the convention it replaced effective 17 December 2009.[37] However, art 4 of *Rome I*, which governs the determination of applicable law in the absence of choice;

> turns the methodology of Article 4 of the *Rome Convention* on its head; the draftsmen have attempted to provide hard and fast rules for most types of contracts, leaving the concept of the principle of the closest connection to play only a minor role'.[38]

In adopting *Rome I*, the EU legislature emphasised the importance of 'legal certainty', at least formally narrowing the discretion European courts have in deciding cases on the basis of 'equity'. The first paragraph of art 4 of *Rome I* provides rebuttable presumptions for the determination of governing law for selected contract types (contracts for the sale of goods, contracts for the provision of services, contracts related to a right *in rem*, etc).[39] I agree with commentators who believe that this will result in extreme reluctance on the part of civil law judges to deviate from the presumptive connecting factors set out in paragraph 1.[40] The presumption of characteristic performance is contained in paragraph 2, as it was in the *Rome Convention*. Paragraph 3 contains the escape clause based on the familiar 'closest connection' principle of paras 1 and 5 of the *Rome Convention*.

Finally, art 4 of *Rome II* governs the determination of governing law in the absence of choice in non-contractual obligations or torts. It is not necessary to go into detail in analysing *Rome II* — suffice it to say that the general and rather rigid rule[41] of art 4 provides that the applicable law shall be the law of the country where the damage

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37 See *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations* [2008] OJ L 177/6, art 28 ('*Rome I*').

38 See Plender and Wilderspin, above n 33, 2009 (emphasis added).

39 See *Rome I* [2008] OJ L 177/6, art 4.

40 See Plender and Wilderspin, above n 33, 167.

41 See *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations* [2007] OJ L 199/40, art 4 ('*Rome II*').

occurs. *Rome II* has been criticised for many reasons.[42] However, its biggest folly is that striving and aspiring for the ideal of 'legal certainty' in the area of torts is simply illogical. One of the main ideas behind 'legal certainty' is the protection of a party's legitimate expectations. But one never truly *expects* to get into an accident; a man does not *plan* to slip and break his leg. The insistence on strict adherence to 'legal certainty' in *Rome II* cannot be justified by arguing that the parties can at least easily determine which law governs their legal relation. That does not seem to be a sufficient reason to displace the principle of 'equity' and ex post determination of the most equitably applicable law based on the circumstances of the particular case. Nonetheless, the EU legislative bodies' (dominated by civil law nations) insistence on 'legal certainty' is a fact an effective attorney must be aware of.

IV Equity and Legal Certainty in Practice: Applying the Rome Convention

Having set out the basic structure of art 4 of the *Rome Convention* (which contains both significant common law and civil law elements) in the previous section, we can now look more closely at how common law and civil law courts differ in their application of art 4.

The English case *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH*[43] involved a dispute over a contract that required the British band Oasis to perform at two festivals in Germany. The Gallagher brothers, members of the group, got into a fight, and the lead guitarist, Noel Gallagher, did not play in Germany.[44] As a result, the German company (the defendant) that organised the festivals and contracted for the band's performance refused to pay the full contract price, claiming that Oasis without

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42 See, eg, Symeon C Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56 *American Journal of Comparative Law* 173 (arguing that the drafters of *Rome II* missed the opportunity to draft a more flexible set of rules, not unlike those contained in the *Second Restatement*).

43 [2001] 2 Lloyd's Rep 455 ('*Oasis case*').

44 Ibid.

Noel Gallagher was not the band it had bargained for.[45] The plaintiff, the English company representing Oasis, insisted on being paid in full.[46] The task before the English Court was to determine whether the contract was governed by English law or German law, which could affect the calculation of damages.[47] The English court, in applying the *Rome Convention*, looked to art 4, para 2, and stated that the party giving the characteristic performance was the plaintiff, because the English company provided the live performances of the band to the defendant.[48] Therefore, if the court were to look only to the characteristic performance factor, it would have had to find that English law governed the contract.[49] However, the court proceeded to look at the escape clause in para 5, which provides that 'if it appears from the circumstances as a whole that the contract is more closely connected with another country',[50] then the law of that other country applies.[51] The court, when interpreting the escape clause of para 5, made very clear that it was aware of the fact that if the exception were to be interpreted too broadly, it would swallow the entire presumption of para 2 and would 'represent a return to the English common law test of determining the proper law'.[52] The court then proceeded to describe the relevant connections this case had with the laws of Germany and England:

> I turn to those factors which are said to show a closer connection between the contract and Germany than with England. The contract provided for Oasis to perform live in Germany; that was the place of the characteristic or substantial performance of the contract.[53] The defendants were obliged to make arrangements in Germany to enable the performances to take place (for example, marketing and promotion) and to provide facilities such as security and bits of equipment. Thus, the

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45 Ibid 456.

46 Ibid.

47 Ibid.

48 Ibid.

49 Ibid.

50 *Rome Convention* [1980] OJ L 266, art 4(5).

51 *Oasis case* [2001] 2 Lloyd's Rep 455, 456.

52 Ibid [7].

53 Note that the court is speaking of the place of the characteristic performance — not of the domicile of the party obligated to provide characteristic performance under the contract.

> contract required performance of contractual obligations in Germany by both parties. For what it is worth, the defendant company is German and payment was to be made in DMs and subject to deduction for German tax. Apart from the location of the claimants and the group, and the place of payment, there is no other connection between England and the contract. The centre of gravity of the dispute is, I think, Germany.[54]

The court concluded — quite logically I believe — that this contract was so closely connected with Germany and its law, that it overcame the presumptive application of the law of the domicile of the party providing the characteristic performance contained in para 2.[55]

The same provisions of the *Rome Convention* came into play a few years prior to the *Oasis case*, but this time it was before a Dutch civil law court in *Société Nouvelle*.[56] The Dutch court decided that the escape clause of para 5 should be discarded 'only in exceptional circumstances'.[57] In *Société Nouvelle* a French purchaser negotiated in France with the French agent of a Dutch seller for the purchase of machinery.[58] The contract price was expressed in French currency and the contract was written in French.[59] The order was placed through the Dutch purchaser's agent in France, and the machinery was delivered in France, where the seller also assembled it.[60] Despite the fact that all the connections, with the exception of the habitual residence of the seller, pointed to the application of French law, the Dutch court still applied the presumption of para 2 (the presumptive application of the law of the domicile of the party providing characteristic performance under the contract), and determined that Dutch law was the appropriate governing law.[61]

These two cases demonstrate the differences between the approaches

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54 *Oasis case* [2001] 2 Lloyd's Rep 455, 456 [8].

55 Ibid [16].

56 See *Société Nouvelle des Papeteries de l'Aa v Machinefabriek BOA* NJ (1992) No 750, RvdW (1992) No 207 ('*Société Nouvelle*').

57 Plender and Wilderspin, above n 33, 175.

58 Ibid.

59 Ibid.

60 Ibid.

61 Ibid.

of civil law and common law courts. Both courts were applying the same provisions of the *Rome Convention*. Yet still they arrived at opposite conclusions. This shows how rigid a civil law court's adherence to legal presumptions can be. It also shows the reluctance of civil law courts to closely consider the facts of the case and to arrive at an equitable decision not explicitly spelled out in the statute (or in this case international convention). The common law court, on the other hand, was ready and willing to use the escape clause of art 4 to reach a decision it found equitable — even if it meant applying law other than the law of the forum.

So what does this all mean in terms of advocacy? How can an attorney practicing across borders, handling a tort case or a contract case with a substantial international element effectively argue in the best interest of his or her client? First of all, the lawyer must determine whether he or she is arguing before a civil law or a common law judge, panel or tribunal.

In arguing before a common law tribunal, it is imperative to focus on the facts and show that the decision sought is not directly contrary to applicable law.[62] In the *Oasis case*, the English plaintiff adopted and argued the position of the Dutch court in the *Société Nouvelle* case.[63] However, the English Court was not persuaded. The English Court looked closely at the facts of the case before it. Then it looked to the *Rome Convention* and searched for an opening that would allow it to apply the law the selection of which it deemed most equitable. And in the escape clause of para 5, the English Court found such an opening. The English plaintiff should not have relied so heavily on the jurisprudential and theoretical analysis of the Dutch Court. It should have emphasised the factual considerations speaking in its favour. The plaintiff should have stressed that the claimants are English, that the band Oasis is English, and that the place of payment was in England. The plaintiff should have attempted to establish that at least

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62 See also Scalia and Garner, above n 5, 7 (emphasising the focus trial courts place on the facts).

63 *Oasis case* [2001] 2 Lloyd's Rep 455.

a minimum quantum (and possibly more than that) of contacts was in England. Then it should have proceeded to the text of the *Rome Convention* and argued that the escape clause of para 5 is an exceptional device that ought not to be applied in a case with so many connections with England.

Of course, there is no guarantee that adopting the arguments of this article's Monday morning quarterbacking would have resulted in a victory for the plaintiff. However, the plaintiff should have done more than simply rely on the language of the statute, as the Dutch court did. A common law court requires more than that; a common law court requires that the decision a party wants it to hand down is equitable, and that the applicable 'choice of law' rules do not unequivocally proscribe that equitable decision. The *Rome Convention*, as discussed in Section II.B, provides a capable advocate with enough room to argue on the basis of the common law principle of 'equity'.

As for the decision of the Dutch court in *Société Nouvelle*, I believe the outcome could have also been different had the advocate for the French party properly appealed to the judge's civil law trained legal mind. While a civil law court is much less likely to be persuaded by calls for an equitable solution based on the facts of the case before it, that does not mean that the facts of the case are irrelevant. On the contrary, facts always play an important role in civil law cases. Nonetheless, an attorney still needs to *begin* with the statute or in this case the applicable 'choice of law' rules. In the *Société Nouvelle* case, that would be art 4 of the *Rome Convention*. The first paragraph provides the basic rule: 'the contract shall be governed by the law of the country with which it is most closely connected'.[64] The second paragraph provides a rebuttable presumption that the contract is most closely connected with the law of the party that is to provide the characteristic performance.[65] The attorney should emphasise the relationship between these two provisions: para 1 provides the main rule, *not* para 2. In fact, if it appears from the circumstances as a

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64 *Rome Convention* [1980] OJ L 266, art 4(1).

65 Ibid art 4(2).

whole that the contract is more closely connected with another country, para 2 should be completely disregarded.[66] Therefore, the *Rome Convention* in fact supported the result the French party desired. After demonstrating that the logical structure of art 4 allows (and arguably *requires*) that French law be applied, the attorney for the French party should have proceeded to show that the facts of the case supported his interpretation of the *Rome Convention*.

The main point is to show that the desired solution is logical. The logic stems both from the structure of the *Rome Convention* (a doctrinal and theoretical argument), and from the facts of the case — almost all the connections were with France (a more practical and fact-based argument). When an attorney succeeds at demonstrating that the interpretation of the statute he or she argues is logical, as evidenced by its application to the facts before the court, the attorney has a significant chance of winning. When a statute is applied pursuant to its inner logic and structure, and that application makes sense given the facts of the case, then the principle of 'legal certainty' is without a doubt satisfied. And when the principle of 'legal certainty' is satisfied, the civil law court should be more than willing to adopt a decision that upholds the more than two millennia old maxim of civil law.

V CONCLUSION

To successfully argue before common law and civil law courts, an attorney must be aware of the main guiding principles typical of the two main legal cultures: 'equity' and 'legal certainty'. The area of choice of law is a very good example of how the two legal cultures differ in the rules they promulgate and the discretion they afford judges. The *Second Restatement* shows how much discretion common law judges often possess in deciding cases on the basis of 'equity'; a civil law attorney should modify his or her argument accordingly when arguing before a common law trained judge or arbiter. The European Regulations *Rome I* and *Rome II*, on the other hand, are

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66 Ibid art 4(5).

based on 'legal certainty' and they leave the judge with much less maneuvering space.

When arguing before a common law court, it is imperative to emphasise the facts; a successful attorney must have a strong narrative. The attorney must also show that the result he or she desires is permitted by the statute (thus satisfying the important but not quintessential need to protect the legitimate expectations of the parties). Above all else, the attorney must show that the ruling he or she argues for is a fair — equitable — result.

When arguing a case before a civil law tribunal, it is imperative to always focus on the text of the statute, using the structure of the implicated provisions to one's advantage. But the facts of the case must not be omitted. A successful attorney must demonstrate — utilising the facts — that the statute was intended to be applied to the facts the way the attorney advocates. The facts of the case ought to serve as a practical demonstration of how the statute is meant to be applied. The ultimate goal of an attorney before a civil law court is to combine theory and doctrine (thus satisfying the obligatory requirement for 'legal certainty') with practicality.

Remembering these two different approaches to advocacy, and the guiding principles upon which these approaches are based, is essential for any litigator who aspires to master the art of advocacy before both common law and civil law courts and tribunals.

Comments

BALANCING BARRIERS TO TRADE AND TECHNICAL STANDARDS: POTENTIAL IMPACT ON ICT INDUSTRIES

TYRONE BERGER*

Abstract

Barriers to Trade — Technical Standards — Impact on Information and Communications Technology Industries — International Trade Law — Protectionism — Agreement on Technical Barriers to Trade — Standardisation

This paper investigates the connection between technical standards, information and communications technology industries and international trade law to demonstrate how standards can be used as potential barriers to trade. There has been less attention paid to the role of standards as a form of protectionism, despite the introduction of the Agreement on Technical Barriers to Trade on 15 April 1994. Stated as an objective, the Agreement on Technical Barriers to Trade is to ensure that no unnecessary obstacles to international trade are created. While governments in the past have relied upon high tariffs and quotas imposed on imports to protect local industries or discriminate against foreign-produced goods, less transparent measures — referred to as non-tariff barriers — are now becoming more prominent. On one hand, it signals the growing significance of proprietary technologies in standards, demonstrating that public policy must embrace these concerns. On the other hand, the continued tensions between two significant trading partners — China

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and the United States — demonstrate the complexity of international trade law in this area.

I INTRODUCTION

Technical standards ('standards') [1] are playing an increasingly significant role in trade disputes between developed nations seeking to gain a commercial advantage for their local industries.[2] Part of the explanation lies with the fact that standards have also become an important feature of the global economy ever more dependent on information and communications technology ('ICT').[3] In the case of mobile telephony, for example, standards ensure the compatibility between individual communication devices and components manufactured by different suppliers, allowing for increased economies of scale and network effects.[4] A good illustration of this was the adoption of the Global System for Mobile communications ('GSM') standard in Europe, which facilitated a rapid penetration of mobile phones across the continent, and then prompted an expansion into other regions such as Asia.[5]

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1 Technical or compatibility standards have commonly been categorised on the basis of how they are developed: a *de jure* or formal standard is developed by industry participants through a voluntary, consensus-driven process facilitated by a particular Standard-Setting Organisation ('SSO'), such as the International Organization for Standardization ('ISO') or Standards Australia; whereas a *de facto* or informal standard is one that has, through widespread use, acquired recognition (which may be limited to a specific industry) in the absence of being officially endorsed by an SSO. For the purposes of this paper, any reference to standards signifies a *de jure* standard unless indicated otherwise.

2 See, eg, Baisheng An, 'Intellectual Property Rights in Information and Communications Technology Standardization: High-Profile Disputes and Potential for Collaboration Between the United States and China' (2009) 45 *Texas International Law Journal* 175, 180.

3 See Christopher S Gibson, 'Globalization and the Technology Standards Game: Balancing Concerns of Protectionism and Intellectual Property in International Standards' (2007) 22 *Berkeley Technology Law Journal* 1403, 1410.

4 See Catherine Mulligan, *The Communications Industries in the Era of Convergence* (Routledge, 2012) 39–40.

5 See generally Rudi Bekkers, Geert Duysters and Bert Verspagen, 'Intellectual property rights, strategic technology agreements and market structure: The case of GSM' (2002) 31 *Research Policy* 1141.

In addition to these direct network effects, further benefits are provided to consumers when complementary goods and services, such as eBooks or Wireless Fidelity ('Wi-Fi'), are supported by an upstream technical platform.[6] But as ICT industries require standards to fully exploit the economic advantages of networked environments, their obstacle to trade rather than a tool for knowledge diffusion is becoming an emerging policy concern for national governments.[7]

At the same time, there has been a proliferation of proprietary technologies incorporated in ICT standards.[8] One important category of exclusive rights in this context is known as Standard Essential Patents ('SEPs'). An SEP is, by definition, necessary for the implementation of a standard. Therefore, if the particular standard is adopted by a SSO, and becomes the industry standard, new entrants to the market and downstream companies must adhere to licensing terms that may attach to the patent rights incorporated in the standard. The result is that companies wishing to manufacture goods implementing the standard would be required to seek authorisation from the patent holder.[9]

While governments in the past have relied upon high tariffs and quotas imposed on imports to protect local industries or discriminate against foreign-produced goods, less transparent measures — referred to as non-tariff barriers (NTBs) — are now becoming more prominent.[10] In relation to standards, the concern lies with the use of incompatible national standards for ICT in different countries. As a

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6 Mark A Lemley, 'Intellectual Property Rights and Standard-Setting Organizations' (2002) 90 *California Law Review* 1889, 1896–7.

7 See Gibson, above n 3, 1405.

8 See Janice Mueller, 'Patent Misuse Through the Capture of Industry Standards' (2002) 17 *Berkeley Technology Law Journal* 623, 649.

9 See, eg, *Patents Act 1990* (Cth) s 13(1) which in Australia 'gives the patentee the exclusive rights, during the term of the patent, to exploit the invention and to authorise another person to exploit the invention'.

10 See OECD Trade Policy Studies, *Looking beyond Tariffs: The Role of Non-Tariff Barriers in World Trade* (OECD Publishing, 2005) 12.

consequence, these NTBs may be used in such a manner as to protect domestic industries from global competition.[11]

A General Agreement on Tariffs and Trade ('GATT') Working Group was established in the 1970s to evaluate the impact of NTBs on international trade, which concluded that technical barriers were one of the greatest challenges facing exporters.[12] Amongst the challenges, was a 'need to strike a balance between the prevention of protectionism and the right of a country to implement specific product regulations for its legitimate public policy purposes'.[13] GATT members agreed that an institutional mechanism to administer new trade agreements was needed, and as a result the Uruguay Round of trade talks established a permanent multilateral trade institution called the World Trade Organization.[14] During this time, the Agreement on Technical Barriers to Trade[15] was negotiated, including a 'Code of Good Practice'.[16] An objective of the TBT Agreement is to ensure no

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11 See Gibson, above n 3, 1406; Panagiotis Delimatsis, '"Relevant International Standards" and "Recognised Standardization Bodies" under the TBT Agreement' (Discussion Paper No 2014-031, Tilburg Law and Economics Center, 3 September 2014) 10 <http://ssrn.com/abstract=2489934>.

12 Doaa Abdel Motaal, 'Overview of the World Trade Organization Agreement on Technical Barriers to Trade' (Working Paper, April 2011) 1 <http://cuts-international.org/Doaa-paper.doc>.

13 M Rafiqul Islam, *International Trade Law of the WTO* (Oxford University Press, 2006) 155.

14 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995).

15 *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*') ('*TBT Agreement*'). The TBT Agreement purports to address any trade barriers arising from national standards and regulations.

16 While the principles for the adoption of technical regulations and standards are the same in the TBT Agreement, the latter are referred to separately in annex 3 'Code of Good Practice for the Preparation, Adoption and Application of Standards'. Since 1 January 1995 Australia, along with 121 other members of the WTO, have accepted the Code of Good Practice: *List of Standardizing Bodies that have Accepted the Code of Good Practice for the Preparation, Adoption and Application of Standards Since 1 January 1995*, WTO Doc G/TBT/CS/2/Rev.19 (18 February 2013).

unnecessary obstacles to international trade are created.[17] It broadly recognises the important contribution that standards make towards improving efficiency of production, while guarding against the creation of unnecessary barriers to trade. One instance where this aspiration has been thwarted was with China's focus on the development of domestic standards for wireless devices sold or imported into China.[18]

By investigating the connection between standards, international trade law and ICT industries, this paper will demonstrate how standards can be used as potential barriers to trade. This will partly address a deficiency in the standards literature, which predominantly examines standards in relation to patented technologies and anticompetitive issues.[19] As a consequence, there has been less attention paid to the role of standards as a form of protectionism.[20]

The rest of the paper is organised as follows. Section 2 provides a brief description of standards, and their role in technological development. Recently, the adoption of proprietary technologies in standards has raised a number of concerns in relation to ICT industries. At the same time, the TBT Agreement seeks to encourage the development and harmonisation of international standards, despite

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17 See the fifth recital of its Preamble.

18 Gibson, above n 3, 1434.

19 For a representative sample, see David J Teece and Edward F Sherry, 'Standard Setting and Antitrust' (2003) 87 *Minnesota Law Review* 1913; Mark A Lemley and Carl Shapiro, 'Patent Holdup and Royalty Stacking' (2007) 85 *Texas Law Review* 1991; Rudi Bekkers and Joel West, 'The limits to IPR standardization policies as evidenced by strategic patenting in UMTS' (2009) 33 *Telecommunications Policy* 80; Liguo Zhang, 'How IPR Policies of Telecommunication Standard-Setting Organizations can Effectively Address the Patent Ambush Problem' (2010) 41 *IIC: International Review of Intellectual Property and Competition Law* 380.

20 There are, however, some notable exceptions, see Gibson, above n 3; An, above n 2; Branislav Hazucha, 'Technical barriers to trade in information and communication technologies' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013).

being described as an imperfect remedy.[21] These two roles will be examined further in Section 2. Section 3 then highlights the recent experience between China and the United States (US) involving the standardisation of Wireless Local Area Networks (WLAN) technology. Although the dispute concluded in 2004, China has continued to pursue an aggressive strategy towards adopting domestic ICT standards in the face of international opposition.[22] Finally, Section 4 offers some concluding remarks.

II TECHNICAL BARRIERS TO TRADE AGREEMENT AND TECHNICAL STANDARDS: UNITING THE TWO ROLES

The economic importance of standards and standardisation has significantly increased in the past decade.[23] Standards are now viewed as one of the main alignment mechanisms that technology owners use to negotiate and coordinate the direction of technological change.[24] According to Blind and Pohlmann, firms achieve this by promoting their 'best and most innovative solution to be accepted as an industry wide standard'.[25]

Furthermore, a number of developments specific to SEPs have provided additional impetus to the area of standards.[26] At the same

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21 See, eg, Arkady Kudryavtsev, 'The TBT Agreement in context' in Tracey Epps and Michael J Trebilcock (eds), *Research Handbook on the WTO and Technical Barriers to Trade* (Edward Elgar, 2013) 17, 18.

22 See Executive Office of the President of the United States, *2013 Report to Congress On China's WTO Compliance* (December 2013) United States Trade Representative, 56 <http://www.ustr.gov/sites/default/files/2013-Report-to-Congress-China-WTO-Compliance.pdf>.

23 See, eg, Knut Blind and Tim Pohlmann, 'Trends in the Interplay of IPR and Standards, FRAND Commitments and SEP Litigation' (2013) 48 *les Nouvelles* 177.

24 Knut Blind et al, *Study on the Interplay between Standards and Intellectual Property Rights (IPRs): Tender No ENTR/09/015 (OJEU S136 of 18/07/2009): Final Report* (April 2011) European Commission, 17 <http://ec.europa.eu/enterprise/policies/european-standards/files/standards_policy/ipr-workshop/ipr_study_final_report_en.pdf>.

25 Blind and Pohlmann, above n 23, 180.

26 Concerns relating to SEPs have, for example, recently become the subject of prominent litigation in the United States and Europe: see Christopher Pleatsikas,

time, in traditional patent-intensive industries (for example, mobile telephony) where you would expect to see standards play a significant role, there has been an increased incidence of valuing SEPs as a business asset.[27] A related concern is that ownership of SEPs may provide companies with a degree of market power, which if left unchecked, may result in patent 'hold-up',[28] and a loss in consumer welfare.[29] It is important to emphasise that concerns surrounding SEPs are not entirely new, although their significance has grown with the 'prevalence of communication technology in our society'.[30]

The TBT Agreement, on the other hand, is concerned with WTO member responsibilities towards the preparation, adoption and application of standards and technical regulations.[31] Notably, the agreement contains an emphasis on harmonisation that creates a duty between contracting states to avoid unnecessary obstacles to international trade.[32] However, the latter purpose has created some unwanted consequences.

'"Smartphone Wars" and their Antitrust Implications' (2013) 21 *Australian Journal of Competition and Consumer Law* 77.

27 See Thomas H Chia, 'Fighting the Smartphone Patent War with RAND-Encumbered Patents' (2012) 27 *Berkeley Technology Law Journal* 209, 213.

28 Patent hold-up may occur when a patentee can obtain royalty payments at a higher level than the competitive rate, or where there is an overall increase in licensing payments and transaction costs due to the existence of numerous independent rights holders (commonly known as 'royalty stacking').

29 See George S Cary, Larry C Work-Dembowski and Paul S Hayes, 'Antitrust Implications of Abuse of Standard-Setting' (2008) 15 *George Mason Law Review* 1241, 1245.

30 James C De Vellis, 'Patenting Industry Standards: Balancing the Rights of Patents Holders with the Need for Industry-Wide Standards' (2003) 31(3) *AIPLA Quarterly Journal* 301, 305. Australia's ICT industry was estimated to be worth nearly A$100 billion for 2006–07: see Australian Bureau of Statistics, *8126.0 — Information and Communication Technology, Australia, 2006-07* (7 October 2008) <http://www.abs.gov.au/ausstats/abs@. nsf/mf/8126.0>.

31 See Articles 2–4 of the TBT Agreement. It should be noted that the WTO does not have any standard-setting capacity itself, nor does it adopt standards.

32 Gibson, above n 3, 1455.

Under art 2.4 of the TBT Agreement, WTO members have a duty to adopt any existing international standards as the basis for their technical regulations, unless it is inappropriate to do so.[33] The potential concern for developed countries arises when patented technologies are incorporated in international standards, resulting in local companies being subject to the licensing regime of foreign patent holders.[34] Partly in response, several countries have attempted to develop their own national standards by incorporating indigenous technologies and mandating their use.[35] The most prominent of these examples was China's challenge to the international ICT standards regime, which is discussed in the next section.

While the TBT Agreement is concerned with standards, it is silent on the issue of proprietary rights in standard-setting. As Gibson explains, 'there is a "disconnect" between TBT Agreement responsibilities to use international standards and the IP rights that are embedded in those standards, particularly in the ICT sector'.[36] This raises an important question: given that three major international SSOs have already adopted a 'Common Patent Policy'[37] — addressing the disclosure of patent rights and declaration of licensing of those rights — towards standard-setting, does the TBT Agreement now need to integrate similar guidelines for the preparation, adoption and application of standards?[38]

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33 Article 12 of the TBT Agreement permits deviations from such standards in cases of 'fundamental climatic or geographical factors or fundamental technological problems', and takes into account the special trade needs of developing countries.

34 See Hazucha, above n 20, 545.

35 See, eg, Heejin Lee and Joon (Chris) Huh, 'Korea's Strategies for ICT Standards Internationalisation: A Comparison with China's' (2012) 10 *International Journal of IT Standards and Standardization Research* 1, 8.

36 Gibson, above n 3, 1475.

37 ITU, ISO and IEC, *Guidelines for Implementation of the Common Patent Policy for ITU-T/ITU-R/IO/IEC* (23 April 2012) International Telecommunication Union <http://www.itu.int/dms_pub/itu-t/oth/04/04/T04040000010003PDFE.pdf>.

38 Similar suggestions have been expressed by Gibson, above n 3, 1481 stating that there's a 'gap in the current WTO standards framework'.

III CHINA AND THE UNITED STATES: RISING TRADE CONCERNS OR LOCAL STRATEGY?

Concerns over the development of ICT standards have involved two significant trading partners. Tensions have been rising between China and the United States surrounding China's approach to standard-setting in ICT environments.[39] For instance, China's move to mandate its own domestic WLAN standard — WLAN Authentication and Privacy Infrastructure ('WAPI') — instead of adopting an existing and widely accepted international standard[40] has caused much unrest with manufacturers and officials in the United States.[41]

In May 2003, China's state-run standard-setting body approved the WAPI security standard for wireless devices, and decreed that WAPI be incorporated into all wireless devices sold or imported into China by December 2003.[42] WAPI was introduced in competition with the security standard for Wi-Fi, an international standard developed by the global Wi-Fi Alliance and adopted by the Institute of Electrical and Electronics Engineers ('IEEE').[43] Both technologies are compatibility standards designed to facilitate wireless communication, however, WAPI employed a proprietary encryption algorithm, which meant that the IEEE and Chinese standards were incompatible for users.[44]

The core concern to emerge during this period had to do with the proprietary technology incorporated in the WAPI standard and it being made available only to a select group of Chinese companies.[45]

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39 See An, above n 2, 182.

40 Such as the Institute of Electrical and Electronics Engineers ('IEEE') 802.11 standard.

41 See Brian DeLacey et al, 'Government Intervention in Standardization: The Case of WAPI' (Working Paper, Harvard Business School, 19 September 2006) 11–12 <http://ssrn.com/abstract=930930>.

42 Gibson, above n 3, 1436.

43 See An, above n 2, 178.

44 See Hazucha, above n 20, 549.

45 Hazucha, above n 20, 549. Another dispute arose over the Chinese 3G standard, TD-SCDMA, but since it was already adopted as an international standard, it could not be challenged under the TBT Agreement.

As a consequence, foreign firms had no direct access to the WAPI specifications. It meant that if foreign manufacturers wanted to sell computers or handheld devices with wireless capability in China, they would have to negotiate with one of the Chinese rights holders. As a sign of the seriousness of these measures, the matter was discussed between the highest levels of government.[46] The impasse was eventually resolved at a meeting of the US-China Joint Commission on Commerce and Trade ('JCCT'), a consultative group formed to address bilateral trade issues.[47] It resulted in China's indefinite suspension of the 'implementation of WAPI as a mandatory wireless encryption standard'.[48]

China has continued, however, to pursue an aggressive strategy towards adopting indigenous technologies into ICT standards amidst opposition.[49] In November 2004, China refused to accept the final verdict by choosing to submit the WAPI standard for adoption as an international standard before the ISO.[50] In effect, China was inviting ISO to choose between the incompatible standards, WAPI and IEEE 802.11i (amended). By 2006, ISO members consequently voted to reject the proposed WAPI standard and adopt the IEEE's 802.11i security specification.[51]

However, to frame the WAPI dispute as purely a financial opportunity to exploit royalties is perhaps too simplistic. One set of commentators have argued:

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46 On 15 March 2004, a letter expressing the US government's concerns over the WAPI regulations was sent to China's Vice Premier, Zeng Peiyan from three US representatives — US Trade Representative Robert Zoellick, Secretary of Commerce Donald Evans, and Secretary of State Colin Powell.

47 See USTR, 'The US-China JCCT: Outcomes on Major US Trade Concerns' (Press Release, 21 April 2004).

48 Ibid.

49 See, eg, Ying Zhan and Xuezhong Zhu, 'Intellectual Property Right Abuses in the Patent Licensing of Technology Standards from Developed Countries to Developing Countries: A Study of Some Typical Cases from China' (2007) 10 *Journal of World Intellectual Property* 187.

50 DeLacey et al, above n 41, 13.

51 Ibid 14.

> understanding of the dynamics and outcomes of China's technology standard efforts we must understand both what are the various goals for the development of technology standards in China, as well as the particular political-economic dynamics unleashed by the specific policy actions followed by the government.[52]

One of the key differences in standard-setting between China and the United States that the authors allude to is the different business models for intellectual property rights ('IPRs') and standards.[53] A simple example of this is the divergent views on revenue. Whereas the United States place emphasis on the intrinsic value of IPRs and maximising revenue through patent licensing or sales, the Chinese view IPRs 'as a factor of production'.[54] According to Breznitz and Murphree, 'Chinese firms are interested in incorporating technology into standards as a means of decreasing the costs of goods they produce'.[55]

Two other factors may have also motivated China's behaviour at this time. It has been reported that the WAPI dispute was merely a strategy to win trade concessions from the United States.[56] Around the same time of the WAPI dispute, the two nations were negotiating an agreement on semiconductor royalty payments that China owed to US-based companies. Another suggestion relates to China's security fear towards the United States gaining access to its telecommunications network.[57] In defence of its actions, China relied on the justification authorised under the TBT Agreement of

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52 Dan Breznitz and Michael Murphree, 'Standardized Confusion? The Political Logic of China's Technology Standards Policy' (Working Paper, Georgia Institute of Technology, 1 February 2011) 26 <http://ssrn.com/abstract=1767082>.

53 See Dan Breznitz and Michael Murphree, 'Shaking Grounds? Technology Standards in China' (Working Paper, Georgia Institute of Technology, 5 October 2012) 17 <http://sites.nationalacademies.org/PGA/cs/groups/pgasite/documents/webpage/pga_072292.pdf>.

54 Ibid 17.

55 Ibid 18.

56 See DeLacey et al, above n 41, 11.

57 See Gibson, above n 3, 1462.

protecting national security for the deviation from an international standard.[58]

IV Conclusion

The WAPI case highlights the potential strategies available to national governments to gain a competitive advantage in ICT industries. It illustrates how the development of standards can lead to potential measures of protectionism. On one hand, it signals the growing significance of proprietary technologies in standards, demonstrating that public policy must embrace the concerns discussed above. On the other hand, the WAPI dispute demonstrates the complexity of international trade law in this area.

Recent commentary looking at standards and ICT industries has been focused on a narrow set of recurring themes.[59] Absent, for the most part, in these discussions is a consideration of the trade-related aspects of standards and standardisation.[60] Despite the increasing number of international standards, coupled with the growth in trade in ICT industries — which has been enabled by the use of standards — only a few studies have attempted to determine the impact of the TBT Agreement on standards, or standards on international trade.[61] Since advances in technology have played a central role in reshaping ICT industries, further research into these NTBs as trade facilitators now seems appropriate to understand how the different national

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58 The seventh recital of its Preamble states 'no country shall be prevented from taking measures necessary for the protection of its essential security interests'.

59 According to Hazucha, above n 20, 563–4, the debates have centered on the 'creation of coalitions between competing entities, the private and legal regulation of information and communication technologies, as well as the competition aspects'.

60 Johan Swinnen and Thijs Vandemoortele, 'Trade and the political of standards' (2012) 11(3) *World Trade Review* 390, 395.

61 Of the small number of studies, the focus has primarily been on product standards as they relate to agricultural goods: see G M Peter Swann, 'International Standards and Trade: A Review of the Empirical Literature' (Working Paper No 97, OECD, 2 June 2010).

approaches to standardisation will influence global competition in the future.

PRACTICAL ASPECTS OF LEGAL TRANSLATION: THE TRANSLATION OF AN ITALIAN LAND SALE CONTRACT

DR ROCCO LOIACONO*

Abstract

Legal Translation — Civil Law Versus Common Law — Land Sale Contracts

In an increasingly globalised world, the need to bridge the legal and cultural divide between nations is of growing importance. Many Australians are acquiring land in Italy given the favourable exchange rate of recent times. Italy is a civil law nation; Australia is a common law nation, thus two distinct legal cultures are involved. This paper will analyse various problematical translations in an Italian land sale contract and propose possible resolutions that can bridge the legal and cultural divide while at the same time ensuring that the meanings of the terms in question are transmitted in the target text so as not to pose interpretation problems.

I INTRODUCTION

In the context of the differences between the legal systems of Italy, a civil law nation in the Roman tradition and Australia, a common law nation in the English tradition, a contract for the sale of land

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constitutes a document whose function, that of transferring a piece of land from seller to buyer, is common to both legal systems. Notwithstanding the identical functional nature of the document, its formal drafting aspect reflects very specific and rigid canons of each legal system.[1]

This paper will identify terms in the contract that pose translation difficulties on account of their inherent cultural nature with respect to the Italian legal system, and propose possible translation solutions that can bridge the legal and cultural divide while at the same time ensuring that the meanings of the terms in question are transmitted in the target text so as not to pose interpretation problems. The contract the subject of this paper is included at App A. The document has been edited to remove details that were not considered relevant to the observations regarding the subject matter of this paper. Furthermore, names and addresses of the parties to the contract, as well as monetary sums to be paid, have been deleted for obvious reasons of confidentiality. There are also several quotations in this paper in the Italian language. A translation in English of these quotations is provided in the footnotes.

II An Overview of the Peculiarity and Problems of Legal Translation

Cao notes that the complexity of legal translation is attributable to the nature of law and the language the law uses, and to the associated differences found in intercultural and interlingual communication in translating legal texts.[2] The translation of legal documentation involves not simply a process of translating across languages, but rather, across different 'special languages' that have developed in a

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1 Federica Scarpa, 'Un esempio di traduzione giuridica dall'inglese all'italiano: il contratto di compravendita immobiliare' in Leandro Schena (ed), *La lingua del diritto. Difficoltà traduttive. Applicazioni didattiche* (CISU, 1997), 93.

2 D Cao, *Translating Law* (Multilingual Matters, 2007), 13.

particular sector of a given society, each with its own history, traditions and cultural development. In this regard Mattila notes:

> Legal language does not qualify as a language in the same way as French, Finnish or Arabic, for example. It operates as a functional variant of natural language, with its own domain of use and particular linguistic norms (phraseology, vocabulary, hierarchy of terms and meanings).[3]

In fact, the real difficulty lies in that often the relationship between a particular word and a legal concept is not the same in the legal languages of different legal systems, or there may not be a corresponding legal term, concept or institution in the target language. Such terms, concepts and institutions must be interpreted in the context of the relevant legal culture to ascertain their meaning. This cultural aspect is one of the main reasons why legal translation is regarded as distinguishing itself from the translation of other text genres. As Schena remarks:

> Il linguaggio giuridico presenta alcune peculiarità inconfondibili. In primo luogo esso si definisce rispetto a quello comune per una sua autonomia morfosintattica e lessicale, nonché per un suo carattere nazionale intimamente legato alla tradizione socioculturale dei Paesi che lo hanno prodotto.[4]

Schena seems to suggest that legal language has both a universal and a particular character: universal in that, in all cultures, it distinguishes itself from ordinary language usage, yet particular in that the legal language of each nation is linked to the peculiar culture and traditions of that nation. Garzone notes that this character of legal language has implications for translation:

> Legal translation is certainly among the varieties of translations where the translator is subject to the heaviest semiotic constraints at all levels: the language of the law is typically formulaic, obscure, archaic; legal

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3 H Mattila, *Comparative Legal Linguistics* (translated by Christopher Goddard) (Ashgate, 2006).

4 Leandro Schena, 'La traduzione e i linguaggi giuridici: le ricerche degli studiosi italiani' in Schena (ed), above n 1, 21. Legal language has some unmistakeable peculiarities. In the first place, it distinguishes itself, with respect to everyday language, because of its morphosyntactic and lexical autonomy, as well as its national character intimately linked to the socio-cultural traditions of the nation that has produced it.

> discourse is culturally mediated; legal texts have a special pragmatic status.[5]

The universal and peculiar characteristics of legal language identified by Schena give rise to numerous problems with regard to the translation of legal terms, concepts and institutions. The difficulties that may arise in this regard have been defined by Fiorito as falling into three broad categories.[6] The first of these occurs where words correspond linguistically in that they are related words in different languages as they derive from a common source (cognates), yet they are conceptually different in the two languages. For example, the term 'Court of Appeal' in English has a cognate term in Italian in 'Corte d'appello'. However, the English term is only a partial equivalent of the Italian since the two judicial authorities have different functions in the respective legal systems.[7] Another example where the terms appear to correspond, at least at the formal lexical level, while their legal meaning is different in the respective languages is the word 'magistrate', which cannot be rendered in Italian as 'magistrato'. In the common law system a 'magistrate' does not have an investigative function, whereas an Italian 'magistrato' does.

The second category described by Fiorito arises where the term, concept or institution is different at both a lexical and legal level. In such situations it may be that a direct translation of such a term does not correspond to any term or legal concept in the target language, although a similar institution exists. Taylor cites the example of 'Chancellor of the Exchequer', which he notes in Italian has been translated (in de Franchis, for example) as 'il Cancelliere dello

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5 Giuliana Garzone, 'Legal Translation and Functionalist Approaches: A Contradiction in Terms?' in <http://www.academia.edu/771698/Legal_Translation_and_Functionalist_Approaches_A_Contradiction_in_Terms>.

6 Lorenzo Fiorito, 'Traduzione e traduzione giuridica: il Legal English dalla Common Law alla Civil Law' in <http://translationjournal.net/journal/33legal.htm>.

7 Chiara Renis, 'Periphrasis: The Most Suitable Translation Approach in Multilingual Legal Communication' in *Proceedings of the Conference on Law and Language: Prospect and Retrospect* (The University of Lapland, 2001).

Scacchiere'.[8] There is no official in Italy known by this title. However, broadly speaking, it can be said that a similar institution does exist, known as *il Ministro dell'economia e delle finanze* ('the Minister for Finance and the Economy'), who is the Minister appointed to the *Ministero dell'economia e delle finanze*.[9]

The third category referred to by Fiorito is where a legal term, concept or institution does not exist in the country of the target language. A typical example in the English context, is 'barrister', a lawyer who specialises in the arguing of cases before the courts, for which in the Italian legal system there is no equivalent and no cognate term. How then would a translator convey the meaning of barrister in Italian? Conversely, *pubblico ministero*, the office in the Italian legal system whose primary responsibility is the initiation of criminal proceedings, could be described as the 'prosecution', but definitely not as the 'public ministry', as there is no such legal official or office in the English legal system.

As we have seen, studies of legal translation tend to focus on the notions of language and culture, in that the development of legal language is inextricably linked to the legal culture in which that language has developed. Therefore, an understanding of legal terms presupposes an understanding of the legal culture to which they belong.[10] For this reason, scholars have described legal terms as *cultural items*.[11] Viezzi describes cultural items as 'elements found in a text whose proper meaning, connotations and value can only be

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8 C Taylor, *Language to Language. A practical and theoretical guide for Italian/English translators* (Cambridge University Press, 1998), 104.

9 See the website of the Italian *Ministero dell'economia e delle finanze* <http://www.tesoro.it>.

10 Cf Marta Chromà, 'Semantic and legal interpretation: two approaches to legal translation' in Vijay Bhatia, Christopher Candlin and Paola Allori (eds), *Language, Culture and the Law* (Peter Lang, 2008), 303.

11 See, eg, Taylor, above n 8 and Maurizio Viezzi, 'Patricia D Cornwell's Novels and the Translation of Cultural Items' in Christopher Taylor (ed), *Aspects of English 2*, (Campanotto Editore, 1996), 89.

understood with reference to a particular culture', and states that legal terms are 'culture-bound terms *par excellence*'.[12]

If, as Kischel asserts, 'each legal culture has a specific mode of talking',[13] translators must find a way to ascertain the meaning of legal terms so as to compile the same legal provisions in different languages. Translation involves interpretation of the source text by the translator in preparing the target text. However, each translation of a legal text also gives rise to an interpretation of it. The interpretation of that text is of key concern in legal documents having a normative or prescriptive function (such as legislation or contracts), since they have the primary aim of regulating the rights and responsibilities of citizens. Therefore, a translator must find a way to ensure that there be no misinterpretation of legal obligations across languages, particularly since legal language texts are specialised texts, that is, texts developed in a specialised sector of society, having a specific regulatory function and written in the 'special language' that pertains to the law.

III Types of Legal Texts and Translation

Before embarking on an examination of the application of translation strategies, it is important to briefly provide an overview of the different types of legal text, as this will impact on the translation strategy that is adopted.[14] The major types of legal text can be divided into three categories:

- *testo normativo* (laws and legislation);

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12 Viezzi, above n 11, 91, 95.

13 Uwe Kischel, 'Legal Cultures — Legal Languages' in Frances Olsen, Alexander Lorz and Dieter Stein (eds), *Translation Issues in Language and Law* (Palgrave Macmillan, 2009), 7, 15.

14 See Eva Wiesmann, 'La traduzione giuridica tra teoria e pratica' in Danio Maldussi and Eva Wiesmann (eds), *Traduzione settoriale 2011. Numero speciale di Intralinea*, <http://www.intralinea.org/specials/article/la_traduzione_giuridica_tra_teoria_e_pratica>.

- *testo interpretativo* (doctrinal texts),
- *testo applicativo* (court documents and administrative documents).[15]

As Cao observes, legal translation can be classified into three categories in light of the purposes of the TL texts. Cao's classification for the translation of legal texts, which we will adopt in this paper, is as follows:

- 'Legal translation for normative purposes',
- 'Legal translation for informative purposes'
- 'Legal translation for general legal or judicial purposes'.[16]

With regard to the first classification, legal translation for normative purposes, texts included here consist of bilingual and multilingual legislation and international treaties, which regulate the rights and responsibilities of two or more nations, or of citizens of those nations, otherwise known as multilingual texts. Texts in this first category have the fundamental objective of determining the same rights and responsibilities in two or more languages. The text must have the same binding effect, and outline with precision the rights and responsibilities of citizens or of the contracting States, in each authentic text. As Cao explains further:

> Examples of these are the legislation in the bilingual jurisdictions of Canada […] the multilingual legal instruments of the UN, and the multilingual laws of the EU.[17]

The second classification, legal translation for informative purposes, includes judgments, which outline the rights in a particular case between litigants. It is therefore addressed principally to other legal actors, that is, the lawyers who represent each party in the litigation, and, implicitly, to judges of appeal, should one of the parties seek a review of the decision. Whether the parties themselves actually read

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15 Stefania Cavagnoli, 'La nota a sentenza come genere unificante di prassi e dottrina giuridica' in Giuliana Garzone and Francesca Santulli (eds), *Il linguaggio giuridico. Prospettive interdisciplinari* (Giuffrè, 2008), 285, 288–9.

16 Cao, above n 2, 10–11.

17 Cao, above n 2, 10.

the decision is another matter, and thus, generally, a judgment would not necessarily be written with them in mind. Judgments generally have a communicative purpose as well as a prescriptive one, in that they establish legal facts and determine obligations between the parties. In such a situation the translation of a court judgment would be for an informative purpose, and therefore not legally binding. The translation would merely be intended to provide information to the target readers.

The third type of legal translation, for a general legal or judicial purpose, includes documentation that may be used in court proceedings as part of documentary evidence. Cao asserts that such translations are primarily for information and are mostly descriptive.[18] Original source language texts of this type may include legal documents such as statements of claim or pleadings, contracts, records and certificates, witness statements, expert reports and other texts such as business or personal correspondence. This is different from the first two categories of legal translation as it may include texts that are not written in legal language by legal professionals, but by the layperson. In summary, it is important for the legal translator to ascertain the status and communicative purposes of both the original text and the translation.

IV The Document to be Translated

Contracts, by their very nature, have the function of imposing order in legal relations between parties, and thus are regulative documents, stipulating the rights and responsibilities of the parties. As Trosborg observes:

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[18] Cao, above n 2, 111–12.

> the commitment in contracts can be established either as an obligation issued by one party over the other (ie, directive), or by a party committing him/herself (ie, commissive).[19]

As such, contracts have a highly formulaic and standardised structure with conventional or fixed formats,[20] some examples of this characteristic from the contract the subject of this paper include: 'Certifico io sottoscritta', 'per quanto occorrer possa', 'ai sensi e per gli effetti dell'articolo …', 'Le parti dichiarano'. Also evident in the contract is the characteristic, common to both English and Italian legal language, of a rigid text structure, as Gotti explains:

> Legal writing is typically ritualistic and archaic, being subject to very strict stylistic conventions in terms of register and diction as well as highly codified genre structures […] with systematic resort to standardized forms, often archaic and uncommon in ordinary text practice, stock phrases, rigid collocations and specialized cohesive devices for anaphoric and cataphoric as well as homophoric and intertextual reference.[21]

Examples of this phenomenon from the contract include: 'I beni oggetto della presente stipulazione', 'Detti comparenti [...] alla presenza dei testimoni convengono', 'La donante dichiara che quanto donato e meglio individuato al precedente articolo 1', 'dell'atto sopra citato', 'la presente donazione', 'il donatario nel prendere atto della sovraestesa donazione'.

Before embarking on the translation of the source text, the translator must not be in any doubt as to the status of the target text (ie, will the target text have the same legally binding status on the parties as the source text), and the target text's audience.[22] The land that is the subject of the contract is situated in Italy, and the sellers are Italian citizens and resident in Italy. The buyers are Australian citizens. The

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19 Anna Trosborg, '"Acts" in Contracts: Some Guidelines for Translation' in Mary Snell-Hornby, Franz Pöchhacker and Klaus Kaindall (eds), *Translation Studies. An Interdiscipline* (John Benjamins Publishing Company, 1994), 309, 311.

20 Cf Scarpa, above n 1, and B Hatim and I Mason, *The Translator as Communicator* (Longman, 1997).

21 M Gotti, *I linguaggi specialistici* (La Nuova Italia, 1991), 105–10.

22 Wiesmann, above n 14.

contract is drafted in Italian, and it is the only version that is binding on the parties. A translation of the contract, therefore, would not have the same legal status as the original, unlike the multilingual instruments referred to in section III above, and therefore, at first glance, does not have a normative function. Furthermore, the buyers themselves may not necessarily be lawyers, so the target text need not be drafted for a professional audience. However, the buyers of the land in question need to be clear on their rights and obligations under the contract so as not to breach it provisions. Therefore, while the translation of this contract is primarily one for informative purposes, it must be free from any ambiguity or uncertainty concerning the rights and obligations of the parties. Consequently, we consider that the translation of this contract, while having primarily an informative purpose, has at the same time a normative purpose as well. We can now proceed to the analysis of potentially problematical translations in the contract, and to explore the possible solutions that can be adopted for them in the target text.

V Analysis of Problematical Translations

This analysis examines 12 terms taken from the contract which pose translation problems due to their inherent cultural nature. In undertaking this analysis, reference will be made to published Italian-English bilingual legal dictionaries (such as de Franchis) and authoritative legal dictionaries of both legal systems (*Butterworths Australian Legal Dictionary*, *Enciclopedia del diritto*) in order to provide detailed definitions of terms used in the contract, as well as offering a valuable point of comparison with English terms that could be considered as providing plausible translations of the original. In some cases, a translation of the term has been provided in English to underline in a particular way the divergences in meaning between the Italian and Australian terms.

(1) Codice fiscale;

The *codice fiscale* is the identification number given to natural and legal persons by the *Agenzia delle entrate*, Italy's taxation and revenue authority. By its nature, therefore, this term is inherently linked to the Italian legal system that it is not really possible to translate it. However, broadly speaking, it can be said that a corresponding term does exist in Australia, known as the Tax File Number ('TFN'). In terms of a translation strategy, the term can be left in the original in the target text with an explanatory note, such as: 'The corresponding Italian regime for the Australian Tax File Number'.

(2) Catasto Fabbricati;
(3) Catasto terreni → land cadastre (with explanatory note);
(4) Il competente Catasto (Agenzia del Territorio) → the relevant titles office (Agenzia del Territorio);
(5) Rendita catastale;

The above four terms have been grouped together given they contain the terms *catasto* or *catastale*.

The *Enciclopedia del diritto* provides the following definition for *catasto*:

> elencazione generale dei beni immobili censiti nell'ambito di uno stato, redatto per accettarne la proprietà, evidenziarne le mutazioni e stabilire una giusta base per la determinazione del reddito […] Vi sono due diverse tipologie di catasto: il catasto dei terreni e il catasto dei fabbricati.
>
> Il catasto dei terreni fu introdotto […] allo scopo di accettare la proprietà immobiliare, tenerne in evidenza le mutazioni e perequare l'imposta fondiaria, ponendo fine alla divisione in compartimenti catastali autonomi.
>
> Fu costituito il catasto dei fabbricati al fine di accertare l'effettiva consistenza della proprietà edilizia e perequare un'imposta riferita a

> imponibili non più desunti da denunce, generalmente inesatte, ma stabilibili in base a criteri tecnici di concreta valutazione.[23]

The corresponding English term is *cadastre*, a term of French origin. As noted by the *Butterworths Australian Legal Dictionary*, this term refers to a survey of land made for the purposes of a cadastre, that is, a register of properties and their owners maintained by the king for the purpose of calculating taxation payable by landholders to the Crown, and has since come to mean an accurate survey to determine boundary positions of land.[24] Thus, the use of a cadastre can be traced back to the times of the Domesday Book of William the Conqueror, which is also the period which legal historians consider as being that which saw the origins of the common law system. However, the cadastre no longer exists in common law systems. As far as a possible translation for *catasto* is concerned, de Franchis notes:

> Grosso modo, tax inventory and assessment of real property. Ma non esiste un equivalente esatto del *cadastre* francese. Un analogo che non coincide con esso è il government survey system; ma si parla anche di *ordinance survey*. Probabilmente, sul piano storico, il primo, o uno dei primi catasti, fu quello ordinato in Inghilterra da Guglielmo il Conquistatore nel 1089, ancora oggi usato come elemento di prova relativamente ad alcuni diritti feudali sopravissuti.[25]

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23 *Enciclopedia Garzanti del diritto* (Garzanti, 2001).
A general register of land undertaken by a State in order to ascertain its ownership, identify any changes made to it and to establish a proper basis for determining income derived from it […] There are two different types of catasto, the catasto dei terreni and the catasto dei fabbricati.
The catasto dei terreni was introduced […] for the purpose of ascertaining land ownership, identifying any changes to it and assess taxation payable, which ended the division between autonomous cadastral districts.
The catasto dei fabbricati was established for the purpose of ascertaining the effective substance of buildings and assess taxation payable with reference to a base determinable according to technical criteria for a tangible estimation, rather than being deduced from generally imprecise declarations.

24 *Butterworths Australian Legal Dictionary* (Butterworths, 1997).

25 F de Franchis, *Dizionario giuridico inglese-italiano/italiano-inglese* (Giuffrè, 1984–96), 484.
Broadly speaking, tax inventory and assessment of real property. However, there is no exact equivalent of the French cadastre. The government survey

Thus, given that *catasto* is a culture-bound term without an apparent equivalent or referent in the Australian legal system, it appears that the more appropriate solution is not to translate the terms, but provide an explanatory note as to their meaning.

With regard to *rendita catastale*, this, as the *Enciclopedia del diritto* explains, is the value attributed to land and buildings (based on a series of classifications which take into account the use of the land and buildings) to determine the tax payable on that property. By comparison with Australia, land taxes are imposed, but only on certain types of property, and are based on unimproved value of land, that is, not taking into account the value of any buildings or other structural improvement that have been made to the land.[26] On the basis of the divergence between the two regimes for the taxation of property, in other words, that *rendita catastale* has no real referent in the Australian legal system, it may be that the most appropriate translational solution would be to leave the term in the original in the target text with an explanatory note, such as: 'calculation of cadastral income for tax purposes', or 'value attributed to land and buildings for calculation of tax payable'.

(6) La nuda *proprietà* → property subject to reversion or life tenancy

In (6) the Italian term, *nuda proprietà*, is an example of the universal characteristic of legal language of distinguishing itself from everyday language usage. One of the ways this is done is through the use of common words and attributing to them an uncommon meaning.[27]

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system is an analogous term that doesn't correspond precisely, ordinance survey is also used in this context. From an historical point of view, the first, or one of the first, cadastres was probably that ordered by William the Conqueror in England in 1089, which is still used today with reference to proving the existence of certain enduring feudal rights.

26 See, eg, the explanation given Office of State Revenue for Western Australia, *What is unimproved value?* Department of Finance: <http://www.finance.wa.gov.au/cms/content.aspx?id=240>.

27 See generally D Mellinkoff, *The Language of the Law* (Little Brown and Company, 1963).

Cortelazzo refers to this as 'risemantizzazione del lesssico comune' (attributing new meanings to words of everyday lexicon)[28] and Mortara Garavelli refers to this phenomenon as 'il riuso specialistico di termini del linguaggio ordinario'.[29] Referring to Belvedere,[30] Mortara Garavelli adds that this is:

> Lo strumento necessario per la costruzione (a livello lessicale) di un linguaggio artificiale, sia che con esse si introducano termini nuovi, sconosciuti al linguaggio ordinario [...] sia che si attribuisca a termini già utilizzati un diverso significato.[31]

As far as the meaning of *nuda proprietà* in the Italian legal system is concerned, the *Enciclopedia del diritto* provides:

> espressione che indica la condizione di un bene sottoposto a usufrutto, con riferimento al proprietario; giacché l'usufruttario per l'intera durata dell'usufrutto può trarre del bene tutte le utilità che ne trarrerebbe il proprietario, a questi non ne resta alcuna, e la proprietà è pertanto temporaneamente spogliata di ogni suo appannaggio.[32]

Also pertinent here is a definition of *usufrutto* (also taken from the *Enciclopedia del diritto*):

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28 Michele Cortelazzo, 'Lingua e diritto in Italia: il punto di vista dei linguisti' in Schena (ed), above n 1, 44.

29 B Mortara Garavelli, *Le parole e la giustizia. Divagazioni grammaticali e retoriche su testi giuridici italiani* (Einaudi, 2001), 11. The specialized re-use of words from everyday language.

30 Andrea Belvedere, 'I poteri semiotici del legislatore (Alice e l'art. 12 Preleggi)' in Letizia Gianformaggio and Mario Jori (eds), *Scritti per Uberto Scarpelli* (Giuffrè, 1998), 85, 88.

31 Mortara Garavelli, above n 29, 11.
The necessary instrument for the construction (at a lexical level) of an artificial language, so that with this either new terminology is introduced, unknown to everyday language, or a different meaning is given to words with respect to that of ordinary language usage.

32 Above n 23.
An expression which indicates, with reference to the property owner, an item of his property subject to usufruct; inasmuch as the usufructary, for the entire period of the usufruct, can draw from the property all the utility that the owner would be able to, since the owner cannot do so, as far as he is concerned, the property is stripped of all its privileges.

> Diritto reale di godere della cosa altrui, immobile o mobile, comprese tutte le accessioni della medesima, e di trarne ogni utilità con il rispetto della sua destinazione economica e salvo le limitazioni imposte dalla legge.[33]

Therefore, as De Mauro points out, 'il nudo proprietario non è privo di abiti' (the proprietor actually does wear clothes).[34] A *nudo propreitario* is a proprietor that is not able to use, enjoy and deal with a particular piece of property until the period of *usufrutto* ends, normally once the *usufruttuario* passes away.

De Franchis gives the following explanation of the term *nuda proprietà*, which in his view, has no apparent referent in the Australian common law system, although there are terms that could be used to explain its meaning:

> Lett, naked property. Ma non esiste in senso stretto un termine esattamente equivalente nella *common law*, data la assai diversa articolazione dei diritti immobiliari di quella tradizione giuridica […] Ma termini che approssimativamente possono rendere il senso nostrano sono quelli di *reversion* o *remainder*, a seconda dei casi.[35]

De Franchis also suggests the use of 'life tenancy' to render this civil law concept.

The *Butterworths Australian Legal Dictionary* defines *reversion* as: 'a future property interest held when rights less than full ownership are created over the property'. In terms of 'reversionary property', this is defined as:

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33 Above n 23.
Material rights to enjoy the real or personal property of another, including all improvement of the same, and to benefit from all its utility, while respecting its economic designation and observing any limitations imposed by law.

34 Tullio De Mauro, 'Obscura lex sed lex? Riflettendo sul linguaggio giuridico' in Gian Luigi Beccaria and Carla Marello (eds), *La parola al testo. Scritti per Bice Mortara Garavelli* (Edizioni dell'Orso, 2002), 147, 152.

35 de Franchis, above n 25, 1010. Literally, naked property. Strictly speaking, however, there is no exactly equivalent term in the common law, given the greatly diverse articulation of real property rights of that legal tradition […] Terms that, however, can render in an approximate way the meaning of our term are those of reversion or remainder, depending on the circumstances.

> Property which is due to return to the possession of the original owner on the expiration of a certain period or the occurrence of a particular event. For example, the owner of an estate in fee simple may grant an interest less than fee simple[36] in property to some other person, for example, a lease or life estate. When that interest ends, possession of the land will revert to the grantor by operation of law.[37]

This is exactly what is to occur under the contract. The clauses in question provide:

> **art 1**
>
> La Signora — riservando per sè la donante l'usufrutto generale vitalizio, senza obbligo di cauzione nè di inventario, dona al — che accetta e al tal titolo acquista … [38]
>
> **art 4**
>
> Si trasferisce da oggi la nuda proprietà di quanto in oggetto.[39]

Therefore, a form of gloss could be used to translate *nuda proprietà*, in the form of 'property subject to reversion or life tenancy' in order to render the meaning of this term appropriately in the target text.

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36 The notion of fee simple is one that is inextricably linked to the common law tradition, is outlined by Stephen Marantelli and Celia Tikotin, *The Australian Legal Dictionary* (Edward Arnold (Australia) Pty Ltd, 1985), 100–1. In England, from a legal point of view, all land is owned by the *Crown*, that is, by the King or Queen. No land can be owned by a private individual. The same applies in Australia. In practice, however, landholders are given ownership by being vested with an estate in what is known as *fee simple* or *freehold title*. This is the right of a person to treat the land as if it did in fact belong to them. A person who holds the land in fee simple may therefore dispose of it (either during their lifetime by selling it, or after death through a will), mortgage it, lease it or use it for his or her own use generally, for example, build on it. The right of the holder of the estate in *fee simple* is so extensive that although the Crown owns the land it cannot acquire it back from the holder of the estate in *fee simple* unless adequate compensation is paid.

37 Above n 24.

38 That — reserving to herself as donor the right to a life interest, without requirement for payment of a deposit or to conduct an inventory, grants to — who accepts the grant and by doing so acquires ….

39 The right of reversion is granted today to the grantee.

(7) Dichiarazione di successione → declaration of inherited property for inheritance tax purposes;

The term in question relates to the imposition of inheritance taxes or death duties, which have been abolished in Australia (Stewart, Flynn and Krever 2004).[40] In Italy, however, death duties are imposed in the form of the *imposta di successione*, which de Franchis equates to estate duties in the United Kingdom.[41] The *dichiarazione di successione* must be presented to the *Agenzia delle entrate* by a person inheriting property within 12 months of the death of the title holder, upon which a calculation will be made of the tax payable. Given the inherent cultural meaning in the term, a gloss of the type suggested above, could be used to explain the meaning and import of the term in the target text.

(8) Decreto legge
(9) Decreto ministeriale

Examples (8) and (9) are grouped together because of the term *decreto*. This term has no equivalent or referent in the common law system for cultural and historical reasons, as de Franchis explains:

> Decree, order, ordinance, statutory order. Ma, anche qui, si entra nelle sabbie mobili dell'intraducibilità dovuta alle notevoli differenze di regime cui il termine viene, di volta in volta, riferito.[42]

In providing an elucidation of *decreto legge*, de Franchis notes:

> Lett, decree-law; ma non esiste un equivalente esatto né nel sistema costituzionale britannico, né in quello nordmaericano.

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40 M Stewart, M Flynn and R Krever, *Death & Taxes: Tax-effective estate planning* (Thomson-ATP, 2004).

41 de Franchis, above n 25, 868.

42 de Franchis, above n 25, 623.
Decree, order, ordinance, statutory order. Here as well, however, we find ourselves on the quick sand of untranslatability due to the notably different regimes to which, from time to time, the term refers.

> Il felice sistema politico britannico — almeno tale appre visto dall'Italia — fondato su un sistema elettorale maggioritario e sull'esistenza di partiti alternativi fungibili tra loro, realizza un biparitismo perfetto che comporta, di solito, saldissime maggioranze parlamentari che evitano il ricorso all'odioso provvedimento nostrano quale il decreto-legge che costituisce — specie quando il governo ne fa oggetto di voto di fiducia — una violenza usata al parlamento.[43]

Given the non-existence of any form of corresponding term in the common law system, it would appear that the only way to render these terms appropriately in the TL would be to leave the term in Italian in the TT and add an explanatory footnote. With regard to *decreto legge*, the note could read: 'A form of statutory order, having a temporary effect, which can then be enacted into law via parliamentary legislation.' The same could be done with *decreto ministeriale*: 'Ministerial order, having a temporary effect, which can then be enacted into law via parliamentary legislation.'

(10) Libera disponibilità di quanto in oggetto e la sua libertà da trascrizioni pregiudizievoli, oneri, pesi, pegni, ipoteche e privilegi → The grantor guarantees that the property subject to the right of reversion is free from all encumbrances, charges, securities, mortgages or liens;
(11) la donante, per quanto occorrer possa, rinuncia all'ipoteca legale → vendor's lien (?);

Examples (10) and (11) have been grouped together for discussion since they contain the term *ipoteca*, which in Italian legal language has diverse meanings, depending on the context.

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[43] de Franchis, above n 25, 624. Literally, decree-law, however there is no exact equivalent either in the British constitutional system, nor in the North American system. The successful British political system — at least that is how it is viewed from Italy — being founded on a majority electoral system and on the existence of alternative fungible political parties, achieves a perfect bipartisanship which usually entails large parliamentary majorities that avoid the need to have recourse to our odious measure of the decreto-legge which constitutes, particularly when the government makes it the subject of a no-confidence motion, an abuse of the parliament.

The following definition of *ipoteca* is given by Favata:

> Diritto reale a favore di un creditore su beni o su diritti relativi a beni immobili o mobili registrati del debitore, o di un terzo che lo garantisce, al fine di assicurare con la vendita forzata dei medesimi l'adempimento di una obbligazione.[44]

As far as *ipoteca legale* is concerned the *Enciclopedia del diritto* provides:

> L'ipoteca legale è prevista dal legislatore (art 2817 cc) a favore dell'alienante sopra gli immobili alienati per l'adempimento degli obblighi che derivano dall'atto di alienazione e a favore di coeredi, soci e altri condividenti per il pagamento dei conguagli sopra gli immobili assegnati ai condividenti ai quali incombe tale obbligo.[45]

To understand the difficulty in translating this term, one need only refer to de Franchis:

> Non ha corrispondenza esatta nella *common law*, anche se, sul piano funzionale, ossia di garanzia reale, l'analogo è spesso costituito dal *mortgage* che, perlatro, non è limitato agli immobili, ma può avere per oggetto anche i beni mobili. Il termine ipoteca non va tradotto con *hypothecation*, forma di garanzia reale avente oggetto beni mobili […] Comunque si noti anche la difficoltà di distinguere tra *mortgage* e *lien*.[46]

To determine whether 'mortgage' could be considered as a corresponding referent in the common law for *ipoteca*, one should

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44 A Favata, *Dizionario dei termini giuridici* (Casa Editrice La Tribuna, 2003). Material right in favour of a creditor over property or over rights relative to land or registered personal property owned by a debtor, or against the property of a guarantor third party, to enforce the completion of an obligation by having the right to sell that property.

45 Above n 23. The ipoteca legale is provided by law (art 2817 of the Codice Civile — Italian Civil Code) in favour of a seller of land in order to ensure the compliance with obligations under the contract for sale and is granted in favour of coheirs, partners and other co-owners to ensure the payment to the same of any adjustments for expenses for which they are responsible.

46 de Franchis, above n 25, 909. There is no term in the common law that corresponds exactly, even if, from a functional point of view, that is, with regard to a material guarantee, the term mortgage is often considered to be analogous. Furthermore, a mortgage can be granted over real and personal property. The term ipoteca should not be translated with hypothecation, a form of material guarantee over personal property […] One should also note, however, the difficulty of distinguishing between mortgage and lien.

determine the precise meaning of the English term. The *Butterworths Australian Legal Dictionary* defines 'mortgage' as: 'A lender's interest in land, secured over the land of the borrower, including a charge on the property for the purpose of securing money or money's worth'.[47] Notwithstanding any different nuances in meaning between *ipoteca* and 'mortgage', in this case, it would probably be acceptable, as Viezzi argues, to adopt a 'functional equivalence' approach and translate *ipoteca* by using the term 'mortgage', given that the translator in this instance would not be producing a binding text, nor, quite probably, producing a text for legal experts.[48] It may be the case that the translator may need to add further explanation or clarification, however, given the type of text and target audience in mind, 'mortgage' would probably be an adequate translation, even at the expense of absolute adequacy.

Turning to the definition of *lien*, the *Butterworths Australian Legal Dictionary* provides:

> The right to hold the property of another as security for the performance of an obligation or the payment of a debt […] A typical example is the lien of an unpaid vendor over the sold property.[49]

This appears to reflect more closely the meaning of *ipoteca legale*, and, taking into account the definition of the Italian and English terms, reflects what is to occur under this particular clause of the contract (as outlined at (11) above). Therefore, the Italian term could quite adequately be rendered in the TT with 'vendor's lien', or simply, 'lien'.

(12) Regime ordinario che per il diritto australiano è quello della separazione dei beni → the sole owner of any property held before and after marriage;

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47 Above n 24.

48 Viezzi, above n 11, 97.

49 Above n 24.

Example (12) presents a term peculiar to the Italian system dealing with property acquired by either spouse during marriage. In Italy, the *regime ordinario* relating to property owned by spouses is that of *comunione dei beni tra coniugi*.[50] As de Franchis explains: 'Joint estates of spouses: di origine civilistica. Il regime patrimoniale nella *common law* è, invece, quella della separazione dei beni'.[51] This means that married people are treated as individuals if they buy property or incur debts in their sole name.[52] However, in Italy, all property acquired is considered as being jointly owned irrespective of whether a spouse acquired it in his or her sole name. It seems, then, that a gloss or explicative form of translation, such as that suggested above, may be adopted to explain in the most appropriate manner the meaning of the Italian term in the target text.

VI Conclusion

It is hoped that this investigation has shown that the dichotomy between translatable and untranslatable is no longer relevant or applicable. Notwithstanding the divide between civil law and common law, countless legal texts, such as contracts, are translated with ever-increasing frequency. In an increasingly globalised world, the need to produce precise, simple and intelligible texts to enhance contact between different peoples and cultures is ever more imperative. The examples of problematical translations chosen for analysis in this paper have shown that, at times, a more 'source-oriented' approach is required (in the form of explanatory note or definitional type translations), and at other times, a more 'target-oriented' approach be applied (in the form of a gloss or the adoption of a functional equivalent, ie, 'mortgage' for *ipoteca*). The translator should adopt whichever strategy renders the meaning of the text they are translating most adequately (always bearing in mind the purpose of the TT), while at the same time taking into account the fact that the

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50 As stipulated in Italy's Family Law regime, *il diritto di famiglia* of 1975 (L 19 May 1975, n 151).

51 de Franchis, above n 25, 531.

52 Sandra Bassam and David Gardner (eds), *The Law Handbook* (Thomson Reuters, 2012), 705.

target readers are from an entirely different legal culture to source language readers, and, in many cases, do not have a degree in law. This will require more flexibility and creativity on the part of the translator to identify potential solutions that can bridge the legal and cultural divide, while at the same time ensuring that the meanings of the terms in question are transmitted in the target text so as not to pose interpretation problems, and thus avoid the danger of potentially costly disputes arising between the parties.

VII APPENDIX A

DICHIARAZIONE

Certifico io sottoscritta — – Notaio iscritto al Collegio Notarile di — – che con atto a mio rogito in data — – , Repertorio numero — – , in corso di registrazione e trascrizione perché nei termini, è stato convenuto quanto risultante dal tenore letterale dell'atto stesso che, omessa la chiusa, qui di seguito testualmente si riporta:

DONAZIONI e COMPRAVENDITA
REPUBBLICA ITALIANA

L'anno — –, il giorno — – del mese di — –
in — , nel mio studio in — avanti a me —— Notaio in — – iscritto al Collegio Notarile di — – assistito dalle signore –
nata a — – il — – , residente a — –
nata a — – il — – , residente a — –
testimoni noti ed idonei, aventi i requisiti di legge, come mi confermano,

SONO PRESENTI

— – nata a — – il giorno — – , residente a — – Codice Fiscale: — – ,
— – nato a — – il — – , residente a — – Codice Fiscale: — –
— – nato a — – il — – , residente a — – , per il presente domiciliato in — – , Codice Fiscale: — –
— – nato a — – il — – , residente a — – Codice Fiscale: — –
Detti comparenti della cui identità personale io Notaio sono certo, mi chiedono di ricevere il presente atto con il quale, alla presenza dei testimoni,

CONVENGONO
IN PRIMO LUOGO
art 1

La Signora — – riservando per sé la donante l'usufrutto generale vitalizio, senza obbligo di cauzione né di inventario, dona al proprio nipote ex-frate Signor — – , che accetta e a tal titolo acquista:

Comune di — –

nel fabbricato urbano, con aerea di pertinenza, in — – , civico — –

- la nuda proprietà dell'appartamento al piano terra (strada), consistente di ingresso, corridoio, cucina, soggiorno, due camere, servizio e ripostiglio, individuato nel locale Catasto Fabbricati — regolarmente allibrato in capo alla donante — con il mappale di:

Foglio — – numero — – subalterno — – P:T: Cat. A/4 cl. U vani 4,5 Rendita Catastale Euro — –
giusta planimetria depositata presso il competente Catasto (Agenzia del Territorio) in data — – , protocollo — – , firmata dai comparenti, dai testimoni e da me Notaio per presa visione ed accettazione, al presente si allega alla lettera "A", per formarne parte integrante e sostanziale; a tale riguardo l'intestataria catastale dichiara che lo stato di fatto dello immobile sopradescritto è conforme — in base alla vigente normativa catastale - ai dati catastali ed alla allegata planimetria: il donatario nel prendere atto della sovraestesa dichiarazione, espressamente la conferma;
a detta porzione compete la proporzionale quota di nuda proprietà in tutti i vani, spazi, servizi, impianti ed enti comuni dell'intero fabbricato nonché nell'area circostante di pertinenza ai sensi dell'art 1117 ss del codice civile,
confinante l'intero fabbricato, con area di pertinenza, in contorno da nord: — – , mappali — – e — – salvo errore e come meglio in fatto.

art 2

Le parti dichiarano che il valore di quanto donato e meglio individuato al precedente articolo 1, anche tenuto conto degli anni della usufruttuaria, è di Euro — –. e la donante, per quanto occorrer possa, rinuncia all'ipoteca legale.

art 3

La nuda proprietà di quanto in oggetto viene trasferita nello stato di fatto e di diritto in cui attualmente si trova con ogni inerente ragione, azione, pertinenza, accessorio e con tutte le servitù attive e passive se vi sono e così come hanno ragione legale di esistere.

art 4

Si trasferisce da oggi la nuda proprietà di quanto in oggetto.

art 5

La donante garantisce la titolarità e la libera disponibilità di quanto in oggetto e la sua libertà da trascrizione pregiudizievoli, oneri, pesi, pegni, ipoteche e privilegi.

art 6

La donante dichiara che quanto donato e meglio individuato al precedente articolo 1, le è pervenuto per assegnazione avutane con la divisione convenuta allo "in secondo luogo" dell'atto a rogito Notaio — – di — – in data — – repertorio numero — – registrato a — – il — – al numero — – ed ivi trascritto il — – ai numeri — – , con la quale è sciolta la comunione creatasi a seguito di:
- successione legittima in morte del Signor — – , che era nato a — – il — – ivi deceduto il — – (dichiarazione di successione numero — – Volume — – registrata a — – il — – ed ivi trascritta il — – ai numeri — –);
- donazione avutane con la stipulazione allo "in primo luogo" dell'atto sopra citato.

art 7

Spese e imposte della presente donazione e conseguenti tutte sono a carico del donatario Signor e, a tale riguardo le parti mi dichiarano:
* che il donatario — – è nipote ex fratre della donante Signora — – ;
*ai sensi e per gli effetti dell'articolo 57 del DPR 31 ottobre 1990 numero 346 che la donante Signora non ha effettuato prima d'ora alcuna donazione al donatario Signor — –

IN SECONDO LUOGO

art 1

Il Signor — – dona al proprio nipote ex-filia Signor — – , che accetta e a tal titolo acquista:

in Comune di — –

*nel fabbricato urbano, con area di pertinenza, in Via — – civico n 2:
- unità immobiliare in piano terra, consistente di due cantine ed astrico, individuata nel locale Catasto Fabbricati - regolarmente allibrata in capo al donante — con il mappale di:
Foglio — – numero — – subalterno — – PT Cat C/2 cl 1 mq. Rendita Catastale Euro — – giusta planimetria depositata presso il competente Catasto in data — – , che in copia rilasciata dal competente Catasto (Agenzia del Territorio) in data — – , protocollo — – , firmata dai comparenti, dai testimoni e da me Notaio per presa visione ed accettazione, al presente si allega alla lettera "B", per formarne parte integrante e sostanziale; a tale riguardo l'intestatario catastale dichiara che lo stato di fatto dello immobile sopradescritto è conforme — in base alla vigente normativa catastale — ai dati catastali ed alla allegata planimetria il donatario nel prendere atto della sovraestesa dichiarazione, espressamente la conferma;

- unità immobiliare in piano terra, consistente di ripostiglio, individuata nel locale Catasto Fabbricati — regolarmente allibrata in capo al donante — con il mappale di:

- Foglio — – numero — – subalterno — – Via — – P.T Cat C/2 cl.1mq. Rendita Catastale Euro — –

  (classamento e rendita proposti DM 701/94)
  giusta planimetria depositata presso il competente Catasto in data — – , protocollo — – , firmata dai comparenti, dai testimoni e da me Notaio per presa visione ed accettazione, al presente si allega alla lettera "C", per formarne parte integrante e sostanziale; a tale riguardo l'intestatario catastale dichiara che lo stato di fatto dello immobile sopradescritto è conforme — in base alla vigente normativa catastale — ai dati catastai ed alla allegata planimetria; il donatario nel prendere atto della sovraestesa dichiarazione, espressamente la conferma;
  a dette porzioni compete la proporzionale quota di comproprietà in tutti i vani, spazi, servizi, impianti e d enti comuni dell'intero fabbricato nonché nell'aria circostante di pertinenza ai sensi dell'art 1117 ss del codice civile,
  confinante l'intero fabbricato, con area di pertinenza, in contorno da nord:
  Via — – , mappali — –

In Comune di — –

* fabbricato urbano in località — – Via — – consistente di cantina e ripostiglio in piano seminterrato e di cucina e due camere in piano terra, individuato nel locale Catasto Fabbricati — regolarmente allibrato in capo al donante — con il mappale di:
Foglio — – numero — – — Via — – PS1-T Cat A/4 cl U vani 3,5 Rendita Catastale Euro — –
giusta planimetria depositata presso il competente Catasto in data — – , che in copia rilasciata dal competente Catasto (Agenzia del Territorio) in data — – –, protocollo — –, firmata dai comparenti, dai testimoni e da me Notaio per presa visione ed accettazione, al presente si allega alla lettera "D", per formarne parte integrante e sostanziale; a tale riguardo l'intestatario catastale dichiara che lo stato di fatto dello immobile sopradescritto è conforme — in base alla vigente normativa catastale — ai dati catastali ed alla allegata planimetria; il donatario nel prendere atto della sovraestesa dichiarazione, espressamente la conferma;
sono comprese tutte le pertinenze relative al fabbricato stesso ai sensi e per gli effetti dell'articolo 818, 1° comma, del Codice Civile,
confinante: mappale — – su quattro lati,
* terreno circostante il precitato fabbricato, individuato nel locale Catasto Terreni con il mappale di:
Foglio — – numero — –
- prato 5 are 20,05 RD Euro RA Euro — –
confinante, in contorno da nord: mappale altro foglio di mappa e strada
* terreno ad ovest del fabbricato sopradescritto, individuato nel locale Catasto Terreni con il mappale di:
Foglio — – numero — – prato 5 are 24,50 RD Euro — – RA Euro — –
Confinante , in contorno da nord: mappale — – , strada e altro foglio di mappa, i confini tutti salvo errore e come meglio in fatto.

art 2

Le parti dichiarano che il valore di quanto donato e meglio individuato al precedente articolo 1, è di Euro — – e il donante, per quanto occorrer possa, rinuncia all'ipoteca legale.

art 3

I beni oggetto della presente stipulazione vengono trasferiti nello stato di fatto e e di diritto in cui attualmente si trovano con ogni inerente ragione, azione, pertinenza, accessorio e con tutte le servitù attive e passive se vi sono e così come hanno ragione legale di esistere e come meglio precisate nelle disposizioni comuni del presente atto.

art 4

Si trasferiscono da oggi proprietà, possesso, godimento ed oneri.

art 5

Il donante garantisce la piena proprietà e la libera disponibilità di quanto in oggetto e la sua libertà da trascrizioni pregiudizievoli oneri, pesi, pegni ipoteche e privilegi, eccezion fatta, relativamente al terreno posto in Comune di , — –individuato con il mappale di Foglio — – numero, per il vincolo di stipulato ai sensi della Legge Regione Lombardia numero 93/1980 con atto da me Notaio autenticato nelle firme in data — – , Repertorio numero — –, registrato a — – il 24 maggio 2004, al numero — – serie ed ivi trascritto il giorno 8 giugno 2004 ai numeri — – .

art 6

Il donante dichiara che quanto donato e meglio individuato al precedente articolo 1, le è pervenuto, anche nell'originaria consistenza ed identificazione catastale, come segue:

* quanto ai beni in Comune di — – per acquisto fattone con atto a rogito Notaio — – di — – in data — – , Repertorio numero — – , registrato a — – il — – al numero — – Volume — – ed ivi trascritto il 20 settembre 1965 ai numeri — –

* quanto ai beni in Comune di — – per assegnazione avutane con la stipulazione allo "in secondo luogo" del sopracitato atto di divisione a rogito Notaio — – di — – in data 15 luglio 1975, repertorio numero — – , con la quale è sciolta la comunione creatasi a seguito della donazione avutane con la stipulazione allo "in primo luogo" dell'atto stesso.

art 7

Spese e imposte della presente donazione e conseguenti tutte sono a carico del donatario Signor — – e, a tale riguardo le parti mi dichiarano:

* che il donatario Signor — – è nipote ex-filia del donante Signor — – ;

* ai sensi e per gli effetti dell'articolo 57 del DPR 31 ottobre 1990 numero 346 che il donante Signor — – non ha effettuato prima d'ora alcuna donazione al donatario Signor — – .

art 8

Ai fini della tassazione le parti chiedono di avvalersi di quanto disposto dall'articolo 34, comma 6/bis testo unico dell'imposta sulle successioni e donazioni (così come integrato dal decreto legge 20 giugno 1996 numero 323, convertito con legge 8 agosto 1996 numero 425) vertendosi nella fattispecie ivi prevista per la definitiva attribuzione della rendita catastale alla unità immobiliare oggetto della presente stipulazione.

IN TERZO LUOGO

art 1

Il Signor — – vende al Signor — – che accetta e a tal titolo acquista:

in Comune di — –

* Nel fabbricato urbano, con area di pertinenza, in Via — – civico n.

- unità immobiliare in pessimo stato di manutenzione e conservazione, svoltengesi su due piani (primo e secondo), collegati fra loro da scala interna, consistente di atrio in piano primo, di atrio, disimpegno e quattro vani ad uso

fienile in piano secondo, individuata nel locale Catasto Fabbricati - regolarmente allibrata in capo al venditore - con il mappale di:
Foglio — – numero — – subalterno — – Via — – P 1-2 Cat C/2 cl 1 mq. Rendita Catastale Euro — –
(classamento e rendita proposti DM 701/94)
giusta planimetria depositata presso il competente Catasto in data 14 settembre 2012, protocollo — – , che in copia rilasciata dal competente Catasto (Agenzia del Territorio) in data — – , protocollo — – , firmata dal comparenti, dai testimoni e da me Notaio per presa visione ed accettazione, al presente si allega alla lettera "E", per formarne parte integrante e sostanziale; a tale riguardo l'intestatario catastale dichiara che lo stato di fatto dello immobile sopradescritto è conforme - in base alla vigente normativa catastale - ai dati catastali ed alla allegata planimetria; l'acquirente nel prendere atto della sovraestesa dichiarazione, espressamente la conferma;
- unità immobiliare al piano terzo-sottotetto, in pessimo stato di manutenzione e conservazione, consistente di solaio, individuata nel locale Catasto Fabbricati - regolarmente allibrata in capo al venditore - con il mappale di:
Foglio — – numero — – subalterno — – Via — – P. 3 Cat C/2 cl 1 mq. Rendita Catastale Euro — –
confinante in contorno da nord: muri perimetrali, proprietà di terzi ed ancora muri perimetrali,
giusta planimetria depositata presso il competente Catasto in data — – , che in copia rilasciata dal competente Catasto (Agenzia del Territorio) in data — – , protocollo — – firmata dai comparenti, dai testimoni e da me Notaio per presa visione ed accettazione, al presente si allega alla lettera "F", per formarne parte integrante e sostanziale; a tale riguardo l'intestatario catastale dichiara che lo stato di fatto dello immobile sopradescritto è conforme - in base alla vigente normativa catastale - ai dati catastali ed alla allegata planimentria; l'acquirente nel prendere atto della sovraestesa dichiarazione, espressamente la conferma;
a dette porzioni compete la proporzionale quota di comproprietà in tutti i vani, spazi, servizi, impianti ed enti comuni dell'intero fabbricato nonché nell'area di pertinenza ai sensi dell'art 1117 ss del codice civile, confinante l'intero fabbricato, con area di pertinenza, in contorno da nord: Via — – mappali — – , salvo errore e come meglio in fatto.

art 2

Il prezzo della presente compravendita è stabilito a corpo delle parti in Euro — – da pagarsi nel rispetto delle norme inderogabili di legge, entro il giorno 31 dicembre 2012 in unica soluzione.

La parte venditrice rinuncia espressamente ad ogni e qualsiasi diritto di ipoteca legale lei spettante.

Le parti convengono che la somma dilazionata non produrrà interesse alcuno.

Il decorrere di sei mesi dalla sopra citata data del 31 dicembre 2012.

senza che a carico della parte acquirente siano stati trascritti atti di citazione o domande giudiziali volte ad ottenere la esecuzione forzata del sopra descritto obbligo costituirà quietanza tra le parti e nei confronti dei terzi.

art 3

I beni oggetto della presente stipulazione vengono trasferiti nello stato di fatto e di diritto in cui attualmente si trovano con ogni inerente ragione, azione, pertinenza, accessorio e con tutte le servitù attive e passive se vi sono e così come hanno ragione legale di esistere, dandosi atto che l'acquirente Signor — – nel prendere atto del cattivo stato di manutenzione anche dell'intero fabbricato, si impegna a propria cura e a proprie spese al rifacimento del tetto comune nonché alla realizzazione di una canna fumaria anche a servizio di terzi come meglio specificato nelle disposizioni comuni.

art 4

Con riferimento agli impianti che corredano i beni oggetto del presente atto, la parte venditrice non garantisce alla parte acquirente la conformità di detti impianti alla normativa in materia di sicurezza.

art 5

Si trasferiscono da oggi proprietà, possesso, godimento ed oneri.

art 6

La parte venditrice garantisce la piena proprietà e la libera disponibilità di quanto in oggetto e la sua libertà da trascrizioni pregiudizievoli, oneri, pesi, pegni, ipoteche e privilegi.

art 7

La parte venditrice dichiara che quanto ceduto e meglio individuato al precedente articolo 1 le è pervenuto, anche nell'originaria consistenza ed identifcazione catastale, in forza di acquisto fattone con il sopracitato atto a rogito Notaio — – di — – in data 22 agosto 1965, Repertorio numero — –.

art 8

La parte venditrice dichiara ed attesta — e parte acquirente ne prende atto — che le unità immobiliari oggetto della presente stipulazione sono prive di impianto termico e che conseguentemente non ricorre alcuno dei casi previsti dalla vigente normativa per cui si renda necessaria l'allegazione al presente atto dello Attestato di Certificazione Energetica.

art 9

Spese e imposte del presente atto e dipendenti sono a carico della parte acquirente e a tale riguardo le parti contraenti dichiarano che tra le stesse non intercorre alcun rapporto di coniugio o di parentela in linea retta o che tale sia considerato ai sensi dell'art 26 del DPR 26 aprile 1986 n 131.

art 10

Ai sensi dell'articolo 1 comma 497 della Legge 23 dicembre 2005 numero 266 così come modificato dal comma 21 dell'articolo 35 del Decreto Legge numero 223 in data 4 luglio 2006 e come ulteriormente modificato dall'articolo 1 comma 309 della Legge 27 dicembre 2006 numero 296 la parte acquirente richiede che la base imponibile ai fini della applicazione delle imposte di registro, ipotecaria e catastale relativamente ai beni oggetto del presente atto sia costituita dal valore determinato ai sensi dell'articolo 52 commi 4 e 5 del DPR 26 aprile 1986 numero 131, indipendentemente dal corrispettivo indicato che si conferma di Euro — –.

A tale fine si precisa:

a) che il presente atto è soggetto ad imposta di registro;
b) che la parte acquirente è persone fisica che non agisce nell'esercizio di attività commerciali, artistiche o professionali;
c) che parte acquirente è nuda proprietaria dell'unità abitativa oggetto della donazione convenuta con la stipulazione di cui allo "in primo luogo" del presente atto e che quanto acquistato con la presente stipulazione è pertinenza della detta unità abitativa;
d) che il valore dei beni di cui alla precedente lettera c) determinato ai sensi dell'articolo 52 commi 4 e 5 del DPR 26 aprile 1986 numero 131 e pertanto la base imponibile ai fini delle imposte di registro ipotecarie e catastali è pari ad Euro — – .

art 11

Ai fini della tassazione le parti chiedono di avvalersi di quanto disposto dall'articolo 12, comma 2/bis del Decreto legge 14 marzo 1988 numero 70 convertito con modifiche nella legge 13 maggio 1988 numero 154, vertendosi nella fattispecie ivi prevista per la definitiva attribuzione della rendita catastale alle unità immobiliare oggetto della presente stipulazione.

art 12

Ai sensi dell'articolo 35 comma 22 del Decreto Legge 4 luglio 2006 numero 223, convertito con modifiche nella Legge 4 agosto 2006 numero 248 e come ulteriormente modificato dal comma 48 dell'articolo 1 della Legge 27 dicembre 2006 numero 296, i Signori — – e — – , da me Notaio previamente resi edotti ed ammoniti sulle sanzioni penali derivanti dalle dichiarazioni mendaci ai sensi di quanto disposto dal DPR 28 dicembre 2000 n 445, nonché resi edotti dei poteri di accertamento della amministrazione finanziaria e della sanzione amministrativa applicabile in caso di omessa, incompleta o mendace indicazione dei dati, dichiarano ed attestano di non essersi avvalsi di alcuna mediazione.

DISPOSIZIONI COMUNI

art 1

I beni oggetto del presente atto vengono trasferiti nello stato di fatto e di diritto in cui attualmente si trovano con ogni inerente ragione, azione, pertinenza, accessorio e con

tutte le servitù attive e passive se vi sono e così come hanno ragione legale di esistere, dandosi atto che, relativamente al fabbricato posto in Comune di — –

* l'astrico a piano terra, facente parte del maggior corpo dell'unità immobiliare individuata con il mappale di Foglio — – numero — – subalterno — – è gravata da servitù di passo a favore delle unità immobiliari individuate con il mappale di Foglio — – numero — – subalterni — –
* è data possibilità di realizzare - a favore dell'unità immobiliare individuata con il subalterno — – - nell'angolo nord-ovest dell'atrio a piano primo, facente parte del maggior corpo dell'unità immobiliare individuata con il mappale di Foglio — – numero — – subalterno — – e sino al tetto - una canna fumaria ed un vano tecnico per impianti;
* le parti acconsentono reciprocamente al passaggio sulle scale e sugli accessi comuni per il raggiungimento del tetto di pertinenza per il posizionamento di antenne TV, pannelli solari o semplicemente per l'esecuzione di urgenti lavori di manutenzione;
* il tetto di copertura del fabbricato è di proprietà comune nonostante il rifacimento a carico del solo Signor — –

Per quanto occorrer possa, ai sensi e per gli effetti della normativa vigente:

* relativamente alle unità immobiliari individuate con il mappale di Foglio — – numero — – subalterni — – si richiamano le planimetrie già allegate al presente atto rispettivamente alle lettere "A", "B", "D", "E" e "F";
* relativamente alla unità immobiliare individuata con il mappale di Foglio — – numero — – subalterno — – , si allega al presente atto alla lettera "G", per farne parte integrante e sostanziale, firmata dai comparenti, dai testimoni e da me Notaio per presa visione ed accettazione la planimentria depositata presso il competente Catasto in data — – , protocollo — – ed in copia dal medesimo rilasciata in data 17 settembre 2012, protocollo numero — –

L'intestatario catastale Signor — – dichiara ed espressamente conferma che lo stato di fatto del fabbricato urbano medesimo è conforme - in base alla vigente normativa catastale - ai dati catastali ed alla allegata planimetria.

art 2

Ai sensi e per gli effetti della legge 28 febbraio 1985 numero 47 e successive modifiche ed integrazioni i Signori — – e , da me Notaio previamente resi edotti ed ammoniti sulle sanzioni penali derivanti dalle dichiarazioni mendaci ai sensi di quanto disposto dal DPR 28 dicembre 2000 n 445, dichiarano ed attestano:

a) il Signor — – che le opere di costruzione del fabbricato posto in Comune di — – sono state iniziate anteriormente al 1 settembre 1967;

b) i Signori — – e — – che le opere di costruzione del fabbricato posto in Comune di — – sono state iniziate anteriormente al 1 settembre 1967;

inoltre ai sensi e per gli effetti della vigente disciplina urbanistica (Legge 28 febbraio 1985 numero 47 e successive modifiche ed integrazioni, DPR 6 giugno 2001 numero 380):

* il Signor — – dichiara che successivamente al fabbricato posto in Comune di — – non sono state apportate modifiche tali che avrebbero richiesto ulteriori licenze, autorizzazioni, concessioni, permessi di costruire o denunce di inizio attività;
* i Signori — – e — – dichiarano che successivamente al fabbricato posto in Comune di — – non sono state apportate modifiche tali che avrebbero richiesto ulteriori licenze, autorizzazioni, concessioni, permessi di costruire o denunce di inizio attività e che l'area di pertinenza è di superficie inferiore a cinquemila metri quadrati.

art 3

Ai sensi e per gli effetti di cui alla legge 19 maggio 1975 n. 151:
* la Signora — – dichiara di essere di stato libero;
* il Signor — – dichiara di essere vedovo;
* il Signor — – dichiara di essere coniugato e di trovarsi nel regime ordinario che per il diritto australiano è quello della separazione di beni;
* il Signor — – dichiara di essere di stato libero.

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Si rilascia per gli usi consentiti della Legge.
– — – –, il — – — –

THE INTERNATIONAL DIMENSION OF COMPETITION LAW

DR LEELA CEJNAR*

Abstract

Competition Law — International Competition Law — International Competition Policy — Globalisation And Competition Law — Model Competition Law — International Co-operation — A 'Global' Competition Law

Although business is now conducted in globally-integrated markets, attempts to create a set of 'international' competition rules have not been completely successful. Though many countries have adopted some form of competition law system or framework, there are economic, social, cultural and political differences between jurisdictions that make it difficult to reconcile the benefits of removing hindrances to competition with the need for a set of 'global' competition laws and policies. This article will consider what the scope of a set of 'global' competition laws might be and to what extent competition law can be 'global'.

I INTRODUCTION

The shift toward trade liberalisation and deregulation in the 1980s significantly broadened the range of markets in which businesses could operate. Businesses began to compete globally for customers and greater market share. Globalisation has also fuelled greater

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international competition and with this has come an increase in the risk of cross-border anti-competitive conduct.[1]

In spite of greater international competition, past attempts to create a set of 'international' competition rules have not been completely successful. However, as a matter of course, business is now conducted in globally-integrated markets (and this is becoming particularly the case with the rapid development and integration of technology in all business dealings). As such, the need for the development of some form of 'global' competition law has arguably become more essential.

This need arises against the backdrop of an increasing number of countries currently in the process of developing some competition law framework. Over 120 jurisdictions have now adopted a system of competition law.[2] These jurisdictions seek to regulate anti-competitive behaviour for the reason that competition is primarily intended to. That is, to increase a market's allocative, productive and dynamic efficiencies thereby increasing innovation, offering consumers better prices, services and choices and improving economic welfare. Most of these competition law regimes share common characteristics and features,[3] including prohibitions on certain types of behaviour such as horizontal agreements between firms (for example, cartels aimed at market-sharing, price fixing, limiting production and collusive tendering), vertical restraints between firms operating at different levels of the market and excessive aggregation of market power.

However, there are economic, social, cultural and political differences between these jurisdictions, making it difficult to reconcile the benefits of removing hindrances to competition with the need for a set of 'global' competition laws and policies. In addition, while many

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1 Martyn D Taylor, *International Competition Law: A New Dimension for the WTO?* (Cambridge University Press, 2006) 36–7.

2 Maher M Dabbah, *International and Comparative Competition Law* (Cambridge University Press, 2010) 3.

3 Ibid 13.

countries have adopted some form of competition law system or framework, some countries have opted to not legislate to protect competition,[4] relying either on the market itself (such as by promoting free trade) or on other types of laws to protect competition or on state control and planning. Some countries have looked at unilateral, regional or bilateral arrangements in an attempt to co-ordinate the application and enforcement of competition law. To what extent, therefore, can competition law be 'global'?

This article will consider what the scope of a set of 'global' competition laws might be and whether efforts in this area should concentrate on capacity building and on international co-operation.[5]

II HISTORICAL BACKGROUND

In the aftermath of the Second World War, several attempts were made by various international bodies to establish some form of global competition rules.[6] For example, efforts to establish an International Trade Organisation (ITO) in the period 1945–48 included negotiations for the inclusion of competition rules in the *Draft Havana Charter* ('*Havana Charter*'). A key aim of the *Havana Charter* included a proposal to introduce provisions dealing with restrictive business practices.[7] In particular, where such restrictive practices interfered with the trade-liberalising aims of the *Havana*

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4 Ibid 5.

5 The OECD and the International Competition Network ('ICN') undertook a joint survey in 2013 which looked at the ways in which international co-operation in relation to the enforcement of competition law could be improved: See OECD, International Enforcement Co-operation, *Secretariat Report on the OECD/ICN Survey on International Enforcement Co-operation* (2013) <http://www.oecd.org/competition/InternEnforcementCooperation2013.pdf>.

6 Examples include the attempt to establish the ITO,ECOSOC draft convention, United Nations Conference on Trade and Development ('UNCTAD'), the OECD and the World Trade Organization ('WTO').

7 Above n 3, 248. See also Peter Muchlinski, *Multinational Enterprises and the Law* (Oxford University Press, 2nd ed, 1995) 403; United Nations Conference on Trade and Employment, *Havana Charter for an International Trade Organization*, UN ESCOR, UN Doc E/Conf 2/78 (24 March 1948, adopted April 1948).

Charter, it sought to impose obligations on member countries of the proposed ITO to prevent firms engaging in activities which may 'restrain competition, limit access to markets or foster monopolistic control in international trade'.[8] The *Charter* also provided for complaints about such restraints to be brought before the ITO. However, the United States objected to these attempts to internationalise competition (antitrust) policy and so the *Havana Charter* failed and the ITO never actually materialised.[9]

A further attempt to internationalise competition law, after the unsuccessful attempt of the *Havana Charter*, occurred when the United Nations Economic and Social Council ('ECOSOC') recommended the inclusion of a draft convention that would have established an international agency with responsibility for receiving and investigating complaints about restrictive business practices. The United States again rejected this convention, however, because of concerns that disparities in domestic laws and policies were so significant that the role and function of any such international organisation would have been redundant.[10]

In 1958, the European Economic Community was established. Among its core rules were competition rules prohibiting agreements between Member States that had as their object or effect the: prevention; restriction; distortion of competition[11] and prohibiting the abuse of a dominant position within the internal market.[12]

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8 Dabbah, above n 2, 248 and n 7; *Havana Charter*, art 46.

9 Dabbah, above n 2, 248. See also Andreas F Lowenfeld, *Public Controls on International Trade* (Matthew Bender, 2nd ed, 1983).

10 Diane P Wood, 'The Impossible Dream: Real International Antitrust' (1992) *University of Chicago Legal Forum* 277, 284–5.

11 *Treaty Establishing the European Economic Community,* opened for signature 25 March 1957 OJ L 25 (entered into force 1 January 1958) art 85 ('*EEC Treaty*'); the *EEC Treaty*, is also known as the *Treaty of Rome* and now the *Treaty on the Functioning of the European Union* ('*TFEU'*), signed on 13 December 2007, 2012/C 326/01, art 101.

12 *TFEU* art 102 (formerly art 86 of *EEC Treaty*).

In 1996, a significant development occurred with respect to the 'globalisation' of competition policy, with its inclusion on the agenda of the then newly formed World Trade Organization ('WTO'). A WTO Working Group was set up to:

> study issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, in order to identify any areas that may merit further consideration in the WTO framework.[13]

However, the United States was concerned that multilateral rules (particularly ones involving supranational dispute resolution)[14] would be too interventionist and sought a non-binding, bilateral solution.[15] As such, attempts to include competition rules on the WTO's agenda failed. However, this was as much because of US opposition as because of opposition from developing states, which were disappointed at the failure of the WTO to deliver better access to developed markets. Accordingly, competition policy was one of the early casualties of the Doha Round of negotiations and in 2003, at the Ministerial Conference at Cancun in Mexico, competition policy was removed from the WTO agenda.[16] Yet again, attempts to establish a multilateral competition agreement were thwarted.

Competition rules have appeared on the agenda at the United Nations Conference on Trade and Development ('UNCTAD') and at the Organization for Economic Co-operation and Development ('OECD'). For example, in 2000, a *Resolution* was adopted by the 4th United Nations ('UN') Conference, dealing with the issue of co-operation between antitrust authorities. The *Resolution* recognises the importance of bilateral agreements and multilateral initiatives and also asked UNCTAD to examine the possibility of developing a model co-operation agreement on competition (antitrust) law and

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13 *Singapore Ministerial Declaration*, WTO Doc WT/MIN(96)/DEC (18 December 1996, adopted 13 December 1996) [20].

14 Brendan Sweeney, 'International Competition Law and Policy: A Work in Progress' (2009) 10 *Melbourne Journal of International Law* 60.

15 Above n 5.

16 Brendan Sweeney, 'Global Competition: Searching for a rational basis for global competition rules' (2008) 30 *Sydney Law Review* 211.

policy, based on UNCTAD's Set of 'multilaterally agreed principles'. Accordingly, UNCTAD's work includes the development of a 'Model Law' on Competition,[17] which states that the main objectives of national competition law and policy are:

> to control or eliminate restrictive agreements or arrangements among enterprises, or mergers and acquisitions or abuse of dominant positions of market power, which limit access to markets or otherwise unduly restrain competition, adversely affecting domestic or international trade or economic development.[18]

Through its Intergovernmental Group of Experts on Competition Law and Policy, UNCTAD has also been considering ways of how to improve worldwide co-operation on competition policy and how to spread a competition-based culture.[19] Among the measures adopted by UNCTAD are training activities, developed in collaboration with competition authorities in different countries, highlighting the need to formulate and enforce competition and consumer protection laws in developing countries, in order to increase efficient allocation of resources and, in the longer term, reduce poverty.

The OECD has also been playing an important role both with regard to countries with competition law systems, as well as countries requiring assistance as they introduce or aim to introduce competition law and policy into their domestic legal systems. In particular, the OECD has issued several non-binding recommendations, including in 1986 and 1995 on international co-operation amongst domestic competition law authorities and in 1998 condemning hard-core cartels.[20]

In 2001, the International Competition Network ('ICN') was launched. A multilateral initiative, the ICN is an independent body

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17 *Model Law on Competition Law (2010) Chapter 1*, Agenda Item 6(a), UN Doc TD/RBP/CONF.7/L.1 (30 August 2010), 2.

18 OECD Global Forum on Competition, *Objectives of competition law and policy: Towards a coherent strategy for promoting competition and development*, 1st sess, UN Doc CCNM/GF/COMP/WD 31 (10–11 February 2003), 2.

19 Dabbah, above n 2, 143.

20 Ibid 252–3.

that focuses exclusively on competition law enforcement and on the development of domestic competition law regimes around the world (see further discussion below). Its three areas of 'priority' are multijurisdictional merger control, competition advocacy and cartels.

While each of the international organisations mentioned above (WTO, UNCTAD, OECD and ICN) have made a substantial contribution to the development of competition law and policy, a lack of legal certainty exists and more progress is needed to ensure greater international co-ordination and consistency in the development, application and enforcement of competition laws and policies.

III THE SCOPE OF A 'GLOBAL' COMPETITION LAW

Currently, a smorgasbord of competition laws and policies exists across jurisdictions. So that while firms doing business internationally might be faced with similar issues globally the practice of competition law and policy is likely to develop differently, if for no other reason than the differences in the political, social and judicial structures of different jurisdictions.[21] Although there are some common goals across the various competition law systems, the approach adopted in each, in trying to implement and achieve these goals, is different.

For example, certain types of agreements and conduct are universally recognised as raising competition law concerns. These include hard-core cartels (particularly involving price-fixing), misuse of market power, certain types of exclusionary conduct and international mergers. It is in these areas that the law may benefit from a global approach. However, there are marked differences in approaches to the application and enforcement of these laws, even between well-established competition regimes. For example, in the United States, the rules that apply to agreements dealing with resale price maintenance used to be fairly consistent with those that applied in Australia, which is that agreements that control a resale price are

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[21] Ibid 64.

strictly prohibited. However, the United States has recently changed its view on this, deciding that resale price maintenance agreements should be assessed using a 'rule of reason' approach.[22]

On the 'global' scale, the recognition of the importance of competition policy is evident in the WTO's Most-Favored Nation[23] and National Treatment principles.[24] However, the fact remains that competition policy has been absent from the WTO's agenda since 2003.

In regional areas like the European Union, a common competition law has been relatively successful. For example, although Member States have maintained or introduced their own domestic competition laws, they are required to interpret those laws in a manner consistent with the overarching EU law.[25]

The Asia-Pacific Economic Cooperation Forum ('APEC') [26] recognises that countries may be prepared to agree on areas of co-operation and facilitate harmonisation with regard to aspects of competition policy even if they do not have any properly developed

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22 *Leegin Creative Leather Products Inc v PSKS Inc*, 551 US 877 (5th Cir, 2007).

23 Under the WTO's Most-Favoured Nation ('MFN') principle, WTO members must treat other WTO members equally and cannot discriminate between their trading partners. In other words, if one country is granted a special favour (such as a lower customs duty rate for one of their products) then the same 'favour' should be offered to all other WTO members. See World Trade Organization, *Principles of the Trading System* (2014) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>, para 1.

24 Under the National Treatment ('NT') principles, WTO members must give others the same treatment as is given to their own nationals. In other words, imported and locally produced goods should be treated equally. See World Trade Organization, *Principles of the Trading System* (2014) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>, para 2.

25 See, eg, *Competition Act 1998* (UK), s 60.

26 Asia-Pacific Economic Cooperation (APEC) has 21 members: Australia, Brunei-Darussalam, Canada, Chile, China, Hong Kong, Indonesia, Republic of Korea, Malaysia, Mexico, New Zealand, Papua New Guinea, Peru, Philippines, Russia, Singapore, Chinese Taipei, Thailand, United States, Vietnam. See Asia-Pacific Economis Coorperation, *Member Economies* (2014) <http://www.apec.org/about-us/about-apec/member-economies.aspx>.

competition system or framework. Within APEC, this recognition has come through acceptance of APEC's trade liberalisation measures, outside a framework of legally binding measures.[27]

Countries from the Association of South-East Asian Nations[28] (ASEAN) agreed to non-binding Regional Guidelines on Competition Policy in 2010. The ASEAN members have committed to the introduction of competition laws by 2015. To date, Indonesia, Singapore, Thailand, Vietnam and Malaysia have laws in place. There are some significant differences between the laws, despite the common policy. For example, Singapore expressly excludes all vertical agreements from its Act, (so resale price maintenance agreements are permitted in Singapore) while Malaysia's legislation currently does not include a merger regime. Against this 'jigsawed' background, it is difficult to envisage what the scope of a truly global competition law could realistically be.

As certain types of agreements and conduct (such as hard core cartels) are prohibited by all competition law regimes, it is possible that a global law could govern these types of competition breaches.

Other breaches of competition law, such as exclusive arrangements or abuse of dominance, that normally require an assessment of the effect of an agreement or conduct on a particular market, will be much harder to assess on an international level. Knowledge of the structure of local markets, including the suppliers and customers, is essential for these types of analyses.

Merger control rules exist in many competition regimes, but not all, so could a global competition law cover merger control? Even where merger control exists, different regimes apply different tests. For

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27 APEC (2014) <http://www.apec.org>; APEC, *APEC Electronic Action Plan (e-IAP)* <http://www.apec-iap.org>.

28 Brunei-Darussalam, Cambodia, Indonesia, Lao, Malaysia, Philippines, Singapore, Thailand and Vietnam. See Associations of the Southeast Asian Nations, *ASEAN Member States* (2014) <http://www.asean.org/asean/asean-member-states>.

example, Europe looks at whether a 'dominant position' will be created, however the United States and Australia assess whether the merger will 'substantially lessen competition'. Arguably this is an area that would benefit the most from global rules. Most large mergers now involve multinational corporations, therefore requiring approval from multiple competition authorities worldwide. Increased co-ordination of the development, application and enforcement of merger laws would reduce transaction costs and lessen the burden for business of multiple jurisdictional reviews of the same transaction. It would also reduce the potential for the adoption of inconsistent procedures or conflicting decisions by different competition authorities[29] and would ensure a more transparent decision-making process. Perhaps global rules could apply to multi-jurisdictional mergers meeting certain thresholds (as is the case in the European Union), while domestic mergers could be governed by domestic rules.[30]

Would there be some benefit in creating a central body to enforce these laws and if this were to be done, could similar tests for similar types of conduct be applied across all jurisdictions? In the alternative, would it be possible to adopt an international competition law that only applies to international companies, so that the international body need only apply the international competition law rules to those that fall within its jurisdiction, leaving domestic competition law to apply to those companies that only operate domestically?

The establishment of an international competition body (in whatever form), responsible for enforcing a global competition law, seems unlikely to gain the support of the many countries that have their own established and respected competition authorities, as they will be

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29 Alison Jones and Brenda Sufrin, *EC Competition Law Text, Cases and Materials* (Oxford University Press, 2011) 1254–5. Which provides a discussion of the well-publicised merger cases of *Boeing/McDonnell Douglas* and *GE/Honeywell* where the EC and US merger authorities were of different opinions.

30 Wolfgang Geiger and Andreas von Meibom, 'A World Competition Law as an Ultima Ratio' (2002) 23(9) *European Competition Law Review* 445.

reluctant to surrender their sovereignty. The WTO has been put forward as a suitable body, given its almost universal membership[31] and the fact that it already has a dispute resolution system in place that is regarded as successful. However, the WTO is a body that 'concerns itself with public restraints of trade' whereas competition law 'concerns itself with private restraints of trade'.[32] In addition, the stalled Doha round of trade liberalisation talks demonstrates that the WTO has been unable to reach agreement on a range of trade liberalisation issues. Therefore reaching an agreement on an acceptable competition policy agenda seems highly unlikely.

The alternative of having national authorities and courts implement global law gives rise to different problems. Inevitably, the law will develop differently in each jurisdiction, thus quickly losing the benefit of consistency.[33]

IV INCREASED INTERNATIONAL CO-OPERATION: THE WAY FORWARD?

The failure to agree on trade issues at an international level has been augmented by increased regional co-operation on trade (eg, the Trans-Pacific Partnership and the Transatlantic Free Trade Area). Perhaps agreement on competition law policies could develop in the same way, that is, by increased co-operation on a regional basis. An agreement should be easier to reach on a regional basis between 'states with similar economic and legal structures [such as the OECD] or with special geographical links [such as the EC, EEA and NAFTA]'.[34]

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31 APEC, above n 28, 7.

32 Keith R Fisher, 'Transnational competition law and the WTO' (2006) 5(2) *Journal of International Trade Law and Policy* 42, 44.

33 Taylor, above n 1, 448.

34 Montini Massimiliano and Claudio Cocuzza, 'International antitrust Co-operation in a Global Economy' (1998) 19 *European Competition Law Review* 156, 159.

However, the only multilateral agreement currently in place in relation to competition law is the UNCTAD Set of Principles referred to above, which is only voluntary.

By contrast, there are a number of bilateral agreements already in place around the world that deal either directly, or indirectly, with competition law. The European Union has co-operation agreements dedicated to competition law with 10 countries around the world;[35] the United States has anti-trust co-operation agreements with 12 countries;[36] Australia has agreements with 10 countries;[37] China has entered into co-operation agreements with 5 countries;[38] and India has formal co-operation agreements with the European Union, the United States and Australia.

Perhaps the best-known co-operation agreements in the area of competition law are those in existence between the European Union and the United States.[39] Despite being the subject of quite heavy criticism, they have been relatively successful. The problematic mergers of *Boeing*/*McDonnell Douglas* and *GE*/*Honeywell* could be

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35 These are: Bosnia and Heregovina, Brazil, Canada, China, India, Japan, Republic of Korea, Russia, Switzerland and the United States. See European Commission, *Bilateral Relations on Competition Issues* (11 June 2014) Competition <http://ec.europa.eu/competition/international/bilateral/index.html>.

36 Australia, Brazil, Canada, Chile, China, European Union, Germany, India, Israel, Japan, Mexico, Russia. See The United States Department of Justice, *Antitrust Cooperation Agreements* <http://www.justice.gov/atr/public/international/int-arrangements.html>.

37 Canada, China, Fiji, India, New Zealand, Papua New Guinea, Republic of Korea, Taipei, United Kingdom and United States. There are further co-operation agreements in place with other countries on consumer policy issues only, eg, European Commission. See Australian Competition & Consumer Commission, *Treaties & Agreements*, International Relations <http://www.accc.gov.au/about-us/international-relations/treaties-agreements>.

38 Australia, Brazil, European Commission, Republic of Korea, United Kingdom.

39 See, eg, the 1991 EU/US Competition Cooperation Agreement; 1998 EU/US Positive Comity Agreement; 2011 EU/US Best Practices on Cooperation in Merger Investigations <http://ec.europa.eu/competition/international/bilateral/usa.html>.

used as examples of why an international competition law is required, at least in the area of mergers between multinational companies.

Although bilateral agreements may be arguably slightly easier to achieve from a policy perspective, it is unlikely that a series of bilateral agreements would be consistent. Negotiations between countries will inevitably lead to different agreements being reached, thus not moving the world any closer to an 'international' competition law.

The challenges associated with negotiating agreements (even non-binding ones) between governments, whether bilateral or multilateral, may make progress in this area unattainable. Perhaps a set of global competition rules is a step too far, and effort and attention in this area should be focused instead on improving international co-operation.

Through the ICN, much progress has been made with regard to informal co-operation between countries with competition laws. The ICN Statement of Achievements 2001–13 explains the numerous achievements of the ICN since its inception in October 2001.[40] The OECD has also issued a number of documents encouraging international co-operation including the OECD Recommendation on international co-operation (1995) and Best Practices on the exchange of information in cartel investigations (2005).

In April 2012, the ICN approved a project on international enforcement co-operation at the same time as the Competition Committee of the OECD agreed to focus part of its future work on international co-operation in competition enforcement. Under the leadership of the ICN Steering Group and the Competition Committee, the ICN and the OECD committed to an unprecedented comprehensive joint survey to gauge the status of current

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[40] International Competition Network, *ICN Statement of Achievements 2001–2013* (24 April 2013) <http://internationalcompetitionnetwork.org/uploads/library/doc905.pdf>.

international co-operation frameworks and to seek members' views on possible future work.

In 2013, the ICN and the OECD published their separate (but complementary) reports on *International Enforcement Cooperation*.[41]

In the OECD Report, the top three objectives in pursuing international co-operation were identified as capacity building, facilitating investigations and avoiding conflicting outcomes. [42] Perhaps it is not surprising that the area where competition authorities had co-operated the most in the years 2007–11 was in relation to mergers, with a total of 313 cases (compared to 250 cartel cases and only 121 abuse of dominance cases). [43] The majority of the respondents to the ICN questions said they wished to see future work related to co-operation on cartels and mergers.

The OECD Report states that informal co-operation between agencies has worked well and has been valuable, with bilateral agreements and confidentiality waivers being the most widely available instruments to assist in co-operation. However, a lack of prior interaction between agencies and lack of trust, for example, are cited as affecting the willingness of enforcers to co-operate with each other and limit effective co-operative relationships. Similarly, restrictions on sharing confidential information were found to be the greatest impediments to co-operation. Although the ability to share confidential information is often achieved through confidentiality waivers, this is not ideal as it is dependent on obtaining parties' consent.[44] As such, the system for exchanging sensitive information was identified as a key area for improvement.

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41 Dabbah, above n 2; International Competition Network, *ICN Report On OECD/ICN Questionnaire on International Enforcement Cooperation*, Document Library <http://internationalcompetitionnetwork.org/uploads/library/doc908.pdf>.

42 Dabbah, above n 2, 11.

43 Ibid 15.

44 Microsoft waived their confidentiality in respect of the investigations by the EC and the DOJ, which made the process more efficient.

Other limitations include legal limitations based on different legal systems. For example, dual criminality requirements affect co-operation in cartel cases between agencies that are operating under different legal regimes for cartel prosecution/investigation.[45]

When asked about future co-operation:

> respondents emphasized that (i) they expect to see more international enforcement cooperation in the future, particularly at regional level; (ii) they hoped to see better provisions for international cooperation and for information sharing in particular; and (iii) globalization is a strong motivation for more cooperation.[46]

To improve the current system of international co-operation, respondents expressed a desire for the OECD/ICN to work on either recommended practices or guidance or on a bilateral or multilateral agreement that established a framework under which competition agencies could co-operate. Indeed one respondent noted that there would be 'increased pressure from businesses on competition agencies to converge on many policy fields, to avoid duplication in proceedings and contradictory outcomes'. [47] There were some suggestions that co-operating on a regional rather than an international level may work better.[48] Areas highlighted as needing attention (in addition to the exchange of information discussed above) included harmonising procedural matters such as leniency regimes and processes/timetables.[49]

V CONCLUSION

There is no doubt that the global nature of business presents significant legal challenges for companies operating on the international stage. In the context of competition law, those

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45 Dabbah, above n 2, 15.

46 Ibid 22.

47 Ibid 158.

48 Above n 3, 158. 46 out of 57 respondents expect to see more international enforcement co-operation in the future, particularly at a regional level.

49 Dabbah, above n 2, 159.

challenges have come into sharper focus as the prevalence (and perhaps publicity) of international mergers and cross-border cartel activity has increased. The number of countries with domestic competition laws has also increased, creating yet more rules requiring compliance.

Those in favour of a global competition regime will argue that many of these challenges would be substantially reduced if one set of international competition rules were adopted. A common set of rules should, in theory, provide a certainty that does not otherwise exist. However, establishing a common set of rules will be challenging and attempting to ensure that a common set of rules is applied in the same way in each country will be almost impossible. The creation of an international body to administer those rules is unlikely to proceed as countries are concerned about losing their sovereignty over these issues.

As competition laws around the world develop alongside each other, largely seeking to achieve the same broad competition policy objectives, perhaps there is no longer a need for an international law. Although problems will continue to exist in implementing laws in a consistent manner, especially where the merger or cartel is multi-jurisdictional, perhaps the focus should be on enhancing and improving co-operation to achieve a more unified outcome, without any need for countries to relinquish control over their own laws and markets.

Going forward, perhaps the focus should be on enhancing and improving co-operation to achieve a more unified and transparent outcome, with more extensive sharing of experiences and capacity building activities across agencies and jurisdictions and greater advocacy for reforms at national and international levels.

CALCULATING THE APPROPRIATE MEASURE OF DAMAGES IN CHARTER PARTY REDELIVERY DISPUTES

IAN SAMPSON*

Abstract

Maritime Law — Charterparties — Shipping Law — Contract Law — Trade Regulation — Dispute Resolution

Ships and shipping law are steep in history and custom. Today, commercial cargo interests hire ships as mules to move tradable commodities via sea-lanes to markets around the globe. On the other side — ship owners seek to maximise their return on investment by leasing space aboard, or their entire ships to others. This comment compares and contrasts two common types of charterparties. The first is the NYPE 93, a time charterparty; the second is the Barecon 2001 ('Barecon'), a demise (or bareboat) charterparty. While these agreements are vastly different in intent and legal effect, many prescriptive terms require similar performance and our primary focus will be on the concluding stages of these agreements. This stage is called 'redelivery'. At redelivery, the charterparty commences conclusion by requiring the charterer to return the ship to the owner(s). This redelivery may be to a specific place or range of places, in good condition with certain supplies aboard. While this sounds simple, disputes do arise due to the competing interests of owners and charterers and damages rapidly accrue. The following

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will discuss many common causes of such disputes, the settled law and available remedies.

I INTRODUCTION

Historically, ships provided a means to explore, discover and conquer new frontiers, defend existing territories, or to transport goods, livestock and people. The subsequent development of iron construction and mechanisation of then sailing ships, coupled with the demands of globalisation refocused shipping purposes to facilitation of international trade, recreation and defence.

Today, purpose built ships carry a myriad of bulk, deck, liquefied, gaseous and containerised cargo. Cargo interests use ships as 'mules' to transport goods from one seaport to another, while the owners treat their ships as a tradable 'commodity' by leasing and sub-leasing the entire vessel or portions of its payload for pre-determined returns.

Despite the 'air of romance' associated with seafaring, our oceans and waterways are perilous, losses can be large and disputes arise. Disputes about damaged, incomplete or lost cargo, non-payment of hire, delay, restraint and the acceptable use of, or damage to the ship itself are common. This paper focuses upon the latter two items. Notwithstanding, many interests may be at stake including those of the ship owners, the ship's master and crew, the ship's agents and the P & I Clubs (the commodity interests). There are also cargo interests, the sellers (consignors), the buyers (consignees) and their respective insurers. Similarly, spin-off business interests like the various port authorities, stevedores, salvage operators, surveyors, classification and safety authorities, general and specialised legal practitioners and governments may be involved. To exacerbate this potentially volatile mix, add diminishing borders and cross-jurisdiction problems coupled with not only varying laws, rules and trade customs but also different cultures, languages and geography.

Regardless, sea-trade's extensive history has resulted in many industry customs that the courts and arbitrators, who have to determine these disputes, now embrace. The well-litigated and commercial nature of the customary rules now dictates the broad commercial construction interpretation. Likewise, the phenomenon of globalisation has driven the need and common desire for universal harmonisation of regulation. The desired outcome being that parties in different jurisdictions can obtain reliable and uniform advice about their rights and obligations regardless of origin. Forums such as the United Nations ('UN'), World Trade Organization ('WTO'), International Chamber of Commerce ('ICC'), United Nations Commission on International Trade Law ('UNCITRAL') and International Maritime Organisation ('IMO') stand alongside member-based organisations like Baltic and International Maritime Council Organisation ('BIMCO'), European Community Ship Owners' Association ('ECSA'), International Ship Suppliers Association ('ISSA') and the like. These groups have assisted or driven the development of many international agreements, conventions and continued evolution of pro forma charter parties and customary law.

The following section will discuss the nature, construction and interpretation of the *New York Produce Exchange Form 93* ('*NYPE*')[1] and *Barecon 2001* ('*Barecon*')[2] pro forma charter parties. Discussion will then turn to the obligations and rights created by these charter parties with a focus upon clauses concerning the common elements of redelivery that most often lead to dispute,

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1 New York Produce Exchange, *NYPE Form 93* (6 November 1913) Freehill <http://www.freehill.com/articles/MLP233/NYPE_93_TIME_CHARTER_FORM.pdf>. (Issued by the Association of Ship Brokers and Agents (USA) Inc and amended 20 October 1921; 6 August 1931; 3 October 1946; Revised 12 June 1981; 14 September 1993).

2 The Baltic and International Maritime Council Organisation ('BIMCO'), *Barecon 2001*, BIMCO <https://www.bimco.org/chartering/clauses_and_documents/documents/bareboat_chartering/barecon2001.aspx>. 'Barecon' was first issued by BIMCO, Copenhagen in 1974 as 'Barecon A' and 'Barecon B' revised and amalgamated in 1989 and revised in 2001.

specifically: time, place, condition, bunkers, legitimate offsets and final accounts.

II THE NATURE OF THE AGREEMENTS AND CONSTRUCTION

A *The NYPE and the Barecon*

Both the *NYPE* and *Barecon* are pro forma charter parties; the *NYPE* is a time charter and the *Barecon* a demise.[3] While these agreements are vastly different in intent,[4] and legal effect,[5] many prescriptive terms require similar performance.[6] Milnes Holden explains:

> The Function of a Charter-Party. Unlike a bill of lading, a charter-party is always a contract (not merely evidence of a contract) and never anything more.[7]

Simon Baughen further notes:

> Firstly, they are not subject to the mandatory application of the Hague and Hague-Visby Rules. Secondly, they are not subject to the statutory assignment contained in the *Carriage of Goods by Sea Act* (*COGSA*) 1992.[8]

However, as contracts, both have common performance requirements: first, the ship requires delivery[9] to a geographical area

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3 Yvonne Baatz, *Southampton on Shipping Law* (Institute of Marine Law, 1st ed, 2008): 'A demise charterparty is a time charterparty usually for a long term such as 10 years and the ship is in the possession of the demise charterer who crews, maintains and insures the ship'.

4 *Banwell v The Ship The Sydney Sunset* [2001] FCA 210, 20–4 (Tamberlin J); *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211 (Hill J); Simon Baughen, *Shipping Law* (Routledge, 5th ed, 2012) 10, 184–6.

5 See *Patrick Stevedores No 2 Pty Ltd v MV Turakina* (1998) 154 ALR 666; *Programmed Total Marine Services Pty Ltd v The Ship 'Hako Fortress'* (2012) 293 ALR 139; [2012] FCA 805, [45]; *Hanson v Matthew Bros Contractors Ltd* (1990) 55 SASR 183, 2; *NYPE* cl 26.

6 Martin Davies and Anthony Dickey, *Shipping Law* (Lawbook, 3rd ed, 2004) 401–2.

7 Milnes Holden, *Payne's Carriage of Goods by Sea* (Butterworth & Co, 6th ed, 1954) 26.

8 Simon Baughen, *Shipping Law* (Routledge, 5th ed, 2012) 184. Simon Baughen is referring to the US and UK Acts.

9 *NYPE* cl 2; *Barecon* cl 3. See 'Delivery'.

(or, sometimes a specific port and sometimes a specific berth) and at a specified time;[10] second, the use of the ship is for a defined duration,[11] within defined limits;[12] and finally, both conclude with redelivery of the ship to the owners at a set location(s) at a particular period.[13] Likewise, these charter parties expressly allocate who will be responsible for maintenance, operation,[14] and other costs inter alia bunkers,[15] insurances, port charges, crew wages, overtime and other expenses.[16] These charter parties activate when the conditions precedent[17] are satisfied and the use of the 'ship and her master and crew are placed at the disposal of the charterers'.[18] For the *NPYE* this means delivery of a seaworthy,[19] cargo worthy vessel with an adequate master and crew.[20] Including 'clean-swept holds and tight, staunch, strong and in every way fit for ordinary cargo service'.[21] For the *Barecon*, it means a seaworthy vessel fitting description and in every way fit for purpose. This delivery triggers the payment of hire,[22] by the charterer to the ship-owner at the agreed rate 'until her redelivery'.[23] Redelivery is described as the time 'when the [charterers'] use [of the ship] is determined and the vessel is replaced at the owner's disposal'.[24] As valid delivery commences the charter,

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10 *NYPE* cl 10; *Barecon* cl 3, 4, 5. See 'Time/place'.

11 *NYPE* cl 1; *Barecon* cl 2. See 'Duration'.

12 *NYPE* cl 5; *Barecon* cl 6. See 'Trading limits'

13 *NYPE* cl 10; *Barecon* cl 15. Defining 'redelivery'.

14 *Barecon* cl 10.

15 Baughen, above n 8, 185.

16 *NYPE* cl 5, 14, 29; *Barecon* cll 7–14, 16–29. See allocation of expenses.

17 Holden, above n 7, 30. 'No set rules but generally a) whereabouts, b) time of sailing c) name, nationality (in war time) and d) her class on the register and clause ready to load'.

18 *Italian State Railways v Mavrogordatos* [1919] 2 KB 305, 311 (Bankes LJ) ('*Italian State Railways*').

19 *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd* [1967] 2 Lloyd's Rep 224, 246 ('*The Madeleine*'); Stewart Boyd et al, *Scrutton on Charter Party and Bills of Lading* (Sweet & Maxwell, 12th ed, 1996) 348.

20 *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha Ltd* [1962] 2 WLR 474.

21 *NYPE* cl 2 lines 34–5.

22 'Payment of hire' *NYPE* cl 11; *Barecon* cl 11; Baughen, above n 8, 185; Boyd et al, above n 19, 351.

23 *Italian State Railways* [1919] 2 KB 305, 5.

24 Ibid 311 (Bankes LJ); Baughen, above n 8, 244.

the redelivery clause initiates the conclusion, and as Stewart Boyd rightfully notes, disputes 'usually concern its termination and not its beginning'.[25] So when a dispute does materialise, how do the courts and arbitrators,[26] interpret this particular class of contracts?

B *Construction and Interpretation*

As alluded to in the introduction, sea-trades history has resulted in many industry customs and the courts have determined these charter party agreements be interpreted within a broad commercial construction[27] incorporating the common and customary law.[28]

The High Court of Australia has adopted this broad commercial interpretation of charter parties[29] and general commercial disputes between sophisticated parties. Former High Court Justice the Hon Michael Kirby explains: 'The court should look at the contract as a whole in its commercial setting'.[30] Further, the Federal Court of Australia follows this approach, as the Hon Justice Rares assures:

> international trade looks to national judicial systems to provide predictable, well-reasoned, and, as best as may be achievable, harmonious interpretation and enforcement of not only commercial

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25 Boyd et al, above n 19, 348.

26 *Barecon* cl 30(a)–(c); enables the parties to select the seat, rules and laws of arbitrations. The *NYPE* cl 45; calls for expressed nomination by election: (a) provides and election of US Law and seat, lines 870–931, or (b) providing for English law and seat, lines 509–19.

27 See Sheppard J in *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No 2)* (1995) 63 FCR 227 per Roskill J, *The Madeleine* [1967] 2 Lloyd's Rep 224, 238:

> It is well established that clauses in charter-parties cannot be construed in isolation from each other. A charter-party like any other contract must be construed sensibly and in its entirety.

28 M E J Black (Chief Justice of the Federal Court of Australia 1991-2010), 'The F S Dethride Memorial Address 1999: Admiralty Jurisdiction and the Protection of Seafarers' (2000) 15 *Australian and New Zealand Maritime Law Journal* 1, 2–9.

29 *Shipping Corporation of India Ltd v Gamlen Chemical Co Pty Ltd* (1980) 147 CLR 142 (Mason and Wilson JJ).

30 *Transport Industries Insurance Co Ltd v NSW Medical Defence Union Ltd* (1986) 4 ANZ Ins Cas 60-736; Baughen, above n 8, 4.

> contracts but obligations that arise in the disparate relations created by international trading disputes.[31]

Professor John Carter further explains:

> The epithet 'commercial' refers to the objective of the process rather than the nature of the contract. That objective is to arrive at a commercially sensible construction. It follows that 'commercial construction' is the process used to reach a commercially sensible conclusion …[32]

Further, Justice Rares adds:

> Refusal to enforce agreements to arbitrate in international transactions is capable of undermining the reasonable but significant expectations of the international commercial community and the confidence which it and, indeed, local business people place in the readiness of courts to hold people to their bargains.[33]

Considering this clear directive of the courts, the well-litigated and long history of sea trade, customary elements and development of pro forma charter parties,[34] what makes redelivery such a 'whirlpool' of contentious business?

Martin Davies and Anthony Dickey assert that four charter party clauses are common concerning redelivery, namely, c) time, d) place, e) condition and g) bunkers,[35] while Simon Baughen suggests h) legitimate offsets and i) final accounts,[36] also constitute elements of redelivery. Furthermore, Lord Mustill emphasises the competing interests of owners, charterers, cargo and external stakeholders mixed

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31 Steven Rares, 'Australia's sea change: Towards Developing a Comprehensive System of Admiralty and Maritime Dispute Resolution for Twenty-First Century Trade in the Asia-Pacific Region' (2008) 30 *Australian Bar Review* 242, 243.

32 John W Carter, 'Commercial Construction and Contract Doctrine' (2009) 25 *Journal of Contract Law* 83, 84.

33 Steven Rares, 'Australia's sea change: Towards developing a comprehensive system of admiralty and maritime dispute resolution for twenty-first century trade in the Asia-Pacific region' (2008) 30(3) *Australian Bar Review* 242.

34 *NYPE*, above n 1.

35 Davies and Dickey, above n 6, 401–2.

36 Baughen, above n 8, 185.

with the enormous costs of shipping and unpredictable inherent perils.[37]

The following will expand each element identified by Martin Davies, Anthony Dickey and Simon Baughen as they apply to the *Barecon* and *NYPE*.

III THE ELEMENTS OF REDELIVERY

A *Time*

In *The Gregos,* Lord Mustill explains the nexus of time, performance and cost in a shipping context:

> My Lords, in merchant shipping time is money. A cargo ship is expensive to finance and expensive to run. The shipowner must keep it earning with the minimum of gaps between employments. Time is also important for the charterer, because arrangements must be made for the shipment and receipt of the cargo, or for the performance of obligations under sub-contracts. These demands encourage the planning and performance of voyages to the tightest of margins. Yet even today ships do not run precisely to time. The most prudent schedule may be disrupted by regular hazards such as adverse weather or delays in port happening in an unexpected manner or degree, or by the intervention of wholly adventitious events.[38]

1 *Contemporary Costing Methodology*

As Lord Mustill observes, time is a cost driver,[39] as time passes costs build. This proposition is true in nearly all commercial contexts as evidenced by traditional and contemporary cost accounting methods like absorption,[40] function, and activity based.[41] These methods

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37 *Torvald Klaveness A/S v Arni Maritime Corporation* [1995] 1 Lloyd's Rep 1, 5 ('*The Gregos*').

38 *The Gregos* [1995] 1 Lloyd's Rep 1, 5.

39 Michael R Baye, *Managerial Economics and Business Strategy* (McGraw-Hill 5th ed, 2006) 89.

40 National Association of Cost Accountants, *Direct Costing NACA Research Report* (National Association of Accountants 1953) 6.

combine all fixed and variable costs with the desired rate of return to produce chargeable units.[42] These chargeable units may be expressed as time: months, weeks, days, and hours,[43] or as weights: tons, tonnes, deadweight or measures: cubic feet (CFT), cubic metres, twenty equivalent unit (TEU), deadweight, displacement, gallons or litres. These units underpin the valuation of hire,[44] suitability of a ship, demurrage, fees and damages and many other shipping functions.[45] This chosen method of costing is a management decision, not prescribed nor regulated, and if traded profitably will be in the ship owner's favour.

Outside of costing, time is a critical measure and indicator of performance. Time defines expressed periods when specific performance such as delivery and redelivery fall due.[46] Both of these aspects of time form a matrix that can also define the quantum of damages.

2 *Time and performance*

As the focus is on redelivery, it follows that this paper now examines the sources of contention connected with time. Redelivery clauses oblige the charterers to redeliver the ship at the end of the charter period to the owners at a specific port or range of ports:

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41 Michael R Baye, *Managerial Economics and Business Strategy* (McGraw-Hill Irwin 5th ed, 2006) 95.

42 Micheal Bazeley, *Contemporary Accounting* (Thomson 5th ed, 2004).

43 Baatz, above n 3, [2], 11(b); 'The time charterer agrees to pay hire for every minute that the ship is at the charterer's disposal from her delivery until redelivery'.

44 See, eg, *NYPE* cl 10 and *Barecon* 2001 cl 11.

45 For example, *Koch Marine Inc v D'amica Societa Di Navigazione ARL* [1980] 1 Lloyd's Rep 75, 82 ('*The Elena D'Amico*').

46 Time is adjusted to Greenwich Mean Time ('GMT') for hire calculations, delivery and redelivery dates. *NYPE* cl 10, lines 137–8.

> in the same or as good structure, state, condition and class as that in which she was delivered, fair wear and tear not affecting class excepted.[47]

Likewise, the charterers cannot redeliver the ship early,[48] to avoid the payment of hire, nor are the charterers to redeliver the ship late, unless by consent.[49] Terence Coghlin attests:

> the charterers are under a duty to redeliver the ship at the end of the charter period. That obligation has as its corollary that the charterers must not redeliver the ship any earlier than the end of the charter period, nor any later.[50]

If early redelivery occurs, it is then the owner's election. Terence Coghlin clarifies:

> Where the owners take advantage of the available market, making a similar substitute fixture by re-chartering the ship in the market at the time of or shortly after the early redelivery, the proper measure of loss is likely to be the difference between what the owners would have earned under the charter and what they did in fact earn; see, for example, *The Riza and The Sun* [1997] 2 Lloyd's Rep 314. In such a situation, assuming no failure to mitigate, the ship's actual earnings will reflect the relevant market.[51]

The *Barecon* 'clock' begins counting down when the obligation for redelivery activates. Clause 15 requires the charterer to provide the owners 'not less than thirty (30) running days' notice of the *expected* date, *range of ports* of redelivery'.[52] This obligation intensifies with time, requiring an additional notice 'not less than fourteen (14) running days' *definite* date and *port* or place of redelivery'.[53] The obligation then becomes one of continuous advice regarding any 'subsequent change in the vessel's position shall be notified

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47 *Barecon* cl 15 lines 539–42; *NYPE* cl 10 'hire shall continue until her hour of redelivery in like good order and condition, ordinary wear and tear excepted' lines 130–1.

48 Baughen, above n 8, 73.

49 Terence Coghlin et al, *Time Charters* (Lloyd's Shipping Law Library 6th ed, 2008) [4.31].

50 Ibid [4.4].

51 Coghlin et al, above n 49, 4.31.

52 *Barecon* cl 15 lines 519–20.

53 Ibid lines 522–3.

immediately'.[54] This portion of cl 15 requires the charterers to keep the registered owners informed of their ships whereabouts so they are able to arrange for mutual inspections,[55] crew change over, inventory audits,[56] and mirrors the courtesy extended to the charterer by cl 4. This prescriptive function is important for the ship owners who 'must keep it earning with the minimum of gaps between employments',[57] and may prudently have subsequent employment fixed. While the preceding is prescriptive, unremarkable and should be foremost in the minds of a charterer who is 'under an implicit duty to ensure that the ship is redelivered at the end of that period',[58] delays do occur. These delays may be the fault of neither/either party,[59] or due to the charterer's election to take one final cargo laden voyage, rather than redeliver the ship via an unprofitable ballast voyage.[60] Alternately, these final voyages may be calculated risk by the charterer, accepting they will be liable for damages and additional charges.[61]

Regardless of the motivation, under the *Barecon* 'the charterer expressly warrants' they will not commence illegitimate voyages and the remainder of cl 15 expressly provides liquidated damages or 'market rate, whichever is higher for the number of days by which the charter period is exceeded'.[62]

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54 Ibid lines 524–5.

55 Ibid lines 114–23.

56 Ibid cl 9 lines 152–67.

57 *The Gregos* [1995] 1 Lloyd's Rep 1, 5.

58 *Hyundai Merchant Marine v Gesuri Chartering* [1991] 1 Lloyd's Rep 100 ('*The Peonia*').

59 *London & Overseas Freighters Ltd Timber Shipping Co SA v Timber Shipping Co SA* [1971] 1 Lloyd's Rep 523, 527 (Lord Reid).

60 The final voyage doctrine determines how final voyage orders are classified; they are ether legitimate or illegitimate. Bingham LJ explains in *The Peonia* [1991] 1 Lloyd's Rep 100; 'the law draws a distinction between a "legitimate last voyage" and an "illegitimate last voyage"'.

61 *Barecon* cl 15 lines 530–7.

62 *Arta Shipping Co Ltd v Thai Europe Tapioca Services Ltd* [1977] 2 Lloyd's Rep 1 ('*The Johnny*') held in determining what was the appropriate 'market rate' for the remainder of the voyage it was essential that so far as possible like should be compared with like (Orr, LJ, and Sir David Cairns; Lord Denning, MR, dissenting).

At this point, it is worth noting that the common law final voyage doctrine will be over-ridden when the charter party expressly provides otherwise, or the parties have agreed a range of time,[63] no overlap or under lap will be implied.[64]

Simon Baughen succinctly states:

> Final voyage orders are said to be 'illegitimate' if, at the start of the last voyage, it cannot reasonably be expected that they will allow redelivery before the end of the maximum charter period.[65]

Moreover, Lord Mustill clarifies that the final voyage order classification will be determined at the time of required performance:

> As a matter of common sense, it seems to me that the time for such measurement is, primarily at least, the time when performance falls due.[66]

Notwithstanding late redelivery, under the *Barecon* the owners have a corresponding expressed duty to allow the ship to remain in the charterers' employment until she has completed the charterers' final legitimate voyage, albeit subject to liquidated damages, or market rate.[67] Liquidated damages should be a genuine forecast or expressly liquidated, and not a penalty.[68] This effectively means that the charter party rate (or expressed variant) up to the last possible date of

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63 David Foxton, 'Damages for Late or Early Redelivery Under Time Charterparties' (2008) 4 *Lloyd's Maritime and Commercial Quarterly* 461, 462; *Alma Shipping Corp of Monrovia v Montovani* [1975] 1 Lloyd's Rep 115 ('*The Dione*'); *Transfield Shipping Inc v Mercator Shipping Inc* [2008] 2 Lloyd's Rep 275 ('*The Achilleas*'); Boyd et al, above n 19, 349.

64 *Skibsaktieselskapet Snefonn v Kawasaki Kisen Kaisha Ltd* [1975] 1 Lloyd's Rep 422, 424 ('*The Berge Tasta*'): 'So the charterers are allowed a reasonable margin or tolerance either side of the agreed redelivery date.' vis-a-vis *The Dione* [1975] 1 Lloyd's Rep 115, 117: 'no margin allowed unless expressed'; Baughen, above n 8, 253; Boyd et al, above n 19, 348.

65 Baughen, above n 8, 112.

66 *Torvald Klaveness A/S v Arni Maritime Corporation; The Gregos* [1995] 1 Lloyd's Rep 1.

67 *Barecon* cl 15 lines 536–7.

68 *Lansat Shipping Co LTD v Glencore Grain BV* [2009] EWHC 551 ('*The Paragon*').

redelivery and then market rate,[69] not backdated, are used to ascertain genuinely forecasted liquidated damages.

Before concluding on the *Barecon* element of time, it is pertinent to note that as a demise the *Barecon* effectively transfers a constructive possessory right, along with navigation, management and operations to the charterer.[70] These obligations include insurance and repairs,[71] wreck removal, [72] trading restrictions, [73] and other seaman like activities. These rights and obligations vary from those contained in the *NYPE*.

The *NYPE* is a time charter party as opposed to the demise (bareboat) *Barecon.*[74] However, the *NYPE* cl 10 contains similar provisions of the *Barecon* regarding notice of redelivery 'wear and tear',[75] and 'probable port',[76] and the common elements identified by Martin Davies, Anthony Dickey and Simon Baughen. The most notable differences concerning 'time' as a measure is the removal of international time contingencies by expressly prescribing 'time' as Greenwich Mean Time ('GMT'). [77] Likewise, performance of redelivery 'hire shall continue until the hour of the day of her redelivery',[78] along with the expressed election 'unless otherwise mutually agreed',[79] are included. These inclusions provide the parties

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69 *The Peonia* [1991] Lloyd's Rep 100, 113.

70 *Barecon* cl 10 lines 168–289; *The Ship 'Socofl Stream' v CMC (Australia) Pty Ltd* [2001] FCA 961.

71 *Barecon* cl 13 lines 357–424.

72 Ibid cl 20 lines 599–605.

73 Ibid cl 6 lines 86–113.

74 *NYPE* cl 26 line 281 'Nothing herein stated is to be construed as a demise of the Vessel to the Time Charterers'.

75 *NYPE* cl 10 line 131.

76 Ibid line 136.

77 Ibid lines 137–8.

78 Ibid line 130; Baughen, above n 8, 185; *London Overseas Freighters Ltd v Timber Shipping Company SA* [1971] 1 Lloyd's Rep 523 ('*The London Explorer*').

79 *NYPE* cl 10 line 134; *Shipping Corporation of India Ltd v NSB Niederelbe Schiffahrtsgesellschaft mbH & Co* [1991] 1 Lloyd's Rep 77 ('*The Black Falcon*').

the opportunity to express the duration when fixing the charter, while not excluding the option for future mutual agreement on extensions of time and should aid in quantification of damages if required.[80]

As a time charter, the *NYPE* does not grant any possessory right to the charterer and control of maintenance and navigation remain with the owners and generally the owner's master and crew. Notwithstanding the employment relationship of master/owner and crew/owner,[81] the master and crew are contractually bound by the *NYPE* to perform all 'sailing orders' and to keep 'logs',[82] and to follow all legitimate orders of the charterer.[83]

Accordingly, if a charterer gives orders for the vessel to undertake a final voyage, which can reasonably be expected to be performed in time to allow regular redelivery,[84] the order ought to be deemed 'legitimate' even if it over runs the charter party duration and no party is at fault. On the other hand, if the final voyage orders cause a delay in redelivery, then the final orders ought to be 'illegitimate' and a cause of action arise at the ship owner's discretion. At this point, the ship owner may refuse the illegitimate order and seek a new legitimate order. Alternately, the owner may accept the illegitimate order and sue for damages. Damages generally equate to the stated hire rate up until the last possible date of redelivery and then at market rate until redelivery or in accordance with any expressed liquidated damages clause in the charter party.[85] Lord Denning MR informs:

> If the charterer sends the vessel on an illegitimate last voyage — that is, a voyage which it cannot be expected to complete within the charter

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80 See *Petroleo Brasileiro SA v ENE Kos 1 Ltd* [2012] UKSC ('*The Kos*'), 17 damages for 2.64 days plus cost of bunkers (although Shelltime 3 not *NYPE* it equals a similar result).

81 *NYPE* cl 26, lines 281–3

82 *NYPE* cl 15, lines 198–204.

83 *NYPE* cl 9 lines 99–108.

84 *The Ship 'Socofl Stream' v CMC (Australia) Pty Ltd (ACN 002 007 427)* [2001] FCA 961, 74. Citing Carver's *Carriage by Sea*, 13th ed, 1304.

85 *The Paragon* [2009] EWHC 551 (Comm) 661.

> period, then the shipowner is entitled to refuse that direction and call for another direction for a legitimate last voyage. If the charterer refuses to give it, the shipowner can accept his conduct as a breach going to the root of the contract, fix a fresh charter for the vessel, and sue for damages. If the shipowner accepts the direction and goes on the illegitimate last voyage, he is entitled to be paid — for the excess period — at the current market rate, and not at the charter rate … The hire will be payable at the charter rate up to the end of the charter period, and at the current market rate for the excess period thereafter.[86]

Justice Steyn applied this methodology in *The Black Falcon*,[87] and this precedent remains the calculus of damages for late redelivery; this is not to say other heads of damages will not apply in addition to a 'time' over-run. Terence Coghlin explains:

> It is thought that, strictly, the owners' damages claim can be formulated both as a claim for damages caused by the illegitimate order and as one for damages for failure to redeliver timeously, but in practice the two claims are likely to be indistinguishable.[88]

The paper will now move to Martin Davies and Anthony Dickey's second element: 'Place' of redelivery.

B *Place*

As with the element of 'time', a ship requires redelivery to her owners at the end of a fixture, at a certain place, or within a geographic range.[89] These 'place' clauses are particularly important in demise charters, as the charterers generally retain the master and crew. This is significant as the master and crew could disembark, thereby abandoning her at any port or virtually at any point in time. This would leave her unsecured, incurring fees, at risk and possibly at a location unknown to the owners. While this sounds excessively dramatic and implausible, it is a possibility, should the relationship end poorly. This risk is untenable and captured by the *Barecon* cl 15

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86 *The Dione* [1975] 1 Lloyd's Rep 115, 118.

87 *The Black Falcon* [1991] 1 Lloyd's Rep 77.

88 Coghlin et al, above n 49, [4.74] citing *Alma Shipping Corporation of Monrovia v Mantovani; The Dione* [1975] 1 Lloyd's Rep 115.

89 *Reardon Smith Line Ltd v Sanko Steamship Co Ltd* [1985] 1 Lloyd's Rep 418, (1)–(3) (Hobhouse J) ('*The Sanko Harvest*').

that requires a preliminary and then specific notice of redelivery.[90] The *NYPE* mitigates this risk as the master and crew are employees of the owners and generally stay aboard, gainfully employed after redelivery. However, illegitimate last voyages prove more problematic in time charters due in part to the direct conflict of interest between the charterers and owners and the inevitability of Murphy's Law. Indeed, several of the texts reviewed posed the interesting question: does the valid issue of these notices by the charterer create an estoppel preventing illegitimate final voyage orders?

Clause 15 of the *Barecon* obliges the charterers to redeliver the ship:

> to the owners to a safe and ice-free port,[91] or place indicated in Box 16, in such ready safe berth as the owners may direct.[92]

Similarly, the *NYPE* cl 10, lines 131–4, calls for the nomination of the redelivery area by providing space to 'write in' the specific location with the qualifier on line 134, 'unless otherwise mutually agreed'. The latter enables the parties to agree to a different port closer to performance.

Notwithstanding, problems still occur in both regimes when a ship is redelivered to the incorrect location. A general presumption asserts that a charterer redelivering occurs outside of the nominated range, or not at the nominated port equates to a breach of by the charterer.[93] Whereas, Coghlin disagrees 'the fact that the ship is not at the agreed place of redelivery does not prevent the charterers from redelivering her'.[94] The consensus on a remedy is damages equating the full hire for the shortest quickest voyage from where she was misdelivered, to

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90 *Barecon* cl 15 lines 522–3.

91 *STX Pan Ocean Co Pte Ltd v Ugland Bulk Transport A.S* [2007] EWHC 1317.

92 *Barecon* cl 15 line 516.

93 Davies and Dickey, above n 6, 401.

94 Coghlin et al, above n 49, [15.9].

return her within the nominated range, or port, less any sum the ship could earn in that period.[95]

C *Condition*

Martin Davies and Anthony Dickey's third common element is the vessel's condition at the time of redelivery. This element does not cover repairs performed within the duration of the charter, rather assessment of condition at redelivery, the purpose being a monetary allowance for necessary repairs at the time of redelivery.

The *Barecon* cl 7 requires both parties to 'appoint [their individual] surveyors for the purpose of determining and agreeing in writing the condition of the Vessel at the time of delivery and redelivery',[96] and cl 15 requires the charterer to insure her 'survey cycles are up to date and trading and class certificates valid'.[97] While, the *NYPE* cl 3 calls for each to appoint surveyors at their own cost for inspections at delivery, redelivery, on-hire/off-hire for ascertaining quantity of bunkers and condition of the vessel,[98] that will ultimately become and adjustment on the final account. Further, cl 35 extends this obligation to any damage caused by others,[99] and cl 7 requires the charterers to remove any dunnage not supplied with the vessel.[100]

Identified damage outside of 'fair wear and tear' will result in damages payable by the charterer to the owners equal to the cost of repair, plus any loss of profit for duration of the repairs. Although, there is no obligation on owners to carry out repairs immediately, but the assessment should mean an adjustment in the owner's favour on the final account if damage is outside of 'fair wear and tear'.[101]

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95 *Malaysian International Shipping Corperation v Empresa Cubana De Fletes; The Bunga Kenanga* [1981] 1 Lloyd's Rep Held Parker (2).

96 *Barecon* cl 7 lines 116–19; *NYPE* cl 3 lines 40–7.

97 *Barecon* cl 15 lines 543–5.

98 *NYPE* cl 3 lines 40–3.

99 Ibid cl 35 lines 422–3.

100 Ibid cl 7 lines 97–8.

101 See *G W Grace & Co Ltd v General Steam Navigation Company Ltd* [1949-1950] 38 Lloyd's Rep 297, 303; *Corporation of the City of Glascow v Barclay*

D *Repairs*

Repairs are required throughout the ship's life and within charter durations. As both of the charterparties require the vessel's delivery in a seaworthy condition and fit for the intended purpose, this obligation reverses upon redelivery, and triggers another survey of condition.

The *Barecon* cl 10(a)(i) requires the charterer to 'maintain the vessel, her machinery, boilers, appurtenances and spare parts in a good state of repair'.[102] This obligation extends to the sharing of upgradable compliance costs,[103] and underwater hull maintenance.[104] Any leasehold improvements the charter wishes to make are subject to the make good clause.[105] These issues may be latent or known to one or both of the parties but ought be revealed and assessed during the condition inspections.

The *NYPE* operates differently as possession of the vessel does not transfer and the operational and maintenance obligations remain the owners concern and account. Maintenance and repairs dealt with by cl 17 'Off Hire' provides relief from payment for lost time resulting from deficiency, including loss of speed and consumption of bunkers occasioned by the owner. Particular legitimate offsets follow in section F.

E *Bunkers*

Ships come delivered with a specific quantity of bunkers to enable proper use of the vessel. At redelivery an assessment of the quantity of bunkers occurs to assess usage. Again, the general provision is the

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Curle & Co Ltd [1923] 16 Lloyds Rep 205, 207. Although not a charterparty, it is a good discussion about 'fair wear and tear'.

102 *Barecon* cl 10 lines 173–5.

103 Ibid cl 10(a)(ii) lines 183–98.

104 Ibid cl 10(g) lines 283–9.

105 Ibid cl 10(f) lines 271–4.

inverse of delivery and the 'owners shall take over and pay' for residual bunkers at the market rate of the respective port of redelivery.[106] The purpose is to quantify bunkers cost at the time of delivery, and then allow an estimate quantity for offset of hire for redelivery followed by a final account adjustment — either way.

The *Barecon* cl 9 calls for an 'inventory of the Vessel's equipment, outfit including spare parts appliances',[107] and 'consumables' at delivery and redelivery. This inventory difference should result in an adjustment on the final account. There is no provision for an estimated offset and only a final adjustment exists; yet problems still arise.[108]

As a time charter, the *NYPE* possess different operational obligations but similar cost allocations allowing for equitable off sets to hire.[109] Yvonne Baatz explains the reason:

> It will be of vital importance to the cash flow of the charterer to be able to deduct claims from the hire rather than to have to pay the hire in full and subsequently seek to recover its claims from the owner … The charterer must be careful not to make wrongful deductions as this would entitle the owner to withdraw the ship …[110]

As Yvonne Baatz says, the obligation to pay hire is generally one of strict liability with severe ramifications.[111] However, the *NYPE* cl 3 permits inspection of bunkers at the onset of 'off hire' periods and at recommencement of hire. These accounts determine consumables used during the 'off hire' period that are validly deducted from

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106 Davies and Dickey, above n 6, 403.

107 *Barecon* cl 9.

108 See *Daebo Shipping Co Ltd v The Ship Go Star* (2012) 207 FCR 220; [2012] FCAFC 156; *The Fesco Angara* [2011] 1 Lloyd's Rep 61; *Fortis Bank (Nederland) NV v MSC Sumatra* [2003] FCA 524.

109 *Minerva Navigation Inc v Oceana Shipping AG; The Athena* [2012] EWHC 3608 (Comm) (Walker J).

110 Baatz, above n 3.

111 *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia; The Laconia* [1977] 1 Lloyd's Rep 315; *Parbulk II a/s v Heritage Maritime Ltd SA: The Mahakam* [2012] 1 Lloyd's Rep 87, [46] (Eder J); Boyd et al, above n 19, 355–8.

hire.[112] More relevantly, cl 7 calls for assessment of bunkers at redelivery and cl 9(a) expressly states the price and quantity of bunkers delivered and the price and quantity to be on board at redelivery, and cl 11(c) prescribes how the last hire payment adjusts any difference,[113] Terence Coghlin adds:

> It is the charterer's responsibility to supply and pay for bunkers. It is the master's responsibility, however, to determine what quantity of fuel shall be brought on board the vessel. Moreover, it is the master's obligation to make sure that there is an adequate supply of fuel for the voyage the charterer instructs him to make.[114]

Terence Coghlin is alluding to the proposition that a charterer may keep any profit generated on an adjustment of bunkers but is not permitted to take on-board unnecessary bunkers to create a trading profit[115] and any estimated adjustments must be made in 'good faith'.[116]

F *Legitimate Off-Sets and the Final Account*

Simon Baughen adds legitimate offsets and final accounts[117] and Martin Davies and Anthony Dickey confirm the importance of the 'final account'.[118] Although legitimate 'off-set' like 'off hire' may occur during the charter period, these items are outside the scope of this paper. For our purpose, legitimate off sets are items that the charterer may claim from the owner and vice-a-versa. These issues may be known to the parties or uncovered during inspection.

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112 Baughen, above n 8, 185.

113 *The Kos* [2012] UKSC 17.

114 Coghlin et al, above n 49, [15.9].

115 See Davies and Dickey, above n 6, 402 citing *Mammoth Bulk Carriers Ltd v Holland Bulk Transport BV* [1978] 1 Lloyd's Rep 346 see [4]:

> it was plain that the intention of the charterers was to take on additional bunkers solely in order to make a trading profit; since they were not needed for the charterers' service at all, the master was entitled to refuse the charterers' request, there was no breach of contract and the charterers were not entitled to damages, Appeal dismissed.

(Lord Denning MR, Goff and Cumming-Bruce, LJJ) ('*The Captain Diamantis')*.

116 Davies and Dickey, above n 6, 403.

117 Baughen, above n 8, 185.

118 Davies and Dickey, above n 6, 402–3.

Therefore, the following is an attempt to condense possible claims and off sets by both parties by way of a 'tick and flick', or rather, simplified Scott Schedule[119] to help settle the final account (see App 1). These items form three-parts, one lists owner's claims, the second charterer's claims, and lastly the adjustment.

IV CONCLUSION

Martin Davies and Anthony Dickey assert that four charter party clauses are common concerning redelivery: time, place, condition and bunkers while Simon Baughen asserts legitimate offsets and final accounts also constitute elements of redelivery.

Lord Mustill tells us, 'time is money' and ships and crew are cost centres, while contemporary accounting teaches us that time is used in all time/cost, functional, or activity based costing methods and therefore indispensable in calculating time over run damages and for ship owners to assess and manage their assets.

Either the owners, or the charterers, may breach their contract and, thus, the appropriate remedy is damages. Common breaches by the charters range from early or late redelivery, illegitimate last voyages, redelivery to the wrong location, failure to maintain the ship and her spare parts appurtenances, failure to carry out repairs prior to redelivery, over-estimating and over-claiming bunkers, failure to adequately clean the ship and remove excess dunnage. The ship owners may also be at fault, particularly in the *NYPE* time charter. This is due in part to the human elements of master and crew, and the differing interests of the charterer and the owners.

Notwithstanding, this area of sea trade has an extensive history and has been well litigated. The courts and arbitrators clearly apply a commercial interpretation of the charter parties and focus remains on

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[119] See generally *Almario v Varipatis (No 2)* [2012] NSWSC 1578, [199]; LexisNexis, *Halsbury's Laws of Australia* [65-2340] 6.

keeping the ships working and thereby earning and fulfilling other contractual obligations.

Inquiry indicates that common areas of dispute are well settled and may remain more so a 'people problem' than 'point of law'. This in reinforces when reviewing the *Barecon* and *NYPE* in their entirety, particularly the very prescriptive performance of redelivery and its nexus to time.

APPENDIX 1

REDELIVERY SURVEY - SIMPLIFIED SCOTT SCHEDULE				
Issue		Disputed Yes/No	Owner's Claim	Charterer's Claim
Time	Early (accept/reject)			
	Late (accept/reject)			
	Legitimate final order (yes/no)			
	Last date/market rate adjustment			
	Repudiated/accepted			
	Re-negotiated rate/amount			
Place	Outside range			
	Outside trading limits			
	Hire for return voyage			
	Profit on return voyage			
Condition	Underwater condition			
	Main engines			
	Auxiliaries			
	Superstructure			
	Damage by others			
Repairs	Charterer's fixtures (take/leave)			
	Machinery			
	Appurtenances			
	Upgrade shared costs			
bunkers	Estimated			
	Actual			
	Spare parts			
	Bunkers free of encumbrance			
	Relevant costs basis			
off set	Off hire surveys			
	Bunkers consumed off hire			
	Dunnage			
	Excess consumption			
Sub totals				
Final adjustment				

Moot

YOUNG ARBITRATORS MATCH

Paris Very Young Arbitration Practitioners ('PVYAP'), a group for junior to mid-level arbitration practitioners with professional links to Paris, launched the inaugural edition of the Young Arbitrators Match ('YAM') in January 2014. The YAM is an award-drafting competition open to young practitioners who have up to 5 years of post-qualification professional experience. It is the first competition of its kind, and the first edition was a resounding success.

YAM participants were asked to decide a dispute based on the 20th Vis Moot and the 10th Vis East Moot problem (available at <http://vismoot.pace.edu>) and to deliver a reasoned award in accordance with the Chinese European Arbitration Center ('CEAC') Rules (available at <http://www.cisg.law.pace.edu/cisg/moot/CEAC_Rules_2012_A5.pdf>).[1]

A 50 page limit applied to awards, and participants could form three-member tribunals or act as sole arbitrators. More details about YAM, including the rules of the competition, are available on PVYAP's website <http://www.pvyap.org/#!yam/ckc0>.

The jury was chaired by Ms Christine Guerrier (Vice-President of Dispute Resolution & Litigation at Thales), who was joined by Mr Christian Albanesi (Linklaters), Mr Anthony Charlton (FTI Consulting), Ms Carine Dupeyron (August & Debouzy), Mr Philippe

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[1] For more details about the CEAC Rules refer to Gabriël A Moens and Rajesh Sharma, 'The CEAC Hamburg Arbitration Rules: A European-Chinese Trade-Related Adaptation of the Revised UNCITRAL Arbitration Rules 2010' in Vol 79(2), April 2013 *Arbitration* 138–157 (also posted to the website of the Willem C Vis International Commercial Arbitration Moot: <http://vismoot.pace.edu>).

Pinsolle (Quinn Emanuel) and Ms Maxi Scherer (WilmerHale). The jury had the hard task of reviewing numerous awards over the summer period in France. After lengthy deliberations, the jury selected as the 'Best Award' an award drafted by an Argentinian team composed of three arbitrators: Mr Ezequiel Vetulli of Pérez Alati Grondona Benites Arntsen & Martínez de Hoz, Mr Pablo Jaroslavsky of Estudio Jaroslavsky Martínez, and Mr Julian Bordacahar MacDermott of Baker & McKenzie.

An award drafted by Mr Alexander Leventhal of Jones Day in Paris, who sat as Sole Arbitrator, came a close second and was awarded the 'Special Award'. Finally, the FTI Award (for the award best-reasoned on quantum issues) went to a Spanish team comprised of Ms Mélanie Piché, Ms Krystle Baptista Serna, and Mr Felipe Aragon Barrero, all of whom are associates at Armesto & Asociados in Madrid. The prizes were presented at an awards ceremony attended by 120 participants and members of the Paris arbitration community, which took place on 11 September 2014, in the Library of the Paris Bar (*Bibliothèque de l'Ordre des Avocats au Barreau de Paris*) in the Paris law courts (*Palais de Justice*).

The YAM Organisation Committee congratulates all participants and is grateful to the jury and the sponsors of the competition, notably Brown Rudnick, Clifford Chance, Shearman & Sterling, FTI Consulting, and the CEAC, for their generous support. Special thanks are also due to Dr Chris Kee and the Association for the Organisation and Promotion of the Willem C Vis International Commercial Arbitration Moot for making this first edition of the YAM possible.

YAM Organisation Committee Diana Bowman (White & Case) / Aksel Doruk (Castaldi Mourre) / Benoit Grangé (Hascoët & Associés) / Céline Lachmann (Clifford Chance) / Anne-Marie Lacoste (Quinn Emanuel) / Sebastián Partida (Université Paris II) / Flore Poloni (August & Debouzy).

CHINESE EUROPEAN ARBITRATION CENTRE

Case No 20120107

MEDITERRANEO EXQUISITE SUPPLY, CO

(Claimant)

Versus

EQUATORIANA CLOTHING MANUFACTURING, LTD

(Respondent)

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AWARD*

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18 May, 2014

Rendered by the Arbitral Tribunal:
Prof PRESIDING ARBITRATOR (Chairman)
Dr ARBITRATOR 1
Ms ARBITRATOR 2

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* This document is an original of the Award rendered in conformity with the Rules of the Chinese European Arbitration Centre.

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Table of Abbreviations

ABC	ABC Chartered Business Valuators SA
CEAC	Chinese European Arbitration Centre
CEAC Rules	Arbitration Rules of the Chinese European Arbitration Centre. Consolidated version, 2012
CISG	United Nations Convetion on Contracts for the International Sale of Goods, Vienna, 1980
Claimant	Mediterraneo Exquisite Supply, Co
Contract	Sale and Purchase Agreement concluded between Claimant and Respondent on 5 January 2011
DCF	Discounted Cash Flow
Exhibit C-	Claimant's exhibit
Exhibit CL-	Claimant's legal exhibit
Exhibit R-	Respondent's exhibits
Exhibit RL-	Respondent's legal exhibit
IBA Rules	IBA Rules on the taking of evidence in International Arbitration, 2010
Oceania Plus	Oceania Plus Enterprises
Parties	Claimant and Respondent
Respondent	Equatoriana Clothing Manufacturing, Ltd
UNIDROIT Principles	UNIDROIT Principles of International Commercial Contracts 2010
WACC	Weighted Average Cost of Capital
XYZ	XYZ Chartered Business Valuators

I INTRODUCTION

A *The Parties*

[1] Claimant, Mediterraneo Exquisite Supply Co, is part of a multinational group of companies named Oceania Plus Group, which supplies leisure clothing. Claimant is a company registered and organised under the laws of Mediterraneo, located at 45 Commerce Road, Capital City.

[2] Respondent, Equatoriana Clothing Manufacturing Ltd., is a company that manufactures clothing. Respondent is registered and organised under the laws of Equatoriana, located in 268 Third Avenue, Oceanside.

B *Factual Background*

[3] The following is a general description of the relevant facts of the present dispute. The Tribunal will also refer to other facts when addressing the arguments of the Parties. The following have been admitted by the parties or arise from the evidence submitted during the course of these proceedings and, therefore, are undisputed. The Tribunal will remark the disputed facts.

[4] Doma Cirun, a company located in Oceania, is a retail clothing chain also owned by the Oceania Plus Group. Prior to 2011, Doma Cirun had hired a manufacturer to produce polo shirts under its brand named 'Yes Casual' for the 2011 summer season. On 2 January 2011, it came to its attention that the manufacturer would not deliver the polo shirts because it had become bankrupt. As a consequence, Doma Cirun urged different Oceania Plus subsidiaries, as Claimant, to search for an alternative supplier on a rush basis. For this reason, Claimant contacted Respondent, who was willing to handle the order on a rush basis.

[5] Respondent had contracted with Claimant in the past, but not since 2008. Claimant alleges that every 4 years, all members of

the group are required to audit third parties manufacturers as a matter of Oceania Plus internal policy.[1] The purpose of this audit is to ensure that the suppliers comply with the group's ethical policy. It also alleges that additional audits are only conducted under special circumstances, if, for example, there are doubts whether a supplier still complies with such policy.

[6] In connection with the previous contract of 2008, Claimant had conducted an audit of Respondent's facilities and those of its suppliers to ensure that they complied with the policy. The results thrown by the audit caused extensive discussion between the Parties, eg, an issue regarding child labour was raised at one of Respondent's supplier plants. However, Respondent alleges that it intervened to get the manager of such plant fired. In the end, the audit was approved.

[7] On 5 January 2011, Claimant and Respondent concluded the Contract, which called for the delivery of 100 000 polo shirts, for the price of USD550 000, per the technical specifications attached to the Contract.[2] It also called for delivery by 19 February, which was the latest that the goods could arrive if they were to make it in time for Doma Cirun's launch of the summer season, scheduled for 15 March 2011. Furthermore, Oceania Plus' ethical policy was also included in the Contract. Two days later, on 7 January, Claimant concluded a contract with Doma Cirun.[3]

[8] On 9 February 2011, Mr Tomas Short, Respondent's contracting officer, called Mr Russell Long, Claimant's procurement specialist, to inform the latter that one of Respondent's suppliers had failed to deliver the necessary goods on time. As a consequence, the goods would not be arriving by 19 February, as originally agreed. Instead, they

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1 Application for Arbitration, ¶ 9.
2 Exhibit C-1.
3 Exhibit C-8.

would arrive on 24 February 2011. This interpretation, and the legal consequences arising out of the telephone conversation, are disputed by the Parties.

[9] Mr Long immediately notified Doma Cirun of the delay. In turn, Doma Cirum complained about the fact that the shirts would not arrive by the launching date of the summer season. Doma Cirum held Claimant responsible for such delay.[4]

[10] On 24 February 2011, the polo shirts were delivered at the agreed location. They arrived at Doma Cirun's warehouse on 11 March 2011, and were finally distributed to the various retail stores throughout Oceania. The polo shirts were ready for sale at Doma Cirun's retail stores on 20 March 2011.[5]

[11] On 5 April 2011, Channel 12 televised a documentary showing young children working in appalling conditions. The images were allegedly taken at one of Respondent's facilities. Even though the documentary did not make specific reference to the polo shirts, it did mention that Respondent was one of the manufacturers of items sold under the 'Yes Casual' brand.

[12] The documentary condemned both Oceania Plus and Doma Cirun for using Respondent as a supplier. This was followed by an article issued on 8 April 2011 by the *Oceania Times*, regarding the use of child labour in the supply chains of leading clothing firms in Oceania.[6]

[13] On 8 April 2011, Doma Cirun notified Claimant that it was avoiding their contract as a consequence of the child labour scandal, and that Claimant should arrange the disposal of the remaining polo shirts.[7] On the same day, Claimant notified Respondent that, in turn, it was avoiding the Contract. In

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4 Exhibit C-3.
5 Application for Arbitration, ¶ 17.
6 Exhibit C-4.
7 Exhibit C-5.

addition, Claimant requested Respondent to arrange the disposal of the remaining shirts.[8] On 10 April 2011, Respondent answered Claimant's letter of avoidance denying that there was any breach of the Contract and refusing to take back the remaining polo shirts.[9]

[14] On 20 April 2011, Claimant sold the remaining 99 000 polo shirts to Pacifica Trading Co, at a price of USD470 000. In addition, upon Doma Cirun's request, Claimant hired Gold Service Clothing to send 90 000 substitute polo shirts for the price of USD612 000.

[15] On 15 September 2011, Doma Cirun began an arbitration proceeding against Claimant for a total sum of USD1 825 000 for loss of sales and damage of reputation, among other claims. On 14 January 2011, this dispute was settled for USD850 000.

[16] On 15 February 2012, Oceania Plus filed a lawsuit against Claimant before the Courts in Oceania. Oceania Plus claimed the reimbursement of USD700 000 it had paid in settlement agreements with its own investors as a consequence of their losses and reputational damages claims due to the child labour scandal. The total claims faced by Oceania Plus amounted to USD15 000 000. On 25 June 2012, Claimant settled this claim by paying the full amount of USD700 000.

C *Dispute Between the Parties*

[17] Whereas Claimant alleges that Respondent breached the Contract by delivering the polo shirts late, Respondent alleges that the goods were delivered on time since the delivery date was orally amended by the telephone conversation of 9 February 2011.

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8 Exhibit C-6.

9 Exhibit C-7.

[18] In contrast, Claimant alleges that the applicable law to the Contract (the CISG) did not allow for oral modifications as a consequence of Mediterraneo's reservation to the provision permitting oral amendments. Furthermore, Claimant also alleges that no amendment took place even if oral amendments were permitted.

[19] In addition, Claimant states that Respondent breached the ethical policy included in the Contract by using child labour in its facilities. In turn, Respondent claims there was no breach since no child labour was involved in the production of the shirts.

[20] As a result of the alleged breaches, Claimant advances several damages claims that altogether amount to USD12 106 214. Conversely, Respondent denies all of them and claims that — in any event — damages should be reduced.

D *Arbitration Agreement*

[21] The dispute between the Parties arises out of the Contract, which cl 19 contains the following arbitration agreement:

> Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by institutional arbitration administered by the Chinese European Arbitration Centre (CEAC) in accordance with the CEAC Hamburg Arbitration Rules.
>
> (a) The number of arbitrators shall be three unless the amount in dispute is less than EUR 100 000 in which case the matter shall be decided by a sole arbitrator;
> (b) The language to be used in the arbitral proceedings shall be English;
> (c) The arbitration shall be held in Vindobona, Danubia. Hearings may take place in other locations.
> (d) The arbitration shall be confidential;
> (e) The parties agree that also the mere existence of an arbitral proceeding shall be kept confidential except to the extent disclosure is required by law, regulation or an order of a competent court;
> (f) The arbitral tribunal shall apply the CEAC Hamburg Arbitration Rules as in force at the moment of the commencement of the arbitration unless one of the parties requests the tribunal, within 4 weeks as of the

> constitution of the arbitral tribunal, to operate according to the CEAC Hamburg Arbitration Rules as in force at the conclusion of this contract.[10]

[22] The jurisdiction of the Tribunal has not been contested. Furthermore, irrespective of what sub-s (f) of the Arbitration Agreement provides, the Parties have agreed that the 2012 CEAC Arbitration Rules shall govern these proceedings.[11]

E *Applicable Law*

[23] According to Clause No 20 of the Contract, the applicable law is the following:

> This contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods of 1980 (CISG) without regard to any national reservation, supplemented for matters which are not governed by the CISG, by the UNIDROIT Principles of International Commercial Contracts and these supplemented by the otherwise applicable national law.[12]

[24] Although there is no dispute between the Parties as to the application of the CISG, they disagree as to the effect of the portion of the clause, *which* provides that the CISG shall be applied 'without regard to any national reservation'. This constitutes an issue that will be dealt with below [¶¶ [68] et seq].

II ARBITRAL PROCEEDINGS

A *Initiation of the Arbitration*

[25] On 1 July 2012, Claimant filed an application for arbitration pursuant to the arbitration agreement and in accordance with art 3(1) CEAC Rules. Within the application, Claimant identified Equatoriana Clothing Manufacturing as the

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10 Exhibit C-1.

11 Procedural Order No 1, ¶ 9.

12 Exhibit C-1.

Respondent. By letter of 6 July 2012, the CEAC notified Claimant of the acceptance of the administration of the case.

[26] On 12 July 2012, the CEAC notified Respondent of Claimant's notice of arbitration. On 4 August 2012, Respondent sent its Answer to the Application of Arbitration in accordance with art 4 CEAC Rules.

B *Constitution of the Arbitral Tribunal*

[27] On 1 July 2012, Claimant named Dr Arbitrator 1 as its party appointed arbitrator, who was notified by CEAC on 6 July 2012. On 20 July 2012, he sent his declaration of acceptance and statement of independence to CEAC.

[28] On 4 August 2012, Respondent nominated Ms Arbitrator 2 as its party appointed arbitrator, who was notified by CEAC on 7 August 2012. On the same day, she sent her declaration of acceptance and statement of independence to CEAC.

[29] On 27 August 2012, CEAC notified Professor Presiding Arbitrator of his joint appointment by Mr Arbitrator 1 and Ms Arbitrator 2 to act as Chairman of this Tribunal. Professor Presiding Arbitrator sent his respective declaration of acceptance and statement of independence to CEAC on 30 August 2012.

[30] On 6 September 2012, CEAC notified the Parties that the Tribunal had been fully and duly constituted. The Parties have confirmed that they have no objection as to the constitution and composition of the Arbitral Tribunal.[13]

C *Procedural History*

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13 Procedural Order No 1, ¶ 2.

[31] The Tribunal and the Parties held a first conference call on 2 October 2012. During that call the Tribunal decided that the Chairman was authorised to make procedural decisions subject to later confirmation by the full Tribunal.[14] A second conference call was arranged for 4 October 2012 between the Parties and the Chairman, in order to discuss the arrangements of the arbitral procedure.

[32] In the same conference call the Parties agreed that:

- Respondent had, in fact, used child labour in at least one of its plants;
- No child labour had been used in the production of the polo shirts of the Contract; and
- Neither Party would ask the Tribunal or any other third party to engage in further investigations as to the use of child labour in Respondent's plants.[15]

[33] Since in its Answer to the Application for Arbitration Respondent had submitted Mr Short's written witness statement,[16] supporting its position on the oral amendment of the Contract, Claimant requested Mr Short to appear at an oral hearing in order to cross-examine him. Respondent replied that it would not be possible.[17] The Chairman decided that the witness statement's admissibility constituted an issue that had to be argued before the full Tribunal.

[34] On 5 October 2012, the Tribunal issued Procedural Order No 1, in which, inter alia, it determined the issues that had to be addressed by the Parties in their respective Statements of Claim and Defence.[18] Moreover, the schedule of the proceedings was

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14 Ibid, ¶ 1.
15 Ibid, ¶ 7.
16 Exhibit R-1.
17 Procedural Order No 1, ¶ 3.
18 Ibid, ¶ 10.

agreed upon.[19] On 6 December 2012, Claimant timely submitted its Statement of Claim. In turn, on 17 January 2013, Respondent timely submitted its Statement of Defence.

[35] From 22 to 28 March 2013, a hearing took place in Vienna in which both Parties were present. While Respondent's witness — Mr Short — was not present, Claimant's witness — Mr Long — was. However, the latter was not called to testify. The Tribunal heard both Parties' counsel on the issues set out in their written submissions.[20]

[36] On 5 December 2013, the Tribunal issued Procedural Order No 2 where it was made aware and acknowledged the reasons for Mr Short's non-attendance at the hearing. In addition, the Tribunal set out certain relevant uncontested issues that arose from the Parties' written and oral submissions.[21] Finally, the Tribunal declared the proceedings officially closed, in accordance with art 31 CEAC Rules.

III ANALYSIS OF THE DISPUTE

[37] According to Procedural Order No 1 the issues disputed in the case are:

- Whether Mr Short's written witness statement is admissible;
- Whether Respondent delivered the goods on time;
- Whether Claimant had the right to avoid the Contract; and eventually; and
- The amount of damages awarded.

[38] While all of the Parties' arguments in their written and oral submissions — and the uncontested issues that were reflected in Procedural Orders No 1 and 2 — have been fully taken into

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19 Ibid, ¶ 11.

20 Procedural Order No 2, ¶ 4.

21 Ibid, ¶¶ 10–15.

account by the Tribunal, who accorded them their proper weight and relevance, only the main arguments and position of the Parties will be summarised while analysing each section of this Award.

A *Should Mr Short's Written Witness Statement be Admitted?*

[39] In order to determine the admissibility of Mr Short's witness statement, the Tribunal will analyse:

- Whether Mr Short's witness statement is admissible under Danubian Arbitration Law and CEAC Rules; and
- Whether it is admissible under the IBA Rules.

1 *Is Mr Short's Witness Statement Admissible Under the Danubian Arbitration Law and CEAC Rules?*

a) *Parties' Position*

[40] Claimant's main arguments are summarised as follows:

1. Cross-examining the other party's witness is essential to rebut its case. Without it, the right to present one's case and the equal treatment of the parties would be severely infringed.[22]
2. In order to fulfill its burden of proof in accordance with art 27(1) CEAC Rules, it would have been up to Respondent to ensure that Mr Short was available for an oral examination.[23]
3. Respondent did not try sufficiently to make use of its right to present valid evidence, since it could have contacted Mr Short's employer and try to persuade it to give him permission to attend an oral examination. Alternatively, it submits that Respondent could have asked the Tribunal to request Mr Short to testify.[24]

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22 Statement of Claim, ¶¶ 13–18.
23 Ibid, ¶¶ 19–20.
24 Ibid, ¶¶ 21–23.

[41] Respondent's main counter-arguments are as follows:

1. Claimant's right to fully present its case would not be affected by the admission of Mr Short's witness statement because the lack of opportunity to cross-examine him will not affect Claimant's right to present its case. Moreover, Claimant will still be able to submit other evidence to prove its allegations.[25]
2. Article 27 CEAC does not state that a party has the burden of ensuring the attendance of its witness. Instead, it merely provides that each Party has the burden of proving the facts relied on to support its claim.[26]
3. Taking into consideration the fact that Mr Short's employer — Jumpers Production — is Respondent's competitor; any attempt of Respondent to convince Mr Short to testify would have been futile.[27] Moreover, the Tribunal has no coercive power to compel Mr Short to attend a hearing.

b) *Tribunal's Findings*

(i) *Right to be Heard*

[42] In the case at hand, the content of the written declarations of Mr Long and Mr Short, and their recollection of the facts are practically identical. The controversy thus, only lies in the difference in their understanding with respect to the effect of their telephone conversation regarding the delivery date in the Contract.

[43] Under art 17(1) CEAC Rules the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated equally and are given a

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25 Statement of Defence, ¶ 15.
26 Ibid, ¶ 23.
27 Ibid, ¶ 24.

reasonable opportunity of presenting their case. Article 18 Danubian Arbitration Law,[28] which is the law of the seat, also contains this principle.

[44] The admissibility of written witness statements in international arbitration is nowadays undisputed. Under art 27(2) CEAC Rules, statements by witnesses may be presented in writing provided that they sign them, and as long as such requirements are met, they suffice as admissible evidence.

[45] This default rule applies to the case at hand, and hence, Mr Short's written and signed statement is valid evidence under art 27(2) CEAC Rules. However, as a general rule, witnesses who deliver a written statement must be available for oral examination by the arbitral tribunal or the other party.[29] The question arises on which are the consequences if a witness is not.

[46] According to a restrictive approach, a written witness statement has no evidentiary value whatsoever if the other party does not have the opportunity to examine the witness in question, just because that witness declines to being questioned.[30] However, according to a liberal approach, the arbitral tribunal may decide in its free discretion under which circumstances — and with what evidentiary value — it will admit written statements of witnesses who refuse to appear for examination.[31]

[47] The principle that both sides must be heard on all issues affecting their legal position is one of the most basic concepts of fairness in adversarial proceedings.[32] The right to be heard must

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28 Which is a verbatim adoption of the UNCITRAL Model Law on International Commercial Arbitration, 1985, with amendments as adopted in 2006.

29 William Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration*, 3rd ed, Oceana Publications, 2000, 433.

30 Ibid 433.

31 Ibid 433.

32 Christoph H Schreuer, *The ICSID Convention: a Commentary; a Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of other States*, 2nd ed, Cambridge University Press, Cambridge, 2009

be guaranteed on an equal level in a way that allows each party to respond adequately to the arguments and evidence presented by the other.[33]

[48] Since witness statements may be rebutted by other means, such as another witness statement or documents; the Tribunal finds that admitting the witness statement would not prevent Claimant from adducing evidence in support of its allegations; and thus it will not deprive it of its right to be heard. Hence, Claimant's inability to test Mr Short's credibility will not result in the infringement of this right.

[49] On the other hand, it is evident that removing from the record Respondent's only piece of evidence would cause substantial detriment to its right to present its case, since it is the only way in which Respondent can prove its interpretation of that telephone conversation. Mr Short is Respondent's only voice on such conversation, and depriving Respondent of the possibility of presenting Mr Short's statement, would leave Respondent almost voiceless on the issue.

[50] Although the credibility of the statement may be somehow limited for lack of the opportunity for oral cross-examination, when appraising the evidence, Mr Short's inability to appear for

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[Exhibit CL-28], 987; C MClachlan, L Shore and M Weiniger, *International Investment Arbitration, Substantive Principles*, Oxford University Press, Oxford, 2007, 241.

33 C Schreuer, 'Three Generations of ICSID Annulment Proceedings' in E Gaillard and Y Banifatemi, *Annulment of ICSID Awards*, Juris Publishing Inc, New York, 2004, 19; High Court Auckland, New Zealand, 30 November 1998, CLOUT No 60 [Exhibit CL-53]; Schreuer, above n 32, 980; *Fraport AG Frankfurt Airport Services Worldwide v Republic of the Philippines*, ICSID Case No ARB/03/25, 23 December 2010 [Exhibit CL-65]; *Wena Hotels Ltd v Arab Republic of Egypt*, ICSID Case No ARB/98/4, 25 May 1999, ¶ 57 [Exhibit CL-69]; Gary B Born, *International Commercial Arbitration*, vol I, Kluwer Law International, The Hague, 2009 [Exhibit CL-03], 2582.

cross-examination can, and will, only affect the probative value but not the admissibility of his statement.[34]

[51] In conclusion, the Tribunal finds that admitting Mr Short's written statement will not affect Claimant's right to be heard. In contrast, rejecting it would jeopardise Respondent's right to be heard.

(ii) *Who Bears the Burden of Bringing a Witness to a Hearing?*

[52] The Tribunal agrees with Respondent that art 27 CEAC Rules does not state that a party has the burden of ensuring the attendance of its witness. Instead, it provides that each party has the burden of proving the facts relied on to support its claim.

[53] Therefore, the Tribunal is disinclined to follow Claimant's assertions of reading into art 27 something that it simply does not state. On the other hand, the Tribunal does sympathise with Claimant's position that it is Respondent's burden to try to ensure Mr Short's attendance since, as a general rule in International Arbitration, a party who proposes a witness should try to make him available. However, this burden does not require the proposing party to succeed in its attempt.

[54] In conclusion, the Tribunal finds that it was Respondent's burden to try to ensure Mr Short's presence at the hearing.

(iii) *Did Respondent Make Sufficient Efforts to Ensure Mr Short's Attendance?*

[55] Claimant would have the Tribunal believe that Respondent should have contacted Jumpers Production, Respondent's business competitor, to persuade it of allowing Mr Short to

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[34] Lucy Reed, Jan Paulson and Nigel Blackaby, *Guide to ICSID Arbitration*, Kluwer Law International, The Hague, 2010 [Exhibit CL-26], 84; Julian D Lew, Loukas Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration*, The Hague, 2003 [Exhibit CL-21], 574.

attend the hearing. Such assertions cannot stand, since Respondent duly contacted Mr Short who informed about his reasons for not attending.

[56] Moreover, it is likely that any contact between Respondent and its competitor, Jumpers Production, would have been futile. The same conclusion applies to the Tribunal trying to ensure Mr Short's presence, since neither the Tribunal nor Danubian courts have the coercive power to bring him to the hearing.[35]

[57] As a result, the Tribunal concludes that Respondent did try to make its witness available for cross-examination even though those efforts did not pay off.

2 *Is Mr Short's Witness Statement Admissible Under the IBA Rules?*

a) *Parties' Position*

[58] Claimant's main arguments are as follows:

1. Under art 4(7) IBA Rules Mr Short's witness statement is inadmissible because there are not valid reasons for him not to appear before the Tribunal. The mere fact that Mr Short's new employer wishes him not to attend an oral hearing does not render his appearance unreasonably burdensome.[36]
2. There were no exceptional circumstances and thus, the statement should be excluded from the record because it was foreseeable that an employee might change employer and that a new employer might not want him to be involved in matters concerning his former job. Also, Mr Short's refusal to testify was not beyond Respondent's control as it had multiple ways to ensure his appearance.[37]

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35 Procedural Order No 2, ¶ 10.
36 Ibid, ¶ 30.
37 Ibid, ¶ 31.

[59] On the other hand, Respondent's main counter-arguments are as follows:

1. There were valid reasons that justified the non-appearance of Mr Short for cross-examination, because he was in no position to question his superior and disobey a direct and specific prohibition from his employer.[38]
2. The statement must remain in the record because there was nothing Respondent could have done to persuade its competitor — or Mr Short himself — to decide otherwise. Also, there was no way of compelling him to attend. These reasons, made the circumstances exceptional.[39]

b) *Tribunal's Findings*

(i) *Valid Reasons*

[60] The Parties agree that the CEAC Rules and Danubia's law do not address the issue of what to do when a witness fails to appear for oral examination. They both propose the IBA Rules to fill that gap;[40] thus, the Tribunal will respect such agreement. Article 4(7) IBA Rules states that if a witness whose appearance has been requested under art 8(1), fails without a valid reason to appear for testimony at an evidentiary hearing, the arbitral tribunal shall disregard such witness statement unless, in exceptional circumstances, it decides otherwise.

[61] As the wording of art 4(7) IBA Rules indicates, the phrase 'valid reasons' relates to the witness's failure to appear, and not to a party's inability to present the witness.[41] Although the IBA Rules do not define which reasons would justify a witness non-

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38 Statement of Defence, ¶ 29.

39 Ibid, ¶ 33.

40 Statement of Claim, ¶ 25; Statement of Defence, ¶ 27.

41 Nathan O'Malley, *Rules of Evidence in International Arbitration: An Annotated Guide*, Informa Law, London, 2012, § 4.55.

appearance, they must be objective reasons, which do not lie within the witness's sphere of control.[42]

[62] In this case, Mr Short refused to appear for cross-examination as his new employer, Jumpers Production, one of Claimant's suppliers, urged him not to be involved in these proceedings.[43] Hence, the reason why Mr Short was not able to appear for oral questioning has been imposed from a third party outside Mr Short's sphere of control. In this line, it cannot be reasonably expected from Mr Short to disobey his employer's orders and thereby risking his employment position.

[63] Notably, an employee may take appropriate steps to safeguard its customary right to work. As an employee, Mr Short was in no position to question his superior and defy a direct and specific prohibition.

[64] Consequently, the Tribunal finds that the facts that prevented Mr Short from appearing for cross-examination were beyond his control, and therefore constituted valid reasons under art 4(7) IBA Rules.

(ii) *Exceptional Circumstances*

[65] Since the Tribunal has already found that there are valid reasons under art 4(7) IBA Rules, the question of whether there are exceptional circumstances becomes moot. However, it is worth noting that the fact that neither the Tribunal nor Danubian courts have the power to compel Mr Short to appear,[44] coupled with the fact that his witness statement is Respondent's only piece of evidence on this issue, results in the existence of exceptional circumstances under art 4(7) IBA Rules.

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42 ICC Case No 15892.

43 Procedural Order No 2, ¶ 26.

44 Ibid, ¶10.

[66] Hence, the Tribunal finds that there were also exceptional circumstances preventing Mr Short from attending to the evidentiary hearing.

[67] Result of Issue A: the Tribunal finds that admitting Mr Short's witness statement does not affect Claimant's rights, whereas removing it from the record would amount to a violation of Respondent's rights. Finally, the Tribunal finds that there were valid reasons and exceptional circumstances that justified the non-appearance of Mr Short. Hence, the written statement is considered a valid piece of evidence.

B *Did Respondent Deliver the Polo Shirts Late?*

[68] The Contract's choice of law clause calls for the application of the CISG '*without regard to any national reservation*'. Since Mediterraneo (Claimant's domicile) has made an art 96 CISG declaration, the Parties dispute whether the portion of the clause that disregards such declaration, is valid. Article 96 CISG provides:

> A Contracting State whose legislation requires contracts of sale to be concluded in or evidenced by writing may at any time make a declaration […] that any provision […] that allows a contract of sale or its modification or termination by agreement or any offer, acceptance, or other indication of intention to be made in any form other than in writing, does not apply where any party has his place of business in that State.

[69] In turn, art 12 CISG reads as follows:

> Any provision […] that allows a contract of sale or its modification or termination by agreement or any offer, acceptance or other indication of intention to be made in any form other than in writing does not apply where any party has his place of business in a Contracting State which has made a declaration under article 96 of this Convention. The parties may not derogate from or vary the effect of this article.

[70] In order to determine whether Respondent delivered the goods on time, the Tribunal will analyse:

- Whether the Parties were entitled to orally amend the Contract; and in any event;
- Whether they actually intended to amend it.

1 *Were the Parties Entitled to Orally Amend the Contract?*

a) *Parties' Position*

[71] Claimant's main arguments are the following:

1. The Parties could not orally amend the Contract since art 12 CISG precludes them from doing so and cannot be derogated by the Parties.[45]
2. The drafting history of the CISG — and relevant case law — show that arts 12 and 96 CISG lead to the application of the reservation State's formal requirements.[46]
3. Alternatively, if the Tribunal finds that a conflict of law analysis should be conducted; Mediterranean formal requirements would still apply,[47] since the fact that the Supreme Court of Mediterraneo has emphasised the special importance of those requirements demonstrates their international mandatory nature.[48] In addition, they constitute rules of a third country which compel its application.[49]

[72] Respondent's main counter-arguments are the following:

1. The Parties may validly choose which legal system will apply to their contract, and such choice will generally be upheld unless it contradicts public policy.[50] In this case, the Parties chose the CISG, not per se, but as a neutral rule

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45 Statement of Claim, ¶¶ 50, 56.
46 Ibid, ¶ 56.
47 Ibid, ¶ 68.
48 Ibid, ¶ 71.
49 Ibid, ¶ 69.
50 Answer to the Application for Arbitration, ¶ 35.

of law and, in fact, the clause reflects the CEAC model clause.[51]

2. The prevailing doctrine requires the Tribunal to determine the applicable law to contract formation through a conflict of law analysis.[52]
3. There is no explicit duty to apply mandatory rules. Moreover, under the conflict of law analysis, Equatoriana's law (which does not contain the writing requirement) should apply since it has the closest connection to the Contract.[53]

b) *Tribunal's Findings*

(i) *May the Parties Derogate from Art 12 CISG?*

[73] Party autonomy is an undisputed general principle of international arbitration, according to which the parties are free to choose — among other things — the applicable substantive law. This principle is contained in art 28(1) Danubian Arbitration Law, which states that the parties may choose the substantive law, without establishing any express limit to such prerogative.

[74] In turn, art 35(1) CEAC Rules mandates the Tribunal to apply the law chosen by the parties; again, without establishing an express limitation. Moreover, the choice of law clause at issue is the exact text of the CEAC model clause, provided in art 35(1)(b) CEAC Rules.

[75] The Tribunal agrees with Claimant on art 12 CISG's mandatory nature. However, it does not find itself bound by it, since that such provision is directed to State courts and not to international arbitral tribunals.

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51 Ibid, ¶ 38.
52 Ibid, ¶ 49.
53 Ibid, ¶ 62.

[76] An international mandatory rule is an imperative provision, which must be applied to an international case, irrespective of the law otherwise applicable under the rules of private international law, ie, mandatory rules are a matter of public policy.[54] This is because they are deemed crucial by a country to safeguard essential public interests, such as its political, social or economic organisation.[55]

[77] Since 'an arbitrator is not the guardian of the public policy of any country at all, he retains his power of appreciation',[56] and is not bound by any mandatory rule (besides the law of the seat). Thus, the mere fact that one party or a foreign State claims the application of a mandatory rule is not enough to render it applicable.[57] In this vein, several Conventions, which deal with mandatory rules in international cases, give State Courts discretion to consider mandatory rules, foreign to both the lex fori and the lex contractus.[58]

[78] The Tribunal agrees with Prof Shroeter, who explains that the effect of art 12 CISG 'does accordingly not apply … for arbitral tribunals, because the Convention neither creates any obligations for arbitral tribunals'.[59] In fact, the same author explains that: 'the arbitrators may opt for a direct application of the CISG without regard to reservations used by particular Contracting States.'[60]

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54 Pierre Mayer, 'Mandatory Rules of Law in International Arbitration' (1986) 2(4) *Arbitration International* 274–93 [Exhibit CL-23], 275.

55 Ulrich G Schroeter, 'The cross-border freedom of form principle under reservation: the role of articles 12 and 96 CISG in theory and practice', *Journal of Law and Commerce* (forthcoming), 25, at <www.ssrn.com> No 2169834.

56 Mayer, above n 54, 290.

57 Mayer, above n 54, 285–6.

58 Convention on the Law Applicable to Agency, The Hague 1978; Convention on the Law Applicable to Trusts and their Recognition, The Hague, 1984; Convention on the Law Applicable to Contractual Obligations, Rome, 1980; Inter-American Convention on the Law Applicable to International Contracts, Mexico, 1994.

59 Schroeter, above n 55, 18.

60 Ibid 34 (emphasis added).

[79] In conclusion, the Tribunal is not bound to apply art 12 CISG, since the Parties were entitled to derogate from it, and in fact they did.

(ii) *What Would be the Effect of Applying Art 12 CISG?*

[80] Even if the Tribunal were to admit Claimant's arguments and consider itself bound by art 12 CSIG, the Tribunal notes that, although via a different path, the result would be exactly the same.

[81] Preliminarily, the Tribunal notes that in practice, such provision is not solid enough, given that art 6 CISG allows the parties to exclude the whole text of the CISG, which would render art 12 CISG inapplicable.[61] Therefore, if the Parties can exclude the CISG as a whole, it is hard to believe that they cannot exclude a single provision (in accordance with the principle of *a maiori ad minus*).

[82] It is true that in some cases, art 12 CISG was given a 'positive effect', considering that it mandates the direct application of the reservation State's formal requirements.[62] However, a deep analysis shows that this is a clear minority view.

[83] On the other hand, according to the majority view, when the State of one of the parties has made an art 96 CISG declaration, the formal requirements of said State do not automatically apply; rather, one should find the applicable law by conducting a conflict of law analysis, which could point to a different State.[63] Thus, it is possible to find that, in the end, the applicable law admits the freedom of forms.

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61 Ibid 35.

62 For example, Supreme Arbitration Court of the Russian Federation, 15 April 2011, CLOUT No 1106 [Exhibit CL-54]; among others.

63 Henry Mather, 'Choice of Law for International Sales Issues Not Resolved by the CISG' (2001) 20 *Journal of Law and Commerce* 167, [Exhibit RL-99], 167;

[84] It is worth remarking that even some scholars quoted by Claimant itself are enrolled in this school of thought.[64] Case law also supports this idea,[65] even in cases ruled by state courts from a reservation State.[66] The underlying reason for this solution is that art 12 CISG has a 'negative effect', as it indicates which provisions 'do not' govern the contract formalities, but does not specify which ones 'do' apply.[67]

[85] The CISG drafting history confirms this solution, since an alternative wording of art 96 CISG, which would have automatically imposed the form requirements of the reservation State's on other Contracting States, was discussed in UNCITRAL but rejected because it would have made such requirements too widely applicable.[68]

[86] The Tribunal acknowledges that law is not an exact science such as maths and therefore does not favor the majority's position

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Peter Schlechtriem, *Uniform Sales Law — The UN-Convention on Contracts for the International Sale of Goods*, 1986 [Exhibit RL-102], 45; CISG Advisory Council Opinion No 15, ¶ 4.17; Schroeter, above n 55, 21–2.

64 Mistelis Kröll and Viscasillas Perales, *UN Convention on Contracts for the International Sale of Goods (CISG)*, Beck-Hart, 2011 [Exhibit CL-17], 197; Albert H Kritzer, *Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods*, Kluwer Law and Taxation Publishers, Boston, 1989 [Exhibit CL-16], 143.

65 *Hispafruit BV v Amuyen SA* Rotterdam District Court, 12 July 2001, [Exhibit RL-36], ¶ 4.5; *JT Schuermans v Boomsma Distilleerderij/Wijnkoperij*, Netherlands Supreme Court, 7 November 1997, [Exhibit RL-37]; *Gasoline and Gas Oil Case*, Austrian Supreme Court, 22 October 2001 [Exhibit RL-10]; *Forestal Guarani SA v Daros International, Inc*, Federal Appellate Court, 3rd Circuit, 21 July 2010, [Exhibit RL-58].

66 *Adamfi Video v Alkotok Studiosa Kisszovetkezet*, Metropolitan Court of Budapest, Hungary, 24 March 1992 [Exhibit RL-32]; *Tumensky fanerny kombinat v Dor-Bat and Demirel Inshaat, Taakhut, Tigaret the Sanay Limited Shikerty*, High Arbitration Court of the Russian Federation, 20 March 2002.

67 Jerzi Rajski in Caesare M Bianca and Michael J Bonell (eds), *Commentary on the International Sales Law*: *the 1980 Vienna Sales Convention*, Milano, 1987 [Exhibit CL-01], 125–6; CISG Advisory Council Opinion No 15, ¶ 4.15.

68 CISG Advisory Council Opinion No 15, ¶¶ 4.18–4.19; Schroeter, above n 55, 24.

only because it is supported by a larger number of courts and legal authorities. While the Tribunal attributes a reasonable amount of relevance to the fact that a rather substantial majority subscribes to the solution that calls for a conflict of law analysis, the Tribunal is ultimately persuaded by its rationale; and finds that it provides a more fair and equitable solution than the one provided by the minority's position.

[87] Besides, the Tribunal bears in mind that the main purpose of the CISG is to achieve uniformity in its application, as provided by its art 7, and considers that following the majority position is the best way to respect the CISG's spirit.

[88] Consequently, the application of art 12 CISG would not automatically mandate to apply Mediterranian law, but to perform a conflict of law analysis to determine the applicable law.

(iii) *Which Law is Pointed by the Conflict of Law Analysis?*

[89] Preliminarily, the Tribunal cannot overlook that the Parties agreed on the application of the UNIDROIT Principles to all matters not governed by the CISG and its art 1(2) provides for absolute freedom of form. However, since the Parties' debate is based on which is the law most connected to the Contract, the Tribunal will settle such debate.

[90] The Tribunal agrees with the Parties that, in international contracts, it is appropriate to apply the law with the closest connection. In this vein, such law is the one of the State where the party in charge of the most characteristic performance is domiciled. In a sales contract, it is unanimously admitted that the most characteristic performance is the delivery of the goods, and therefore, the law of the seller's domicile should apply.[69]

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[69] ICC Case No 5713 of 1989, CLOUT No 45 [Exhibit CL-71]; *Shanghai Weijie Electronic Devices Ltd v Superpower Supply Inc*, First Intermediate People's

[91] In the present case, given that Respondent is the seller, and it has its place of business in Equatoriana; Equatorianan law, which does not include the writing requirement, should apply.

[92] Claimant alleges that when making a conflict of law analysis, the Tribunal is equally limited by international mandatory rules; in this case, Mediterranean form requirement. However, the mere fact that the Mediterraneo's Supreme Court has ruled in three cases that the writing requirement applies both to the entering into a contract and its amendments, is not enough to prove that such requirement constitute Mediterraneo's public policy.

[93] Claimant has failed to submit the original text of those rulings, so its reasoning remains unknown; it has not even mentioned whether those cases involved international transactions; and whether the Court faced a conflict between contradictory laws or the only provision involved was the domestic one.

[94] The fact that Mediterraneo has subjected its ratification to the CISG to an art 96 declaration, in itself, does not proves it either. In fact, some States as Argentina, Chile and Paraguay have made the declaration, even though they have no legislation prescribing a mandatory written form for all sales contracts.[70]

[95] Nevertheless, even assuming that the writing requirement is a matter of Mediterranean public policy, the truth is that it had no connection whatsoever with the Contract, and hence, according to the analysis made in ¶ [77], the Tribunal would not be bound to apply it.

Court of Shanghai, 2003 [Exhibit RL-18]; ICC Case No 4237, 17 February 1984, in Pieter Sanders (ed), *Yearbook Commercial Arbitration*, 1985, vol X, Kluwer Law International, 52–60 [Exhibit RL-75].

[70] Schroeter, above n 55, p 11.

[96] In conclusion, the Tribunal finds that, Mediterranian law does not limit the conflict of law rules. Such analysis points to Equatorianian law, which does not have a writing requirement. Thus, the Parties were entitled to amend the Contract orally.

2 *Did the Parties Intend to Amend the Delivery Date?*

a) *Parties' Position*

[97] Claimant's primary arguments are as follows:

1. Even if the Tribunal finds that an oral amendment of the Contract was possible, the Parties did not agree to amend it.[71] Moreover, since Mr Long only referred to the shipping contract and the letter of credit, his statement cannot be interpreted as an implied offer to amend the delivery date.[72]
2. Amending the delivery date in the letter of credit and the shipping contract was a secondary part of the job, but necessary for the performance of the Contract.[73]
3. Consider the Contract amended is not a reasonable assumption, since it would mean that Claimant has waived its right to claim the penalty set forth in Clause 10(b) of the Contract in exchange of nothing.[74]

[98] On the other hand, Respondent's primary counter-arguments are as follows:

1. Since amendments of contracts are commonly made orally, any contracting officer of a clothing manufacturer would have understood Mr Long's acceptance of the new delivery date as an amendment to the delivery date.[75]

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71 Statement of Claim, ¶ 75.
72 Ibid ¶ 76.
73 Ibid ¶ 83.
74 Ibid ¶ 89.
75 Application for Arbitration, ¶ 67.

2. By amending the letter of credit, Claimant is deemed to have amended the Contract.[76]
3. If the Contract had not been amended, Claimant should have informed Respondent that it would enforce the penalty clause.[77] Claimant had only two options: to proceed with or to avoid the Contract. Thus, by choosing to proceed to comply with Doma Cirun, Claimant had an incentive to amend the Contract.[78]

b) *Tribunal's Findings*

(i) *Was There a Meeting of the Minds Between Mr Short and Mr Long?*

[99] Having established that the Parties were entitled to amend the Contract orally, in order to find whether in this case they actually did so, it is necessary to identify their real intention. Even though the amendment can be either expressly or implicit, it must come out of a clear intention.

[100] Under arts 8(1) and (2) CISG, the Parties' conduct must be analysed according to their intention (subjective standard) and the understanding of a reasonable person (objective standard). In addition, art 8(3) CISG provides that due consideration is to be given to all relevant circumstances of the case, including negotiations, practices, usages and any subsequent conduct of the parties.

[101] Both witness statements agree on most of the facts, and the only contradiction lies in the interpretation they gave to the conversation. Thus, the Tribunal considers that oral examinations in the hearing would have shed light on the issue. In this sense, the probative value of Mr Short's statement is somehow affected by his failure to attend the oral hearing. In

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76 Answer to the Application for Arbitration, ¶ 68.
77 Ibid ¶ 73.
78 Ibid ¶ 75.

this regard, while the Tribunal will take any concession made by him at full face value, any of his assertions advancing Respondent's arguments will be cautiously and carefully considered.

[102] Both witnesses agree that Claimant made clear to Respondent the importance of the delivery date.[79] In fact, Mr Short acknowledged that when he called Claimant 'Mr Long was very upset at the news. I was not surprised. He had indicated at the time we entered into the contract that this was a rush job in order to have the goods in the stores in Oceania in time for the opening of the summer selling season'.[80]

[103] In this context, the Tribunal is not persuaded to assume that Claimant would have intentionally waived its right to claim damages by amending the delivery date in exchange of nothing, especially considering its commercial character.

[104] The Tribunal cannot ignore art 48 CISG's straight application since it is part of the law agreed by the Parties. That provision is very specific. It deals with this exact situation, and indicates that the seller's communication to the buyer informing that he will deliver in a specified period of time includes a request for a time to cure a breach, and the buyer may claim damages. This solution makes full sense.

[105] On the contrary, admitting that when the seller communicates the buyer of a delay and the buyer still decides to receive the goods amounts to an amendment would mean that late performance would never be possible (unless the seller delivers late without giving notice). Since cooperation and communication is one of the basic principles of the CISG, the parties are expected to make these communications.

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79 Exhibit R-1, ¶ 5; Exhibit C-2, ¶ 10.

80 Exhibit R-1, ¶ 5.

[106] Furthermore, the Tribunal does not consider the amendment of the shipping contract as a relevant fact, because given that Respondent is not a party to it, whatever happens with that contract does not directly concern Respondent.

[107] In conclusion, Mr Short's phone call does not constitute an offer to amend the delivery date; rather, it was a request for a time to cure its breach.

(ii) *Which are the Implications of the Amendment to the Letter of Credit?*

[108] Preliminarily, the Tribunal notes that the Parties have not submitted the letter of credit. However, even though they dispute whether its modification amounts to an amendment of the Contract, they do agree that, to be operative, such letter had to reflect the real delivery date.[81]

[109] Clause 10 of the Contract provides for an economic incentive if Respondent delivered early. Based on the Parties' assertions, the Tribunal understands that the letter of credit should have been modified even if Respondent delivered before the date fixed. Such feature is crucial, as it means that the modification of the letter does not necessary amount to a modification of the Contract, but instead was necessary to its performance, irrespective of whether Respondent delivered late or earlier.

[110] Thus, the mere fact of amending the letter of credit is not enough to entail an amendment of the Contract, since it was necessary to perform the Contract.

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[81] Exhibit C-2, ¶ 12; Exhibit R-1, ¶ 6.

(iii) *What are the Implications of Claimant's Failure to Deduct the Penalty?*

[111] Clause 10(b) of the Contract contains a penalty clause for late delivery, which was not deducted by Claimant. However, the fact that Claimant did not act pragmatically does not mean that it waived its right to claim damages, which can be done at any point in time within the relevant statutory limitation period, in this case, 3 years as established by art 10(2) UNIDROIT Principles.

[112] If subsequent facts to the telephone conversation were to be considered, one should consider Doma Cirun's letter to Claimant when avoiding their contract which reads: 'This is to confirm our telephone conversation […] I'm glad that you did not waive the delivery date'.[82] This means that Claimant made clear to Doma Cirun — on the same day of the telephone conversation — that it had not waived the delivery date.

[113] Consequently, the fact that Claimant did not deduct the penalty clause does not mean that it was willing to amend the Contract.

[114] Result of Issue B: the Tribunal finds that the Parties validly derogated art 12 CISG, and thus were entitled to orally amend the Contract. However they did not do so. Hence, Respondent delivered the goods 5 days later than the date agreed.

C *Did Claimant Have the Right to Avoid the Contract?*

[115] In order for Claimant's claim regarding avoidance of the Contract to succeed, Claimant will have the burden of proving:

1. That Respondent breached the Contract; and
2. That such breach was fundamental under art 25 CISG.

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[82] Exhibit C-3.

1 *Did Respondent Breach the Contract by Using Child Labour?*

[116] It is not disputed between the Parties that Respondent used child labour in at least one of its plants, but that no child labour was used in the polo shirts.[83] In fact, the Parties agreed that neither of them would ask the Tribunal to investigate any further on the issue.[84] Put simply, only the legal consequences — if any — that arise from Respondent's use of child labour, are disputed.

a) *Parties' Position*

[117] Claimant's main arguments are as follows:

1. Respondent breached cl 12 for three reasons. First, the literal sense of the wording shows a broad implementation for which there is no limitation on Respondent's conduct.[85] Second, cl 12 has to be read in conjunction with Claimant's 2008 audit; which covered Respondent's entire business as well as all of its suppliers.[86] Third, a rationalisation of 'situational' ethical behaviour would go against the nature of ethics and hence against cl 12's purpose.[87]
2. Respondent failed to deliver polo shirts fit for the particular purpose in breach of art 35(2) CISG since Claimant informed Respondent that the goods had to be finally resold in Oceania by Doma Cirun.[88] Moreover, Claimant could reasonably rely on Respondent's skill and judgment.[89] Finally, art 35(3) CISG,[90] does not exclude Respondent's liability.

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83 Procedural Order No 1, ¶ 7; Statement of Defence, ¶ 80.
84 Procedural Order No 1, ¶ 7.
85 Statement of Claim, ¶ 101.
86 Ibid ¶¶ 102–105.
87 Ibid ¶ 106.
88 Ibid, ¶¶ 112–113.
89 Ibid, ¶¶ 114–117.
90 Ibid, ¶¶ 118–121.

3. Under art 35(1) CISG, 'quality' encompasses all surrounding circumstances that are relevant for the production of the goods. Therefore, the incorporation of ethical standards into the Contract made them part of the 'quality'. Hence, Respondent's use of child labour made the quality of the polo shirts defective.[91]

[118] Respondent's counter-arguments are as follows:

1. There was no breach of the Contract for three reasons. First, under the *contra preferentum* principle, the ambiguity of cl 12 should be resolved in favour of Respondent.[92] Second, Claimant knew that Respondent had had ethical issues regarding other contracts and despite of that decided to hire it, which indicated that the policy was only limited to the relationship between the Parties.[93] Third, Respondent cannot be charged with knowledge of the rationale of Claimant's policy, absent a clear communication on behalf of Claimant to that effect.[94]
2. There was no breach of art 35(2) CISG since Respondent was not aware of any particular purpose of the goods.[95] Even assuming that it was, and that a seller is expected to know all public law requirements in a destination country, Claimant could not rely on Respondent's skill and judgment, since Respondent only delivered to Oceania three times, which hardly constitutes regularity.[96] Moreover, since Claimant should have conducted an extra audit of Respondent's facilities.

Article 35(3) CISG,[97] excludes Respondent's alleged liability. Only the physical descriptions specified in the Contract — more

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91 Ibid, ¶ 110.
92 Statement of Defence, ¶¶ 81–86.
93 Ibid, ¶¶ 84, 87–88.
94 Ibid, ¶ 89.
95 Ibid, ¶ 102.
96 Ibid, ¶¶ 103–104.
97 Ibid, ¶¶ 105–109.

precisely in Annex 1 — can be construed to encompass the 'quality' of the goods. Thus, Respondent complied with every requirement under art 35(1) CISG.[98]

b) *Tribunal's Findings*

(i) *Did Respondent Breach Cl 12 of the Contract?*

[119] Clause 12 provides:

> It is expected that all suppliers to Oceania Plus Enterprises or one of its subsidiaries will adhere to the policy of Oceania Plus Enterprises that they will conform to the highest ethical standards in the conduct of their business.[99]

[120] While it is true that the wording of cl 12 suggests a broad scope and high ethical standards, the exact scope of the clause cannot be determined by it's wording alone. In this sense, the Clause must be analysed under art 8 CISG (see ¶ [100]), considering practices, negotiations, and subsequent conduct of the parties.

[121] The burden of proving cl 12's exact scope lies entirely on Claimant being the party that claims there was a breach thereof. However, while determining its scope, the Tribunal will also consider the fact that this clause has been included in previous contracts between the Parties and which has been their understanding on those occasions. Nonetheless, in case any doubt should arise, they will be resolved in favour of Respondent due to the *contra preferentum* principle.

[122] Even if it is not completely clear whether the phrase 'conduct of its business' — in and of itself — refers to Respondent's entire business or only to the business between the Parties, the mere fact that Claimant introduced an ethical policy is evidence that it intended to hire an ethical company; and Respondent freely consented to be bound by it. Under the 'highest ethical

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98 Ibid, ¶¶ 93–100.

99 Exhibit C-1, ¶ 12.

standards' it would be unethical to hire someone who uses child labour, no matter in which facility and to produce which goods.

[123] Furthermore, the fact that the 2008 audit included not only Respondent's facilities but also the ones of its suppliers is sufficient evidence to prove that Claimant's policy intended to cover the whole of Respondent's business. In this regard, Respondent's efforts to fire the manager of its supplier is also evidence of Respondent's understanding that the policy went not only beyond its facilities but also in relation to commercial activities in which Claimant was not even involved.

[124] Moreover, the Parties had contracted in the past and in one of those occasions, the specific issue of child labour was extensively discussed, which proves that this was a sensitive issue for Claimant, and Respondent knew this.

[125] Finally, while ethics can be a grey area, child labour is not. An ethical policy cannot be 'situational' or 'conditional' because this would go against the very own nature of ethics and the meaning and purpose of any ethical policy, regardless of its extent.

[126] Consequently, the Tribunal finds that cl 12 should be construed broadly. Thus, it included Respondents' whole manufacturing process, and the use of child labour was in direct contravention of it.

(ii) *Were the Polo Shirts Fit for the Particular Purpose?*

[127] Under art 35(2)(b) CISG the goods do not conform to the contract unless they 'are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement'.

[128] Although the Contract itself did not specifically provide for the particular purpose, what is relevant is if — at the time of the Contract — Respondent was aware of its existence.[100] In Respondent's own words '[w]hen signing this contract, Respondent understood that the goods were to be delivered finally to Doma Cirun for resale in Oceania but did not know in which of its stores they were to be sold.'[101]

[129] A particular purpose may also exist if the buyer is operating in a market with a special emphasis on fair trade and the observance of ethical principles.[102] It has been established that Oceania is a market which is very sensitive to child labour issues, as has been proven by the *Oceania Times* article[103] and Oceania's strong reaction against the TV documentary.

[130] In this sense, the fact that Claimant expressly made Respondent aware that the polo shirts were destined for sale in Oceania by Doma Cirun, coupled with the fact that an ethical policy was included in the Contract, meant that Respondent was being informed that the goods had to be resold in a market — and by a company — with special ethical characteristics. Hence, the Tribunal finds that Respondent was informed — both expressly and impliedly — of the particular purpose of the goods at the time of the conclusion of the Contract.

[131] Having established that Respondent was informed of the particular purpose, the Tribunal now turns to analyse whether Claimant could rely on Respondent's skill and judgment. In this regard, the fact that Equatoriana and Oceania are both signatories of the ILO Convention serves to prove that they share a commitment towards fighting child labour. However, what it is relevant in the case are the particularities of the Oceanian market plus Claimant's ethical policy.

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100 Exhibit C-27, ¶ 21.

101 Answer to the Application for Arbitration, ¶ 5.

102 Exhibit C-27, ¶ 20.

103 Exhibit C-4.

[132] Since Respondent was familiar with the Oceanian market and was aware of the contents of Claimant's policy, the Tribunal finds that it was reasonable for Claimant to rely on Respondent's skill and judgment. Additionally, Claimant had relied on Respondent's judgment in 2008 since, as soon as Respondent was confronted with an unethical issue, its reaction caused the manager of the plant involved to be fired.

[133] Given that the shirts were linked to the child labour scandal because of Respondent's use of children in its manufacturing process, the Oceanian market repudiated them, making the shirts not fit for resale there.

[134] In conclusion, given that Respondent was aware of the particular purpose and Claimant could rely on its skill and judgment, Respondent is liable for delivering shirts unfit for resale in Oceania.

(iii) *Is Respondent's Liability Excluded by Art 35(3) CISG?*

[135] Finally, art 35(3) CISG states that '[t]he seller is not liable […] for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity.'

[136] In this vein, an obligation based on facts of which one 'could not have been unaware' does not impose a duty to investigate, but refers to facts that are before one's eyes.[104] In this sense, Respondent's use of child labour in its facilities was not something that Claimant had to be aware of, since — at the time of the conclusion of the Contract — there was no clear and conclusive indication to that effect, nor would this necessarily become evident should an audit be conducted.

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104 John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 3rd ed, Kluwer Law International, The Hague, 1999, 260.

[137] In the *'Jane Doe v Wal-Mart'* case,[105] the issue was whether Wal-Mart's failure to inspect its suppliers' facilities precluded the supplier's liability for breaching the company's labour policies. The Court found that even though Wal-Mart had the right — under its policy — to inspect and monitor its suppliers' facilities, Wal-Mart's failure to do so did not exclude the supplier's liability for breaching its policy's standards.

[138] Here, the issue is that Respondent was contractually precluded from hiring child labour; and such obligation has nothing to do with Claimant conducting an audit or not. Claimant's decision not to conduct a new audit did not mean that Respondent was contractually allowed to hire children. It just meant that — in the event of using child labour — it was more likely that Respondent was not going to get caught for it.

[139] Moreover, as mentioned above, Respondent's proactive behaviour towards the shady dealing of its suppliers reinforced Claimant's trust on it. In addition, Respondent itself acknowledged that it offered such a low price for the polo shirts precisely because it intended to attract further contracts with Claimant.[106] Hence, there was no reason for Claimant to be aware that Respondent would use child labour.

[140] Consequently, art 35(3) CISG does not preclude Respondent's liability. Having found a breach under cl 12 and art 35(2) CISG, the Tribunal considers that the issue of whether there was also a breach of art 35(1) CISG becomes moot.

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105 *Jane Doe v Wal-Mart*, US District Court for the Central District of California, 30 March 2007.

106 Answer to the Application for Arbitration, ¶ 4.

2 *Was Respondent's Breach Fundamental?*

a) *Parties' Position*

[141] Claimant's main arguments are as follows:

1. Respondent committed a fundamental breach of Contract under art 25 CISG since Claimant was substantially deprived of what it was entitled to expect. Claimant intended to sell the shirts to Doma Cirun for resale in Oceania. Hence, the mere connection of the shirts with child labour made them unsalable.[107]
2. Any reasonable person in Respondent's position would have foreseen the consequences since Respondent knew that the goods had to be resold in Oceania. Additionally, Respondent had to recognise Claimant's core interest not to contract with firms who do not value ethical standards, due to the audit and discussions about it as a mandatory pre-requisite for any contractual relation.[108]
3. The resale of the polo shirts was irrelevant for the purposes of analysing a fundamental breach, since Claimant sold them on Respondent's account. If Claimant had sold the goods under its own name, it would have given the impression that it was profiting with ethically tainted goods.[109]

[142] Respondent's main counter-arguments are as follows:

1. Clause 12 merely stated that 'it is expected' that suppliers will adhere to the policy, which does not constitute an obligation; rather it is a best directory. Hence, a breach thereof cannot substantially deprive Claimant of its interests.[110]

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107 Statement of Claim, ¶ 126.
108 Ibid, ¶¶ 132–133.
109 Ibid, ¶¶ 129–130.
110 Statement of Defence, ¶113.

2. Since in 2008 there was evidence of child labour in other goods, but the Contract with Claimant was still successfully concluded, Respondent could not foresee the consequences for using child labour in other goods.[111]
3. Claimant's resale of the goods indicated one of two things: either it did not consider them non-conforming, or its own policy was not essential. Additionally, the shirts were sold at 86% of their original price, which proves that they were still valuable goods.[112]

b) *Tribunal's Findings*

(i) *Was Claimant Substantially Deprived of What it was Entitled to Expect?*

[143] Having established that Respondent breached the Contract,[113] the Tribunal will now analyse whether such breach was fundamental. Article 25 CISG states:

> A breach of contract […] is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to *expect* under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result. (Emphasis added).

[144] The use of the wording 'expectation' in cl 12 is the exact same term used by art 25 CISG while defining fundamental breach. Hence, Claimant expected — and was indeed entitled to expect — that Respondent had to comply with its ethical policy under cl 12, due to its mandatory nature. Any breach thereof, would certainly deprive Claimant of its expectations.

[145] Whether the aggrieved party failed to receive the essence of what it could expect under the contract is essential for

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111 Ibid, ¶ 120.
112 Ibid, ¶¶ 116–118.
113 See Section 0.2.a.

determining if there was a fundamental breach.[114] In particular, as Prof Schwenzer states:

> If the parties stipulate that certain *ethical standards* have to be adhered to, the parties have, thereby, sufficiently made clear that compliance is of special interest to the buyer and, therefore, such deprivation can be assumed in the event of a breach.[115] (Emphasis added).

[146] It is undisputed that there were practically no sales of the polo shirts in Oceania. On April 5 the Oceanian public became aware that Respondent had used child labour in its facilities and decided not to purchase any more shirts. Until that day, only 1000 out of 100 000 had been sold, ie, 1% of the total amount.[116]

[147] While Claimant itself acknowledges that it is not clear whether this was the only reason for the drop in sales, it was definitely the main reason. This is so, because it was only after the TV documentary was aired that the sales started to drop and continued to do so even further, once the Oceania Times article was published.[117]

[148] Consequently, the Tribunal finds that Claimant was substantially deprived of its valid expectations to receive 100 000 polo shirts, manufactured by a company, which complied with its ethical policy and fit for resale to Doma Cirun in Oceania.

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114 Leonardo Graffi, 'Case Law on the Concept of "Fundamental Breach" in the Vienna Sales Convention' (2003) 3 *International Business Law Journal* 339–40.

115 Ingeborg Schwenzer and Benjamin Leisinger in Ross Cranston, Jan Ramberg and Jacob Ziegel (eds), *Commercial Law Challenges in the 21st Century*; Jan Hellner in memorium, Stockholm Centre for Commercial Law Juridiska institutionen, 2007, 249–75 [Exhibit C-30], 269.

116 Application for Arbitration, ¶ 19.

117 Ibid ¶19.

(ii) *Were the Consequences of the Breach Foreseeable?*

[149] The predominant understanding is that the party causing substantial detriment is liable for its breach, unless it can prove that the consequences of the breach were unforeseeable,[118] both subjectively and objectively, under art 25 CISG.[119] Hence, Respondent has not only the burden of proving that it actually did not foresee the consequences of its breach, but also, that a reasonable person would not have either.

[150] The fulfilment of cl 12 cannot be measured by a given percentage of success. In other words, either Respondent complied with the policy or it did not. Following this line of reasoning, Respondent had to know that a breach of the ethical policy would render the Contract meaningless and the same applies to any reasonable person in Respondent's position.

[151] In this sense, any reasonable person would have foreseen that the public in Oceania, being so sensitive to child labour issues, would not buy clothes manufactured by a company who employs child labour.

[152] Consequently, the Tribunal finds that Respondent could have foreseen — and a reasonable person would have foreseen — the consequences of the breach.

(iii) *What are the Consequences of Claimant's Resale of the Polo Shirts?*

[153] Under art 86 CISG if the buyer intends to reject the goods, he must reasonably preserve them. Moreover, according to art 88 CISG, a buyer who relies on art 86 may sell the goods if there has been an unreasonable delay by the seller in taking them

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118 Peter Schlectriem, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2nd ed, Oxford University Press, New York, 1998, 177.

119 Franco Ferrari, 'Fundamental Breach of Contract under the UN Sales Convention' (2006) *Journal of Law and Commerce* 489–508, 499 [CL-09].

back, provided that reasonable notice of the intention to sell has been given.

[154] In *casu*, as soon as Claimant avoided the Contract, it also notified its intentions to return the polo shirts.[120] Respondent refused to take them back and claimed that it was up to Doma Cirun to dispose of them.[121] In the end, Claimant sold them.

[155] While it has not been proved whether Claimant duly notified Respondent's of its intention to sell the goods, the dispute between the Parties does not lie on whether Claimant was entitled to sell them or not, rather on the interpretation that should be given to such sale. In any event, the notification requirement may become flexible when — as in this case — previous communications were proven futile.[122]

[156] Moreover, the Tribunal also weighs the fact that Claimant's resale of the goods has substantially mitigated Respondent's damages — as provided by art 77 CISG — by USD470 000, since according to arts 88(3) and 84(2)(a) CISG Claimant must account to Respondent for all benefits, which it has derived from the goods. In addition, since Claimant resold the goods at 86% of their original Contract price, the Tribunal finds that the price of such re-sale was a reasonable price for resale.

[157] Consequently, Claimant's resale of the goods does not preclude it from claiming fundamental breach since it constituted a mitigation measure.

[158] Result of Issue C: since Respondent breached the Contract by using child labour, and such breach was fundamental, Claimant was entitled to avoid the Contract.

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120 Exhibit C-6.

121 Exhibit C-7.

122 Pilar Perales Viscasillas, *El Contrato de Compraventa Internacional de Mercanacias (Convención de Viena de 1980)*, § 182, <www.cisg.law.pace.edu/cisg/biblio/perales1-85.html>.

IV DAMAGES

[159] As it appears from its submissions, Claimant's damages claims are as follows:

- USD27 500 for late delivery;
- USD550 000 for the reimbursement of the purchase price;
- USD850 000 for the settlement with Doma Cirun plus USD700 000 for the settlement with Oceania Plus, ie, USD1 550 000; and
- USD9 978 714 for lost profits.[123]

[160] Having determined that Respondent is liable for breaching the Contract, the Tribunal must now analyse:

- Whether those heads of damages meet the CISG requirements to be recoverable; and, in any event,
- Their quantification.

A *Is Claimant Legally Entitled to Claim Damages Under the CISG?*

1 *Parties' Positions*

[161] Claimant does not address the legal aspects of each head of damages claimed. Instead, it makes a general statement, asserting that it is entitled to recover the purchase price and any resulting damages under art 74 CISG.[124] Only as to the settlements paid, it specifically states that they were a direct result of Respondent's breach and could not be avoided. Furthermore, it states that, since Respondent sold the polo shirts to a merchant, the consequential damages were also foreseeable.[125]

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123 Statement of Claim, ¶¶ 138–139.
124 Ibid, ¶¶ 134–135.
125 Ibid, ¶¶ 135–136.

[162] Respondent's counter-argument is that the claim does not meet the foreseeability requirement of art 74 CISG. It states that, at the time the Contract was concluded, Respondent could not have reasonably foreseen that the employment of child labourers outside the production of Claimant's polo shirts would have a detrimental effect on Claimant. Hence, Claimant is precluded from claiming them.[126]

2 *Tribunal's Findings*

[163] Article 74 CISG contains the principle of full compensation,[127] which has various limitations, such as: causation, foreseeability, and the aggrieved party's duty to mitigate damages under art 77 CISG.[128] However, since Respondent has only contested the foreseeability of the damages, the Tribunal will restrict the analysis to such requirement. For the sake of the analysis, foreseeability of each of the heads of damages will be assessed separately.

[164] As a preliminary matter, the burden of proving the foreseeability of damages lies on Claimant. In order to determine foreseeability under art 74 CISG, the Tribunal must determine which facts and matters Respondent actually knew or ought to have known at the time of the conclusion of the Contract.

[165] As to the penalty clause, since the Parties, in cl 10 of the Contract, previously agreed the terms of its application, it goes without saying that Respondent foresaw its application in the event of late delivery of the goods.

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126 Statement of Defense, ¶¶ 121.

127 Fritz Enderlein and Dietrich Maskow, *International Sales Law, Commentary on the International Sales of Goods*, Oceania Publications, New York, 1992, 298.

128 Joseph Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, Kluwer Law International, The Hague, 200.

[166] Regarding the reimbursement of the purchase price, its legal aspect has already been fully addressed by the Tribunal above [¶¶ [153] et seq]. There, the Tribunal found that Claimant was entitled to avoid the Contract and that both Parties had to make concurrent restitutions under art 81(2) CISG subject to the fact that Claimant's must account for the proceeds of that sale to Respondent.

[167] Regarding the ethical policy's breach, Respondent knew that the goods were destined to Doma Cirun for resale in Oceania. Second, Respondent knew that it had to comply with Oceania Plus' highest ethical standards; and it was further familiar with them, since it had contracted with Claimant on several occasions. Third, Respondent was also familiar with the particularities of Oceanian market since it had already sold goods that were destined there. Therefore, it could have foreseen that in case of a breach of the policy, Claimant would face potential legal claims.

[168] Finally, concerning loss of profits, given that Claimant's ethical policy had a special connection with the Oceanian public's sensitivity, it could reasonably be foreseen that its breach could — to some extent — impact Claimant's business, and amount to loss of profits as it is a commercial company.

[169] Result of Issue A: the Tribunal concludes that all the damages claimed are legally recoverable under the CISG, since they were all foreseeable at the time of the conclusion of the Contract.

B *Quantification of Damages*

[170] The Tribunal will now analyse the quantum of all the items that have exceeded the required legal threshold, in the same order that they were analysed above.

1 *Actual Losses*

[171] As to the damages for late delivery, there is no dispute regarding the plain applicability of cl 10(b) of the Contract. Since said clause provides for a deduction of 1% of the Contract price (USD550 000) per day late, and Respondent delivered 5 days late (5500 x 5), Respondent shall pay USD27 500 to Claimant.

[172] Regarding the recovery of the purchase price, Claimant had to account for the benefits it received as a consequence of reselling the goods. Since the Contract price was USD550 000 and Claimant resold the goods for USD470 000, the Tribunal finds that Respondent owes Claimant only for the difference in the amount between the total Contract price and the resale price of the goods, ie, USD80 000.

[173] As to the reimbursement of the amount that Claimant paid under the two settlements, given that Respondent has not provided a different calculation of this head of damages, the Tribunal will grant Claimant the full amount claimed, being that:

- USD850 000 paid to Doma Cirun; and
- USD700 000 paid to Oceania Plus; ie, a total amount of USD1 550 000.

2 *Loss of Profit*

[174] The Tribunal will now analyse Claimant's loss of profits, which is the only head of damages, whose quantification is disputed between the Parties. Regarding this issue, both Parties rely on their respective expert reports.

a) *Parties' Positions*

[175] Both experts valuate Claimant's lost profits applying the DCF method by projecting Claimant's net cash flow for a certain

time period into the future and then applying a discount rate to bring it back to present value as of the date of their reports.

[176] On the one hand, they evaluate the present value of future profits that Claimant would have earned had the Contract not been breached ('but for' scenario). On the other hand, they evaluate the present value of the 'actual' future profits (actual scenario). Then, the expected future revenue stream is assigned a present value by applying a discount rate. Ultimately, the future lost profits are calculated as the difference between the amounts arising out of both scenarios.

[177] Claimant's expert, ABC, concludes that Claimant's lost profits amount to USD9 978 714, based on the following:

1. The breach of the Contract will affect Claimant's potential revenues for a period of 12 years from the date of the breach, taking Oceania Plus Group ethical policies as reference, which state that it will not contract with a company that breaches them, for that period.
2. In its 'but for' scenario ABC makes the following assumptions:
   i. Claimant's proportion of revenues for sales in Oceania would be of 90% (of the company's total sales), instead of the historical 70% rate, because Claimant's management had intended to increase its sales in Oceania.
   ii. A constant gross margin of 40% (of the total revenues), higher than 30% historically earned, because of Claimant's plan to procure clothing from lower cost manufacturers in countries with lower cost of labour.
   iii. Claimant's sales would grow 6% per annum.
3. In ABC's 'actual' scenario Claimant will mitigate 15% of its assumed lost sales in Oceania by expanding into new countries, since it would have absolutely no sales in Oceania. Further, with a gross profit margin of 15% (lower than it was in Oceania) and sales and administrative costs at 13% of assumed revenues (higher than in Oceania),

Claimant would achieve a lower profit margin because it does not normally conduct business there.

4. Applying a mid-year discount rate based on an estimate WACC of 6%, which is the average WACC calculated by PQR Analytics Ltd. for retail companies in the clothing sector in 2010.

[178] In turn, Respondent's expert — XYZ — concludes that in any event Claimant's lost of profits amounts to USD492.000. Whereas it does not contest several of Claimant's assumptions, it uses different technical concepts and questions the following assumptions:

1. Claimant's losses are assessed over a period of 4 years, based on the precedent of an investment case, *WestOil v Republic of Oceania,* and a study of West Mediterraneo University, indicating that companies suffering from a loss of reputation saw profits reduction for a period of 3 to 5 years, but rarely longer.
2. The 'but for' scenario should be based on historical results, rather than the aggressive assumptions used by ABC. Thus, it considers a gross margin of 30% and sales in Oceania to represent 70% of Claimant's total sales.
3. In XYZ's 'actual' scenario, Claimant's sales would grow 1% per annum since:
   i. Claimant would have absolutely no sales in Oceania.
   ii. Claimant generates an increasing proportion of its sales in its home market.[129]
   iii. The clothing industry had a strong growth in emerging markets in the last 3 years, and a study projects retailing in Ozgolia to grow 75% over the next 4 years. Thus, Claimant will maintain its historical gross margin at 30% and sales and administrative costs at 10%.
4. The discount rate invoked by ABC is not applicable since there are important differences between PQR Analytics

[129] XYZ's Report, ¶ 4.31.

> Ltd's study and Claimant's characteristics as a company.[130] Given that Claimant is a clothing wholesale company, it owns a lot less real estate than a typical retail clothing company, and therefore it should be accredited a higher cost of equity as it has a lower amount of tangible assets against which its equity value can be secured. Hence, the appropriate mid-year discount rate is of 12%.

b) *Tribunal's Findings*

[179] Preliminarily, the Tribunal notes that both expert reports refer to facts (eg, the existent clothing companies in Oceania, market issues, among others),[131] which have not been supported by any evidence. In addition, both experts have relied on Claimant's unaudited financial statements. Nonetheless, since the Parties have not contested several of the facts alleged by each other, the Tribunal understands that they are correct. The Tribunal will now address the technical aspects that make the difference between the results of both reports.

[180] In so doing, the Tribunal's analysis will be guided by certain basic principles. First, that in accordance with the principle of full compensation, Claimant must be placed in the same economic position it would have been had the Contract not been breached. Second, that in accordance with the legal international principle of *actori incumbit onus probandi*, Claimant has the burden of proving possible losses with reasonable certainty.[132]

[181] However, while it must provide a reasonable basis upon which the Tribunal can fairly estimate the losses, it does not need to do

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130 Ibid, ¶ 4.37.

131 ABC's Report, ¶ 4.12.

132 John Y Gotanda, 'Assessing Damages in International Commercial Arbitration: a Comparison with Investment Treaty Disputes' (2007) 4(6) *Transnational Dispute Management* 2.

it with mathematical precision.[133] Indeed, valuation — although employing principles of economics — is as much an art as it is a science.[134]

(i) *Relevant Time Period*

[182] When calculating damages, special attention must be given to the particular circumstances of the case. Claimant itself acknowledges that on 20 April 2011, upon Doma Cirun's request, it purchased 90 000 polo shirts from Gold Service on a rush basis; what's more, '[b]ecause of the urgent need for the polo shirts, the first 20 000 were shipped by air'.[135]

[183] If just a few days after the child labour scandal there was an 'urgent need' for polo shirts to be available for sale it is not reasonable to assume that the economic consequences of the breach would extend for 12 years. Claiming losses for 12 years while entering into new sales contracts is like having the cake and eating it too.

[184] Of course, the referred urgent sale does not lead the Tribunal to deny that Claimant's sales in Oceania will be affected, but XYZ's proposal of a 4 year period is more suitable. The Tribunal thus finds that after such period — and all things being equal — Claimant will be available to recover from the child labour scandal and re-enter into the Oceanian market.

(ii) *Assumptions for the Projection of the 'But For' Scenario*

[185] The quality and relevance of the output of a DCF model depends on the quality of the inputs, eg, the reasonableness of the growth assumptions and the discount rate. Thus, the

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133 CISG Advisory Council Opinion No 6, ¶ 2.9.

134 Mark Kantor, 'Valuation for Arbitrators: Uses and Limits of the Adjusted book Value Method in Energy-related Disputes' (2007) *Transnational Dispute Management* 7.

135 Application for Arbitration, ¶ 24.

projections of revenue growth and profitability need to be properly justified.[136]

[186] The starting point for several of ABC's assumptions is mainly based on Claimant's own future business strategy.[137] Having Claimant the burden of proving its losses, it would be unreasonable to plainly admit several of these assumptions since its accuracy has not been properly proved.[138]

[187] In contrast, XYZ's assumptions are based on historical data provided by Claimant itself. The Tribunal finds these assumptions much more reasonable since they have an existing basis on which the Tribunal can rely as opposed to merely assuming projected higher margins as Claimant would have the Tribunal believe.

(iii) *Assumptions for the Projection of the Actual Scenario*

[188] Both experts agree that there will be no sales in Oceania, but dispute the potential sales in other countries. The Tribunal sympathises with Claimant's position in this point since, as a general rule, establishing a company's name in a new market entails higher operating expenses and marketing efforts.

[189] Although in certain cases there could be room for exceptions to such rule, XYZ has failed to provide conclusive evidence of why the Tribunal should support its assumptions of applying historical figures in new markets.

[190] Thus, the Tribunal finds that ABC's proposed basis of 13% of expenses is reasonable. Additionally, it also entails expecting lower gross margins. In this particular point, the Tribunal is not

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136 Anthony Charlton, 'Discounted cash flows — Part 2, Valuation and the Financial Crisis', 26 January 2012, at <www.kluwerarbitrationblog.com>.

137 ABC's Report, ¶ 5(a).

138 Anthony Charlton, 'On quantifying known unknowns', 26 May 2011, at <www.kluwerarbitrationblog.com>.

persuaded by either of the Parties' positions. Thus, by making an independent assessment (within the parties' limits proposed) it concludes that a gross margin of 25% is a more appropriate expected rate for Claimant in new markets.

(iv) *Appropriate Discount Rate*

[191] The application of a discount rate assigns present values to the expected future revenue stream by decreasing the nominal amounts. It basically encompasses two premiums:

- Reflecting the time value of money (ie, the notion that a dollar to be received in the future is worth less than a dollar received today) and
- Risks.

[192] ABC calculates its discount rate based on a study from PQR Analytics Ltd, which calculates an average WACC for companies in the retail clothing sector. Regardless of its reputation, truth is that, being a general study; it does not take Claimant's particular characteristics into account.

[193] When a company is relatively new, there is more uncertainty about its possible results,[139] and thus, it is appropriate to apply a higher discount rate.[140] Claimant was established in 2007,[141] what means that it has been operating only for 5 years as of the date of the expert report.

[194] More importantly, Claimant acknowledges that:

> Despite the negative publicity resulting from the contract with Respondent, Claimant ran the risk of trusting the assurances of Gold Service Clothing instead of making an audit given the time constraints.[142]

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139 Ibid.

140 Ibid.

141 ABC's Report, ¶ 6.

142 Application for Arbitration, ¶ 24, n 9.

This serves to demonstrate Claimant's own non-compliance with its own policy, what becomes crucial.

[195] It seems that Claimant wants to have it both ways, it expects to be regarded as an ethical company, but does not put its policy into practice. Thus, to the extent that Claimant continues to hire suppliers without monitoring them, it itself increases the risks of a future scandal that may affect its business, which, in turn leads to an increase of the respective risk premium.

[196] Therefore, the Tribunal is disinclined to apply Claimant's proposed discount rate of 6% for considering it too low given its own contributions to increase the risks of potential harm taking place. Instead, the Tribunal considers Respondent's rate of 12% more appropriate.

(v) *Loss of Profits Determination*

[197] In accordance with the foregoing analysis, while the Tribunal accepts Respondent's proposed 'but for' scenario; in order to reflect Claimant's current situation, in the 'actual' scenario two variables need to be adjusted based on Claimant's proposal. Thus, the Tribunal will now proceed to make its own assessment of the 'actual' scenario, considering that — as explained above — the gross marging in new countries will be 25% and the sales and administrative costs will be 13%. All other assumptions presented by Respondent will be respected.

[198] Therefore, the 'actual' scenario shall be as follows:[143]

	2011/ 2012	2012/ 2013	2013/ 2014	2014/ 2015
Revenues — new countries	2 514 157	2 539 299	2 564 692	2 590 339
Gross margin — new countries	628 539	634 825	641 173	647 585
Costs - new countries	326 840	330 109	333 410	336 744
Income — new countries	301 699	304 716	307 763	310 841
Revenue — other countries	1 539 280	1 554 673	1 570 220	1 585 922
Gross margin — other countries	461 784	466 402	471 066	475 777
Costs — other countries	153 928	155 467	157 022	158 592
Income — other countries	307 856	310 935	314 044	317 185
Total income	609 555	615 651	621 807	628 026
Net profit after 30% tax	426 688	430 956	435 265	439 618
Discount factor at 12%	0 945	0 844	0 753	0 673
Discounted net profit	**403 220**	**363 727**	**327 755**	**295 863**

[199] In this sense, the total discounted net profit for the 'actual' scenario is **USD1 390 565** (ie, 403,220 + 363,727 + 327,755 + 295,863). Finally, the estimated present value of decrease in incremental profit is the difference between the 'but for' scenario (2,340,598) and the 'actual' scenario (1,390,565), ie, **USD950 033.**

[200] Result of Issue B: Claimant's damages arising out of Respondent's breach are determined as follows:

1. USD27 500 for late delivery;
2. USD80 000 for the reimbursement of the purchase price;
3. USD1 550 000 for the settlements with Doma Cirun and Oceania Plus; and

[143] All the amounts represent USD.

4. USD950 033 for lost profits. In conclusion, the total amount of damages is USD2 607 533.

V INTEREST

[201] Article 3(3) CEAC Rules provides that the notice of arbitration 'shall include […] (f) the remedy or relief sought'. While it is true that — on top of damages — Claimant originally made a claim on interests in its Application for Arbitration in compliance with art 3(3),[144] it later failed to maintain or confirm that claim in its final Statement of Claim. The Tribunal thus analyses whether there is any reason to believe that Claimant either abandoned its original position or is otherwise deemed to have waived its claim.

[202] In its final presentation — its Statement of Claim — Claimant did not address the issue of interest, ie, it did not ask the Tribunal to award them. Article 20(2) CEAC Rules states '[t]he statement of claim shall include […] (c) The points at issue; (d) The relief or remedy sought; (e) The legal grounds or arguments supporting the claim.' In this vein, if Claimant actually intended to make a claim on interest it should have complied with the above requirements; however, it did not.

[203] Should the Tribunal conclude that the petition made in the Application for Arbitration is enough — in and of itself — with no need to further confirm it in the Statement of Claim, as required by art 20(2) CEAC Rules, would turn the provision meaningless. Conversely, pursuant to the *effect utile* doctrine, any legal provision should be construed in a fashion that assigns its existence a reasonable meaning and purpose. Following this rationale, the Tribunal considers that Claimant had the duty to indicate or confirm all of its petitions in its Statement of Claim.

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144 Application for Arbitration, ¶ 38.

[204] Claimant's failure to claim interests, coupled with the fact that its economic expert did not assess the issue either, persuades the Tribunal that — for some reason — Claimant either neglected or decided to waive its original petition on interests.

[205] To reach the opposite conclusion would not only constitute *ultra petita*, but would also infringe Respondent's right to be heard. Article 21(1) CEAC Rules states 'The Statement of Defence shall reply to the particulars (b) to (e) of the statement of claim'. In this line, since the issue was not even put on the table, Respondent did not have the obligation to — and actually did not — defend itself from that claim.

[206] The Tribunal further notes that whereas art 78 CISG states that the aggrieved party 'is entitled to claim interests', art 84(1) CISG states that when the seller is bound to refund the purchase price (as in the case at hand), it 'must also pay interest'. The Tribunal finds that the imperative nature of the provision does not alter the above analysis absent a clear and unmistakable petition in the Statement of Claim; thus complying with art 20(2) CEAC Rules and providing Respondent with the appropriate opportunity to defend itself.

[207] This solution was reached by other tribunals facing the same situation,[145] including cases involving a stricter provision, where the applicable law expressly provided that interest should be awarded even in the absence of request by the party.[146]

[208] In conclusion, the damages awarded to Claimant shall not accrue interests.

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145 Roque J Caivano, *Control Judicial en el Arbitraje*, Abeledo Perrot, Buenos Aires, 2011, 222 ('*Pilliod v Econosto International Holding*').

146 *Cour d'Appel de París*, 30 June 2005, *Revue de l'Arbitrage*, No 3, 2006, 687 et seq.

VI COSTS

[209] Article 40 CEAC Rules establishes that the tribunal shall state the costs of the arbitration. In turn, art 42 CEAC Rules provides that the tribunal shall allocate those costs. Read together, those provisions mandate the Tribunal to first determine the costs, and then decide on their allocation.

[210] According to art 40(1) CEAC Rules 'costs' basically include:

- Arbitrator's fees;
- Arbitrator's expenses;
- Costs of the tribunal-appointed experts;
- Witnesses expenses;
- Successful party's legal and assistance fees; and
- CEAC expenses, etc.

[211] The expenses of the successful party are included within the costs only and insofar that they were claimed during the arbitration (art 40(1)(e)). While it is true that each party has requested the Tribunal to order the other one to pay the costs of this arbitration in their first presentations,[147] they failed to maintain those positions in their final submissions.

[212] Following the same line of reasoning explained in Section 0, they shall be deemed to have waived their positions, especially when neither party has presented a detailed description of their legal fees and costs. Nevertheless, the Tribunal has both the power — and the duty — to decide on the proceedings' costs even if the absence of a petition of the parties to that effect (with the exception of legal fees).

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147 Application for Arbitration, ¶ 38; Respondent's Answer to the Application for Arbitration, ¶ 16.

[213] Hence, as to the other costs, the Tribunal's decision is subject to a prior determination by CEAC Management. Given that CEAC Management has not yet submitted such determination, the Tribunal does not have the necessary elements — at this stage — to appropriately determine those costs nor to allocate them. Hence, since both arts 40 and 42 CEAC Rules allow the Tribunal to determine and allocate the costs in a further decision; the Tribunal deems it appropriate to do so once CEAC Management has rendered its preliminary decision.

VII DECISION

[214] Based on all the facts and legal arguments presented by the Parties in their written and oral submissions which were analysed herein, the Tribunal unanimously renders the following Award:

- Mr Short written witness statement submitted by Respondent is admitted as evidence.
- It is declared that Respondent breached the Contract by delivering the goods 5 days later than originally agreed.
- It is declared that Respondent committed a fundamental breach of the Contract by failing to comply with its cl 12 and art 35 CISG.
- Respondent shall pay Claimant damages in the amount of **USD2 607 533.**
- The determination on costs — and their allocation — shall be decided at a later stage, once the CEAC provides the Tribunal with the necessary information to do so.

- All other claims and requests of the Parties are hereby rejected.

Place of Arbitration: Vindobona, Danubia.

Date: 18 May, 2014

Dr ARBITRATOR 1

Ms ARBITRATOR 2

Prof PRESIDING ARBITRATOR
(Chairman)

Book Reviews

Annamaria La Chimia, *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law*, Hart Publishing, 2013, ISBN 9781849461153, 488 pages

Introduction

Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law shares some captivating and startling concepts. Tied aid refers to aid granted to developing countries on condition that goods and services for the aid-financed projects are purchased from the donor country only. Prior to reading this book, I had never heard of tied aid. When I thought of a country giving aid, I believed that that was where the story ended. However this book analyses how that aid is implemented, and its effectiveness, before legally examining its compatibility to EU and WTO Law. It is an informative and rare contribution to public procurement and development law.

Main Points

Originally born in Italy, the author Annamaria La Chimia is a Lecturer in the School of Law at the University of Nottingham, where she obtained an LLM and a PhD. Prior to joining the School of Law, she was a member of the Italian Bar, working as a lawyer in Italy where she qualified as a Barrister and Solicitor in 2002. She is Head (and founder) of the Humanitarian and Development Procurement Unit of the Public Procurement Research Group (PPRG). Recent publications by the author include *Donors' Influence on Developing Countries' Procurement Systems, Rules and Markets: a Critical Analysis* which can be found in ch 11 of Public Procurement Regulation in Africa and *Untying Aid through the Agreement on Government Procurement: a means to encourage developing countries' accession to the Agreement and to improve aid effectiveness?* which can be found in The WTO Regime on Government Procurement: Challenge and Reform.

The book is divided into three parts. Part 1 starts by considering the practice of tying aid and development aid procurement. It discusses the causes and rationale for tying aid and the effects and problems

associated with it. The analysis in parts 2 and 3 identifies relevant legal rules within the EU and WTO framework, considers how they are interpreted, applied and their relation to tied aid. It is then discussed where amendments may be needed to limit the practice of tied aid using legally binding international instruments.

Part 1

Part 1 of *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law* gives an overall background to tied aid. Overall, Part 1 is opinionated against tied aid. In ch 1, the author argues that as a result of recipient country fulfilling conditions imposed by the donor in order to receive the grant or the loan, the effectiveness of aid is undermined. It leads to higher costs paid for the goods and services purchased and the distortion of the nature of the aid. Furthermore, tying aid frustrates the potential to foster trade between developing countries where aid-financed projects are major potential outlets for trade between neighbouring states.

This is reinforced in ch 2, with the focus on food aid, which can cause economic inefficiencies and delays when tied. Despite the Food Aid Convention (FAC), food aid is overwhelmingly tied. One major issue is because there are no penalties for non-compliance with the FAC.

Chapter 3 begins by giving a historical overview of international efforts to untie aid. It then talks about the Recommendation to untie aid adopted by Members of the OECD's Development Assistance Committee. While on its face this recommendation appeared to encompass much of the OECD's bilateral aid, only 12% of total OECD bilateral aid is covered by the Recommendation due to limitations, exclusions and derogations. Furthermore, developing countries are not members of the OECD, and they should not be excluded from the decision-making process that leads to agreements on aid matters. Although the Recommendation is an important step to untying aid, many issues still remain.

Chapters 4 to 7 analyse case studies implementing tied aid and the procurement process in Italy (no surprises there, given the author's

ties to Italy), the United Kingdom, the European Union and the United States respectively. Italy, in contrast to the United Kingdom, is against untying aid, and has amongst the highest percentage of tied aid in Europe, never reaching the UN targets. Italy implements aid projects by letting the beneficiary country carry out the procurement process. The United Kingdom, on the other hand, who has completely untied all of its aid, maintains responsibility for the procurement process. Italy's aid varies from year to year depending on interests of the political party in power. It suffered massive cuts to its aid budget during global financial crisis. There are two major forms of aid instruments through which tied aid is implemented in Italy: Crediti di Aiuto (soft loans) and Interventi a Dono (grants). There is not, however, a standard set of rules and procedures applied for aid funds or the procurement process. The Directorate General for Development Cooperation (DGCS) is supposedly, on an international level, contributing to the coordination of standard donors' procedures, when it itself has no internal consistency.

Chapter 6 analyses EU policies towards tied aid, in particular the scope of 1905/2006 Regulation on establishing a financing instrument for development cooperation. While the European Union supports untying, no impact can be had until donors agree on reciprocal untying policies. Chapter 7 reveals that aid from the United States is usually tied, whether in the aid projects itself, or on the transportation of aid commodities. Attempts that have been made to substantially untie aid have failed.

Part 2

Part 2, titled 'Tied Aid and the EU' analyses EU legal rules in regards to tied aid. Chapter 8 gives strong arguments to suggest that implementing tied aid could fall within the Common Commercial Policy, the competence of which is exclusively the European Union's. This is because of its similarity to export credits, a form of export aid, which can be encompassed under the broad definition of trade. If it does, then Member States would not have the power to implement tied aid, and would be infringing the policy if they did so. However, tied aid does not only exhibit trade elements. Its interests and

objectives also lay in development. The competence of development policies is that of a Member States, and thus Member States would be free to implement tied aid. No one view currently prevails.

Chapter 9 then investigates the compatibility of tied aid with the rules of free trade in the Treaty on the Functioning of the European Union, with the conclusion that tied aid agreements do not conform to this Treaty, no matter what the procurement process. Chapter 10 investigates whether the EU Public Procurement Directives apply to tied aid. It is revealed that the will apply if the donor country has carried out the procurement process, but will not if the responsibility has been deferred to the recipient country, as the recipient country is not a member of the European Union.

Part 3

Part 3, titled 'Tied Aid and the WTO' analyses whether there are any WTO rules applicable to tied aid. Chapter 11 reveals that WTO multilateral rules on trade apply to tied aid in a limited and uncertain way. Non-discrimination principles under the agreement on trade in goods (GATT), as well as the agreement on trade in services (GATS) exclude government procurement. Chapter 12, which examines tied aid in the context of the Agreement of General Procurement (GPA), concludes that tied aid does not contravene the GPA due to a specific exemption for tied aid.

Overall in Parts 2 and 3 it is concluded that the practice of tying aid is contrary to international and regional agreements aimed at market liberalization and built upon the principles of free trade, such as the WTO and EU. Tied aid as a form of protection to the donor country is contradictory to these principles, in the very sector where there is need for optimum allocation of resources and for efficiency.

Analysis

As the first half of the book is devoted to the context of tied aid, it was easier to comprehend as a novice reader than the technicality and language involved in the second half regarding EU and WTO law. From the very first pages you are confronted with shocking statistics,

for example, that 1.1 billion of the worlds 6 billion live on less than USD1 a day. Such techniques were very persuasive, inducing outrage while simultaneously highlighting the necessity of aid on which so many rely, and thus the importance of making aid as effective as possible. This goal was very clearly achieved.

While not disagreeing at all with the author's arguments, I also understand why a donor country would want to give aid on the condition that goods and services be purchased from that country. The donor country is giving aid: is it not logical that they should be free to put conditions on the aid before the country it is donated to can have it? While aid could be used more effectively if it was not subject to any geographical limitations of procurement, isn't any aid better than nothing? It is commonly said that nothing in life comes for free. Tied aid is a good way to ensure that the donor country will still be economically stimulated through the expenditure on goods and services. It is a selfish view, and does undermine the effectiveness of aid, yet it completely reflects the society in which we live. Furthermore, to abolish tied aid could mean the donor country reduces the amount of aid it gives, or in the extreme, stop giving aid entirely.

The author however does not neglect to talk about such points. This is clear when both the advantages and disadvantages of tied aid are discuseed before the author gives her informed opinion. It is certainly not a prejudiced or one-sided book. For example, in ch 2, the author gives the donor' rationale for tying food aid, which included the argument above, as well as the unsustainability of local purchases and the risk of corruption. This would then be countered with the risks to damaging local production.

To adopt the arguments in *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law* and begin to implement untied aid, there must be a degree of selflessness. As was argued in ch 2, aid (here the author was referencing specifically to the UN Special Rapporteur on the right to food) must be seen as a human right, and thus an obligation, not a charitable act. In saying that, the

arguments against tied aid are not purely moral. Half of the book is devoted to its compliance with legal rules. While Part 1 defined the issue of tied aid, its causes and the importance of untying it, the author's aim in Parts 2 and 3 was to determine whether tied aid was compatible with EU and WTO laws. The author has adequately determined that in every chapter, while offering solutions and recommendations to untie aid.

This was displayed in ch 2, where it is argued that food vouchers rather than donations are effective because they ensure aid is spent correctly while encouraging local market sustainability. Furthermore, in ch 8, when it is discussed as to whether tied aid falls within the EU's or a Member States competence — two equally important objectives — the author offers a solution which adopts both the legal bases. The obligations of tied aid are extensive, leading to the inference that it is of a trade nature, and thus should be governed by the CPP. However this should not detract from the actual nature of the agreement, for development cooperation. The author concludes that the participation of both the European Union and the Member States is required, but that the Member States only bound to conform with the EU decisions made in regards to the condition of tied aid.

Evaluation

The importance of tied aid has been pointed out in economic literature but there has been little written on the legal aspects of tied aid practices. This book fills such a gap. As stated above, Annamaria La Chimia's previous works focus on tied aid, and as such much of her time researching has been devoted to these questions. Thus, not only is her passion for the topic is evident, but her judgement is expert and invaluable.

The book is well structured and concise. This facilitated ease of reading on such a complex topic. While the first half of *Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law* would be of interest to anyone who is foreign to these concepts (as they were to myself), it is still easy in the second half to get bogged down in the complexity of EU and WTO law, and thus would

be more suited to someone in a relevant field, or with a higher degree of general legal knowledge. In saying that, it is extremely important that this topic become common knowledge, as to raise awareness directly impacts the lives of millions.

The book is quite expensive at around $150, but would be worth the time and cost for academics in the field on EU and WTO law, NGOs and practitioners working both in the field of public procurement and development policies.

Conclusion

Ultimately this book gives a very thorough background on tied aid generally, the concepts behind it and the effects it has on the objectives of aid. Development aid can help achieve the targets to reduce poverty and raise the living standards of the poor in developing and developed countries, but these targets are not being met. A major contributing factor is because the aid is tied, and not being used as beneficially as it could. This is extremely important in a world where current aid resources are said not be sufficient to address developing countries needs. Of course, this requires an individual to look beyond their lifestyle.

Tying aid protects the domestic market of a donor and even protects against corruption. However I agree with the author in thinking that this could not outweigh the detriment being caused by tied aid, namely the smaller amount of aid that can be purchased from the donor country rather than the recipient country, and the damage to and prevention of local market production in the recipient country. Tied aid has a ripple effect as this also discourages developing countries from trading with each other. While tied aid will give immediate help, it undermines the long-term objectives of aid.

Tied Aid and Development Aid Procurement in the Framework of EU and WTO Law is also extremely enlightening in a legal sense, when examining the compatibility of tied aid with EU and WTO law. Though many of these laws appear to be incompatible with tied aid, when it comes to reality, the laws are disappointing in accomplishing

the purpose of untying aid. In order to achieve a reduction in poverty, rather than donor countries providing more aid, they can untie their aid and use it more effectively. This needs to be a more active concern for institutions such as the EU and the WTO if development targets are to be met. The author has done a brilliant job of compelling these thoughts.

Tamlyn Jayatilaka

Jan H Dalhuisen, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law*, Hart Publishing, 2013, ISBN 9781849464512 (hbk), 350 pages, $136

Introduction

As private law and its transnationalisation has become increasingly important at the operational level in international commerce and finance, *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law*; a book by Jan Dalhuisen provides a clear and concise explanation of the concept of transnationalisation. Dalhuisen synthesises and integrates diverse bodies of law into a coherent written description that facilitates the ease of reading and comprehending the complex topic.

Main Points

Jan Dalhuisen is currently a Professor of Law at King's College London and Miranda Chair in Transnational Financial Law at the Catholic University in Lisbon. He has taught at prominent Law Schools including the University of California at Berkeley, the Tsinghua University in Beijing, the University of Hong Kong and the University of New South Wales. Dalhuisen is a member of the New York Bar, a corresponding member of the Royal Netherlands Academy of Arts and Sciences, and fellow of the Chartered Institute of Arbitrators in London. His main expertise is in international arbitration and litigation, modern financial products and financial regulation.

This is the fifth edition of Dalhuisen's distinguished work on transnational and comparative commercial law. The book covers an all-inclusive range of topics relating to the modern law of international commerce, finance and trade. Since the release of the fourth edition, Dalhuisen's work has been divided into three volumes, each of which may be read independently or as part of the complete work. The subject matter of this book is accurately portrayed in the title and offers a comprehensive, yet modern approach to discussing the increasing internationalisation of the law. Volume one explores the foundations of private law; the concepts and theoretical basis of

transnationalisation of the law; the structural differences between civil and common law and the autonomous sources of the new law merchant or modern *lex mercatoria*.

Part I: The Transnationalisation of Commercial and Financial Law

The introductory section discusses the concept of transnationalisation and its status in civil and common law. The text draws on the distinctions between the status of commercial and financial law in the different legal systems. Despite their differences, Dalhuisen accepts that commercial and financial law must still be considered as national. He goes further to suggest that the evolution of civil and common law, their origins and their differences, remain relevant in discussing the nature and application of transnational law. As a result, Part I of the book principally focuses on whether the civil and common law approaches should be followed, or if a different approach all together should prevail.

Part I provides a neat analysis on the coverage of domestic and transnational commercial and financial law in civil law and common law countries. Dalhuisen explores law formation at the transnational level, its reaction to system thinking, its apparent need for more dynamic law and its legitimacy. Dalhuisen offers further consideration and discussion on additional theoretical notions that are still used in domestic law to set commercial law apart. The book illustrates this point from the view that such traditional notions do not best suit the transnationalisation concept. Part I goes further to examine the origins of civil law and common law in relation to the operation of private law before the book discusses the emergence and development of the modern *lex mercatoria* in greater detail.

In discussing the sources of law in the civil and common law tradition in relation to transnational private law, Dalhuisen looks at nationalism and systematic thinking in civil and common law. He goes further to consider the revival of the traditional sources of law through liberal interpretation techniques and the survival of transnational legal sources in commercial law by discussing the attitudes of EU and

Public International Law. Part I provides an insightful yet extensive analysis on autonomous legal sources; the fundamental principle, the general principle, custom and practices, party anatomy and treaty law. In addition, the book goes further to discuss domestic laws as an autonomous source of transnational law.

Part I also introduces the emerging new transnational merchant, more commonly referred to as the modern *lex mercatoria*, a legal principle that has a reoccurring presence throughout the book in its entirety. Dalhuisen suggests that the merchant law is less systematic and more pragmatic, particularly in its method, coverage and responsiveness. Dalhuisen is of the opinion that it is now in its formation and operation essentially closer to the common law, which is not statist per se nor systematic and less averse to other sources of law. He goes further to suggest that the principle is more pragmatic as it moves from case to case on the basis of practical needs.

The final segment of Part I considers the cultural, sociological and economic undercurrents in the formation of transnational commercial and financial law. In discussing the topic as a whole, Dalhuisen looks at the different legal orders, their manifestation and the competition between them. The book starts by evaluating the 20th century dominance of statist legal orders and the effects of globalisation. The book goes on to discuss the operation of the different legal orders in private law; the evolution of US federal commercial law, transnational private law concepts in the European Union and the international human rights law in the European Court of Human Rights. Part I concludes by examining the international commercial and financial legal order; the role of legal theory, legal history and comparative law.

Part II: The Nature, Status and Function of Private International Law

In discussing the concept of modern private international law, the book acknowledges that there has been a recent widespread unease regarding the traditional methods and results of private international law. Dalhuisen contends that it is nevertheless important to

understand what traditional private international law is, what it aims to achieve and how it operates. As a result, Part II principally focuses on the underlying concept of modern international law; it's earlier approaches and in most extensive detail, the drawbacks of the modern conflicts rules.

Part II begins by discussing the view of Friedrich Carl von Savigny, a German jurist and legal scholar, who viewed all law as national and territorial. The book follows Savigny's journey throughout the 19th century as he proceeded to formulate a set of objective conflicts rules aimed at reaching applicable national law in cases with international facets. The book contends that this approach was viewed as fundamentally nationalistic and an important by-product of the 19th century notion that all law was national and that there were no longer universal legal concepts, rules of principles.

The book transitions to examine the principle aim of the new method, the *lex mercatoria*, which was produced to create clear conflict rules from which domestic law could automatically follow. Dalhuisen acknowledges that the new approach was intended for situations where international flows were limited and the perceived conflicts were considered insubstantial. Although the *lex mercatoria* was intended to resolve issues involving the applicability of domestic law to international cases, Dalhuisen observed that the approach was faced many complications.

Part II primarily focuses on comparing the varied modern European and US approach to conflicts law. This section of the book provides a concise history and evolution of private international law along with its current position in the 21st century. Dalhuisen expresses that he is of the opinion that a further refinement of the traditional European model proved necessary to create a more refined private international law approach. This process is deemed to have lead to a substantial refinement of the method proposed by Savigny. On the other hand, Dalhuisen discussed the unease experienced by the United States in regards to the 19th century conflicts rules and the reason why the United States ultimately lead to a substantially different approach to

interstate conflicts. The book provides that the US approach to conflict law was considered to be more sensitive to substantive law considerations than the traditional European approach. However despite their differences, the book notes that the US approach has not gone unnoticed in Europe.

Part III: The Operation and Substance of Transnational Commercial and Financial Law or the Modern *Lex Mercatoria*

Part III of the book provides a brief outline of the history relating to the old *lex mercatoria* that disappeared as a result of the nationalisation in Europe in the early 19th century. Dalhuisen notes that private law became purely national and territorial as the political objective of the 19th century was strongly connected with an emergence of a modern state. The book acknowledges that this process of modernisation left international commercial transactions and the laws applicable to them exposed because of the old *lex mercatoria*. As a result, this part of the book is soley dedicated the concept and operation of the hierarchy of principles and norms in the modern *lex mercatoria*.

Part III provides a full introduction to the concept of the modern *lex mercatoria* as a hierarchy of norms. The book acknowledges key questions concerning the application of private law to commercial and financial transactions is whether a whole new pattern of substantive transnational law can exist within an own, non-territorial non-statist legal order. The book contends that such a legal order is currently operating in international trade and finance as a natural consequence of globalisation. Dalhuisen goes further to suggest that this order has now acquired the capacity to move forward in creating its own laws and law-making institutions such as ICC committees for Incoterms, UPC and international commercial arbitrations for dispute resolution.

A key part of Dalhuisen's examination of the modern *lex mercatoria* system focuses on its concepts, operation and objectives. The book submits that practitioners, courts and arbitrators would be better guided in matters concerning the application of substantive private

law by considering the modern *lex mercatoria* and applying transnational law as oppose to private international laws. Part III questions why all private law must be domestic per se and finds its origin soley in one state. The book suggests that in this present day, it is no more than a political philosophy that can hardly be maintained at a practical level.

The final segments of Part III indicate that there is now more room for transnational private law that is not territorial, pre-conceived or static in the international commercial and financial legal order. The book suggests that it is the ambivalence of the subject and the lack of knowledge about the functions of the modern *lex mercatoria* that contributed to its rare application in arbitration statuses or official commentary. The potential application of modern *lex mercatoria* was suggested in UNIDROIT and European Contract Principles, although neither source expressed any views on what it is or how it works. Despite this, the book indicates that it has now become increasingly accepted that arbitrators apply the modern *lex mercatoria*.

The book concludes by stating that the application of the modern *lex mercatoria* will be a matter for the ordinary courts and international arbitrators. Part III goes further to suggest an interesting idea to set up a 'central highest international commercial court' to effectively guide the development of the modern *lex mercatoria*, to develop the criteria for balancing governmental interests and to potentially function as a normal appeal court in respect of decisions taken in the ordinary commercial courts in the first instance. Dalhuisen suggests that the development of such a court would be limited to giving preliminary opinions on points of transnational law only when asked by commercial courts, arbitration tribunals or by the parties. Dalhuisen is of the opinion that this notion would present a helpful and significant development, one that is not far-fetched at all.

Conclusion and Evaluation

Volume one of Dalhuisen's works makes a significant contribution to the study of transnational commercial, financial and trade law. Dalhuisen's considerable experience in the field of international

commercial and financial law is noticeably reflected in the overall structure of the book. The brilliance of Dalhuisen's approach to this book is that he discusses each concept in remarkable scope and depth, yet his writing style is so relaxed and convincing. Volume one offers a comprehensive analysis of the history and development of the *lex mercatoria* approach while offering valuable policy reform suggestions that are relevant to the future application of the principle on an international platform.

For students that are unfamiliar with the topic, Dalhuisen has included plenty of historical and background context to effectively assist readers in understanding the significant arguments and legal concepts discussed throughout the book. Nevertheless, I am of the opinion that the book lends itself more easily to students undertaking research or advanced study in the field of transnational law, practitioners or academics, as the book is written to the upmost academic standard.

In conclusion, this book will be highly useful for both students and seasoned experts as it is concise, educational and highly authoritative. For all readers within the legal profession or readers with an interest in mordern transnational commercial law, this text is a highly regarded resource and a worthwhile investment. I would highly recommend this book as a valuable contribution to legal literature and suggest that anyone who reads it, or reads parts of it, will come away with a good understanding of the increasing transnationalisation of the law. *Dalhuisen on Transnational Comparative, Commercial, Financial and Trade Law* is thoroughly recommended as a must have for readers with an interest in international commerce, finance and trade.

Mila Banovic

CH (Remco) van-Rhee, Fu Yulin (ed), *Civil Litigation in China and Europe*, Springer, 2013, ISBN 9789400776661, 362 pages

Introduction

This book succeeds in its aim of providing an informative comparison of the role of the judge and the parties between the Chinese legal system and the legal systems of various European countries. It is composed of a series of essays evaluating the efficiency and strengths and weaknesses of each system. The purpose of the book is to give the reader an in-depth, balanced knowledge of each system, in a comparative manner. 'It provides an overview and an analysis of how these respective roles have been changed in order to cope with growing caseloads and quality demands. It also shows the different approaches chosen in the jurisdictions covered.'

The book consists of seven main parts and an introductory chapter. Each part or chapter of the book follows a general formula, allowing for an easy transition through legal systems. They generally begin with a general analysis of whichever legal system is under consideration, a brief historical background, a discussion of case management in that jurisdiction and the development of the current rules for civil procedure, followed by an analysis or suggestions for reform.

Part 1: China: Mainland

The most substantive part of the book focuses on China with 132 pages dedicated to its legal system, a great deal more than any of the European legal systems. China was focused on in such great detail not just because it is the fastest growing economy in the world, has the largest population, but because the areas of civil procedure is currently undergoing rapid changes, making it a very topical issue. It was also explained in the introduction that this area was focused on more than any other particularly due to the lack of resources on the Chinese judicial systems in languages other than Chinese. This volume was published with the aim of providing an in-depth analysis and document of the Chinese civil system to a foreign audience.

The second chapter begins by stating that the 'Chinese civil justice system seems to be more efficient compared to its European Union counterparts'. However, the goal of the essay is to investigate whether or not this efficiency comes at the expense of quality. The author's, Wang Yaxin and Fu Yulin provide a solid introduction into the topic and begin by explaining into the historical background of the Chinese Civil Procedural Law. The author's then offer a very detailed example of a Chinese civil case and the procedures and steps that must be made, from filing through to judgement. This allows for a solid foundation of understanding to a reader unfamiliar with this process, which then leads into a discussion and analysis of case management, the roles of the parties and the judge and the efficiency of the process. The author's conclude that despite its high rates of efficiency, which come as a result of the country's rapid economic development, the public confidence and legitimacy of the courts is an issue that needs to be fixed. The author suggests that to do this, the rule of law needs to be more heavily enforced and the roles and relationships between the judges and the parties more developed, rather than the focus being placed on the internal management powers of the courts.

The third chapter, by Cai Yanmin, is more heavily focused on case management. Following from the first chapter, it investigates the fairness and quality of the judicial system, as well as using the mediation rate as a method of examining the effectiveness of the Chinese civil system. Much like the first chapter, this chapter analyses whether their strive for efficiency has come to the detriment of the quality of the judicial system. The author states that the focus of the judicial system needs to be shifted from efficiency to the enhancement of quality. This author states that the lack of alternative dispute resolution mechanisms is a large part of the problem. This chapter is well researched, as the author stated that she had talked to Chinese judges as part of her research, who backed her findings. The author also comments on the limited role of the parties, noting that they are just subjects to the procedure and that the case management powers of the court play a much stronger role. The author calls for the parties to be given a more substantial role in the proceedings.

The fourth chapter focuses on trial management and is written by Wang Fuhua. The introduction provides an explanation of the concept of trial management, which aims at improving the efficiency of the justice system and the effectiveness of the legal system, through the emphasis of the administrative functions of the judiciary. The author states that trial management is the internal administrative management of the court, and in narrower terms, can be rephrased as case management. In China, this means the integration of individual case management and the courts' overall administrative management and is totally different from Western case management. The author notes that in China, the role of the judge is not just to adjudicate but also to implement national policies and even educate the public. Case management extends the powers of the judge. The litigants in a proceeding have a more limited role.

In summary, the conclusion that can be drawn from Part 1 is that the Chinese system places efficiency over almost everything else, often to the detriment of the quality of the judiciary and the public's confidence in the judicial system. The court and the judge play the most significant role in the proceedings, whilst parties have a more limited role to play. All author's agreed tat significant reforms were needed to enhance public confidence and the overall quality of the system.

Part 2: China: Hong Kong

Hong Kong is also given a special focus, in particular its historical ties to the English legal system. In the fifth chapter, the author's Peter Chan, David Chan and Chen Lei, note that traditionally the judge took a more passive role in proceedings, however this led to cases being run more by the parties and not the courts, due to the rules being ignored by parties and not enforced by the courts.

The author's provide a firm background of the history, nature and origins of the civil procedure system in Hong Kong, in a succinct and informative matter. This then follows through to an analysis of the transferral of powers from the parties to the courts and judges, why

these powers were transferred and the effect this had on the judicial system.

Chapter six follows on with a detailed analysis on alternative dispute resolution and the impact this has had on Hong Kong's judicial system, by Christopher To. The author comments on the significant transformation 2009's Civil Justice Reform had on the judicial system in Hong Kong. He notes the popularity of arbitration in Hong Kong and the success of recent legislation in the area and comments on the development of mediation in recent times. The author concludes by stating that the Civil Justice Reform enabled the development of alternative dispute resolution in Hong Kong, a very positive effect and transformation.

Part 3: Austria and Germany

The rest of the book delves into the European systems, beginning in Part 3 with Austria and Germany. Austria's jurisdiction with modern judicial case management has the longest tradition and Germany is examined because it currently has one of the most efficient and high quality justice systems in Europe.

This part contains three concise chapters beginning with chapter 7, by Andrea Wall, which examines the success of legal reforms in Austria and Germany and states that the efficiency and competence of these systems relies a lot upon legislation, in particular, their individual Codes of Civil Procedure. This chapter is well structured, looking at the history of the division of powers between judges and parties before examining the present situation regarding civil procedure and case management as well as recent reforms in this area and the effects these reforms have had.

Chapter 8 focuses specifically on the Austrian Model of Cooperation between the Judges and the Parties, written by Irmgard Griss, a former Austrian Judge and focuses on the interaction and relationships between the parties and judge. It is a short but interesting point of view.

Chapter nine, by Burkhard Hess, looks at 'mediation judges' in Germany and the impact the EU standards and national developments have had. This is another concise but informative and interesting chapter on judicial mediation.

Part 4: Croatia

Croatia was chosen, as it is a country in transition, moving forward from its turbulent past.

Chapter 10 discusses the role of judges and case management. The author, Alan Uzelac, notes that the judges play a very active role in proceedings and the parties role is somewhat limited and suggests that this, and the reluctance of judges to enforce civil procedural rules and adhere to processes, is a reason for the inefficiency of proceedings in Croatia. He notes that in practice, civil procedure is very different from what is discussed in theory. He states that awareness, judicial scandals and growing media interest in the serious deficiencies of the system have led to recent reforms from 2000 onwards, including significant reforms to the Code of Civil Procedure. The author believes, though he notes it lacks the support of concrete statistics, that in practice these reforms have been insufficient and practice remains relatively the same.

Chapter 11, by Mario Vukelic, provided a brief look into case management and commercial courts in Croatia. The author explains the court hierarchy, case management system, the appointment of judges, the commercial courts and concludes with an analysis of the problems within commercial courts, mainly, their inefficiency and the need to recognise the faults of the system in order to fix them.

Part 5: Italy

Italy was used as an example of a jurisdiction where efficiency of a civil procedure is still largely absent despite a large number of reform attempts and a high number of courts, judges and lawyers. Italy has the highest number of incoming civil cases in Europe and there are extremely long delays in cases being heard. Part 5, focusing on Italy consists of one chapter, ch 12 by Elisabetta Silvestri. This chapter

examines 'civil procedure in crisis'. The author explores the history of civil procedure and the Code of Civil Procedure, before explaining the court structure and the processes of a civil case in Italy. She also notes to this day, the criminal and civil justice system in Italy are in crisis, and have been in a state of crisis since World War 2. However, she declines to participate in the national 'blame game' or suggest any magic remedies that could 'reverse the fate of Italian civil justice'. In conclusion, the author paints a very negative picture of the Italian justice system, with little hope for any improvement in the future.

Part 6: The Netherlands

The Netherlands provide an example of a business like, no nonsense approach in regards to civil procedure and the successful reforms introduced in 2002, which aimed at strengthening the position of the judge to increase efficiency are examined.

Chapter 13 by CH (Remco) van Rhee and Remmme Verkerk, is a well-structured and informative essay. The authors chart the evolution of the Dutch Code of Civil Procedure into its present state as well as noting the recent reforms in this area, in particular, the Rules of Civil Procedure. The author then delves into the effects of these reforms on efficiency, quality and costs, which have been mostly positive, and then the failure of these reforms, including problems caused by them and reform proposals for the future, a different but positive and informative view, as is the inclusion of a section entitled 'litigant satisfaction'. The author's then noted the increasing relevance and importance of mediation in the Netherlands, now an established option for settling a dispute. The author's conclude by examining the relevance of the Dutch reforms to other jurisdictions, stating that to reform a civil justice system, it is not just the rules that need to be changed, but the processes and finances of the system too.

Rob Jagtenberg takes a different approach in ch 14, by focusing on mediation with reference to the experiences of several other countries, in order to analyse mediation on a wider scope. The author notes that

while mediation is widely used, there is a definite lack of framework in the system and ends with no firm conclusion or solution.

Part 7: Romania

The next country to be observed, Romania, may appear to be an odd choice, however it was chosen due to its maintained strong and active role of the judge after the fall of communism. Chapter 15, by Serban S Vacarelu and Adela O Ognean, sets out a detailed history of Romanian civil procedure, before explaining the court structure and processes in bringing a case to trial. It then examines mediation, a relatively new addition to the civil procedural system in Romania. The author's conclude by remarking that 'Romania is in a continuous state of reform, with various amendments being passed almost every year'. Their usefulness, however, remains questionable.

Part 8: Annex

The two annex chapters on England and Wales and on France, were included for the readers benefit as very prominent procedural lawyers wrote them.

In ch 16, the author, Neil Andrews, analyses case management in England and Wales in detail. Chapter 17, by Emmanuel Jeuland, documents the development of case management in civil proceedings in France and the workings of the French civil system. Both chapters are relatively concise and do not follow the same structure as the other essays but provide a brief and interesting antidote on case management in their jurisdictions.

Evaluation and Conclusion

Fu Yulin is an Associate Professor at Peking University Law School, teaching Civil Procedure, arbitration, legal practice and resolution of civil and commercial dispute in China. She has a PHD in the field of Civil Procedure from the People University of China and a Master's Degree in the field of Civil Law from Peking University. She has worked as an Arbitrator on both Chinese and International Arbitration boards and has worked in various international Universities as a scholar. Professor Yulin has published three books, focusing on

judicial hierarchy and civil procedure in China, as well as 19 articles on similar subject matter. She is easily considered an expert in her field, Chinese Civil Procedure and has a vast and impressive range of credentials and experience in the area.

C H (Remco) van Rhee is a Professor of European Legal History and Comparative Civil Procedure at Maastricht University in the Netherlands, as well as being the director of Foundations and Principles of Civil Procedure in Europe of the Ius Commune Research School. His PhD was on early-modern Civil Procedure and was obtained from the University of Leiden, which was received with High Distinction and awarded the prix d'excellence of the Praemium Erasmianum Foundation. He is considered an expert in the field of comparative law, civil procedure, the history of courts and education and European legal history and is actively involved as an advisor to the Council of Europe for civil procedure reforms and also works as a scientific organiser of major seminars and workshops throughout Europe and Asia in his field. He is a member of many international editorial boards, as well as many legal associations and councils.

The writing is clear and easy to read. The structured format, generally followed in each chapter, allows for easy reading and the use of headings separates each topic neatly, meaning information is accessible and not lost amongst the vastness of information provided. It also enables efficient reading, especially useful for researching and referencing purposes. Despite some essays being translated into English, there are no major grammatical errors or misinterpreted words or phrases.

The goal of the book and indeed each individual essay, is clearly indicated in the introduction by the books' editors. That aim is to provide a general understanding and analysis of the legal systems of a particular country, the 'development of the current civil procedural rules in historical perspective' focusing on case management, 'the court's powers to actively manage the progress of a civil case' and 'how and why such powers have been granted'. More specific issues were also addressed by each author. These include: the judges'

specific powers to control the conduct of parties and procedures in Alternative Dispute Resolution, before proceedings and after proceedings, sanctions judges are able to impose, powers that have been transferred between the parties and judges and the reasons for these transfers, as well as how and the extent to which these powers were transferred and the result of these shifts of power in relation to costs, delays and quality of proceedings and outcomes.

As the editors established a clear subject matter and specifically stated the main areas of focus, it appears that each essay has covered, as much as possible, the main issues focused on by the book. As a reviewer, I cannot think of any major issues that have been neglected or that I would have liked to examine more thoroughly.

I believe that this book would be most useful to students with an interest in international law and civil proceedings, as it provides a broad and general understanding of the subject matter in Europe and a more comprehensive viewpoint of the role of the judge and the parties in Chinese civil proceedings. It is obviously not exhaustive, but is a good starting point in research or to provide a general basis for an individual's knowledge in this area.

Each essay has been written from an unbiased, informative perspective. The tone is clear, unbalanced and based in fact. To approach it from any other perspective would not be as informative or useful in terms of gaining knowledge and understanding of the subject matter.

This book makes a very positive and useful contribution to the existing knowledge of the subject area, international civil procedure. By combining the information presented on Chinese civil procedure with that presented on European civil procedure, readers are given a vast area of comparison and therefore a greater understanding of the area. There isn't a lot of material available that delves into both European and Chinese law and combines the two. This book provides an in-depth look into Chinese civil procedure, which is of great benefit to Western readers, as it provides a solid and unbiased

understanding of the Chinese methods, information that is not very readily available or easily accessible, especially in clear English.

This book is definitely worth the cost. As stated before, this information, particularly in relation to China, is not easily accessible or readily available to the English speaking market. The information provided in this book is well researched, credible and very straightforward. The way this book has been structured makes for easy and efficient reading and allows for stress-free pinpointing of specific information. The authors have done well in providing enough context, historical and background, in each of their essays to assist the readers' understanding. The retail cost of $220.99 may dissuade students from purchasing it, however, I would recommend this book to anyone, as anyone who reads the book, or even parts of the book, will take from it a good understanding of the practices of civil litigation and the role of the judge and parties in any of the countries provided.

Amelia Arndt

Ruth Charlton and Micheline Dewdney, *The Mediator's Handbook: Skills and Strategies for Practitioners,* Thomson Reuters, 2014, ISBN 9780455233291, 426 pages, $130

Introduction

Alternative dispute resolution in Australia stretches as far back as the 1980s, where it was used in community justice programs.[1] This inevitably led the introduction of mediation in the 1990s. Since its insertion into the Australian legal system mediation has under gone rejection, transformation, modification and finally acceptance. It is now a prominent feature of the legal process throughout Australia. For example, mediation is mandatory in the state of New South Wales in certain circumstances.[2] Initially these mandatory requirements were met with apprehension, however, with the globalisation of the market place attitudes have shifted. People now see the value in mediation in its ability to preserve relationships, as well as the characteristics of collaborative discussion, creative problem solving and cost savings.

The Mediator's Handbook published in 2014 is the 3rd edition. Both the 1st and 2nd editions of the book were positively received as a pragmatic resource by the legal community. The text is set out in six parts: Part 1 considers mediation generally; Part 2 looks at the procedural variations in mediation; Part 3 explains the pre-mediation steps; Part 4 examines the necessary skills for mediation; Part 5 outlines strategies and Part 6 discusses issues that are specific to mediation. Chapters 7, 12 and 18 have been updated and chs 13, 14, 19, 20 and 22 are new additions.

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1 Laurence Boulle, 'Minding the Gaps — Reflecting on the Story of Australian Mediation' (1999) 11 *Bond Law Review* 2, 217.

2 Since 1996 commercial lease disputes require mediation before they are able to be directed to a tribunal. Since 2002 mediation is required before workplace injury claims can proceed to the District Court. John A McGruther, 'Mediation Developments in the Australia/Pacific Region' (2014) 25 *Australasian Dispute Resolution Journal* 73.

The authors are Ruth Charlton and Micheline Dewdney together with Geoff Charlton. Ruth Charlton is a solicitor in private practice and practicing full time as a mediator. Ruth is also the editor of *Australasian Dispute Resolution Journal* and is experienced as a course leader, trainer, coach, assessor and speaker. Micheline Dewdney is a solicitor of the Supreme Court in New South Wales. Micheline has conducted over 2000 mediations, is a part-time presiding lawyer in the Mental Health Review Tribunal and an arbitrator for the Workers' Compensation Commission. Geoff Charlton is a solicitor solely practicing as a specialist mediator of commercial, farm debt and parenting disputes. Geoff has been involved in mediations for 22 years and is a nationally accredited mediator and Family Dispute Resolution Practitioner.

Main Points

Part 1 of the text gives the reader an overview of the mediation process. The authors concisely introduce the topic and take the time to acknowledge the various models of mediation available. Chapters 2 to 8 break down the authors' 7 stage process of mediation. The process begins in ch 2, also called stage 1, with the mediator's opening statement. The chapter goes through content, tips and co-mediation considerations. It conveniently finishes with sample opening statements. Chapter 3, or 'stage 2', moves to the parties' opening statements and mediator's summaries. This chapter provides a short discussion on why opening statements are necessary. Essentially, it is so the mediator can get a wider picture of the situation without getting lost in detail, encouraging participation of the parties and if required to create doubt. The chapter then moves to a detailed 'how to', this is an expansive guide and it covers from who should begin to how to deal with interruptions. It finishes with guidance on giving summaries of the parties' statements and alternate methods of commencing a mediation.

Chapter 4, also called stage 3, deals with issue identification and agenda setting. The authors highlight the importance of an appropriate agenda for achieving the goals of the session. Chapter 5, stage 4, provides detailed information on exploring the issues and

how to conduct the first joint session of the parties. This is an important chapter to novice mediators as it tackles the often stumbled over task of how to pick the first issue to resolve. The chapter ends with a useful table containing the do's and don'ts of issue exploration. Chapter 6, stage 5, described private session and outlines the requirements, timing and strategies used in these session.

Chapter 7, stage 6, is on negotiation and problem solving and is one of the revised chapters of the edition. This chapter describes how a mediator transitions into this final stage and its purposes. The authors point out that this is often the most challenging stage in the process but some times, depending on the circumstances, it can merely be a winding up session. Again, the authors make use of a do's and don'ts table as a summary of the chapter. Chapter 8, stage 7, covers how a mediator ends a mediation session. The chapter firstly deals with the often awkward task of adjournment through some straight forward tips. It then moves on to discuss how a mediator deals with issues that are not resolved.

Part 2 of the book discusses the procedural variations to the models of mediation outlined in Part 1. Chapter 9 beings this part and deals with the concept of co-mediation. Co-mediation contains unique features and provides a valuable opportunity to train beginner mediators. The authors give an unbiased view of the practice by describing both its advantages and limitations. Chapter 10 tackles the idea of mediation over the telephone. Chapter 11 addresses multi-party mediation. Mediation involving more than three parties requires signification adaptions to the mediation model described in Part 1. This chapter takes the reader through the stages of mediation again, highlighting practices that need to be changed in order to accommodate a larger number of parties. Chapter 12 is one of the updated chapters and describes shuttle negotiation and shuttle mediation. Shuttle negotiation is where the mediator 'meets separately with each party, moving backwards and forwards between them'. Shuttle mediation differs from shuttle negotiation because it is a planned occurrence rather than one of convenience. It is generally decided early on that the parties will not ever meet face-to-face. The final chapter in Part 2

is ch 13, titled 'Family Dispute Resolution' and is a new edition to the handbook. The reason for this new chapter, its main focus is the regulatory changes brought about by the 2006 amendments to the *Family Law Act 1975* (Cth). The chapter talks the reader through the amendments and outlines their affects on mediators working in family law. A notable point made by the authors is that 'family dispute resolution practitioners' are now required to have higher qualifications in the areas of law, psychology, conflict management and mediation.

Part 3 of the text covers the pre-mediation stage, which essentially consists of procedural based issues. Chapter 14, titled 'intake', is another new addition to the text. 'Intake' refers to the initial discussions with the parties involved in the dispute. This chapter offers a neat explanation of the goals and essential outcomes of this step. Chapter 15 deals with preliminary conferences and ch 16 discusses pre-mediation issues.

Part 4 deals with the specific set of skills required of mediators. This part begins with a chapter about key terms used in the mediation process. Next, the authors delve into the essential communications skills of mediators. These include: active listening; summarising; reflection; comparison; reframing; the perception of neutrality and constructive listening. The inclusion of constructive listening is an update to this chapter. Chapter 19 is a new addition to the text. This is a highly practical chapter of great relevance which includes specific examples of the construction and application of questions. Chapter 20 is another new chapter dealing with the facilitation of direct communication. This chapter links back to the skills discussed earlier in the test, especially constructive listening and reframing. The authors promote the use of direct communication to allow the mediator to utilise their listening skills and observe the parties communicating in a less guarded and more spontaneous manner. Chapter 21 is on the effective use of note taking. This chapter explains the use of whiteboards and visual aids. The use of a whiteboard is emphasised as a power-balancing strategy that is

indispensable to any mediator. This chapter is useful to a trainee mediator or someone who wants to improve their whiteboard skills.

Part 5 begins with a brand new chapter titled: underlying needs in a dispute resolution context. The first part of the chapter focuses on what are the needs of the parties and then progress with how mediators can discuss and address those needs. It also mentions hidden agendas and how to treat them. It finishes with how to apply a 'reality test' to a final agreement. This is an important addition to the text as it shows that although parties may not be happy with the final agreement, in reality it does satisfy their needs. Chapter 23 is essentially a list of impasse breakers. The authors describe what an impasse is and how to identify it in a session. Chapter 24 lists and summarises strategies to deal with the issues raised throughout the text, it includes case notes to illustrate the practical implications of these strategies.

Part 6 is titled 'special mediation issues' and begins with a look at the role of a legal practitioner. The first part of this chapter gives guidance for a mediator, it talks the reader through a number of potential sticky situations, including when a legal practitioner attempts to dominate the session. The second part is aimed at a legal practitioner who will participate in a mediation. This is interesting inclusion and illustrates the practical and holistic approach the authors have taken to formulating this handbook. Chapter 26 explains the fundamental element of any mediation; that a mediator must be neutral and impartial. This chapter includes a list of 17 things a mediator should avoid. This includes: treating parties differently; debating the facts or establishing proof and judgmental language. Chapter 17 deals exclusively with power issues. Minimising a power imbalance is not about ensuring that each party actually has equal power, power is dynamic, it can vary depending on who the parties are and is often outside of the mediator's control. The mediator's role is to safeguard the integrity of the mediation process from these imbalances as best they can. This chapter specifically considers power imbalances in situations where there is a history of domestic violence. It also mentions that the amendments to the *Family Law Act*

now require an assessment as to whether mediation is appropriate. This chapter additionally explores the powers of a mediator, and highlights that mediators are there to guide the parties and not be a member of the 'we know what's best for you brigade'. Chapter 28 covers party and mediator driven problems. Party driven problems include: bad fair participation; anger; insults and the walk out. Mediator driven problems include: inappropriate advice; defining of the issues; bias and ignoring the parties' emotions. The role of interpreters and support persons is explained in ch 29. It is clear that in some situations the use of an interpreter is critical, however, their presence can change the dynamic of the mediation. The use of an interpreter can increase the duration of the session and obstruct the flow of communication. This chapter lays out a useful guide of managing this situation and selecting an interpreter.

The text concludes with appendices that include:

- preliminary conference pro-forma letter;
- preliminary conference agenda;
- post-preliminary conference pro-forma letter;
- mediation agenda;
- agreement to mediate;
- confidentiality agreement.

Analysis

Ruth Charlton and Micheline Dewdney, together with Geoff Charlton, penned the Mediators Handbook. All authors have an extensive history of professional experience with the subject matter. The text itself is presented in an aesthetically pleasing and user friendly manner. The intertwining of case notes in the text keeps it interesting and gives life to the practical advice that the authors are providing. The text promises to provide a comprehensive coverage of the field of practical strategies and skills necessary for practice in mediation. Fortunately for the authors, the text lives up to its promises and can be described as a constructive compendium of information on mediation. The experience of the authors translates

seamlessly on to the pages through a blend of theological explanations, anecdotes and useful tips.

However, one point that the book could be expanded on is the viewpoint of a legal practitioner. The second part of ch 25 is dedicated to the perspective of a legal practitioner, but these 4 pages really only skim the surface. The text is tailored specifically for a mediator, however, the increase in the use of mediation in large scale disputes means that an inclusion of the perspective of a legal representative has considerable value.

Evaluation

The third edition of the text brings with it practical updates and valuable new additions. The authors have produced a practical guide with the reader in mind. The text is a worthwhile investment for a person interested in the area and valuable contribution to the practice of mediation.

In conclusion, this text is a relevant resource for all readers within the legal profession. This book is to be looked at as a 'how to guide', for a novice mediator or student it may be best paired with contextual 'why' book for a comprehensive understanding on the topic. Nevertheless, the text is suitable for a wide range of audiences, from the seasoned mediator to a student. It will leave a reader with a sound understanding of the mediation process from start to finish.

Sarah Sharp

Howard Bennett, *Principles of the Law of Agency*, Hart Publishing, 2013, ISBN 9781841138855, 234 pages, $45

Introduction

Agency is a ubiquitous institution that permeates both commercial and social activity. Auctioneers, mortgage brokers, ship masters, and lead banks all represent examples of commercial intermediaries. Agency provides the foundation of legal personality and enables against deteriorating capacity. *Principles of the Law of Agency*, authored by Howard Bennett, endeavours to provide a fresh, succinct analysis of the principles of the English law of agency. Such an undertaking is by no means trifling. Agency law — which concerns the authorisation of a party, known as an agent, to act on behalf of another, the principal, to create legal relations with a third party — has been likened to a swamp draining off the seepage from the main stream of law; a legal Slough of Despond. Areas of law as diverse tort, contract, property, crime, and evidence all exhibit a reliance on agency in varying degrees. Professor Raphael Powell, in his highly regarded 1952 book on the topic, expressed doubt whether a person could be adequately versatile to write a perfect book on agency. Sixty-one years on, in a notably different domestic and international legal context, Bennett proves well-placed to take on the challenge.

After receiving degrees in both English and French law, Bennett became a lecturer at the esteemed University of Nottingham in 1989. In 2001 he was appointed Hind Chair of Commercial Law. Previous publications by Bennett include *The Law of Marine Insurance* (2nd ed, 2006, Oxford Press) and the *Vulnerable Transactions in Corporate Insolvency* (2003, Hart Publishing), to which he both contributed and co-edited. He has additionally contributed as a member of authorial teams to *Benjamin's Sale of Goods* (8th ed, 2010, Thomson Reuters) and *Scrutton on Charterparties and Bills of Landing* (22nd ed, 2011, Sweet & Maxwell). Each publication was well-received in in its own right, as have been Bennett's numerous essays and articles as found in leading journals. This impressive background in academic research and scholarship is evident throughout his latest offering.

Main Points

Chapter 1, 'Agency: A Flexible Institution', introduces the concept of agency in basic terms, before detailing the practical situations in which a relationship in agency may arise. While explicitly stating the focus of the book is the English law of agency, Bennet notes that agency is addressed by three academic, international soft law instruments. These are *The Principles of European Contract Law*, *The UNIDROIT Principles of International Commercial Contracts* (2004), and the *Principles, Definitions and Model Rules of European Private Law*. It is proposed that such instruments offer a coherent and comprehensive set of principles against which English agency law can be evaluated, and from which possible suggestions can be drawn for the resolution of outstanding issues within the national law. Bennett states his intention to enrich his analysis of agency law through regular reference to these instruments. General, introductory discussion is subsequently provided on each of the principles to be explored in the following chapters.

Chapter 2 provides closer description and analysis of the legal framework governing commercial agency in England. Bennett prefaces the discussion by detailing the disparities, existent prior to the 1990s, in the treatment of agents across the European Union. Concisely, as Bennett explains, civil law jurisdictions afforded commercial agents significant, but variable, favourable treatment, whereas commercial agents in common law nations received no specific recognition. In order to mitigate the trade hampering effect of these disparities, a Council Directive was adopted in 1986 to coordinate the laws of Member States. The directive was adopted in England by way of the *Commercial Agents (Council Directive) Regulations 1993*. Bennett proceeds to evaluate the scope of the *Regulations* by citing its definition of 'commercial agent', before assessing the implications of each of the definition's four elements with full consideration of English common law. Indeed, as the author explains, common law forms an important part of commercial agency law because, in situations in which the directive is not fully compatible with English law, the onus falls upon the courts to *marry* the two approaches. The chapter concludes by examining the

territorial applicability of the Council Directive and *1993 Regulations*.

Chapter 3, 'Actual Authority', addresses the most common basis of agency: consent given by the principal to the agent to act in some way on its behalf. Actual authority not only binds the principal to the acts of the agent within the scope of the conferred authority, but also entitles the principal to any rights created against third parties. Bennett explains that the extent of this authority is determined through interpretation of the principal's manifestation of consent, as reasonably understood by the agent in the context it was given. Complicating factors such as ambiguity and lack of clarity in respect to the principal's manifestation are subsequently discussed, along with the issue of implied authority. The chapter additionally provides commentary on the issue of 'necessity', which concerns the occurrence of emergencies that have not explicitly been contemplated by the terms of the actual authority. Coverage is also given to an agent's scope to delegate authority, as well as the formalities involved in the conferral of actual authority.

The situation in which an agent acts beyond its prescribed authority in interacting with a third party is detailed in ch 4, 'Apparent Authority'. Bennett articulates that the utility of agency would be severely diminished if a third party did not have assurance that an agent was accurately representing the position and will of the principal — and thus be forced to seek clarification on the extent of the agent's authority upon every interaction. To alleviate this issue, a principal may be bound by an act that has not in fact been authorised. Bennett analyses the contested theoretical underpinning of this doctrine, citing the conflicting positions of the English common law and the *Restatement of the Law Third, Agency*. Analysis is then shifted to the elements which must be satisfied to establish apparent authority. Broadly speaking, the principal must have made a representation to a third party that the agent possesses a particular authority, and the third party must have relied upon the representation. Factors such as fraud and forgeries and the implications of undisclosed principals on the doctrine are considered in Bennett's analysis.

The text logically flows into description of the way in which a principal may retrospectively approve, and derive benefit from, an unauthorised act. Observation is made in ch 5, 'Ratification', that the significance of the doctrine of ratification is enhanced in English law due to the nature of apparent authority limiting the doctrine to the conferral of rights on a third party. In this way, the existence of the principal's rights against a third party outside of actual authority depends on ratification. Bennett goes on to detail, in-depth, the particulars of the doctrine as applicable in Britain. Full consideration is given to issues including: the nature of ratifiable acts; the ascertainability of the principal; the principal's competence in performing a ratified act; the principal's existence at the time of the unauthorised act; and the knowledge by the principal of the material circumstances surrounding the unauthorised act.

Chapter 6, 'An Agents Obligations', details both the performance and fiduciary obligations imposed upon an agent. Performance obligations are entirely dependent on the specifics of an agency agreement. Thus, as Bennett notes, the exercise is one of interpretation. To aid this process of interpretation, extensive examination has been included of the various situations, in relation to performance, which may befall a relationship in agency. The analysis is enriched with extensive reference to common law. Similar thoroughness is observable in Bennett's discussion of an agent's fiduciary obligations. The analysis is centred on the two broad duties owed by an agent: to avoid or resolve conflicts interest; and to only derive benefit from the agency relationship to the extent authorised by the principal. The remedies available to a wronged principal are subsequently examined in length. Chapter 6 is supplemented by ch 7, 'Mutual Obligations in Commercial Agency'. The short chapter details the mandatory, shared responsibilities of parties in a commercial agency relationship under the *Commercial Agents Regulations*. The central feature of these obligations as described by Bennett is to act dutifully and in good faith. As in the preceding chapter, remedies for breach are subsequently outlined.

As one would reasonably expect, the nature of an agent's remuneration is also largely dependent on its agreement with the principal. Chapter 8, 'An Agent's Financial Rights Against the Principal', extensively details the various contractual and non-contractual relationships which may arise between principal and agent, and examines the respective financial rights of the agent in each situation. To the extent of remuneration by commission, a commercial agent's financial rights are partially enshrined in mandatory law by way of the *Commercial Agents Regulations*. Bennett evaluates the operation of the law in regards to an agent's entitlement to commission for transactions during and after the agency, the timing of payments, and the issue of forfeiture of earned commission. Attention is also afforded to the subject of indemnity, which again is explained to apply by means of an express or implied contractual term. To ensure any payment and indemnity entitlements are enjoyed, Bennett notes that an agent has a possessory lien over the principal's chattels at common law, unless an alternate agreement is made.

Chapter 9, 'Agency and Contract' details the nature and legal implications of disclosed and undisclosed agency. Bennett explains that, as the term suggests, disclosed agency refers to the situation in which the third party is aware of the agent's status as a commercial intermediary. Conversely, undisclosed agency refers to the situation in which the third party is unaware of the existence of the principal, believing the agent to be acting in its own right. As the chapter details, the rights to which the agent and principal are entitled at common law vary significantly depending on the disclosure of the principal's existence. To broadly summarise Bennett's meticulous comparative discussion, the rights of an undisclosed principal are somewhat truncated when compared to that of a disclosed principal; as is an agent's ability to generate privity of contract between an undisclosed principal and a third party.

The interaction of agency with the law of tort is examined in ch 10, 'Agency and Tort'. The scope of the chapter extends not only to the potential personal liability of the agent and principal, but also

includes assessment of a principal's vicarious liability for the torts of the agent. Bennett explains that an agent's personal liability to a third party is incurred in accordance with the standard principles of tort law. Clarification is made however, that personal commission of a tort is required to establish personal liability. Thus, as Bennett articulates, in a case of negligent misstatement, a third party must demonstrate a duty of care was owed by the agent 'through an assumption of personal liability for the statement'. The specifics of a principal's personal liability in tort are then outlined. In essence, it is explained that this liability may be incurred through a direct act of the principal, or by the act of an agent operating within its actual or ratified authority. The remainder of the chapter is dedicated to the issue of vicarious liability.

The final chapter, 'Termination and Authority', fittingly discusses the situations in which authority may be terminated, and the implications of such termination. Full consideration is given both to termination by agency agreement, and termination by operation of law. Issues of irrevocable authority and termination of apparent authority are assessed in turn. In respect of remedies for wrongful termination, it is noted that commercial agents enjoy rights that go beyond the common law position courtesy of the *Commercial Agents Regulations*. Where at common law an agent may be entitled to damages for breach of contract in the event a principal unduly revokes authority, a commercial agent may be entitled to compensation or indemnity under statute. The exact nature of these remedies is subsequently outlined.

Evaluation

Bennett overwhelmingly succeeds in his endeavour to produce a fresh and accessible analysis of the principles of agency law. His lucid, engaging writing style ensures that the text is not only academically enriching, but equally interesting and genuinely enjoyable. Bennett offers a refreshing conciseness that is often found wanting in legal academic literature. This brevity does not however, come at the expense of rigorous academic scholarship. On the contrary, discussion is not only informed by impressively extensive reference

to common law authorities, but also continuously enriched through critical discussion and evaluation of international soft law instruments, specifically, *The Principles of European Contract Law*, *The UNIDROIT Principles of International Commercial Contracts* (2004), the *Principles*, *Definitions and Model Rules of European Private Law*, as well as the *Restatement of the Law Third, Agency*. Humorously, Bennett has endeavoured to state the law as it stood on April Fool's Day 2013.

The succinct, general introduction to each principle in chapter one provides a useful *stepping stone* to the more advanced discussion of the concepts found in proceeding chapters. Indeed, this is indicative of the careful thought that has been invested into ensuring the text follows a logical path from chapter to chapter, with each section progressively adding an additional layer to the reader's knowledge and understanding. Upon concluding a section, one is left with a clear sense of where the concept fits into the greater scheme of the law of agency. In this way, readers with even the most rudimentary understanding of agency can fully benefit the text, and achieve a respectable level of competence in its subject matter. Readers experienced in the subject should not however be dissuaded by this approach. As noted above, analysis of the law is conducted to the highest of standards. This analysis falls naturally under headings and sub-headings, ensuring the information can be efficiently and effectively recovered. The headings are coupled with a comprehensive contents page that further ensures the text is easily navigable and can effectively serve as a *quick reference guide* if one so wishes. Bennett has also included an immensely extensive Table of Cases. Although predominantly concentrated on British law, cases from other common law countries have been included, such as from Australia, Canada, and the United States. Cases from the European Court of Justice have also been listed. The precedents have been helpfully marked with pinpoint references to their discussion in the text. A similarly well-endowed list has been included of relevant legislation. Hence, despite the focus being on English agency law, Bennett's commendable commitment to reference, compare, and evaluate international positions on the topic ensures that the text has

relevancy and usefulness beyond simply agency as applicable in England.

It is difficult to find fault with the text. While it does not cover the principles of agency as they apply to every branch of law, this was not its stated purpose. Perhaps this fact disqualifies it from being considered the 'perfect book on agency' on the standards of the abovementioned Professor Raphael Powell. The utility of such a pursuit however, is questionable. To endeavour to produce a perfect and complete book on any subject ignores the contributions made by other capable authors. A far more valuable pursuit is to consider the contribution that can be made to the broader body of literature on a subject. This is what has been considered and achieved by Bennett in providing an innovative, succinct, yet still rigorous, analysis of the principles of agency law.

Howard Bennett's *Principles of the Law of Agency* laudably continues the mission of well-regarded legal publisher, Hart Publishing, to produce intellectually stimulating and innovative books that contribute to the academic study and formal implementation of law. Priced at just AUD45, it is a very worthwhile addition to the bookshelves of law students, academics and professionals. Alternatively, for those so inclined, an electronic version is soon to be released.

Jonathan Dewing

Michelle Evans and Augusto Zimmermann (Eds), *Global Perspectives on Subsidiarity*, Springer, 2014, ISBN: 978-94-017-8809-0 (hbk), ISBN 978-94-017-8810-6 (ebk), 223 pages

Introduction

Global Perspectives on Subsidiarity is a groundbreaking book, solely devoted to the principle of subsidiarity. The book explores the many applications of the principle, consolidating the works of authors whose prestigious qualifications demonstrate the height of quality expected by a Springer book. When reading the 'Contributors Biographies', one can anticipate with excitement the depth of analysis and authenticity of opinion to cover a principle rich in philosophical and political substance. The book provides a comprehensive account of the principle's diverse aspects, ranging from philosophical origins, to its development in theological social doctrines, and the current influence it plays in EU law and the various implementations and interactions subsidiarity plays in a constitutional frameworks.

In general, each chapter is an exclusive topic focused on the principle of subsidiarity. A general introductory passage is provided for each chapter, which allows the reader to anticipate and ease into the chapter from the basic prelude. The construction of the book allows the reader to engage in chapters that are independent of each other. The reader may read the book as a novel from start to finish or instead they may select a chapter that is relevant or interesting to them.

About the Editors

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Augusto Zimmermann (LLB (PUC-Rio), LLM *cum lande* (PUC-Rio), PhD (Monash University)) is a Senior Lecturer and former Associate Dean (Research) and Director of Postgraduate Studies at the School

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Main Points

Chapter 1, written by Michelle Evans and Augusto Zimmermann unpacks the principle of subsidiarity by exploring its origins and setting a general definition. This chapter outlines the significance of subsidiarity as a social and political principle, touching on its core applications in contemporary society, whilst revealing its presence in the EU Law. Furthermore this chapter lays out a summation of the various other chapters dealing with distinct applications of the principle.

Chapter 2, written by Professor Nicholas Aroney (Professor of Constitutional Law at the T C Beirne School of Law, University of Queensland, Brisbane, Queensland, Australia), examines the philosophical origins of subsidiarity. This chapter traces the origins of subsidiarity to the workings of Aristotle and Aquinas, honing in on their involvement in the formulation of this principle.

Chapter 3, written by Professor Patrick McKinley Brennan (John F Scarpa Chair in Catholic Legal Studies at Villanova University, School of Law, Villanova, Pennsylvania, United States of America) further illustrates the origins of subsidiarity in the context of catholic social doctrine. The underlying contention by Brennan is that catholic social doctrine promotes the message that higher societies should avoid absorbing those below them. Furthermore when aid is given by higher functioning societies, the purpose should be to encourage and strengthen that society.

In chs 4 and 5, Lael Daniel Weinberger (PhD student in history at the University of Chicago, Chicago, Illinois, United States of America) and Professor Jonathan Chaplin (Director at Kirby Laing Institute for Christian Ethics, Cambridge, UK) compare the political and social aspects of subsidiarity. The authors do this through the concepts of ‘sphere sovereignty’ from Dutch Calvinist tradition and ‘social pluralism’, a political theory that operates by dividing authority as

opposed to one centralised source of power. Pluralism on a general note allows for individuals to forge values and beliefs for themselves instead of prescribing a value trend emanated by a government or even social groups.

In ch 6 Dr Augusto Zimmermann examines subsidiarity's ability to enhance democracy and individual rights in Brazil. Furthermore, Zimmermann examines the potential benefits gained by implementing subsidiarity principles into Brazilian constitutional and civic structures. A central point raised by Zimmermann is the need for a redistribution of power to introduce society to a democratised culture of individual responsibility for individuals, through the implementation of the subsidiarity principle to decentralise state power.

In ch 7 The Rev Robert A Sirico (Acton Institute for the Study of Religion and Liberty, Grand Rapids, Michigan, United States of America) discusses how subsidiarity can be used to restructure welfare to empower individual citizens. Reverend Sirico illustrates that current trends across the western world demonstrate an increasing dependence by individuals on the welfare system. Presently, welfare administered by faceless governmental institutions provides a 'band-aid' solution to breaking the reliance a person has on the welfare system. Welfare distributed by apathetic structures result in depriving human self-worth and often perpetuates the cyclical dependency on welfare. The individual is thus deprived of a sense of responsibility to themselves, their families and those around them. Reverend Sirico argues the principle's application in this context.

The following chapters deal with the constitutional and political application of subsidiarity and the resulting application of the core principle in differing contexts.

In ch 8, Professor Jürgen Bröhmer (Dean and Professor of Law at Murdoch University School of Law, Murdoch, Perth, Western Australia, Australia) examines the principle of subsidiarity in the

context of the German Constitution. Although subsidiarity is entrenched in the Constitution and the themes of decentralisation are gaining momentum in Europe, there remains a bias towards the centralised administration of power. Germany has already introduced its own version of subsidiarity in art 72(2) of the *Basic Law* in the Federal Republic of Germany. Bröhmer outlines the practice and operation of subsidiarity in respect of the German Constitution and the Federal Constitutional Court of Germany's interpretation of the subsidiarity principle.

In ch 9, Professor Gabriël A Moens (Professor of Law and Director of Research at Curtin Law School, Curtin University, Bentley, Perth, Western Australia, Australia) and Dr John Trone (Adjunct Professor of Law at Murdoch University) explore how the principle of subsidiarity functions in the European Union in the political, procedural and legal domain of the principle's function. The chapter's ultimate premise is that subsidiarity is legally enforceable under the European Union's founding treaties, however, ineffective as is evident in case law from the European Court of Justice. Notwithstanding, the European Court of Justice's ability to annul directives that impede the principle, the Court of Justice has abstained from such action due to the principle's treatment as a political devise, as opposed to a legal principle. Although some countries from the European Union provide legal actions for a breach of the subsidiarity principle derived from constitutional provisions, in accordance with Professor Dashwood's comments, subsidiarity is ineffective at adjudication, as it remains a political and subjective principle. This chapter deals with the function and effectiveness of subsidiarity in the European Union.

Chapter 10 authored by Dr Michelle Evans addresses the relevance of subsidiarity in relation to Australian constitutional interpretation. This is a very interesting and thought provoking chapter. Dr Evans discusses whether subsidiarity can invoke and inspire decentralisation in federal systems of government, which have embraced a centralised power scheme. This premise challenges the preservation of commonwealth sovereignty as the guiding entity for decision-making

power. Yet, as Dr Evans notes, subsidiarity was the preeminent theme in pre-federation debates and apparent in the objective interpretation of the *Constitution*. However, Australia has abandoned this premise embedded in the vision of the federation, and thus the role of the senate has evolved from protecting state interests as the farmers intended, to a political playground operating on party loyalty. Furthermore, the High Court of Australia has dismissed its responsibility as the guardian of the state and federal constitution by submitting to the Commonwealth government. Dr Evans makes valid attempts to restore genuine federalism using subsidiarity. One might view such synthesis as idealistic; as dominant political parties will unlikely adopt a policy, which will water down centralised federal power. However, under the current political landscape, an apparent imbalance in federal power is restricting state autonomy. By providing the states with enhanced sovereignty with respect to legislative powers and financial independence, the federal balance of power would shift to the states. Dr Evans makes compelling suggestions as to how subsidiarity could restore authentic federalism.

Chapter 11 written by Professor Andreas Follesdal (Professor of Political Philosophy at the Faculty of Law, University of Oslo, Oslo, Norway) attaches a wide scope to subsidiarity's application by considering the principle's potential to enhance global governance at a future time. Follesdal recognises the shrinking effects attributable to globalisation since the rise of technology. He argues whether subsidiarity principles might avail those who protest against globalisation.

Analysis

Global Perspectives on Subsidiarity assembles a diverse range of thought provoking opinions, each dealing with a distinctive aspect of subsidiarity, a principle with unfettered potential applications in political, social and philosophical doctrines. Accordingly, the book provides a rich and often detailed outlook on the principle in various contexts. The collection of texts appeals to a readership of academics and students of philosophy, theology, comparative law, EU law, constitutional law and politics. Although the book is structured in a

way that allows the reader to choose a chapter at will without having to read previous chapters, the earlier chapters which primarily deal with historical, philosophical and theological contexts, provide a solid foundation enhancing the more specific applications of the principle in regard to political, constitutional and social doctrines and affairs. Overall the book was a fantastic and enlightening exposition of the principle, consolidating the works of eminent authors whose quality of work sets a benchmark for future scholarship on the principle.

Evaluation

Global Perspectives on Subsidiarity has a price of 88€ (AUD144.00) on Springer's official website. For a student who does not have a particular interest in the principle of subsidiarity, the price might be steep. However, the principle itself has far-reaching applications demonstrated in the diversity of the chapters. Therefore I would recommend this book to any student whether studying law, philosophy or other relevant degree, as the principle is the bedrock for social organisation, a concept that has roots in political and social structure, as well as legal and philosophical ties.

Any student or academic who has an interest in the topic of subsidiarity would be wise to purchase this book. It has a wide focus of the principle's many applications, while providing a rich and enthralling account of the origins of the principle and its outreaching influence across philosophical, theological and political domains.

Conclusion

Across the board, *Global Perspectives on Subsidiarity* is an enriching book on the principle of subsidiarity. The book illustrates a clear, concise yet detailed account of the various applications and historical prevalence the principle has had. Each author provides a compelling discussion on distinguishable aspects of the principle. The editors acknowledge that this book only lifts the veneer of subsidiarity as a decentralising and empowerment principle, and note that further scholarship is required in areas such as (to name a few) human rights, other religions such as Judaism and the potential focus in private sphere applications such as corporate and university governance. This

book is as much a foundation on subsidiarity as it is an invitation to further scholarship, research and insight into the often neglected but highly important principle and its vast potential applications.

Jared Cartoon