

International Trade and Business Law Review

Volume XXIII, 2022

Founded in 1995, the *International Trade and Business Law Review (ITBLR)* is a peer-reviewed journal that publishes articles, case notes, comments, and book reviews on international trade, business law, investment, commercial arbitration, and governance and regulation. The *ITBLR* provides a platform for rigorous and thought-provoking scholarly and policy debates on international trade and business, encouraging among others, interdisciplinary scholars and emerging voices from all over the world.

The *ITBLR* was founded by Professor Gabriël A Moens, Emeritus Professor of Law, The University of Queensland; Adjunct Professor of Law, Curtin University, Australia, and The University of Notre Dame Australia, Sydney. Professor Moens has recently transitioned as the Emeritus Editor-in-Chief.

The *ITBLR* is now edited by the Curtin Law School. The Editor-in-Chief is Curtin Law School's Dean of Law, Professor Robert Cunningham and General Editors are Dr Sharmin Tania and Dr Mostafa Haider. The *ITBLR* also utilises a Student Editorial Board and comprises an International Advisory Board of eminent national and international scholars.

Articles and Comments for publications in *International Trade and Business Law Review* may be sent to Dr Sharmin Tania or Dr Mostafa Haider <ITBLR@curtin.edu.au>.

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FOREWORD

Sharmin Tania, Mostafa Haider, Robert Cunningham

Editorial Note

We are pleased to introduce Volume XXIII of *International Trade and Business Law Review (ITBLR)*. There have been two important changes to the journal for the first time since its inception. First, there is a change to the editorial team of the journal. Emeritus Professor Gabriël Moens founded the journal in 1995 with an aim to publish quality research in the areas of international trade, investment and business law and regulation. Professor Moens made it possible for us to take over the operational charge of the journal and has recently transitioned as the Emeritus editor-in-chief. Professor Robert Cunningham is the new Editor-in-chief of the journal along with two new editors Dr Sharmin Tania and Dr Mostafa Haider. Second, the transition to a new editorial structure has inevitably brought a change to the aim and focus of the journal. One of the earliest law journals in Australia dedicated to matters of international trade and business, *ITBLR* was a bold and far-sighted initiative for its time. While we remain committed to publishing well-researched and quality pieces in global trade and business, we also intend to publish wider research that has implications not just for global trade and business but also global governance, broadly understood. In short, we hope to launch a reinvigorated *ITBLR* with a broader aim and focus, which at once builds on Professor Moens's founding work and expands on wider themes and issues of global governance.

ITBLR has remained, at its core, as conceived by Prof. Moens, a source of intellectual engagement and contribution for law students. This volume too, engages students at the Curtin Law School's LLB program at various stages and benefits from their participation and inputs. While senior students often work for the journal as a requirement for a Law Review unit, current and past students of Curtin Law School have enriched the journal in numerous ways. For the current volume, we are particularly grateful to the editorial assistant Meika Atkinson for her excellent editorial assistance and efficient management of student queries. Our sincerest thanks to three student editors and volunteers of this volume: Tracey Ram, Kate Basta-Zima and Sara Dofash. Finally, we would like to extend our thanks to John McRobert and the editorial and graphics team of CopyRight Publishing for their meticulous work in finalising the manuscript for publication.

In a world of climate uncertainty and technological possibilities, no doubt legal scholars in diverse fields are asking new questions and framing

novel inquiries in and around global law and policy. We would like the *ITBLR* to be at the forefront of these questions and inquiries. We would also like diverse voices to be heard. We would particularly encourage emerging scholars from the global South to use *ITBLR* as an intellectual outlet for advancing a more inclusive understanding of trade and business.

Volume XXIII Summary

In this volume, we have four articles, a public lecture, two book reviews and several case notes. The first two articles cover some aspects of international investment law and the third and fourth articles explore issues in international trade law. In the first article, Zaman and Islam look at the current administration of international investment disputes from the host developing countries' lens, shedding light on their growing dissatisfaction in international arbitration. Using Bangladesh as a case study, they argue that rethinking and renegotiating Bilateral Investment Treaties (BITs) and International Investment Agreements (IIAs) instead of abandoning them can better harness a level playing field for host developing countries.

Du Maurier examines, in the second article, the validity of optional asymmetrical arbitration agreements in several foreign domestic jurisdictions and its likely effect upon Australia. While foreign courts have not taken a uniform stance on the invalidity of optional asymmetrical arbitration agreements on public policy grounds, Du Maurier argues that Australian courts will likely take a 'pro-arbitration approach of the New York Convention' along the lines of other common law jurisdictions such as England and Singapore.

In the third article, Anawaratna explores the World Trade Organization's (WTO's) Dispute settlement Mechanism (DSM) from the perspective of its marginalised members: Least developed countries (LDCs) and low-income developing countries (LIDCs). To ensure genuine participation of all WTO members, the paper advocates a small claim procedure for LIDCs and LDCs for them to be able to access and to seek remedy from DSM.

Bonardi highlights, in the fourth article, the inchoate governance in WTO when it comes to compliance with *jus cogens* norms. She argues, by reference to the alleged persecution of Uyghur people, that conditioning WTO membership on compliance with *jus cogens* norms will further the core humanitarian obligations enshrined in international law without sacrificing WTO's central role in enhancing international trade and human welfare.

The public lecture by Emeritus Professor Rosalind Croucher, current President of the Australian Human Rights Commission, is an intellectual *tour de force*. It provides a reassessment of Australian Human Rights Commission's former president Sir Ronald Wilson's most accomplished

piece of work – that is, *Bringing them Home*, also known as the Stolen Generations Report. The lecture also proffers a personal reflection on the contested terrains of social justice within the Australian legal landscape including that of Indigenous and immigrant communities. As much as Croucher celebrates the courage and leadership of Sir Wilson in authoring the Stolen Generations Report, she also acknowledges that Australia as a country has yet a long journey towards fuller compliance with international human rights law.

Among two book reviews, Bath reviews Anil Vastardis' 'The Nationality of Corporate Investors under International Investment Law' published by OUP in 2020 and Boccardo reviews Nicholas Perrone's 'Investment Treaties and the Legal Imagination: How Foreign Investors Play by their Own Rules' published by OUP in 2021. Of the commentaries and case notes, Dofash provides a brief overview of the WTO dispute on Australia's tobacco plain packaging measures. Basta-Zima comments on the bilateral trade relationship and trade disputes between China and Australia in the wake of Covid-19 and Ram summarises two cases relating to the *Fair Work Act 2009* (Cth) decided by the High Court of Australia.

Thank you for being with us. We look forward to a renewed conversation about international trade, investment, environment, human rights, arbitration, business and many relevant legal issues of international significance.



Articles

MINIMISING THE INTERNATIONAL INVESTMENT TRIBUNAL'S EXPANSIVE TREATY INTERPRETATION: IS 'RENEGOTIATION' OF INVESTMENT TREATIES A BETTER STRATEGY FOR HOST DEVELOPING COUNTRIES?

Khorsed Zaman* and M Rafiqul Islam**

ABSTRACT

Arbitration, investment treaties, dispute settlement, ICSID, renegotiation, investors, developing countries, investment law, and umbrella clause.

In the investor-state dispute settlement (ISDS) system, international arbitration tribunals interpret investment treaties in ways that more often than not undermine the competing interests of investment importing developing countries. In a bid to overcome such interpretations, some host countries have resorted to stark options: terminating their bilateral investment treaties (BITs), denouncing International Investment Agreements (IIAs), and withdrawing from the international investment arbitration system – a trend set to continue. They are also in search of an alternate route that can shield them from invasive arbitral awards. This article seeks to find a better alternative. It undertakes a cost-benefit analysis of the termination of BITs and withdrawal from IIAs and ISDS from host developing countries' perspectives, particularly in the context of Bangladesh's experience in ISDS. It also examines the continuing effects on Bolivia despite its denouncement of and withdrawal from the International Centre for the Settlement of Investment Disputes (ICSID). Upon a strategic analysis of the available options, this article argues that the renegotiation of BIT provisions susceptible to expansive arbitral interpretations appears to be a better option than other stark options to ameliorate the adverse consequences that both Bangladesh and Bolivia experienced as host developing countries. Renegotiated treaties will go a long way in limiting arbitrators' wide discretionary power of interpretation and keeping host developing countries within the regulatory regime of international investment law.

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I INTRODUCTION

Foreign direct investment (FDI) has a developmental role in capital and technology impoverished developing countries, including the least developed countries (LDCs). Liberalised entry, speedy facilitation, incentivised operation, and investor-state dispute settlement under bilateral investment treaties have become the hallmark of investment governance today. As more countries, particularly developing and LDCs, compete for available investment, its domestic regulation has become more of promoting with attractive fiscal and non-fiscal incentives and less of policing. The international regulation of investment has a North-South dimension that surfaces the tension of economic interests between investment exporting northern countries and investment importing southern countries. The former continues to support market freedom for their corporate investors and the latter continues to see the erosion of power to manage their national economic affairs and developmental goals. This article contributes to the ongoing debates over investment law by suggesting a balanced and viable alternative to ease the north-south tension between the competing interests in a manner that pragmatically retains ISDS within the international arbitration system, minimises uncertain and discretionary investment treaty interpretation, and maximises predictable application of international investment law.

In the polarised environment, both sides formulated codes of conduct and guidelines on the regulation of investment operations which are opposite to each other. The codes of conduct of the UN Centre on Transnational Corporations and UNCTAD, dominated by developing countries, seek to regulate the corporate investment practices in a manner that protects the interest of host countries. While the OECD code of conduct unconditionally protects investment in the host countries, the World Bank Guidelines on the Treatment of FDI 1992 prescribe standards of treatment that host countries are obliged to extend to foreign investments. These codes and guidelines are voluntary and self-contradictory entailing no binding obligations. This situation favours corporate interests and their investments to remain active in global market operating almost beyond the reach of host countries' regulation by using the threat of 'capital flight' and without any regulatory grip of international law for want of legal status and personality as profit-making non-state entities.¹

¹ *Barcelona Traction case (Belgium v Spain)*, [1970] ICJ Rep 47; *ELSI case (US v Italy)*, [1989] ICJ Rep 15, 42; *Diallo case (Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639; M Sornarajah, *The International Law on Foreign Investment* (Cambridge University Press, 3rd ed 2010) 37–38; M Sornarajah, *The Settlement of Foreign Investment Disputes* (Kluwer International, The Hague 2000) 194–207; M Rafiqul Islam, 'International Arbitration of Foreign Direct Investment Disputes: Benign or Malign for FDI-induced Development in Bangladesh' (August 2017) No. 4 *International Arbitration Law Review* (London), 121.

Amid the above national and international regulatory chill, BITs are the main legal instrument aimed at protecting FDIs in host countries. Developing countries have been concluding BITs as a guarantee for FDIs despite controversies surrounding the net level of their achieved development and relationship between FDIs and the development goals.² Of the 2,969 BITs concluded by January 2019, 383 treaties contained investment provisions (TIPs).³ These numbers are steadily declining. As of January 2022, the total number has decreased to 2,815 BITs with 423 TIPs.⁴ The statistics indicate that investment importing developing countries are now extremely cautious in concluding new BITs. In 2017–2018, the total number of terminations of investment treaties ‘outpaced the number of new IIAs’.⁵ The fundamental reason is that host countries want to avoid the most contentious features of BITs, the international arbitration clause. Arbitration tribunals often deliver awards ‘in a manner not contemplated by the original drafting of the parties’.⁶ The investment tribunals’ interpretations of identical issues in investment treaties are sometimes criticised for being inconsistent with the BIT contracting parties’ original pledges.⁷ Conflicting interpretations of BITs create inconsistency and incoherence in international investment law.⁸ Tribunals often interpret treaties in ways that are either overly broad or too narrow.⁹

The diverging jurisprudence on ‘umbrella clauses’ is an example of how the arbitration tribunals create expansive and incoherent interpretations on the same issue and apply their discretion in conflicting ways.¹⁰ Many BITs contain an ‘umbrella

² M Sornarajah, ‘Developing countries in the investment treaty system: A law for need or a law for greed?’ in Stephan Schill et al eds., *International Investment Law and Development: Bridging the Gap* (Frankfurt Investment and Economic Law series, 2015) 43–66.

³ UNCTAD, ‘Investment Policy Hub: International Investment Agreements Navigator’, <<https://investmentpolicyhub.unctad.org/IIA>>.

⁴ UNCTAD, ‘Investment Policy Hub: International Investment Agreements Navigator’, <<https://investmentpolicy.unctad.org/international-investment-agreements>>.

⁵ UNCTAD, *World Investment Report 2018*, page XXIII.

⁶ M Sornarajah, ‘The Retreat of Neoliberalism In Investment Treaty Arbitration’, in Catherine Rogers and Roger Alford eds, *The Future of Investment Arbitration* (New York: OUP, 2009) 291; Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005) 228–262; Jurgen Kurtz, ‘The Delicate Extension of Most-Favoured-Nation Treatment to Foreign Investors: Maffezini v Kingdom of Spain’, in Todd Weiler eds, *International Investment Law and Arbitration: Leading Cases from ICSID, NAFTA, Bilateral Treaties and Customary International Law* (London: Cameron May, 2005) 523–555.

⁷ *Plama Consortium Ltd. v Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction (8 February 2005) para 203.

⁸ Trinh Yen, *The Interpretation of Investment Treaties* (International Litigation in Practice Series, Volume 7) (Brill, 2014) 8–13.

⁹ Christopher Dugan et al, *Investor-State Arbitration* (New York: OUP, 2008) 423.

¹⁰ Katherine Jonckheere, ‘Practical Implications from an Expansive Interpretation of Umbrella Clauses in International Investment Law’, (2015) 11(2) *South Carolina Journal of International Law and Business*, 143–162; Anthony Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’, (2004) 20 (4) *Arbitration International* 411–434.

clause' making generic promise for investment protection which lacks precise articulation of circumstances and specificity of limits. No uniform jurisprudence on 'umbrella clause' has developed yet. It is this open ended 'umbrella clause' and the lack of interpretive guiding jurisprudence that give the tribunals a free hand to interpret this clause in a manner that provides blanket protection for all investments under all circumstances regardless of its adverse effect on the underlying interest of the host country.¹¹ Umbrella clause thus appears to be a formidable challenge in its uniform interpretation and compliance by the tribunals. Consequently, it is a frequently disputed issue in arbitral rulings.¹²

Based on the arbitrators' mindset of interpretation of the umbrella clause, investors' 'contract-based claims' under investment contracts can be translated to 'BIT-based claims'. Contractual breaches are subject to personal remedies among the parties, whereas BIT claims ultimately make host countries accountable under international law.¹⁴ Neither any tenet of investment law nor any case law provides a consistent explanation of umbrella clauses that can compel host countries to recognise their obligations under these clauses. In *Noble Ventures v Romania*,¹⁵ the tribunal elevated Romania's contractual obligations to its treaty obligations under the BIT between the US and Romania of 1992. It concluded that Romania's breach of a 'contractual obligation' violated the BIT's umbrella clause and triggered its 'state responsibility' for breach of an international treaty.¹⁶ This award is consistent with the decisions of *SGS v Philippines*,¹⁷ *Eureko v Poland*,¹⁸ and several other disputes.¹⁹

On the contrary, in *SGS v Pakistan*,²⁰ the International Centre for the Settlement of Investment Disputes (ICSID) tribunal concluded that the umbrella clause cannot

¹¹ Sinclair, *ibid.*

¹² Jude Anthony, 'Umbrella Clauses Since *SGS v Pakistan* and *SGS v Philippines* – A Developing Consensus', (2013) 29(4) *Arbitration International* 607.

¹³ Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford: OUP, 2012)166.

¹⁴ Shotaro Hamamoto, 'Parties to the Obligations in the Obligations Observance (Umbrella Clause)', *ICSID Review* (2015) 30(2) 449.

¹⁵ *Noble Ventures, Inc. v Romania*, ICSID Case No. ARB/01/11 (2005), <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/01/11>>.

¹⁶ *Ibid.*, para 53.

¹⁷ *SGS Société Générale de Surveillance S.A. v Republic of the Philippines*, 'Decision on the Jurisdiction', ICSID Case No. ARB/02/6 (2004), <<https://www.italaw.com/cases/1018>>.

¹⁸ *Eureko B.V. v Republic of Poland, Partial Award* (2005), <<https://www.italaw.com/cases/documents/413>>.

¹⁹ *AMTO v Ukraine* (2008) (SCC Case No. 080/2005); *Duke Energy Electroquil Partners and Electroquil S.A. v Republic of Ecuador* (2008) (ICSID Case No ARB/04/19); *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic* (2015) (ICSID Case No. ARB/02/1); *Siemens A.G. v Argentine Republic* (2008) (ICSID Case No ARB/02/8); *Plama Consortium Limited v Republic of Bulgaria* (2008) (ICSID Case No. ARB/03/24).

²⁰ *SGS Société Générale de Surveillance S.A. v Islamic Republic of Pakistan*, Decision on Jurisdiction, ICSID Case No ARB/01/13 (2004), <<https://www.italaw.com/cases/1009>>.

be invoked for the breach of separate contractual obligations between Pakistan and Switzerland. The tribunal held that there was no convincing evidence in the dispute demonstrating the actual intention of both the parties when they adopted the umbrella clause in the Pakistan–Switzerland BIT of 2004.²¹ The *SGS – Pakistan* tribunal finally ruled that ‘under general international law, a violation of a contract entered into by a state with an investor of another state, is not, by itself, a violation of international law’.²² This same line of interpretation was also followed in the awards of *El Paso v Argentina*,²³ *Pan America v Argentina*,²⁴ *CMS v Argentina*,²⁵ and *Sempra Energy v Argentina*²⁶ disputes.

Besides these divergent legal interpretations on similar issues in investment disputes, the economic loss and developmental consequences of such interpretations often go unnoticed. Tribunals’ expansive, restrictive, or conflicting interpretations have become more detrimental than the host states could expect.²⁷ The Harten study 2012 into ICSID awards exposes its pro-investor tendencies in which arbitrators typically adopted a claimant-friendly interpretation, an ‘approach [that] would be accentuated where the claimant was a national of a major Western capital-exporting state’.²⁸ Parties must pay for ICSID arbitration, which is cost-intensive – a questionable access to justice for host developing countries. According to OECD, the average cost of initiating arbitration is US\$ 8 million,²⁹ which is unaffordable

²¹ Ibid para 173.

²² Ibid para 167.

²³ *El Paso Energy International Company v Argentine Republic*, Decision on Jurisdiction ICSID Case No. ARB/03/15 (2011), <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/03/15>>.

²⁴ *Pan American Energy LLC and BP Argentina Exploration Company v Argentine Republic*, Decision on Preliminary Objections, ICSID Case No. ARB/03/13 (2006), <<https://www.italaw.com/cases/808>>.

²⁵ *CMS Gas Transmission Company v Argentine Republic*, Award, ICSID Case No ARB/01/8 (2005), <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/01/8>>.

²⁶ *Sempra Energy International v Argentine Republic*, Award, ICSID Case No ARB/02/16 (2007), <<https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/02/16>>.

²⁷ Jan Sasse, *An Economic Analysis of Bilateral Investment Treaties* (Springer, 2011) 67–84.

²⁸ Gus Van Harten, ‘Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration’ (2012) 50(1) *Osgoode Hall Law Journal* 15.

²⁹ OECD, *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* (Working Papers on International Investment 2012, No 03 by David Gaukrodger and Kathryn Gordon) 19.

for most developing countries. The arbitration tribunals' wide discretion in interpreting the terms 'investment', 'indirect expropriation', 'fair and equitable treatment', and 'indirect investment' often cause the host developing party to pay huge unwarranted compensation.³⁰ Arbitral compensatory awards in favour of the winning party (usually investors) are excessively exorbitant and the magnitude of awarded damages is on the rise. UNCTAD study suggests that developed countries and their investors, having initiated 35 out of 42 cases against developing host countries in 2014, substantially benefited from these damage awards.³¹ Its 2017 report shows no noticeable change in this trend.³²

Due to these inconsistent arbitral interpretations, host developing countries are increasingly searching for an escape route to obtain relief from, or at least to minimise, the adverse effects of ISDS.³³ After experiencing the difficulties associated with ISDS, host countries become eager to exit the investment arbitration system.³⁴ Bolivia was the first host developing country to denounce the ICSID Convention in 2007,³⁵ followed by Ecuador in 2009,³⁶ and Venezuela in 2012.³⁷ In June 2011, Bolivia terminated its BIT with the US to avoid further ISDS.³⁸ In 2016, India terminated 58 BITs to align them with its model BIT.³⁹ Indonesia opted

³⁰ Generally, *El Paso Energy International Company v Argentine Republic*, ICSID Case No ARB/03/15 (31 October 2011), Paras 232–99; *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1 (30 August 2000); *ADF Group Inc. v United States of America*, ICSID Case No. ARB(AF)/00/1 (9 January 2003); *Mondev International LTD v United States of America*, ICSID Case No ARB(AF)/99/2 (11 October 2012); *Te'cnicas Medioambientales TECMED S.A. v United Mexican States*, Case No ARB(AF)/00/2 (29 May 2003).

³¹ UNCTAD, 'Recent Trends in IIA and ISDS' (IIA Issues Note No 1, February 2015) 1, 6, 10, <http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf>.

³² UNCTAD, *World Investment Report 2017 – Investment and the Digital Economy* (UN publication 2017) 114–17.

³³ Anthea Roberts, 'Incremental, Systematic and Paradigmatic Reform of Investor-State Arbitration' (2018) 112 (3) *American Journal of International Law* 412, 410–432.

³⁴ Yoram Haftel and Alexander Thompson, 'When do states renegotiate investment agreements? The impact of arbitration' (2018) 13 (1) *The Review of International Organizations* 27, 25–48.

³⁵ ICSID News Release, 'Bolivia Submits a Notice under Article 71 of the ICSID Convention' (16 May 2007), <<http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/Announcement3.html>>.

³⁶ Thomson Reuters, 'Ecuador withdraws from ICSID Convention', <<https://uk.practicallaw.thomsonreuters.com/2-422-1266?originationContext=document&transitionType=DocumentItem&contextData=%28sc.Default%29&comp=pluk>>.

³⁷ Thomson Reuters, 'Venezuela withdraws from ICSID', <[https://uk.practicallaw.thomsonreuters.com/2-517-5244?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/2-517-5244?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)>.

³⁸ UNCTAD, *World Investment Report 2012* (2012): Towards a New Generation of Investment Policies, 87.

³⁹ Nirmala Sitharaman, 'India to Renegotiate all Bilateral Investment Pacts', (*The Economic Times*, 25 July 2016), <<https://economictimes.indiatimes.com/news/economy/policy/india-to-renegotiate-all-bilateral-investment-pacts-nirmala-sitharaman/articleshow/53385020.cms>>.

not to renew its BIT with the Netherlands and 67 other BITs, including those with Australia, China, Singapore, and the UK.⁴⁰ This downward trend in the number of BITs is becoming more common all over the world.

Against the above background, this article identifies and critically examines three escape routes – denunciation, termination, and withdrawal – that host developing countries usually resort to in a bid to avoid the marginalising effects of expansive and/or restrictive interpretations of their BITs. This article argues that these stark options do not necessarily serve the best interest of the host developing countries and that there is a safer alternative option, namely renegotiation, that has the untapped potential to maximise their interest and minimise the scope of discretionary interpretation yet remaining within the international arbitration system. Its arguments are illustrated by analysing three investment disputes of Bangladesh and its experience at ICSID tribunals. Bolivia's experience at ICSID and the problems it faced as a denouncing party is also examined to substantiate further the underlying argument.

This article is presented in five parts. The introductory Part I portrays the legal vacuum in national and international regulatory regimes of FDI, eclipsing under the shadow of the North-South tension. Part II outlines the domestic regulatory structure of FDIs in Bangladesh and its arbitration experience with the ICSID tribunal. Part III draws upon and appraises the lessons from the ICSID disputes involving Bangladesh to underscore the benefits of renegotiation as a viable solution. The argument tilts in favour of renegotiation as a balanced and better option than the withdrawal of arbitral jurisdiction and/or termination of BITs. The argument is strengthened further by highlighting Bolivia's experience with the ICSID tribunal and its post-denouncement/termination consequences encountered as a denouncing developing country. Part IV explains why renegotiation should be the palatable way forward for host developing countries to curtail the scope of expansive and/or narrow arbitral interpretations of BITs. In the interest of attracting foreign investment, they must remain within the international investment regime as a pathway to ensure FDI-induced sustainable development to co-exist pragmatically with adequate protection to investment. Finally, Part V offers some concluding observations emanating from this study.

⁴⁰ D Price, 'Indonesia's Bold Strategy on Bilateral Investment Treaties: Seeking an Equitable Climate for Investment?' (2017) 7(1) *Asian Journal of International Law* 124–151.

II. THE FDI REGIME IN BANGLADESH AND ITS ARBITRATION EXPERIENCE WITH THE ICSID TRIBUNAL

A *Regulatory law and policy*

Bangladesh claims that it offers ‘an unparalleled investment climate’ in South Asia.⁴¹ It maintains a favourable business environment for foreign investors and invites FDI in apparel, power, oil, and gas infrastructure projects. It adopts a modern industrial policy and export-oriented growth strategy. Bangladesh Parliament passed *The Foreign Private Investment (Promotion & Protection) Act 1980*,⁴² which regulates FDIs in Bangladesh. This law promotes and protects FDIs, ensures equal treatment for domestic and foreign investors, and shields FDIs from nationalisation and expropriation.

Bangladesh is a signatory to the *Multilateral Investment Guarantee Agency* and the World Bank-backed ‘ICSID Convention’.⁴³ It acceded to the *United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)* on 6 May 1992.⁴⁴ *The Arbitration Act 2001* authorises parties to international investment contracts to resolve disputes through third-country forums,⁴⁵ implying that disputes could be resolved by resorting to any recognised arbitration tribunal in any country/location such as Singapore or Dubai. Bangladesh recognises foreign judgments and commits to execute them as per the *New York Convention*.⁴⁶ Like many countries, Bangladesh adopts the ‘conflict of laws’ principles in recognising and implementing foreign judgments and awards.⁴⁷ This approach to private international law allows broader discretion to domestic courts in determining the enforceability of foreign judicial and arbitral decisions. Decisions of foreign jurisdictions that significantly conflict with local laws and practices can be considered unenforceable.

⁴¹ Bangladesh Investment Development Authority, ‘Investment in Bangladesh’, <http://bida.gov.bd/?page_id=133>.

⁴² Bangladesh Laws, <http://bdlaws.minlaw.gov.bd/pdf_part.php?id=597>.

⁴³ *ICSID Convention, Regulations and Rules*. Washington, DC: International Centre for Settlement of Investment Disputes, 2003.

⁴⁴ New York, 10 June 1958, for the text, <<https://www.newyorkconvention.org/11165/web/files/original/1/5/15432.pdf>>; for the list of contracting parties, <<https://www.newyorkconvention.org/countries>>.

⁴⁵ *Bangladesh Arbitration Act 2001*, section 26.

⁴⁶ *Ibid*, chapter 10, sections 45, 46.

⁴⁷ *Ibid*.

B Declining BITs of Bangladesh

Bangladesh has concluded 31 BITs and four TIPs.⁴⁸ It signed its first BIT with the UK on 19 June 1980.⁴⁹ Currently, 24 BITs are in force. Since 2014, Bangladesh has shown a reluctance to sign more BITs. This reluctance is not a sign to turn back from FDI but indicates the country's changed approach to by-pass typical BITs and their effects. Presumably, this trend is created by some external and internal factors. Both the factors are obvious and can be palpable through the concurrent global attitude towards BITs. Paradoxically, the global regime of BITs is at a crossroads.⁵⁰ Host countries want a high inflow of FDI but like to avoid ISDS provisions in BITs. On the contrary, investment exporting countries of the global north in particular prefer ISDS provisions in BITs, especially if the receiving end is a developing country. This deeply embedded discord is perhaps deterring developing countries like Bangladesh from signing new BITs.

Amid the North-South tension, the emergence of South-South FDI outflows from the BRICS group (Brazil, India, China and South Africa)⁵¹ has also contributed to the declining number of BITs. Bangladesh is bagging the opportunity of this transformation in the global investment regime.⁵² Despite refraining from signing any new BIT from 2014, FDI inflow in Bangladesh is booming consistently. For example, without having any BIT, Russia and India made a huge investment in the country's nuclear energy sector.⁵² UNCTAD reports show that FDI inflow in Bangladesh surged 68% to a record high of \$3.61 billion in 2019.⁵³ As an internal factor, it is also perceived that investment importing developing countries first realize the downside impacts of FDI when they first confront any investment arbitration tribunal. Some experts euphemistically termed this act as 'bounded

⁴⁸ UNCTAD, 'Investment Policy Hub', <<https://investmentpolicy.unctad.org/international-investment-agreements/countries/16/bangladesh?type=bits>>.

⁴⁹ Ibid.

⁵⁰ Above, n 4–9.

⁵¹ Wladimir Andreff, 'Outward Foreign Direct Investment from BRIC countries: Comparing strategies of Brazilian, Russian, Indian and Chinese multinational companies' (2016) 12 (2) *The European Journal of Comparative Economics* 79, 131.

⁵² *The Economic Times* (India), <<https://economictimes.indiatimes.com/news/defence/india-russia-bangladesh-sign-tripartite-pact-for-civil-nuclear-cooperation/articleshow/63127669.cms?from=mdr>>.

⁵³ Nikkei Asian Review, 'Bangladesh enjoys foreign investment tailwind for economic boom', <<https://asia.nikkei.com/Economy/Bangladesh-enjoys-foreign-investment-tailwind-for-economic-boom>>.

rationality’ – a likelihood of suffering from ‘cognitive biases’ in investment policymaking without being fully aware of the risks of ISDS.⁵⁴ Empirical studies reveal that difficulties in the contemporary investment arbitration system can create a fear of loss to the host countries, which ultimately make them eager to leave the investment arbitration regime.⁵⁵ Developing countries’, including Bangladesh’s, experiences in investment arbitration can substantiate these claims. It can contribute to a chilling effect causing the country not to sign more BITs in the existing forms.

⁵⁴ Lauge N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries* (Cambridge University Press, 2015) 25–46.

⁵⁵ Haftel and Thompson, above n 34.

C *International investment arbitration experience of Bangladesh*

This study focuses on three remarkable investment disputes of Bangladesh at ICSID. The objective of selecting these ISDS through international arbitration is to show how BIT provisions are interpreted somewhat arbitrarily by the ICSID tribunal to afford asymmetrical protection for corporate interest that has made the competing interest of the host country peripheral. The premise of this analysis is that the ICSID tribunal has failed to strike a pragmatic balance between the competing interests of investors and developing host countries. Bangladesh won one of the three disputes but lost the other two. Despite its victory in the third dispute, it had to pay to the investors, hefty compensation awarded by the ICSID tribunal, which may be construed as a ‘loss’ in the litigation. A substantial compensation in favour of investors against host developing parties is fairly common in ISDS.⁵⁶ This has even happened in the case of Australia winning in the ‘Big Tobacco case’ against Philip Morris but the external legal and arbitration cost of Australia ran over AUD24 million, yet the losing tobacco corporation was ordered to pay only the half of the cost.⁵⁷

1 *The NIKO–Bangladesh Dispute*⁵⁸

NIKO, a Canadian company, filed this ICSID dispute against two Bangladeshi State-Owned Enterprises (SOEs), Bangladesh Petroleum Exploration and Production Company Ltd (BAPEX) and Bangladesh Oil, Gas and Mineral Corporation (Petrobangla). Based on a 1999 framework of understanding, NIKO and BAPEX signed a joint venture agreement (JVA) in 2003 for gas exploration in Feni and Chattak regions in Bangladesh. Gas exploration and supply to Petrobangla began in November 2004 without a price agreement, which subsequently became the core issue of this dispute. Until 1 April 2010, Petrobangla owed USD27.16 million to NIKO. It also withheld payment of USD8.55 million to its subsidiary, BAPEX. This

⁵⁶ See UNCTAD reports in above n 31–32.

⁵⁷ Pat Ranald, ‘When even winning is losing. The surprising cost of defeating Philip Morris over plain packaging’ (*The Conversation*, 27 March 2019), <<http://theconversation.com/when-even-winning-is-losing-the-surprising-cost-of-defeating-philip-morris-over-plain-packaging-114279>>.

⁵⁸ *NIKO Resources (Bangladesh) Ltd. (Claimant) v People’s Republic of Bangladesh (First Respondent), Bangladesh Petroleum Exploration & Production Company Limited (“BAPEX”) (Second Respondent), and Bangladesh Oil Gas and Mineral Corporation (“PETROBANGLA”) (Third Respondent)*, ICSID Case No ARB/10/18 (award on merit of 14 September 2015) and ICSID Case No ARB/10/11 (decision on jurisdiction of 19 August 2013).

non-payment was linked to a damage caused by two gas-field blowouts and massive fire-destruction during the drilling at Chattak on 7 January and 24 June 2005. NIKO failed to take necessary safety precautions, resulting in a huge explosion. It did not attempt to extinguish the fire and confine the damage. The fire remained uncontrolled for months, causing extensive damage to the gas wells and adjacent areas, as well as to human life and the surrounding ecosystem. This became an issue of corporate negligence.

Bangladesh investigated the causes of the gas-field blowout and found NIKO irresponsible and careless in handling the fire extinguishing. Based on the government report, in May 2008, Petrobangla filed a compensation suit against NIKO in the Dhaka District Court. NIKO rejected the jurisdiction of the local courts. Bangladesh Environment Lawyers' Association (BELA), a renowned NGO in Bangladesh, filed a separate public interest litigation⁵⁹ against NIKO in the High Court Division (HCD) of Bangladesh.⁶⁰ BELA sought two orders: first, cancellation of JVA and second, an injunction on gas payments until NIKO compensated for the damages caused by the blowouts. The HCD rejected the first claim but issued an interim order restraining the payment of gas price to NIKO. It also ordered NIKO to pay compensation for the blowouts to the injured party Bangladesh. Petrobangla stopped payments to NIKO as per the HCD order and served a legal notice on NIKO claiming USD9 million in damages for the blowouts.⁶¹

To avoid liability for negligence and to absolve itself of liability for fire damage, NIKO filed two separate investment disputes against Petrobangla at ICSID—one for 'non-payment of gas price' and the other for 'a compensation claim' associated with the non-payment.⁶² Petrobangla counter-argued that the blowouts involved tort, criminal and environmental liabilities of NIKO, which are not the subject matter of the JVA, and hence, these issues were beyond the jurisdiction of ICSID. ICSID Tribunal rejected Petrobangla's arguments.

The NIKO–BAPEX–Petrobangla JVA and gas purchase and sale agreement (GPSA) conferred the dispute settlement jurisdiction to ICSID,⁶³ which enabled the

⁵⁹ The invocation of the law before courts to advance human rights, equality, or issues of widespread public interest and concern is known as public interest litigation (PIL). It contributes to the advancement of minority or disadvantaged groups or individuals' causes. Both public and private law matters can give rise to PIL.

⁶⁰ The Supreme Court of Bangladesh is composed of two divisions: the HCD and Appellate Division (AD), the latter being the apex court in Bangladesh.

⁶¹ *NIKO v Bangladesh*, supra, note 58, para 100.

⁶² Ibid.

⁶³ Article 18 of the JVA, Article 13 of GPSA; paras 45, 88 *NIKO v Bangladesh*, above n 58.

ICSID tribunal to decide this dispute.⁶⁴ The respondents initially refused the ICSID jurisdiction but later accepted it. Petrobangla's central claim was to get a 'set-off' for its compensation claim from the gas price due to NIKO, which was not accepted by the ICSID tribunal.⁶⁵ The tribunal dismissed this claim and determined that Petrobangla shall immediately pay USD25,312,747 and BDT139,988,337 to NIKO, plus interest (a) in the sums of USD5,932,833 and BDT49,849,961 and (b) as of 12 September 2014, at the rate of six months LIBOR + 2 percent for USD and 5 percent for BDT, compounded annually.⁶⁶

This decision helped NIKO evade its corporate liabilities and exonerate its legal obligations for gross negligence to the host country. The tribunal ignored the gas-field fire damage which caused widespread environmental destruction and economic loss to Bangladesh. It ruled out the possibility of a mutual 'set-off',⁶⁷ which may lead one to question the tribunal's neutrality and fairness. This decision demonstrates the ICSID tribunal's approach of ignoring the host country's wider public interest, environmental issues, and local laws and policies. This dispute is an example of circumventing the legitimate interests of host developing countries, as well as evidencing the ICSID tribunal's over-protection of investor interests.

It is important to note that a breach of an investment contract or contractual obligations as in this NIKO JVA or GPSA does not *ipso facto* give rise to direct international state responsibility under international law.⁶⁸ The NIKO tribunal expanded a contract-based obligation beyond the contractual parties and included the host country into its jurisdiction without reference to any effective BIT between the parties or an umbrella clause. The tribunal did not give any specific reason for this. It is an instance of an expansive interpretation of arbitration laws. Although controversial, investment tribunals nowadays⁶⁹ tend to interpret contract-based claims as treaty-based claims in the context of BITs with an umbrella clause.⁷⁰ But

⁶⁴ *NIKO v Bangladesh*, above n, 58, para 575.

⁶⁵ Paras 43, 167, *NIKO v Bangladesh*, ICSID Award (14 September 2015), Decision on Implementation of the Decision on the Payment Claim, <<https://www.italaw.com/sites/default/files/case-documents/italaw4402.pdf>>.

⁶⁶ *NIKO v Bangladesh*, ICSID Award (26 May 2016), *Third Decision on The Payment Claim*, para 110, <<https://www.italaw.com/sites/default/files/case-documents/italaw7341.pdf>>.

⁶⁷ *NIKO v Bangladesh*, above n 58, para 100.

⁶⁸ Surya P Subedi, *International Investment Law: Reconciling Policy and Principle* (Hart Publishing, 2012) 100, 102.

⁶⁹ Anthony, above n 12, 607.

⁷⁰ Sinclair, above n 10, 21.

the context of NIKO dispute was totally different because no BITs exist between the states. Only an expansive reading of umbrella clause can be interpreted to compel the host state to comply with the obligations created by investment contracts.

2 *The SAIPEM–Bangladesh Dispute*⁷¹

Saipem, an Italy-based company entered into a contract with Petrobangla to construct a 409 km gas and condensate pipeline in Bangladesh. The contract was governed by the laws of Bangladesh. It contained an International Chamber of Commerce (ICC) arbitration clause with its locus in Dhaka.⁷² Saipem sued Petrobangla for a breach of contract at the ICC tribunal (discussed below). Saipem took the case to ICSID since the ICC award was not enforceable under the *New York Convention*.

SAIPEM—Petrobangla Arbitration

In April 1991, Saipem requested a one-year extension after missing the construction deadline set in the Saipem-Petrobangla contract. In addition to claiming more time to complete the project, Saipem accused Petrobangla of the delay and sought USD 21,231,115 in compensation.⁷³ Petrobangla denied responsibility for the delay, claiming that because of Saipem's mistreatment of the local people, local communities protested against the company's construction and its resultant displacement, which caused the delay. Consequently, Petrobangla refused to extend the time and imposed USD91 million compensation against Saipem for causing the delay. This 'delay', associated 'liabilities for the delay'⁷⁴ and 'conflicting compensation claims between parties' were the main issues of this dispute. The World Bank financed the project,⁷⁵ and hence, it intervened and pressurised the Bangladesh Government to extend time to Saipem.⁷⁶ Under the World Bank's pressure, Petrobangla agreed to the

⁷¹ *Saipem S.P.A.(Claimant) v The People's Republic of Bangladesh (Respondent)*, ICSID Case No. ARB/05/07 (decision on jurisdiction and recommendation on provisional measures of 21 March 2007 and award on merit of 30 June 2009).

⁷² *Ibid* para 10.

⁷³ *Ibid* para 13.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* para 7.

⁷⁶ *Ibid* para 14.

time extension, but declined the payment of ‘additional costs’ as compensation to Saipem for the delay.⁷⁷ Claims and counterclaims of the liability and compensation continued.⁷⁸ A fair, impartial investigation to inquire into the liability for the delay was never conducted.

Saipem completed the construction in 1992. In June 1993, it sued Petrobangla for the additional costs for the delay at the ICC arbitration tribunal in Dhaka. Petrobangla complained against some procedural irregularities of the ICC trial, which were instantly rejected by the Tribunal. First, it complained about the ‘admissibility’ of the written statement of the main witness, who never appeared before the tribunal.⁷⁹ None of the parties was able to examine or cross-examine the witness whose written statement was admitted without examination and became the central evidence. Subsequently, this uncorroborated statement was also treated as the core evidence at ICSID tribunal. Petrobangla argued at the ICC tribunal that this evidence is ‘non-admissible’ for a fair trial. It pleaded that the ICC tribunal must ensure that all witnesses must be physically present before the tribunal, and both parties must be given the opportunity to examine and cross-examine the witness. The tribunal rejected these claims⁸⁰ and concluded the trial with uncorroborated evidence.

Apprehending imminent injustice from the ICC trial, Petrobangla filed a case in the Sub-ordinate Judge Court of Dhaka claiming revocation of the tribunal’s authority under sections 42(2) and 43 of the *Arbitration Act 1940*. It also sought an interim injunction, which the Sub-ordinate Judge Court of Dhaka dismissed, and then Petrobangla appealed to the HCD. The HCD overruled the lower court’s decision and granted a temporary injunction for eight weeks on the proceedings of the ICC tribunal.⁸¹ Subsequently, Petrobangla again applied for the revocation of the tribunal’s authority to the Sub-ordinate Judge Court, which was granted amid Saipem’s written objection.⁸² After this lower court’s ‘revocation order’, Saipem did not appeal or respond, and refrained itself from seeking remedies in Bangladesh courts.⁸³ Nevertheless, the ICC tribunal ignored the local court’s orders and resumed its trial on the premise that the local court’s revocation of the

⁷⁷ Ibid para 23.

⁷⁸ Ibid para 14.

⁷⁹ He was the first of three witnesses nominated by Saipem in the ICC Tribunal.

⁸⁰ *Saipem* award, above n 71, paras 31, 32.

⁸¹ Ibid para 84.

⁸² Ibid para 40.

⁸³ Ibid para 42.

tribunal's authority went against the general norms of international arbitration.⁸⁴ Finally, the ICC tribunal ordered Petrobangla to pay to Saipem 'the total amount of USD6,148,770.80 plus EUR110,995.92 (which included the Retention Money which remained unpaid) plus interest at 3.375% from 7 June 1993'.⁸⁵

Petrobangla appealed to the HCD to annul the ICC award. The HCD refused to set aside the award on the ground that the disputed award itself is illegal and does not exist 'in the eyes of law'.⁸⁶ The HCD stated that 'non-existent award can neither be set aside, nor can it be enforced'.⁸⁷ The HCD also explained that the ICC tribunal had continued the arbitration and delivered the award in defiance of the HCD and subordinate court's existing orders, which had rendered the award non-existent in Bangladesh. Such a non-existent award did not require a further annulment, and as a result, the ICC award became inexecutable in Bangladesh. Saipem did not appeal against the order to the Appellate Division of the Supreme Court of Bangladesh. It, instead, went to ICSID tribunal straight away for a further remedy. Saipem contented that its right of arbitration with Petrobangla was a contractual right as well as a right under Article I(e) of *Bangladesh-Italy BIT*.⁸⁸ It claimed that the Bangladesh court's decision to revoke the ICC tribunal's authority and non-execution of ICC Award amounted to an uncompensated illegal expropriation of Saipem's rights to arbitration, which is a violation of Article 5(2) of the BIT

Examining 'Judicial Expropriation' Claim in Saipem Case

The ICSID tribunal awarded in favour of Saipem⁹⁰ based on its interpretation of Article 5(2) of the BIT between Bangladesh and Italy (20 March 1990, effective 20 September 1994), which states that

⁸⁴ Ibid para 31.

⁸⁵ *Saipem v Petrobangla*, ICC case No. 7934/CK, award on jurisdiction of 27 November 1995 and final award of 9 May 2003, para 48, <<https://www.italaw.com/sites/default/files/case-documents/ita0734.pdf>>; also, ICSID award, above n 71, para 48.

⁸⁶ *Saipem* award, above n 71, paras 49, 50, 129.

⁸⁷ *Saipem v Bangladesh*, unreported HCD decision of 20 June 2009, p 50.

⁸⁸ *Saipem* award, above n 71, para 84 (2).

⁸⁹ Ibid.

⁹⁰ Ibid paras 161, 216.

Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of other Contracting Party ... (emphasis added).

It decided that the decision of the Bangladesh HCD on the non-recognition of the ICC award was a measure 'having similar effects' of 'indirect expropriation'.⁹¹ Since indirect appropriation was caused by the judicial organ of the host state, it was tantamount to an act of judicial expropriation.

Saipem–Bangladesh is not the first case on judicial intervention in investment arbitration. Injunctions on the functions of arbitration tribunals and judicial interference by local courts were issues in other investment disputes before the *Saipem* case.⁹² *Himpurna California Energy Ltd v Indonesia* case is another important dispute where the UNCITRAL tribunal dealt with issues which involved judicial injunction restraining the tribunal's authority, interception of an arbitrator and breach of the terms of appointment.⁹³ The *Himpurna* tribunal in its interim award held that the Jakarta court's injunctions constituted a 'denial of justice'.⁹⁴ Prior to *Saipem*, there were only a handful of investment conflicts in which 'denial of justice' was a major debate. Among them, the most well-known award was rendered in the *Loewen v United States* dispute,⁹⁵ but the legal jurisprudence on the scope of the prohibition of denial of justice and exhaustion of local remedies rules remained unsettled. Simultaneously, the nexus between judicial expropriation and exhaustion of local remedies is still not clearly addressed in arbitral practice and academic commentary. Amid this context, *Saipem* tribunal decided that the exhaustion of local remedies is substantially essential to establish the investor's claim of 'denial of justice', but not for establishing 'judicial expropriation'.⁹⁶ *Saipem* tribunal did not give any reason or explanation in support of the decision which is controversial and demands justification.

⁹¹ Ibid paras 129, 153.

⁹² Alan Redfern et al., *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 2004) 409–12; Julian Dew, 'Anti-Suit Injunctions Issued by National Courts to Prevent Arbitration Proceedings', in Emmanuel Gaillard (ed.), *Anti-Suit Injunctions in International Arbitration* (Juris Publishing, 2005) 25–40.

⁹³ *Himpurna California Energy Ltd v Indonesia* (2000) XXV Ybk Commercial Arbitration 109, interim award of 26 September 1999 and final award of 16 October 1999. Another similar case is, *Autopista v Venezuela* 10 ICSID Rep. 309, award of 23 September 2003: 200–208.

⁹⁴ Ibid, *Himpurna*.

⁹⁵ *Loewen v United States* (ICSID Case No. ARB(AF)/98/3) (2003) 42 I.L.M. 811 (25 June 2003).

⁹⁶ *Saipem* award, above n 71, para 176.

The Loewen award and the widely accepted academic writing on the issue puts forward that the rule on exhaustion of local remedies is the substantial element of a delict of denial of justice.⁹⁷ Even if the BITs or IIAs exempt the investor from the requirement of exhausting local remedies before making claims to international investment tribunals, experts underscore that such exemption is not applicable in disputes involving the question of denial of justice.⁹⁸ This argument also applies for claims against judicial expropriation for at least two reasons. The first and main rationale behind this is that both ‘judicial expropriation’ and ‘denial of justice’ presuppose the host state’s duty to ensure a fair and effective system of justice for the investors. This judicial administration of justice system of a host country is not to be considered in fraction or in isolation by assessing the orders or actions of one or a few lower courts of the judicature. Instead, it should be the conclusive order of the judicature, which is to be taken into consideration because it represents the final result of the judicial administration system. Unless and until any investor tries the whole judicial system and fails, no claim of judicial expropriation or denial of justice can arise under international law. This argument points out the special nature of a country’s judicial administration system which logically leads to the conclusion that any allegation of an international delict committed by the judicature of a host country is actionable only when the whole system is unsuccessfully tried. It also leaves an opportunity for the local judicature to rectify their mistakes through the upper and apex courts. Saipem, unfortunately, did not try to get a remedy from the Appellate Division of the Supreme Court, the highest judicial organ of Bangladesh, and therefore, the award of the tribunal is unfair. This decision is grounded on irrational views.

Second, the Saipem award has narrowed down the scope of denial of justice claims by separating judicial expropriation from them. In a greater sense, judicial expropriation is one type of denial of justice. The claims of ‘denial of justice’ and ‘judicial expropriation’ are both the delicts of the judiciary which occur in dispense

⁹⁷ On ‘judicial finality rule’ in the *Loewen* dispute, see, Bradford Gathright, ‘A Step in the Wrong Direction: The Loewen Finality Requirement and the Local Remedies Rule in NAFTA Chapter Eleven’ (2005) 54 *Emory Law Journal* 1093; Don Wallace Jr, ‘Fair and Equitable Treatment and Denial of Justice: *Chattin v Mexico* and *Loewen v USA*’ in Todd Weiler, ed., *International Investment Law and Arbitration: Leading Cases from the ICSID, NAFTA, Bilateral Treaties and Customary International Law* (Cameron May, 2005) 669–701.

⁹⁸ Jan Paulsson, *Denial of Justice in International Law* (Cambridge University Press, 2005) 108–

of justice. Both the delicts contain some form of judicial error and arise in the context of the administration of justice. If the special application of exhaustion of local remedies can be rationalised with reference to the special nature of the judicial system, it is quite logical that the same set of considerations must be applied to all forms of judicial erroneous functions including the allegations of expropriation. If the exhaustion of local remedies is an essential requirement for a 'denial of justice', local remedies must also be exhausted if there is a question or claim on 'judicial expropriation'. The Saipem tribunal rejected this concept. It also refrained from giving any single reason as to why a claim of 'judicial expropriation' is distinct from a claim of 'denial of justice'. The fact that the Saipem tribunal chose to remain silent in this matter is a type of denial of justice in and of itself.

Controversies in the Saipem Case

The first criticism of the Saipem award is that it ignored the issue of 'exhaustion of local remedies'. On the question of admissibility, it is an essential requirement under Article 26 of the ICSID Convention. It is admitted that Saipem, the claimant, did not even try to appeal against the Dhaka Sub-judge Court order on the 'revocation of ICC jurisdiction'. It also refrained from appealing against the HCD order to the Appellate Division of Bangladesh Supreme Court which is the apex judicial body.⁹⁹ Despite these, the tribunal concluded that Saipem had 'exerted reasonable local remedies' and spent 'considerable time and money' to get redress.¹⁰⁰ Here lies the erroneous disposition of the ICSID tribunal, which is used to interpret the legal terms in favour of the investors. It must not be forgotten that before stigmatising the whole judiciary of a country, ie, declaring judicial decisions as an act of indirect expropriation, it must be clearly proved that the claimant had availed all available remedies from the local judiciary. The meaning of 'exhaustion of remedies' should be holistically interpreted to include decisions from the 'apex judicial organ' (Appellate Division of Bangladesh Supreme Court in this dispute) and exclude 'inconclusive decisions' of lower courts. Investors' proclivity to bypass local laws (as done by Saipem in this case) should also be addressed in such interpretation.

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⁹⁹ Saipem award, above n 71, para 42.

The second controversy relates to the legitimacy of Saipem arbitration under the *Bangladesh–Italy* BIT. The gas-line construction contract was signed on 14 February 1990, whereas the *Bangladesh–Italy* BIT, ‘the legal basis of this dispute’¹⁰¹ was concluded subsequently and came into effect in 1994. The legality to adjudicate a dispute with retrospective effect of a BIT was not questioned at any point of the arbitration. The retrospective application of international treaties is not legally permitted, because it conflicts with the spirits of Articles 4 and 28 of the *Vienna Convention on the Law of the Treaties* (VCLT).¹⁰² Article 4 of the VCLT prohibits non-retroactivity of the Convention and discourages its use in retrospect, whereas Article 28 states that treaty ‘provisions do not bind a party in relation to any act or fact which took place ... before the date of the entry into force of the treaty ...’. Filing a dispute under a BIT that came into effect subsequent to the investment contract raises the question of legitimacy of the trial. If construed pursuant to the principles of VCLT,¹⁰³ the ICSID tribunal lacked jurisdiction to adjudicate the dispute. This award is therefore flawed for want of legitimacy.

Third, even if the HCD ruling causes Saipem a financial loss, it is harsh to consider it ‘indirect expropriation’.¹⁰⁴ Saipem claimed compensation for the host country’s inaction which caused the delay. The tribunal could fairly order Bangladesh to pay the arrears in due. Moreover, the incident of ‘setting aside’ or ‘non-implementation’ of arbitral awards by domestic courts is not uncommon practice.¹⁰⁵ For example, if an arbitral award violates common norms of natural justice, Australia usually refuses to implement it. International arbitral awards may not be enforced in Australia under federal law if they are made in violation of natural justice (or procedural due process) requirements.¹⁰⁶ Considering this, it can be argued that the Bangladesh courts’ refusal to recognise and execute a procedurally flawed ICC award is not an act of judicial expropriation.

¹⁰⁰ Ibid para 183.

¹⁰¹ Ibid, para 95.

¹⁰² Anthony Aust, ‘Vienna Convention on the Law of Treaties (1969)’, *Oxford Public International Law: Max Planck Encyclopedia of Public International Law* (Oxford University, 2006).

¹⁰³ Paul McDade, ‘The Effect of Article 4 of the Vienna Convention on the Law of Treaties 1969’ (1986) 35 *International and Comparative Law Quarterly* 499–511.

¹⁰⁴ See, *Tippets, Abbett, McCarthy, Stratton v TAMS-AFFA Consulting Engineering of Iran*, (1985) 6 *Iran-US Claims Tribunal Reports* 219, 225; *Biloune and Marine Drive Complex Ltd v Ghana Investment Centre and Government of Ghana* (award of 30 June 1990) (1993) 95 *ILR*, para 75.

¹⁰⁵ Stephen Tully, ‘Challenging Awards Before National Courts for A Denial of Natural Justice: Lessons from Australia’, (2016) 32 (4) *Arbitration International* 659–680.

3 *The Chevron–Bangladesh Dispute*¹⁰⁷

Chevron, a Bermudan company, sued Bangladesh over the interpretation of the tariff provisions in the Production Sharing Contract (PSC) and Gas Production and Sharing Agreement (GPSA). The ICSID jurisdiction in this dispute was based on the PSCs and GPSAs – a contract-based obligation which needed the clarification from the tribunal, on whether Petrobangla was entitled to receive 4 per cent transportation tariff from Chevron as the ‘wheeling charge’ for supplying gas transported through Petrobangla’s own pipelines.¹⁰⁸ Chevron agreed to pay the tariff only when Petrobangla transported the gas to third parties using Petrobangla’s pipelines – but not for the gas sold to Petrobangla itself. Petrobangla claimed that as a gas transmission company, it would be entitled to receive a tariff when its pipeline is used.¹⁰⁹ Chevron sought ICSID’s clarification on this point. It paid the 4 per cent transportation tariff to Petrobangla until 2003 but stopped after filing the dispute. Chevron demanded a refund of USD240 million, claiming that this amount was wrongly paid to Petrobangla.

Bangladesh objected to the ICSID jurisdiction until 2009¹¹⁰ on two grounds:

(a) that the dispute was not an investment dispute as the gas sale proceeds did not constitute an investment under Article 25(1) of the ICSID Convention, which requires that such money/proceed has to be invested to earn interest or profit; and

(b) that the dispute was not between the contracting states but between two corporate nationals – Petrobangla, incorporated in Bangladesh but not a part of its government and Chevron, incorporated in Bermuda which is not an ICSID party. After prolonged reluctance to accept ICSID jurisdiction, Bangladesh conceded as most of its BITs contain a broad definition of investment and Petrobangla is indeed a state-owned entity. Thereafter, Bangladesh participated in the arbitration. The tribunal ruled in favour of Bangladesh and ordered Chevron to pay a 4% gas transmission tariff to Petrobangla regardless of who the buyer was.¹¹¹ Petrobangla would also be entitled to collect USD312 million in 20 years from Chevron.¹¹²

¹⁰⁶ Ibid.

¹⁰⁷ *Chevron Bangladesh Block Twelve, Ltd. And Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. Vs People’s Republic of Bangladesh*, ICSID Case No. ARB/06/10 (award of 18 May 2010). Year missing in the reference.

¹⁰⁸ Paras 129, 134 and 149. *Chevron Bangladesh Block Twelve, Ltd. and Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. (Claimants) v People’s Republic of Bangladesh (Respondent)*, (ICSID Case No. ARB/06/10), award.

¹⁰⁹ Lindsey Marchessault, ‘Chevron Bangladesh Block Twelve, Ltd. And Chevron Bangladesh Blocks Thirteen and Fourteen, Ltd. Vs People’s Republic of Bangladesh (ICSID Case No. ARB/06/10): Introductory Note’ (2011) 26(1) *ICSID Review: Foreign Investment Law Journal* 257, 256–264.

¹¹⁰ Ibid 259.

¹¹¹ Ibid 261.

¹¹² *The Daily Star*, ‘Int’l Court rejects Chevron Claim’ (Dhaka, 19 May 2010), <<https://www.thedailystar.net/news-detail-139124>>.

Bangladesh was successful in the dispute but was heavily penalised for its alleged ‘intransigent stance at the jurisdiction phase’ of the arbitration.¹¹³ In exercising its discretion, the tribunal ordered Bangladesh to pay Chevron’s litigation costs, expenses for Chevron’s preparation for the merits hearing that had been initially adjourned, and the entirety of Chevron’s costs from the arbitration’s jurisdictional phase.¹¹⁴ Lindsey Marchessault, a consultant of ICSID, opined that imposing these costs on Bangladesh was largely attributed to its disinclining approach to accept ICSID jurisdiction in the beginning.¹¹⁵ So, although winning on merits, Bangladesh had to ‘pay a higher portion of the costs’ than Chevron.¹¹⁶ The tribunal awarded five sets of payments against the respondent,¹¹⁷ which was a significant amount of economic reparation for Bangladesh. Chevron simply had to pay the ‘wheeling charges’.

The Chevron tribunal can be criticised for its harsh application of discretionary power and imposing injudicious penalties to the respondent. Penalties for resisting the tribunal’s jurisdiction and ‘intransigent stance at the jurisdiction phase’ of the arbitration, ordering the expenses of the entire jurisdictional phase of the arbitration, and bearing the claimant’s litigation costs are heavy and unjust convictions for a developing country such as Bangladesh. Refuting the tribunal’s jurisdiction at the jurisdictional phase is a well-established practice,¹¹⁸ which is a right of the parties involved and usually taken as a part of the arbitral proceedings. The Chevron award has not only denied the party the basic procedural right to challenge the jurisdiction but also it has to face heavy financial consequence for exercising its legitimate right. This type of inconsiderate application of arbitral discretion raises doubts on the credibility, impartiality, and judicious application of tribunal’s powers., particularly in disputes involving developing countries.

¹¹³ Para 263, *Chevron v Bangladesh*, supra, note 107; Sameer Sattar, ‘*Chevron v Bangladesh* (ICSID Case No. ARB/06/10) in Country Chapters: Bangladesh’, *The Asia Pacific Arbitration Review* 2015 (Global Arbitration Review Publication, 2015).

¹¹⁴ Paras 252, 263, *Chevron v Bangladesh*, above n 107.

¹¹⁵ Above n 109, Marchessault, 263.

¹¹⁶ Ibid 264

¹¹⁷ Ibid 261, 263, 264.

¹¹⁸ Parties to a dispute can object to jurisdiction, but the tribunal has the last say. It is a part of the process, not an offence for which the party would be punished – it goes squarely against the fair trial and natural justice principle. See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v US)*, preliminary judgment of 26 November 1984 on jurisdiction of the International Court of Justice (ICJ) and the US objection to the ICJ jurisdiction.

Bangladesh's lesson from the ICSID arbitrations signals that the country should review its future strategies on BITs and FDI contracts. In all three disputes, the ambiguous terms in BITs and investment contracts allowed arbitrators to overlook investors' delicts, make sweeping interpretations, and disregard the principles of natural justice.¹¹⁹ The NIKO tribunal's rejection of corporate negligence and set-off claims against gas field blowouts, as well as its approach to establishing jurisdiction over a host nation in the absence of a BIT or contractual obligation, serve as a sobering lesson for Bangladesh. The Saipem tribunal's perspective on setting new parameters for judicial expropriation without exhausting local remedies is unjustifiable to host countries. The Chevron dispute also evidences ICSID tribunals' insensitivity to apprehend the pecuniary impact of extraneous fines on developing countries. These are not the goals of concluding FDI contracts and BITs.

III. EXAMINING THE EXIT ROUTES TO AVOID BANGLADESH'S EXPERIENCE IN INVESTMENT ARBITRATION

Host developing countries have three options to overcome the unintended or undesired consequences of their BITs. These options are (a) withdraw from the controversial ICSID arbitration process; (b) terminate the BITs or contracts to escape further litigation and damage, and/or (c) change or redefine vague, twisted or legally stretchable treaty provisions through renegotiation. Legal challenges and potential opportunities of these three options are examined below. This part will analyse the first two options while Part IV proposes the third option as a preferable one.

A *Option 1 – Denouncing ICSID jurisdiction*

Aggrieved countries such as Bolivia, Ecuador, and Venezuela can opt to denounce the ICSID jurisdiction.¹²⁰ The denunciation of the ICSID Convention has some unique ramifications. Unlike the ICC or UNCITRAL awards, the ICSID awards are more effective in that they do not necessitate a separate enforcement procedure.¹²¹ Similar to the final judgment of domestic courts, ICSID awards can be directly executed.¹²²

¹¹⁹ Michael Waibel et al, 'The Backlash against Investment Arbitration: Perceptions and Reality', in Michael Waibel et al, eds, *The Backlash against Investment Arbitration*, (Kluwer Law, 2010) xxxvii–lii.

¹²⁰ Above n 35–37.

¹²¹ Domestic recognition of ICSID award is clearly admitted by the ICSID parties under the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958.

¹²² Article 54(1) of the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UN Treaty Series 159 (ICSID Convention, also known as Washington Convention).

1 How does ICSID denunciation work?

The ICSID tribunal can hear an investment dispute if the following three conditions are met:

- i) The investor's state of nationality must be an ICSID Contracting Party.
- ii) The responding state must be an ICSID Contracting Party.
- iii) Parties must consent in writing to the ICSID tribunal's authority.¹²³

A formal denunciation of the ICSID Convention is the first step towards escaping the jurisdiction of the ICSID investment tribunal.¹²⁴ Any unilateral denunciation generally takes effect after six months of a formal notice. But the denouncement process becomes complicated if any country makes a 'prior consent' or 'parallel consent' to accept ICSID jurisdiction through its BITs or IIAs. Such a previously given consent under BITs or IIAs creates a '*compromis*' or another binding jurisdiction for ICSID that cannot be denounced unilaterally.¹²⁵

In cases where a 'parallel consent' exists, that is, if a Contracting Party has already accepted the ICSID tribunal's jurisdiction by perfecting its consent through a BIT or other IIAs, it cannot be revoked unilaterally through subsequent denouncement.¹²⁶ Conversely, if a country does not have any prior consent, it can unilaterally denounce the ICSID Convention.¹²⁷ A 'prior consent' or 'parallel consent' can likely be withdrawn by terminating the BITs or other contracts simultaneously (explained below). Thus, investment tribunals' jurisdiction can be terminated only when all forms of consent from the parties are explicitly withdrawn. Nonetheless, it did not happen for Bolivia which terminated the relevant BITs and withdrew from the ICSID jurisdiction to protect itself from the influx of investment disputes.

2 Bolivia's experience as a denouncing party

Since Bolivia's withdrawal from the ICSID Convention in October 2007, more than 14 years have passed, but investment disputes have not left the country. Bolivia was a respondent in an ICSID investment dispute until 18 May 2018.¹²⁸ Its post-denunciation situations are outlined as follows.

¹²³ Ibid Article 25(1).

¹²⁴ Ibid Article 71.

¹²⁵ Christoph H Schreuer et al, *The ICSID Convention: A commentary*, 2nd ed (Cambridge: Cambridge University Press, 2009) 1278–80.

¹²⁶ Julien Fouret, 'Denunciation of the Washington Convention and Non-Contractual Investment Arbitration: 'Manufacturing consent to ICSID arbitration?' (2008) 25 (1) *Journal of International Arbitration* 71, 82–83; E.T.I. *Euro Telecom International N.V. v Bolivia*, ICSID, Case No. ARB/07/28, Expert Opinion of Allain PELLET, 3.

¹²⁷ ICSID Convention, Article 25.1, above n 122.

¹²⁸ Deleted

ICSID disputes filed before Bolivia's denunciation

In *Quiborax S.A., Non-Metallic Minerals S.A. and Allan Fosk Kaplun v Plurinational State of Bolivia*¹²⁹ the ICSID case was filed against Bolivia on 5 October 2005, almost two years before Bolivia's formal denouncement of the ICSID. The Chilean company Quiborax requested compensation for the Bolivian revocation of a mining concession in the department of Potosi, an administrative unit of Bolivia. The arbitration continued almost eight years after Bolivia's date of denouncement, and in September 2015, the tribunal issued an award in favour of the investors. The tribunal ordered Bolivia to pay USD50 million compensation to Quiborax. The ICSID Annulment Committee had also upheld the decision.¹³⁰ It is distressing for Bolivia or a similarly affected country to realise that the ICSID arbitration system can require a party to be actively involved in a dispute even after 11 years of its voluntary denouncement of ICSID jurisdiction.

Disputes filed during Bolivia's denunciation

Despite Bolivia's objection, the ICSID registered the *E.T.I. Euro Telecom International N.V. v Plurinational State of Bolivia* on 30 October 2007,¹³¹ only four days before the end of the six-month denouncement notification period. According to Article 72 of the ICSID Convention, the denouncing nation will be subject to ICSID jurisdiction until the six-month notification period expires. Thus, the Secretary-General registered the dispute for arbitration. However, on 21 October 2009, the tribunal issued a formal order to discontinue the trial.¹³² It was widely admitted that there was a USD100 million settlement deal between the Dutch telecom company and Bolivia.¹³³ Such private settlement outside court/tribunal usually follows the policy of 'non-disclosure', the arrangement remained undisclosed, and no official record or document is publicly available.

¹²⁹ *Quiborax S.A., Non-Metallic Minerals S.A. v Plurinational State of Bolivia*, ICSID Case No. ARB/06/2 (2012). On the decision on jurisdiction, "italaw", <<https://www.italaw.com/sites/default/files/case-documents/italaw1098.pdf>>; <<https://www.italaw.com/sites/default/files/case-documents/italaw4389.pdf>>.

¹³⁰ *Ibid Quiborax*, para 626.

¹³¹ *E.T.I. Euro Telecom International N.V. v Plurinational State of Bolivia* (I), ICSID Case No. ARB/07/28.

¹³² UNCTAD, 'Investment Policy Hub', <<https://investmentpolicyhub.unctad.org/ISDS/Details/272>>.

¹³³ Luke Peterson, 'Telecom Italia subsidiary agrees to withdraw ICSID claim against Bolivia, but case to proceed under other auspices', *Investment Arbitration Reporter* (November 25, 2010), <http://www.iareporter.com/articles/20101126_8>.

Disputes filed long after Bolivia's denunciation

As per Article 72 of the ICSID Convention, the tribunal's jurisdiction over a denouncing country ceases to exist after formal denouncement. However, this did not happen in case of Bolivia. *Pan American Energy LLC* registered a dispute against Bolivia on 12 April 2010, more than two years after Bolivia's denouncement of the ICSID Convention.¹³⁴ This United States based oil company sued Bolivia over a BIT concluded in April 1998.¹³⁵ Bolivia denounced this BIT on 16 June 2012.¹³⁶ The jurisdiction over this dispute is perhaps founded on the argument that the unilateral denunciation of the ICSID Convention does not terminate all relationships with the denouncing state, as has happened in the above dispute. The ICSID jurisdiction continues to be effective even after the formal denouncement if the denouncing country's 'parallel consent' is effective. Unless this consent is also retracted, the ICSID jurisdiction can continue to exist even after the denunciation. Nevertheless, this dispute did not proceed further. On 24 February 2015, ICSID issued an order to discontinue it, referring to its executive power to do so as per Arbitration Rule 43(1) of the ICSID Convention.¹³⁷ This dispute was reported as settled outside formal arbitration, where Bolivia paid USD357 million in compensation to the investors.¹³⁸

3 Denouncing ICSID Convention: Is it a preferred solution?

The legal ramifications of the ICSID Convention's denunciation are extremely difficult to predict, and they are not straightforward. Even if a country withdraws its consent from the ICSID Convention, the effect of 'prior consent' or 'parallel consent' can frustrate the objectives of denunciation. Unless and until 'prior consent' from all sources are simultaneously withdrawn, the denunciation will be fruitless. Bolivia's experience shows that its strategy to withdraw unilaterally from the ICSID Convention was ineffectual. Its strategy to stop all ISDS against the country did not work. Following its denunciation, foreign investors initiated at least 13 investment disputes against Bolivia between 2007 and 2018.¹³⁹ This was possible because Bolivia's 'parallel consent' to the ICSID Convention was 'active' through several BITs concluded by the country.

¹³⁴ *Pan American Energy LLC v Plurinational State of Bolivia*, ICSID Case No. ARB/10/8, registered on 12 April 2010.

¹³⁵ UNCTAD, 'Investment Policy Hub: Bolivia, Plurinational State of - United States of America BIT (1998)', <<https://investmentpolicyhub.unctad.org/IIA/mostRecent/treaty/596>>.

¹³⁶ Ibid.

¹³⁷ UNCTAD, 'Investment Policy Hub', <<https://investmentpolicyhub.unctad.org/ISDS/Details/385>>.

¹³⁸ Ibid.

¹³⁹ UNCTAD, 'Investment Policy Hub', <<https://investmentpolicyhub.unctad.org/ISDS/CountryCases/24?partyRole=2>>.

Considering Bolivia's experience, it is suggested that a mere denunciation of the ICSID Convention cannot provide a desired solution for host developing countries. If denunciation is a choice, it must be supplemented with the withdrawal of coexistent 'parallel consent', if any, given through BITs and other IIAs. The withdrawal of prior consent from BITs is an uphill, daunting, indeed herculean, task. The termination of BITs could help, but BITs have an inherent resilience to survive for an extended period longer than is commonly expected. Legal and political challenges that are associated with these issues should also be taken into consideration.

B Option 2 – Terminating BITs and investment contracts

Depending on specified inbuilt applicable jurisdiction and law, investment contracts provide one layer of legal protection. Investment contracts can exist independently of any BIT between the host and investing countries. If a BIT exists, it supplements an additional layer of legal protection to the investments.¹⁴⁰ Since investment contracts are private legal instruments between the investment parties, jurisdictional issues, methods of performance, consequences for their termination, breach, compensation, renegotiation and associated remedies are subject to the terms and conditions of the contract. Parties can mutually change, renegotiate or terminate the contracts. If these are done in disagreement, parties in breach would face the consequences as per the contract. From a legal standpoint, the termination and renegotiation of investment contracts is a much simpler process than that of BITs. From the lessons of NIKO, Chevron and Saipem disputes, Bangladesh and other host developing countries should not accept ICSID jurisdiction in the future investment contracts. It is also suggested that they must include exhaustion of local remedies clause in new contracts. It can also be done through renegotiation, and renewal of existing contracts.¹⁴¹

A host country's involvement in ISDS does not generally arise from the breaches of investment contracts unless it is supplemented by a built-in arbitration clause in the contract or complemented by a BIT. The existence of an umbrella clause in BITs can also create the possibility of providing blanket protection to all investments in the host country. Therefore, IIAs must not include umbrella clauses which can trigger a treaty-level protection to investment contracts.

¹⁴⁰ James Crawford, 'Treaty and Contract in Investment Arbitration', *Arbitration International* (2008) 24(3) 351–374, 374.

¹⁴¹ Examined in Part IV below.

Unlike investment contracts or IIAs, BITs have a minimum effective period, but they last much longer. A study on the ‘trends in investment rulemaking through the BITs’ discovered three distinct tendencies in how nations determine the BITs¹⁴² initial effective period. First, the ‘prevailing trend has been ... 10 years’,¹⁴³ while the second choice is 15 years.¹⁴⁴ Third, other treaties specify that the BITs remain in force until a termination notice is properly served.¹⁴⁵ This third option tacitly exists in most BITs but becomes effective only after the initial effective period. For this ‘tacit survival clause’, most BITs survive over their initial effective period. Tacit clauses silently increase the lifetime of BITs.

1 ‘Initial effective period’ and ‘internal immunity clauses’ in BITs

BITs do not have any instant termination provision that can end the treaty immediately. In general, BITs may have two types of compliance periods: the ‘initial or minimum effective period’ and the ‘extended lifetime’. For example, Bangladesh has 24 active BITs.¹⁴⁶ Some of them were signed for only 10 years in the 1980s. These treaties are still alive even after 40 years. Surprisingly, a BIT concluded for only 10 or 15 years can survive hundreds of years. It is possible because investment treaties have ‘internal immunity’ provisions, interchangeably also called ‘survival clause’ that keep BITs alive for an infinite time. The ‘initial effective period’ of BITs is the agreed minimum ‘shelf life’. Parties are bound by this mandatory period. Most BITs of Bangladesh have a ten-year shelf life.¹⁴⁷ Normally, after this period, parties can terminate BITs with impunity. Bangladesh’s BITs with Iran (2001), the Netherlands (1994), and Switzerland (2000) require only six months’ notice, whereas its BITs with all other countries require 12 months.¹⁴⁸

Some BITs have an extended compliance period. In such cases, following the initial effective period, the BITs are renewed automatically if no written notice of

¹⁴² UNCTAD, ‘Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking’ (UNCTAD/ITE/IIT/2006/5), <https://unctad.org/en/Docs/iteia20065_en.pdf>.

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ UNCTAD, above n 48.

¹⁴⁷ Ibid. The only exception is that the initial effective period of Bangladesh’s BITs with the Netherlands (1994) and Singapore (2004) are for 15 years.

¹⁴⁸ Ibid.

denunciation is issued. If any party intending to terminate the BIT misses the specific timeline, it will have to wait for another full or half cycle similar to the original lifetime of the treaty. The *Bangladesh–Uzbekistan* BIT of 2000 incorporates such an auto-renewal provision.¹⁴⁹

The ‘tacit auto-renewal’ provision works silently, which extends the mandatory compliance period. One example is the *Bangladesh–Italy* BIT, which was the legal instrument in the Saipem dispute. Article 14(1) of the treaty sets out a five-year auto-renewal period after the expiry of its original 10-year lifetime. The tacit auto-renewal provision is also available in Bangladesh’s BITs with the Netherlands, India, and Indonesia.¹⁵⁰ The *Bangladesh–Indonesia* BIT is more critical on this point, which states that if any party fails to give the denouncement notice every nine years, it will eventually continue for an indefinite time.¹⁵¹

Apart from these different sets of ‘effective’, ‘auto-renewal’ and ‘denunciation notice’ periods, the BIT parties are also required to wait for a further 10 to 15 years after the date of ‘formal termination’. This dormant life of BITs silently keeps them alive for an indefinite time after termination. For Bangladesh BITs, the average effective period following the formal denunciation is 10 years. Because of this invisible dormant life, some of its BITs can survive even 15 to 20 years after termination. Thus, the real lifetime of a BIT is clearly difficult to predict. This difficulty is often created by the inbuilt ‘immunity provisions’ that are triggered only after parties terminate a BIT. For example, the *Bangladesh–UK BIT*, concluded in 1980 with a 10-year effective period, was supposed to end in 1990. However, the treaty remains effective till date since none of the parties has yet denounced it. This treaty will continue to be effective for an unending period unless one party to the treaty issues a 12-month termination notice. Most importantly, this BIT cannot be immediately terminated even after those 12 months. Its internal immunity provision keeps the treaty dormant for a further 10 years after the termination.¹⁵² Therefore, hypothetically, even if Bangladesh would have given a termination notice to the United Kingdom in February 2022, the notice would be effective from February 2023. Thereafter, the dormant life of 10 years would allow the treaty to survive until August 2033.

¹⁴⁹ Article 14(2) of the BIT, above n 144.

¹⁵⁰ Article 14(2) of *Bangladesh–Netherlands* BIT of 1994; Article 15(2) of *Bangladesh – India* BIT of 2009.

¹⁵¹ Article XIII (1) of *Bangladesh–Indonesia* BIT of 1998.

¹⁵² Para 1, Article 13, *Bangladesh–UK* BIT of 1980.

More specifically, Bangladesh concluded its BIT with Denmark in 2009, which came into effect in 2011. Similar to India, or Indonesia, if Bangladesh now decides to terminate all its BITs that have some adverse effects, it must think about the dormant lifetime of BITs. The BIT with Denmark will remain effective at least until 2023. Thereafter, it can be terminated with impunity.¹⁵³ The ‘waiting period’ is one year, and then it will remain silently active for another 10 years.¹⁵⁴ This means Bangladesh must wait until at least 2034 to terminate its BIT with Denmark. This simple calculation does not work for BITs with ‘auto-renewal’, ‘tacit renewal’ or ‘extended waiting period’. In these cases, the termination takes an unpredictable, longer time to become effective.

2 *Legal consequences of unilateral denunciation of BITs*

Unilateral denunciation cannot instantly terminate BITs. The denouncing party must wait for a long time to experience the fruition of the action. The inherent resilience of BITs is the main reason that triggers the countdown only after the option of unilateral denunciation is initiated. Because of multiple immunity clauses, even for a long period after the formal denunciation, as seen in Bolivia’s case, investors can continue to sue the host country. In some cases, this burn down effect of BITs can be longer than the initial effective period. For example, the *Bangladesh–Japan BIT* was initially concluded for 10 years.¹⁵⁵ If Bangladesh wants to denounce this BIT, it will have a burn down effect of 15 years that will start from the date of formal termination.¹⁵⁶ It is eventually longer than the original lifetime of the BIT.

Even though unilateral denunciation takes a longer time to become effective, it is unable to provide the appropriate remedy sought by host developing countries. Merely the termination of BITs cannot discharge host countries from all their commitments and relieve them from the investment arbitration disputes. If the termination of a BIT is associated with a simultaneous withdrawal of consent from relevant IIAs, it might provide the desired relief. This simultaneous denunciation of multiple treaties is not without consequences, as it has economic and political consequences. Authentic empirical research on the economic effects of unilateral denunciation from BITs is currently unavailable. In the absence of any such data and

¹⁵³ Article 16(1), *Bangladesh–Denmark BIT* (2009).

¹⁵⁴ *Ibid* Article 16(2).

¹⁵⁵ Article 14(1), *Bangladesh–Japan BIT* (1998).

¹⁵⁶ *Ibid* Article 14(3).

information, it can be presumed that existing and potential investors are unlikely to invest in a country that has abandoned its investment protection commitments. However, some scholars argue that investors invest in a country to further their own interests and will therefore continue to do so even in the absence of BITs or IIA.

IV. RENEGOTIATION OF BITs: THE WAY FORWARD

The options of denouncing ICSID jurisdiction and withdrawal from BITs are extreme choices. These two options do not have any immediate effect on reducing the difficulties in investment arbitrations. The third option for the renegotiation of BITs can avoid the need to consider the operation of ‘tacit renewal’ and ‘immunity clauses’. Through renegotiation, flimsy and legally stretchable terms, ambiguous provisions and vague technical issues in BITs can be redefined and simplified to such an extent that arbitrators cannot exercise their expansive discretionary power. Most importantly, contracting parties can agree to regulate arbitrators’ discretionary power so that they cannot interpret the BITs beyond the defined limits. Renegotiation can also protect them from the arbitrators’ propensity of extra-judicial interpretation and open prioritisation of investors’ interests. The opportunities, challenges and risk-factors in renegotiation are outlined below.

A *Renegotiation Stops Triggering the Internal Immunity or Survival Clause*

Renegotiation allows for redefining and rearrangement of BIT obligations that may work against the parties in arbitration. An essential constructive feature of renegotiation is that the IIAs remain effective during renegotiation. If there is an auto-renewal provision, it also works in parallel. For instance, the *Bangladesh–Italy* BIT states that it will ‘remain effective for 10 years ... and shall be tacitly renewed for further periods of 5 years, unless either Party terminates it’.¹⁵⁷ If terminated, it will remain effective for five years from the date of denunciation.¹⁵⁸ As per the ‘ordinary meaning’ under the VCLT,¹⁵⁹ the five-year extended lifetime only becomes effective if the BIT is terminated. The ‘immunity clause’ of the treaty is counted from the date of termination. The renegotiation process of treaties, or amendments thereof, does not terminate the BITs,¹⁶⁰ and therefore, it does not trigger the factors that can unleash the immunity clauses of a BIT. The provisions on ‘amendment and

¹⁵⁷ Article 14(1), *Bangladesh – Italy* BIT (1990).

¹⁵⁸ *Ibid* Article 14(2)

¹⁵⁹ VCLT Article 31(1), above n 102.

modification of treaties' under the VCLT also suggest that the parent treaty remains in force in conjunction with the effects of subsequently renegotiated or modified versions.¹⁶¹ After a successful renegotiation, the amended version of a BIT would result in changes to the content but keep the main treaty alive. Contents can be changed up to the extent of the contracting parties' agreement.¹⁶²

In order to get rid of the complexities posed by the current investment arbitration system, investment importing developing countries should try to fix their long-standing BITs, IIAs and investment contracts through renegotiations. Some of their BITs were concluded 20 to 40 years ago.¹⁶³ The overwhelming majority of these BITs and IIAs no longer reflects today's economic interests, sustainable development objectives and priorities of the host developing country. These BITs include very broadly drafted provisions. For example, the definitions of 'investment', 'indirect expropriation', 'fair and equitable treatment' are extremely broad, unrefined, unqualified and all these expose the country to recurrent ISDS actions, depending upon BIT provisions providing concurrent jurisdiction of national and international arbitration of the same dispute. Against these odds, it is essential to draft a model BIT based on a new-generation treaty to minimise the detrimental effects of BITs, IIAs, FDI contracts, and investment arbitrations.¹⁶⁴ Age-old BITs and IIAs can either be amended, renewed or replaced with new-generation treaties. New-generation BITs are drafted in a clearer manner, which include precise objectives. These safeguard both investors' and host countries' interests. They strive to achieve a balance between the promotion and protection of FDIs on the one hand, and the host state's right to regulate investment, safeguard society, and the environment on the other.

¹⁶⁰ Ibid, the meaning of the rules and provisions in Articles 31(1) and 39-41 of the VCLT.

¹⁶¹ Ibid.

¹⁶¹ Ibid, subject to the limitations in Articles 30(2), 30(3) and 59 of the VCLT.

¹⁶² *Bangladesh-UK BIT*, above, n 151.

¹⁶⁴ Arbitration experience of Bangladesh and detrimental effects of BITs and IIAs are analysed in Part II above.

The *Brazil–India BIT* (2020),¹⁶⁵ *EU–Vietnam Investment Protection Agreement* (EUVIPA, 2019),¹⁶⁶ *Nigeria–Morocco BIT*¹⁶⁷ (2016) and *Brazilian Cooperation and Facilitation Agreements* (CFIAs) are a few examples of new-generation investment treaties. The *Nigeria–Morocco BIT*¹⁶⁸ includes a ‘unilateral termination rule’,¹⁶⁹ whereas the CFIAs do not have any ‘survival clause’,¹⁷⁰ which are unprecedented in most old-BITs. In terms of a new-generation model BIT, the *Brazil–India BIT* (2020) may serve as an appropriate model for Bangladesh and other developing countries. The *White Industries* dispute,¹⁷¹ and the accompanying deluge of ISDS led India to cancel existing BITs, establish a model BIT, and renegotiate all IIAs.¹⁷²

¹⁶⁵ UNCTAD, ‘Investment Policy Hub, Brazil–India BIT (2020)’, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5912/download>>.

¹⁶⁶ <<https://edit.wti.org/document/show/66f74a5f-5c00-455d-97f5-709f837d2bb4>>.

¹⁶⁷ UNCTAD, ‘Investment Policy Hub, Morocco–Nigeria BIT (2016)’, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaties/otheriia/3711/morocco---nigeria-bit-2016->>>.

¹⁶⁸ Natali Moreira, ‘Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development’, <http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/?doing_wp_cron=1597379043.4782121181488037109375>.

¹⁶⁹ Article 34, *Nigeria–Morocco BIT* (2016), ‘UNCTAD Investment Policy Hub’, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>>.

¹⁷⁰ UNCTAD, ‘Investment Policy Hub, “Brazilian Cooperation and Facilitation Agreement”’, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5855/download>>.

¹⁷¹ *White Industries Australia Limited v The Republic of India* (2011), Final Award; UNCITRAL, <<https://www.italaw.com/sites/default/files/case-documents/ita0906.pdf>>.

¹⁷² Ashutosh Ray, ‘White Industries Australia Ltd. v Republic of India: A New Lesson for India’ (2012) 29 (5) *Journal of International Arbitration* 623–635.

In 2016 India adopted a model BIT.¹⁷³ The *Brazil–India BIT* is based on Brazil and India’s model BITs.¹⁷⁴ It is an extension of a novel approach to foreign investment in international law based on investment facilitation and cooperation, not exclusive protection to investments – something that a typical BIT entails. It defines ‘investment’ very narrowly to include shares, stocks, licenses, authorisations, loans to enterprises, intellectual property, and movable and immovable property.¹⁷⁵ It categorically excludes debt securities, portfolio investments, claims to monies arising out of commercial transactions and goodwill. It excludes typical most favoured nation (MFN) and fair and equitable treatments (FET).¹⁷⁶ The BIT only recognises and protects investments from ‘direct expropriation’.¹⁷⁷

The *Brazil–India BIT* rejects the typical ISDS system and adopts a very novel approach to settlement of investment disputes based on prevention.¹⁷⁸ For that purpose, it provides rules for the creation of a joint committee comprising officials of both the countries,¹⁷⁹ national focal points or an ombudsman in both the countries.¹⁸⁰ Any measure of a country that the other country considers as a breach of the BIT shall be referred to the joint committee for dispute prevention. If the committee is unable to prevent the dispute, then the dispute shall be referred to a State-to-State Dispute Settlement (SSDS) tribunal created by the parties as per the treaty provision.¹⁸¹ The purpose of the arbitration is to decide on the interpretations of the treaty or ‘the observance by a Party of the terms of the Treaty’.¹⁸² Most importantly, the tribunal is not empowered to award compensation.¹⁸³ The *Brazil–India BIT* has also added a meaningful preamble, significant explanatory statements, general

¹⁷³ India signed three other recent BITs with Belarus, Taiwan and Kyrgyz Republic based on its model BIT 2016.

¹⁷⁴ UNCTAD, ‘Investment Policy Hub, “Brazilian Model BIT”’, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>>; UN Investment Policy Hub, *Brazilian Model BIT*, <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4786/download>>; Department of Economic Affairs, India, *Model Text for the Indian Bilateral Investment Treaty*, <https://dea.gov.in/sites/default/files/ModelBIT_Annex_0.pdf>.

¹⁷⁵ Article 2(4), *Brazil–India BIT* 2020.

¹⁷⁶ *Ibid* Article 4.

¹⁷⁷ *Ibid* Article 6(3).

¹⁷⁸ *Ibid* ‘Part IV – Institutional Governance, Dispute Prevention and Settlement’ (Articles 13–19).

¹⁷⁹ *Ibid* Article 13.

¹⁸⁰ *Ibid* Article 14.

¹⁸¹ *Ibid* Article 19.

¹⁸² *Ibid* Article 19(2).

¹⁸³ *Ibid*.

exceptions, security exceptions, no ‘tacit renewal provision’ and ‘no survival clause’. Instead, it incorporates a ‘tacit termination’ clause which implies that if parties do not expressly agree for a renewal after 10 years, the treaty will be automatically terminated.¹⁸⁴ The BIT can be amended any time,¹⁸⁵ and terminated by the parties with a 12-month prior notice.¹⁸⁶ All these perhaps make very little scope for the arbitrators to make expansive interpretations.

It is therefore submitted that Bangladesh and other developing countries should adopt a new generation model BIT like the *Brazil–India BIT 2020*. It will strategically strengthen them in the renegotiation process. It can help developing countries in their bilateral, multilateral and plurilateral negotiations on investment and FDIs. Model BITs clearly guide a country to achieve its expected goals, priorities, and development objectives from the investment negotiations.

B Political will of the contracting parties

Denunciation from the ICSID jurisdiction and BIT termination are both unilateral actions. While these options might not produce instant results, they are simple and straightforward for host countries. Renegotiation, on the other hand, is a friendly, safer, and highly dynamic action, but it is a mutual process, rather than unilateral. It requires the concurrent political will of both host and home countries to kick-off the renegotiation. If any party disagrees, the renegotiation process cannot start.

Most BITs concluded in the past few decades do not contain any explicit provision on renegotiation. In some exceptional cases, for example, the *Bangladesh–Denmark BIT*¹⁸⁷ or *Bangladesh–Indonesia BIT*¹⁸⁸ state that the amendment of the treaties is possible if the parties agree. Regardless, whether the provision of renegotiation is incorporated or not, renegotiation is mostly optional. Article 39 of the VCLT confirms the voluntary and flexible criteria for initiating a renegotiation process. Herein lies the main challenge. It is the political will of the parties involved which is the vital factor and prime obstacle in initiating a renegotiation.

¹⁸⁴ Ibid Article 28(3).

¹⁸⁵ Ibid Article 27.

¹⁸⁶ Ibid Article 28(4).

¹⁸⁷ Article 13(1) of the *Bangladesh–Denmark BIT*.

¹⁸⁸ Article XII(2) of the *Bangladesh–Indonesia BIT*.

It is commonly considered that host developing countries like Bangladesh are predominantly investment importers and they have more incentives in renegotiation. By contrast, developed countries are mainly FDI exporters, and hence, they have less or no incentive in renegotiation. This idea of host and home countries' positions does not appear to be conclusive for several reasons.

First, the world's top developed economy is also the top receiver of FDIs. The UN report on *Global Investment Trend Monitor* shows that in 2020 and 2021, the US remained the largest recipient of FDIs, estimated at USD251 billion, followed by China at USD140 billion and the UK at USD61 billion.¹⁸⁹ In 2018 and 2019, the top host countries were the US, China, Singapore, Brazil, UK, Hong Kong (SAR), France, India, Canada and Germany.¹⁹⁰ Half of these 10 FDI recipients are developing countries that are simultaneously emerging as FDI exporters in the global market. China and India are particularly noteworthy because these two developing economies are gradually exporting huge investments in other parts of the world.¹⁹¹ Apart from the typical notion of developed countries being the home of FDIs, they are increasingly becoming the host of FDIs. Developing countries, which are commonly known as investment importers, are gradually becoming investment exporters. This geo-economic shift in global investment flows has been increasingly resulting in developed countries becoming defendants in investment dispute arbitrations. This shift in position creates a common incentive in renegotiating BITs. As defendants to investment disputes, developed countries' interests in ISDS largely coincide with those of developing countries. This common interest perhaps contributes to common incentive and formation of a 'political will' of both developed and developing countries in the renegotiation process.

¹⁸⁹ UNCTAD, *Investment Trend Monitor* (Issue 33, January 2020), <https://unctad.org/en/PublicationsLibrary/diaeiainf2020d1_en.pdf>, page 3; UNCTAD, *Investment Trend Monitor* (Issue 40, January 2022) <https://unctad.org/system/files/official-document/diaeiainf2021d3_en.pdf>, p 1–3.

¹⁹⁰ Ibid.

¹⁹¹ Center for Strategic and International Studies, 'China Power Team: Does China dominate global investment?', <<https://chinapower.csis.org/china-foreign-direct-investment/>>; CEIC Data (2019), 'India Foreign Direct Investment: Outflow', <<https://www.ceicdata.com/en/india/foreign-direct-investment-outflow/foreign-direct-investment-outflow>>.

Some developed countries have already taken a firm stance against the inclusion of ISDS in future investment treaties and are considering renegotiation to withdraw any such provisions from their existing BITs. For example, New Zealand has opted to oppose ISDS provisions in future investment treaties and to seek their exclusion from existing investment treaties. Its position of ‘opposing investors to initiate dispute directly against states’ is appropriately reflected by adding ‘side letters’ in the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP, or TPP-11)*.¹⁹³ In early 2018, New Zealand signed ‘side letters’ with CPTPP countries to either exclude ISDS entirely or restrict its application.

Second, renegotiations of BITs or IIAs are no longer a crucial debate between North and South. Both developed and developing countries, irrespective of their economic position, are perhaps either one way or the other unsatisfied with the age-old IIAs. Every country pursues different economic interests, strategies, demands and expectations, yet a global consensus is growing to renew, replace or modify these agreements. The revision and redrafting of old model BITs, or the adoption of new generation model BITs, bear the evidence of such consensus. A wide range of countries including the US, Canada, the Netherlands, France, Norway, Brazil, India, South Africa, Argentina, Ecuador, Guatemala and Burkina Faso have either revised or adopted new model BITs.¹⁹⁴ In 2004, Canada and the US revised their

¹⁹² Amokura Kawharu and Luke Nottage, ‘Renouncing Investor-State Dispute Settlement in Australia, Then New Zealand: Déjà Vu’ (1 February 2018), Sydney Law School Research Paper No. 18/03, <<https://ssrn.com/abstract=3116526>>.

¹⁹³ ‘Side letters’ with CPTPP States are concluded to either exclude ISDS entirely, or to restrict its application. While Australia signed a side letter to exclude ISDS between itself and New Zealand, it has agreed to ISDS with all other CPTPP parties; See, DFAT, ‘CPTPP text and associated documents’, <<https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Pages/official-documents.aspx>>.

¹⁹⁴ UNCTAD Investment Policy Hub, ‘Model Agreements’ <<https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>>.

model BITs to respond to the controversy surrounding ‘indirect expropriation’ and to provide guidance to future tribunals.¹⁹⁵ Inspired by a leading case-decision of the US Supreme Court, both countries added an interpretative annex to their model BITs subjecting claims of indirect expropriation to a ‘case-by-case’, fact-specific inquiry that requires the balancing of at least three factors.¹⁹⁶ In fact, the US revised and redrafted its model BIT in 2012 for the fourth time to fit it and respond to the latest changes in international investment law regime.¹⁹⁷

Third, in line with the European Union’s (EU) recent change to the internal and external investment policy, its position over dealing FDIs, and approach towards reforming old IIAs, Bangladesh and similar developing countries can be encouraged to renegotiate their BITs with the EU and its member states. The Treaty of Lisbon (ToL)¹⁹⁸ brings a number of changes in the field of EU external trade and investment policymaking.¹⁹⁹ After the ToL came into force in 2009, the FDI matters of 27 member states now fall within the EU common investment policy.²⁰⁰ All BITs and IIAs signed by the EU member states are now within the EU jurisdiction, which is also subject to ratification at different levels in the EU and States.²⁰¹ Because of this shift in ‘competence’, the EU is in the lead role of negotiating BITs involving its members.

¹⁹⁵ Lise Johnson, ‘The 2012 US Model BIT and What the Changes (or Lack Thereof) Suggest about Future Investment Treaties’, *Political Risk Insurance Newsletter*, (Volume III, Issue 2, November 2012), <http://ccsi.columbia.edu/files/2014/01/johnson_2012usmodelBIT.pdf>; see also, Agreement Between Canada and [Country] for the Promotion and Protection of Investments (Canada Model BIT), Article 13 and Annex B.13(1) (2004); Treaty Between the Government of the United States of American and the Government of [Country] Concerning the Reciprocal Protection of Investment (US Model BIT), Article 6(1) and Annex B(4), (2004).

¹⁹⁶ *Penn Central Transp. Co. v City of New York* [1978] 438 US 104, 123–5. These three factors are (i) the economic impact of the government measure, (ii) the extent to which the measure interferes with distinct, and reasonable investment-backed expectations and (iii) the character of the government measure.

¹⁹⁷ UN Investment Policy Hub, ‘Model BITs’, <<https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements>>.

¹⁹⁸ European Union, ‘The Treaty of Lisbon’, <<https://www.europarl.europa.eu/factsheets/en/sheet/5/the-treaty-of-lisbon>>.

¹⁹⁹ Stephen Woolcock, ‘EU Trade and Investment Policymaking After the Lisbon Treaty’, *Intereconomics* (2010), <<https://link.springer.com/content/pdf/10.1007/s10272-010-0321-z.pdf>>.

²⁰⁰ Article 207, European Parliament, ‘Treaty on the Functioning of the European Union’, <<https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008E207:en:HTML>>.

²⁰¹ White and Case, ‘EU Court confirms EU competence on wide range of trade areas in opinion on EU-Singapore FTA’ (2017), <<https://www.whitecase.com/publications/alert/eu-court-confirms-eu-competence-wide-range-trade-areas-opinion-eu-singapore-fta>>.

Again, besides the EU's exclusive competence in FDI's, the European Court of Justice's (ECJ) decision in the *Achmea case*²⁰² has created an unprecedented phenomenon for the intra-EU BITs and ISDS process.²⁰³ The ECJ found that any ISDS provision in intra-EU BITs is incompatible with the EU treaties, because ISDS failed to comply with the EU policy of treating both investment protection issues and public interests in host countries on equal footing devoid of any automatic priority of the former over the latter. It preferred an investment dispute settlement system that is:

[S]ubject to democratic principles and scrutiny, where potential cases are treated in a transparent manner by publicly appointed, independent professional judges in public hearings and which includes an appellate mechanism, where consistency of judicial decisions is ensured, the jurisdiction of courts of the EU and of the Member States is respected, and where private interests cannot undermine public policy objectives.²⁰⁴

In pursuance of this EU policy, on 24 October 2019, member states agreed on signing a plurilateral treaty for the termination of all intra-EU BITs. This was done on 5 May 2020, when 23 members,²⁰⁵ signed a termination agreement.²⁰⁶

²⁰² *Slovak Republic v Achmea case* (Case C-284/16 of 2018), <<http://curia.europa.eu/juris/document/document.jsf?text=&docid=199968&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=501520>>.

²⁰³ Tania Singla, 'Achmea: The Fate and Future of Intra-EU Investment Treaty Awards under the New York Convention' <<https://www.ejiltalk.org/achmea-the-fate-and-future-of-intra-eu-investment-treaty-awards-under-the-new-york-convention/>>.

²⁰⁴ Piero Bernardini, 'Reforming Investor–State Dispute Settlement: The Need to Balance Both Parties' Interests' (February 2017) 32(1) *ICSID Review: Foreign Investment Law Journal* 38–39; also, European Parliament Resolution of 8 July 2015, Doc 2014/2228(INI) (2014), para 2(d)(xv).

²⁰⁵ Austria, Ireland, Finland, and Sweden are yet to sign the treaty.

²⁰⁶ European Commission, 'Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union' <[https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529\(01\)](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:22020A0529(01))>.

The EU recently concluded IIAs with Vietnam (EUVIPA),²⁰⁷ Japan,²⁰⁸ Singapore (EUSIPA),²⁰⁹ and Canada.²¹⁰ The EUVIPA replaced 25,²¹¹ EUSIPA replaced 13,²¹² and CETA replaced 7 old BITs,²¹³ which were previously active between Vietnam, Singapore and Canada and EU member states. All these treaties (except the EU–Japan EPA 2019) are based on a common EU model of permanent investment court system (ICS),²¹⁴ which tends to eliminate the negative implications of the typical investment arbitration mechanisms. Out of these treaties, EUVIPA is the most ambitious IIA ever concluded by the EU with a developing country. It is therefore more relevant to the developing country context as Vietnam’s economic position does have a resemblance to Bangladesh’s and other similar developing economies. Consequently, developing countries can also consider EUVIPA as a guiding model.

EUVIPA came into force on 1 August 2020.²¹⁵ It does not have any tacit renewal or hidden survival clause. Instead, it is amendable,²¹⁶ and either party can terminate

²⁰⁷ UNCTAD Investment Policy Hub, ‘EU–Vietnam Investment Protection Agreement (EUVIPA 2019)’, <[https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-nam-investment-protection-agreement-2019->](https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3616/eu---viet-nam-investment-protection-agreement-2019-).

²⁰⁸ UNCTAD Investment Policy Hub, ‘EU–Japan Economic Partnership Agreement (2018)’, <[²⁰⁹ The EU–Singapore trade and investment agreements were signed on 19 October 2018. Following the European Parliament’s consent to the agreements on 13 February 2019, the agreements will now continue their ratification process in line with the procedures foreseen in the EU Treaties to allow for their entry into force. See, European Commission, ‘EU – Singapore Free Trade Agreement/ Investment Protection Agreement’, <\[http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/>\]\(http://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/\).](https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3827/eu---japan-economic-partnership-agreement-2018->.</p>
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²¹⁰ Known as the *EU–Canada Comprehensive Economic and Trade Agreement (CETA)*. The agreement was concluded on 30 October 2016 and came in force from 21 September 2017 (except the investment part), see, European Commission, <[http://ec.europa.eu/trade/policy/in-focus/ceta/>](http://ec.europa.eu/trade/policy/in-focus/ceta/).

²¹¹ EUVIPA, above n 207.

²¹² UNCTAD, ‘Investment Policy Hub, ‘EUSIPA 2018’, <[²¹³ UNCTAD Investment Policy Hub, ‘CETA 2016’, <\[²¹⁴ EUSIPA 2018, Chapter 3 \\(on Dispute Settlement\\); Canada–EU CETA 2016, Section F \\(Resolution of Investment Disputes between Investors and States\\).\]\(https://investmentpolicy.unctad.org/international-investment-agreements/treaties/treaties-with-investment-provisions/3546/canada---eu-ceta-2016->.</p>
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²¹⁵ European Commission, ‘EU–Vietnam trade agreement enters into force’, <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1412>.

²¹⁶ EUVIPA, Article 4(3), above n 207.

the treaty at the end of six months after notification.²¹⁷ If it is terminated, some provisions of the treaty will remain active for the next 15 years to provide protection to existing investors.²¹⁸ It recognises indirect expropriation, but this term is well-articulated with detailed explanatory statements.²¹⁹ It includes ‘general exceptions’ and ‘security exception’ to reaffirm host country’s right to regulate within their territories to achieve legitimate policy objectives.²²⁰ The most intriguing feature of EUVIPA (also CETA, EUSIPA) is the EU-model of ICS which includes a permanent investment tribunal and an appeal tribunal as part of a two-tier system.²²¹ The tribunal consists of 9 members – 3 nationals each appointed from the EU and Vietnam, together with 3 nationals appointed from third countries.²²² The tribunal shall hear cases in divisions consisting of three members – one from EU, one from Vietnam and one from a third country, who will chair the division.²²³ EUVIPA also allows a ‘sole tribunal member’ if the claimant is a small or medium-sized business and the damages are minor.²²⁴ This is a flexible approach considering that Vietnam is still a developing country. Parties aggrieved by the tribunal’s decision can appeal to a permanent Appeal Tribunal.²²⁵ Final decisions of the Appeal Tribunal will be enforceable by the local authorities.²²⁶ While this ICS is different from the common arbitration proceedings, it is similar to the 2-level dispute settlement mechanism in the WTO (Panel and Appellate Body) with an added advantage of a small claim tribunal. A permanent tribunal and appellate tribunal with a prior option for mediation or conciliation could also add more benefits to host developing countries.

These latest developments in the EU is a remarkable evidence of EU’s strong political will to make changes in the international investment arbitration system. This article suggests that Bangladesh and other developing countries utilise the new-found environment and engage in renegotiation of their age-old BITs/IAs with

²¹⁷ Ibid Article 4(14).

²¹⁸ Ibid Article 4(15).

²¹⁹ Ibid Article 2(7) and Annex 4.

²²⁰ Ibid Articles 4(6), 4(8); see also, EUSIPA Article 2(2), above n 214.

²²¹ Ibid EUVIPA 2019, Subsection 4; Investment Tribunal System, Article 3(38) and 3(39); see also Articles 3(9), 3(10) of EUSIPA 2018, above n 214; Canada – EU CETA Articles 8(23), 8(27), 8(28), above n 214.

²²² EUVIPA, Article 3(38(5)), above n 207.

²²³ Ibid Article 3(38(6)).

²²⁴ Ibid Article 3(38(9)).

²²⁵ Ibid Article 3(39).

²²⁶ Ibid Article 3(57).

the EU since both have a common objective to eliminate the detrimental effects of existing investment arbitration system. It is a unique opportunity for Bangladesh since 10 out of its 24 active BITs are with the EU members.²²⁷ In addition to considering the model of the *Brazil–India BIT 2020*, a model of EUVIPA may also be able to serve the interests and expectations of Bangladesh and other developing countries. The EU models of investment protection agreements (IPA) could be a steppingstone for developing countries. If developing countries are successful in renegotiating their investment treaties with the EU, it can lead them to initiate further renegotiation with other EU counterparts, such as Singapore, Vietnam, and Japan, which have already concluded IPAs with the EU.

V. CONCLUSION

This study presents a case-based scenario which shows the concerns of host developing countries like Bangladesh in international investment arbitration. It demonstrates that expansive and other wide-discretionary adjudicatory roles of ICSID tribunals are extremely detrimental and impractical for these countries. In the wake of a global consensus on changing the current trends of BITs and IIAs, renegotiation of investment treaties can benefit all countries irrespective of their global power and position in the global economy. The inclusion of interpretative statements, review, renew or change of the age-old BITs and IIAs through renegotiation, coupled with the adoption of new-generation model BITs which guarantee protection of all stakeholders affected by FDIs, could help rebalance public and private interests under international investment law.

In search of relief options from the detrimental effects of the current investment arbitration system, FDI importing developing countries need not pursue the extreme path of denunciation and abrupt termination of these investment treaties as has been done by Venezuela, Ecuador, Bolivia, and other countries. Exodus from the international investment law regime should not be a policy panacea to evade the adverse effects of ISDS. Instead, they should strive for changes in the investment law regime pragmatically to balance the competing interests of both investors and host developing countries. This can be achieved through renegotiation of BITs and IIAs in good faith, and consolidated efforts for a fair investment arbitration system that can assist all parties in overcoming the challenges they are currently experiencing. Well-articulated BITs and regulating the discretionary power of investment tribunals can enhance the trust in, and reliability of, the international investment arbitration system.

²²⁷ UNCTAD, above n 48.

OPTIONAL, ASYMMETRICAL AND ACCEPTABLE? THE VALIDITY OF OPTIONAL ASYMMETRICAL ARBITRATION AGREEMENTS IN AUSTRALIA

Alexander Du Maurier*

ABSTRACT

Optional asymmetrical arbitration agreement – Validity of arbitration agreements – Public policy in arbitration – Procedural rights in arbitration.

The validity of optional asymmetrical arbitration agreements has been successfully challenged in several international jurisdictions on the basis that such agreements contravene public policy; namely, because they confer unequal jurisdictional rights. Australian courts are yet to grapple with the issue of whether optional asymmetrical arbitration agreements are invalid for want of compliance with public policy in the context of the International Arbitration Act 1974 (Cth), albeit consideration from the High Court of Australia to a related issue in the context of a domestic arbitration. That notwithstanding, a clear delineation of the position in the Australian legal system is imperative in ensuring that parties understand the extent of their autonomy in selecting a particular mechanism to resolve their disputes. Against this backdrop, this article will, first, comparatively explore the validity of optional asymmetrical arbitration agreements in various international jurisdictions as a potential framework to resolve the issues posed by such agreements in Australian jurisprudence. Second, this article will examine the potential impact of Australian public policy on the validity of optional asymmetrical arbitration agreements. Finally, this article will consider the impact, if any, of the International Arbitration Act 1974 (Cth) on the validity of optional asymmetrical arbitration agreements and how Australian courts are likely to approach the validity of optional asymmetrical arbitration agreements in the context of that Act.

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I INTRODUCTION

An optional asymmetrical arbitration agreement is, as the name suggests, an arbitration agreement that is both optional and asymmetrical (or unilateral).¹ Such agreements are optional insofar as they provide that the parties may commence either arbitral or curial proceedings in one or several jurisdictions. They are asymmetrical insofar as one party is limited to commencing either arbitral or curial proceedings (i.e. in one and not the other), yet reserving for the other party the option to commence either arbitral proceedings or proceedings in a court of one or several jurisdictions. Although optional asymmetrical arbitration agreements are by no means exclusive to international arbitration,² the validity of such agreements has recently become an emerging issue in the context of international arbitration in light of developing jurisprudence from the Russian Federation, Poland and Turkey that such agreements are void because they contravene public policy by failing to balance parties' procedural rights.³ Optional asymmetrical arbitration agreements have also been declared invalid for a lack of what has been described as 'mutuality of obligation'; that is, the agreement fails to confer on the parties bilateral rights of reference to a dispute resolution forum.⁴ If declared invalid either for contravening public policy or for want of mutuality of obligation, the whole of the arbitration agreement (although not the substantive agreement within which the arbitration agreement is likely to be found) will be invalid,⁵ and any award rendered pursuant thereto is also likely to be unenforceable.⁶ Nevertheless, several common and civil law jurisdictions including England and Wales, Singapore, India, the United States of America, Italy and Spain consider optional asymmetrical arbitration agreements

¹ See part II below for a sample optional asymmetrical arbitration agreement.

² See, eg, *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service* (1995) 184 CLR 301 ('*PMT Partners*').

³ See, eg, *Russian Telephone Company v Sony Ericsson*, The Supreme Arbitrazh Court of the Russian Federation, 19 June 2012 [tr Korelskiy, Ischuk] 3 ('*Russian Telephone Company*'); see also Sąd Najwyższy (Supreme Court of Poland), V CSK 503/11, 19 October 2012; Sąd Najwyższy (Supreme Court of Poland), II CSK 291/10, 24 November 2010; Turkish Court of Appeal, 11th Civil Chamber, 2009/3257.

⁴ See, eg, *Baron v Sunderland Corporation* [1966] 2 QB 56, 64 (Davies LJ) ('*Baron*').

⁵ See *International Arbitration Act 1974* (Cth) sch 2 art 16(1) ('*IA Act*').

⁶ See *IA Act* (n 5) sch 2 art 36(1)(b)(2).

to be valid.⁷ In these jurisdictions, such agreements do not contravene public policy, nor is there any requirement for mutuality of obligation.

Australian courts are yet to settle this competing authority in the context of international commercial arbitration, thus creating considerable uncertainty for parties entering into an optional asymmetrical arbitration agreement. That having been said, the issue of whether an arbitration agreement requires mutuality of obligation was, at least on one view, settled by the High Court of Australia in *PMT Partners Pty Ltd v Australian National Parks & Wildlife Service*⁸ ('PMT Partners') in a contest to the validity of an optional asymmetrical arbitration agreement governed by the *Commercial Arbitration Act 1985* (NT)⁹ Although the Court resolved that the arbitration agreement in contest in PMT Partners was a valid arbitration agreement for the purpose of *Commercial Arbitration Act 1985* (NT), it remains to be seen whether the High Court, or any Australian court for that matter, will adopt the same approach to optional asymmetrical arbitration agreements in the context of the *International Arbitration Act 1974* (Cth) ('IA Act').

In contending with the competing international jurisprudence on the validity of optional asymmetrical arbitration agreements, this article will explain why Australian courts are likely to adopt an identical approach to the validity of such agreements governed by the *IA Act* and those governed by State and Territory legislative schemes, including the *Commercial Arbitration Act 1985* (NT). This article will also explain why Australian courts are likely to uphold the validity of optional asymmetrical arbitration agreements, notwithstanding the emerging jurisprudence from the Russian Federation, Poland and Turkey. Part II of this article contains a sample clause to which reference will be made throughout the remainder of the article. Part III will explore the competing international jurisprudence by

⁷ *Pittalis v Sherefettin* [1986] QB 868 ('Pittalis'); *NB Three Shipping Ltd v Harebell Shipping Ltd* [2004] EWHC 2001 (Comm) ('NB Three Shipping'); *New India Assurance Co. Ltd. vs Central Bank Of India & Ors* AIR 1985 Cal 76 ('New India Assurance'); *Willis Flooring Inc. v Howard S. Lease Construction Company*, 656 P.2d 1184 (Alaska, 1983) ('Willis Flooring'); *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd* [2017] SGCA 32, [4] (Sundares Menon CJ) ('Wilson Taylor Asia Pacific'); High Court of Appeal of Madrid, LA LEY 172387/2013, 18 October 2013; Final Award, Chamber of National and International Arbitration of Milan, Case No 10915, 14 November 2016 reported in (2017) 42 *Yearbook – Commercial Arbitration* 280.

⁸ *PMT Partners* (n 2).

⁹ *Ibid.*

comparatively analysing the approaches adopted in the Russian Federation, England and Wales, and Singapore. Finally, Part IV will examine public policy considerations that may render optional asymmetrical arbitration agreements invalid in Australia, including, specifically, the obligations contained in art 18 of the UNCITRAL *Model Law on International Commercial Arbitration 1985* ('Model Law')¹⁰ In examining how Australian courts are likely to address these public policy considerations, this part will explain why Australian courts are likely to uphold the validity of optional asymmetrical arbitration agreements, notwithstanding the inequality inherent in such agreements.

II SAMPLE CLAUSE

The following sample optional asymmetrical arbitration agreement, which has been modelled on the Australian Centre for International Commercial Arbitration's ('ACICA') model arbitration clause, shall be used as a point of reference in this article ('the Sample Clause'):

1. The Parties shall submit any dispute, controversy or claim arising out of, relating to or in connection with this contract to the Courts of the Commonwealth of Australia and agree that the Courts of the Commonwealth of Australia have exclusive jurisdiction in respect of any dispute, controversy or claim, subject to the Buyer's right to arbitrate under the following clause.
2. The Buyer has the right, notwithstanding the preceding clause, to submit any dispute, controversy or claim arising out of, relating to or in connection with this contract, including any question regarding its existence, validity or termination, to arbitration under the ACICA Arbitration Rules.

The seat of the arbitration shall be Sydney, Australia.

The language of the arbitration shall be English.

The number of arbitrators shall be three (3). Each Party has the right to nominate one arbitrator while the presiding arbitrator shall be appointed by ACICA.

The governing law of the arbitration shall be the laws of the Commonwealth of Australia¹¹ The Sample Clause is optional insofar as the buyer has the right to commence curial proceedings in the courts of the Commonwealth of Australia or arbitral proceedings under the ACICA Arbitration Rules. The Sample Clause is also asymmetrical insofar as the right to commence arbitral or curial proceedings vests only in the buyer. The *prima facie* procedural inequality generated by the asymmetry is manifest from a cursory reading of the Sample Clause. That being so, for the reasons advanced in this article,¹² the Sample Clause is unlikely to fall foul of the public policy considerations required by the *IA Act*.

¹⁰ *IA Act* (n 5) s 16.

¹¹ 'ACICA Model Arbitration Clause', *Australian Centre for International Commercial Arbitration* (Web Page) < <https://acica.org.au/acica-model-arbitration-clause/> >

¹² See part IV below.

III INTERNATIONAL JURISPRUDENCE

Courts in international jurisdictions are divided on the validity of optional asymmetrical arbitration agreements. As aforementioned, on the one hand, Russian, Polish and Turkish courts consider optional asymmetrical arbitration agreements to be invalid for want of compliance with public policy.¹³ On the other hand, courts in England and Wales, Singapore, India, the United States of America, Italy and Spain consider optional asymmetrical arbitration agreements to be valid as they do not contravene public policy. In discerning how Australian courts are likely to approach the public policy¹⁴ conundrum caused by optional asymmetrical arbitration agreements, this part will consider the jurisprudence emerging from the Russian Federation on the one hand, and England and Wales, and Singapore on the other.

A *The Russian Federation*

Prior to 2012, optional asymmetrical arbitration agreements were considered to be valid in the Russian Federation. However, in its seminal decision in *Russian Telephone Company v Sony Ericsson*¹⁶ (*Sony Ericsson*) in 2012, the Presidium of the Supreme Arbitrazh Court of the Russian Federation (the Presidium) declared optional asymmetrical arbitration agreements invalid for contravening public policy;¹⁷ a view which has since been affirmed in several judgments of superior Russian courts and the Presidium of the Supreme Court of the Russian Federation's Digest of Case Law Involving Judicial Assistance and Oversight in Relation to Domestic and International Arbitration ('the Digest').¹⁸ In *Sony Ericsson*, the Court

¹³ See *Russian Telephone Company* (n 3) 6; see also Sąd Najwyższy (Supreme Court of Poland), V CSK 503/11, 19 October 2012; Sąd Najwyższy (Supreme Court of Poland), II CSK 291/10, 24 November 2010; Turkish Court of Appeal, 11th Civil Chamber, 2009/3257.

¹⁴ See *Pittalis* (n 7); *NB Three Shipping* (n 7); *New India Assurance* (n 7); *Willis Flooring* (n 7); *Wilson Taylor Asia Pacific* (n 7); High Court of Appeal of Madrid, LA LEY 172387/2013, 18 October 2013; Final Award, Chamber of National and International Arbitration of Milan, Case No 10915, 14 November 2016 reported in (2017) 42 *Yearbook—Commercial Arbitration* 280.

¹⁵ See, eg, *ING Bank N.V. v ZAO Factoring Company Eurokommerz*, Federal Arbitrazh Court for the Moscow District, 18 January 2010.

¹⁶ *Russian Telephone Company* (n 3).

¹⁷ *Ibid* 5.

¹⁸ Presidium of the Supreme Court of the Russian Federation, 26 December 2018, reported in *Обзор практики рассмотрения судами дел, связанных с выполнением функций содействия и контроля в отношении третейских судов и международных коммерческих арбитражей* [Digest of Case Law Involving Judicial Assistance and Oversight in Relation to Domestic and International Arbitration] <http://www.supcourt.ru/documents/all/27518/> ('Presidium of the Supreme Court of the Russian Federation'). Although the Digest is not binding authority, it is an important guide issued by a superior Russian court that has considerable weight in Russian jurisprudence.

was tasked with determining whether the following arbitration agreement was valid:

Any dispute arising in connection with this Agreement that cannot be resolved through negotiations is to be finally resolved in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by three (3) arbitration judges appointed in accordance with the Rules. The place for the arbitration proceedings will be the City of London, the proceedings will be held in the English language ... The arbitration clause does not restrict Sony Ericsson's rights to file with a court of a competent jurisdiction a claim for recovery of debts for supplied Products.¹⁹

The arbitration agreement in dispute in *Sony Ericsson* was, until its final sentence, a standard arbitration agreement. The final sentence, however, was the cause for controversy in the case insofar as it rendered the agreement both optional and asymmetrical. The agreement was optional because it granted Sony Ericsson the right to commence arbitral proceedings in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce or to commence proceedings in a court of competent jurisdiction. The agreement was also asymmetrical because it only conferred that option upon Sony Ericsson; that is, only Sony Ericsson could commence either arbitral or curial proceedings. The Russian Telephone Company, by contrast, was limited to commencing arbitral proceedings.

In its consideration of the validity of the agreement, the Presidium expressed concern that it violated 'the balance of interests of the parties'.²⁰ More specifically, the Court formed the view that the clause eroded 'basic fundamentals of civil law includ[ing] the principle of equality of civil relations'.²¹ In the Court's view, it was imperative that the parties be 'granted equal procedural opportunities to defend their rights and lawful interests'.²² The Court substantiated its position by referring

¹⁹ *Russian Telephone Company* (n 3) 3.

²⁰ *Ibid* 5.

²¹ *Ibid*, citing *Suda v The Czech Republic* (European Court of Human Rights, Fifth Section, Application No 1643/06, 28 October 2010).

²² *Russian Telephone Company* (n 3) 5.

to art 6 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*²³ (ECHR), which the Court held ‘guarantees the right of one of the parties to have an equal standing with respect to the opposing party’.²⁴ In resolving the controversy, the Court held that the arbitration agreement was invalid insofar as it was procedurally unequal and, in remedying the inequality, it granted the Russian Telephone Company the right to commence curial proceedings thus placing the parties on equal footing. The Court was thus clearly only concerned with the procedural inequality generated by the agreement. For that reason, it is likely that the Court would have reached the same conclusion if the arbitration agreement conferred upon both parties the right to commence proceedings in a competent court, yet reserved for one party only the additional right to commence arbitral proceedings.

As the Presidium is a superior court of the Russian Federation, the Court’s decision in *Sony Ericsson* has served as the jurisprudential foundation upon which subsequent decisions throughout the Russian Federation have rested. For instance, in 2015, the Chamber on Economic Disputes of the Supreme Court of Russia applied the Presidium’s decision in *Sony Ericsson* in enforcement proceedings of an arbitral award.²⁵ In *Piramida LLC v BOT LLC*²⁶ (*Piramida*), the dispute resolution clause contained an optional asymmetrical arbitration agreement that granted upon ‘the claimant’ only the right to commence either arbitral or curial proceedings.²⁷ It was thus both optional and asymmetrical. In the arbitral proceedings commenced by *Piramida*, the company was successful and an award was rendered in its favour. *Piramida* then sought to enforce the award in the Commercial Court of the Smolensk region. At first instance, the arbitration agreement was declared invalid in light

²³ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, ETS No 194 (entered into force 1 June 2010) (‘ECHR’).

²⁴ *Russian Telephone Company* (n 3) 6.

²⁵ See *Piramida LLC v BOT LLC*, Supreme Court of Russia, 27 May 2015 (‘*Piramida*’).

²⁶ *Ibid.*

²⁷ *Ibid.*; see also Alexander Gridasov and Maria Dolotova, ‘Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion’, *Kluwer Arbitration Blog* (Blog Post, 7 May 2019) <<http://arbitrationblog.kluwerarbitration.com/2019/05/07/unilateral-option-clauses-russian-supreme-court-puts-an-end-to-the-long-lasting-discussion/>> (‘Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion’); Mikhail Ivanov and Inna Manassyan, ‘Chapter 36 – Russia’ (2016) (Third edition) *The International Arbitration Review* 431, 442 (‘Chapter 36 – Russia’).

of the Presidium's reasoning in *Sony Ericsson* and the Court declined to enforce the award. On appeal, the decision of the Commercial Court of Smolensk region was overturned by the Russian Supreme Court, despite *Sony Ericsson*, because the agreement was not, in fact, asymmetrical.²⁸ Notably, the Court held that the agreement did not contravene the principles expounded in *Sony Ericsson* because both parties could have been 'the claimant' in any proceedings commenced.²⁹ Although the Russian Supreme Court interpreted the dispute resolution clause as conferring symmetrical rights, it nevertheless affirmed the principles espoused in *Sony Ericsson* and confirmed that if the agreement conferred asymmetrical procedural rights, it would have been invalid for want of compliance with the principles of equality in civil relations.³⁰

Sony Ericsson and *Piramida* were later considered in a 2016 decision of the Moscow Circuit Court in *Emerging Markets Structured Products B.V. v LLC Zhilindustriya & Ors*³¹ (*Emerging Markets*). In that case, the parties' dispute resolution clause conferred upon one party the right to submit its disputes to arbitration under the Arbitration Rules of the London Court of International Arbitration ('LCIA') or a court in England, Russia or any other competent jurisdiction.³² The counterparty, by contrast, was limited to submitting its disputes to arbitration under the LCIA Arbitration Rules. In examining the validity of the dispute resolution clause, the Moscow Circuit Court adhered to principles expounded in *Sony Ericsson* and observed 'that by giving only one of the parties the option to choose between arbitration and litigation, the clause violated their procedural equality guaranteed by the Constitution and the Convention on Human Rights and Fundamental Freedoms'.³³

Finally, in 2018, the Presidium of the Supreme Court of the Russian Federation published the Digest.³⁴ Although the Digest is not binding authority in Russian jurisprudence, it is an important guide on case law issued by a superior Russian

²⁸ *Piramida* (n 25); see also Ivanov and Manassyan, 'Chapter 36 – Russia' (n 29) 442.

²⁹ *Piramida* (n 25); see also Ivanov and Manassyan, 'Chapter 36 – Russia' (n 29) 442.

³⁰ *Piramida* (n 27); see also Gridasov and Dolotova, 'Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion' (n 29).

³¹ *Emerging Markets Structured Products B.V. v LLC Zhilindustriya & Ors*, the Moscow Circuit Court, 14 March 2016 ('Emerging Markets Structured Products').

³² *Ibid*; see also Russian Arbitration Association, 'Courts and Arbitration in Russia' (2017) Newsletter – Issue 7 5 (*Courts and Arbitration in Russia*).

³³ *Courts and Arbitration in Russia* (n 34), citing *Emerging Markets Structured Products* (n 33).

³⁴ Presidium of the Supreme Court of the Russian Federation (n 20).

court and has considerable weight.³⁵ In the Digest, the Presidium: firstly, affirmed *Sony Ericsson*, stating that optional asymmetrical arbitration agreements are invalid for want of compliance with public policy insofar as they confer unequal jurisdictional rights;³⁶ secondly, clarified that such agreements are not invalid to the extent that they do not contravene principles of equality because, properly construed, they are in fact symmetrical, as was evinced in *Piramida*; and thirdly, explained that Russian courts are to resolve the invalidity of optional asymmetrical arbitration agreements by conferring equal jurisdictional rights upon the parties.³⁷

In summary, to the extent that optional asymmetrical arbitration agreements contravene principles of equality in civil relations – that is, confer unequal jurisdiction rights – they are invalid in the Russian Federation. Accordingly, the Sample Clause would likely be invalid if challenged in a court of the Russian Federation.

B *England and Wales*

Prior to 1986, optional asymmetrical arbitration agreements were invalid in England and Wales as they did not confer bilateral rights of reference to the proposed dispute resolution forum upon the parties.³⁸ The seminal decision upon which the jurisprudence in England and Wales rested prior to 1986 was *Baron v Sunderland Corporation*.³⁹ Although that case concerned a domestic arbitration, the decision, which concerned an application by a school teacher (Mr Baron) for what he asserted was his statutory entitlement to an additional salary of £135,⁴⁰ applied equally to international arbitration jurisprudence in England and Wales until it was subsequently overturned in 1986.⁴¹

In *Baron v Sunderland Corporation*, Mr Baron commenced proceedings in the Sutherland County Court seeking payment of £135. Despite having commenced

³⁵ Gridasov and Dolotova, 'Unilateral Option Clauses: Russian Supreme Court Puts an End to the Long-Lasting Discussion' (n 29).

³⁶ Presidium of the Supreme Court of the Russian Federation (n 20).

³⁷ Ibid.

³⁸ *Baron* (n 4). Cf *Woolf v Collis Removal Service* [1948] 1 KB 11.

³⁹ *Baron* (n 4).

⁴⁰ Ibid 62 (Davies LJ).

⁴¹ See, eg, *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA; The Messiniaki Bergen* [1983] 1 All ER 382.

proceedings in the Sutherland County Court, Mr Baron's employment was subject to an asymmetrical arbitration agreement. It was submitted at first instance by Sutherland Corporation, and accepted by Judge Sharp, that the clause was a valid arbitration agreement and that Mr Baron's claims should, therefore, be referred to arbitration. Having accepted that submission, Judge Sharp referred Mr Baron's claims to arbitration in the statutorily prescribed manner. On appeal to the Queen's Bench Division, Davies, Russell and Salmon LJ allowed the appeal, Davies LJ giving the lead judgment with which Russell and Salmon LJ agreed. In allowing the appeal, his Lordship observed that the asymmetrical arbitration agreement was 'about as unlike an arbitration clause as anything one could imagine'⁴² and that, for there to exist a valid arbitration agreement, each party ought to have agreed:

to refer disputes to arbitration; and it is an essential ingredient of an arbitration clause that either party may, in the event of a dispute arising, refer it, in the provided manner, to arbitration. In other words, the clause must give bilateral rights of reference. The present clause, as I see it, does nothing of the kind ... there is a complete lack of mutuality ...⁴³

Accordingly, the lack of mutual jurisdictional rights was fatal to Sutherland Corporation's contention that the impugned arbitration agreement was valid, although it should be noted that the Court cited no authority in support of that proposition. That notwithstanding, *Baron v Sunderland Corporation* was followed in *Tote Bookmakers Ltd v Development & Property Holding Co Ltd*,⁴⁴ which concerned a dispute as to the validity of an optional asymmetrical arbitration agreement governed by the *Arbitration Act 1950* (UK). At first instance, Peter Gibson J applied *Baron v Sunderland Corporation* and declared the optional asymmetrical arbitration agreement to be invalid for failing to confer mutual jurisdictional rights. In reaching that conclusion, however, His Honour expressed doubt as to the correctness of *Baron v Sunderland Corporation* and referred to the 'powerful criticisms'⁴⁵ of *Baron v Sunderland Corporation* in *Russell on Arbitration*⁴⁶ and Mustill & Boyd's *Commercial Arbitration*.⁴⁷ Nevertheless, his Honour observed that he was 'plainly bound by the *ratio decidendi* in *Baron's* case ... and [was] compelled to hold that [there was] no arbitration agreement'.⁴⁸

⁴² *Baron* (n 4) 64 (Davies LJ).

⁴³ *Ibid.*

⁴⁴ *Tote Bookmakers Ltd v Development & Property Holding Co Ltd* [1985] Ch 261 ('*Tote Bookmakers*'); see also *Union of India v Bharat Engineering Corporation* [1977] 2 ILR Delhi Series 57.

⁴⁵ *Tote Bookmakers* (n 47) 268.

⁴⁶ Anthony Walton and Mary Vitoria, *Russell on Arbitration* (Stevens & Sons, 20th ed, 1982) 38.

⁴⁷ Michael J Mustill and Stewart C Boyd, *Commercial Arbitration* (Butterworths, 1982) 52.

⁴⁸ *Tote Bookmakers* (n 45) 268; see also *Westfal-Larsen & Co A/S v Ikerigi Compania Naviera SA; The Messiniaki Bergen* [1983] 1 All ER 382, 386 (Bingham J).

Although Peter Gibson J was bound to apply *Baron v Sutherland Corporation*, Fox, Dillon and Neill LJ did not consider the Court of Appeal to be so bound in *Pittalis v Sherefettin*.⁴⁹ That case concerned, similarly to *Tote Bookmakers Ltd v Development & Property Holding Co Ltd*, a rent review dispute in respect of which there existed an optional asymmetrical arbitration agreement in favour of the lessee. The lessee, however, failed to commence arbitral proceedings in the time stipulated by the clause and commenced proceedings pursuant to s 27 of the *Arbitration Act 1950* (UK) seeking an extension of time within which he could commence arbitral proceedings. After having initially refused the application, Judge Martin QC, at first instance, recalled his own decision (which had not, by that time, been entered) and by a further judgment granted the relief sought by the lessee. On appeal to the Court of Appeal, the landlord cited both *Baron v Sutherland Corporation* and *Tote Bookmakers Ltd v Development & Property Holding Co Ltd* in support of the submission that the arbitration agreement was invalid because it did not confer bilateral rights of reference and accordingly, his Honour had no power to extend the time within which the lessee could commence arbitral proceedings because there did not exist a valid arbitration agreement. In reply, the lessee disputed the correctness of *Baron v Sutherland Corporation*, insofar as that decision was authority for the proposition that there must exist mutuality of obligation within an arbitration agreement for it to be valid. Fox LJ (with whom Dillon and Neill LJ concurred) allowed the appeal. On the issue of whether an arbitration agreement must confer bilateral rights of reference to be valid, his Lordship cited the aforementioned powerful criticism of *Baron v Sutherland Corporation* and relevantly said:

Looking at the matter apart from authority, I can see no reason why, if an agreement between two persons confers on one of them alone the right to refer the matter to arbitration, the reference should not constitute an arbitration. There is a fully bilateral agreement which constitutes a contract to refer. The fact that the option is exercisable by one of the parties only seems to me to be irrelevant. The arrangement suits both parties.⁵⁰

⁴⁹ *Pittalis* (n 7).

⁵⁰ *Pittalis* (n 7) 875 (Fox LJ).

Thereafter, mutuality of obligation was no longer a requirement for there to exist a valid arbitration agreement, including in international arbitration agreements, in England and Wales (and elsewhere, for that matter).⁵¹ But precedential value aside, Lord Justice Fox's judgment is, with the greatest respect, logical and consistent with other fundamental pillars of the British common law system. Indeed, a requirement of symmetry in arbitration agreements is inconsistent with the fundamental purpose of contractual relations: to exchange one obligation for another.⁵² If the law mandated that contracts, including arbitration agreements, ought to confer symmetrical jurisdictional rights such that parties are required to exchange the same obligations, no exchanges would take place.⁵³ Although, of course, an arbitration agreement requires consideration like any other agreement governed by the laws of England, what the parties exchange for a unilateral right to arbitrate is their prerogative.⁵⁴

Whilst *Pittalis v Sherefettin* settled the issue of whether arbitration agreements require mutuality of obligation, it did not resolve the question of whether arbitration agreements are invalid if they do not confer equal jurisdictional rights upon both parties in the manner required by the Presidium in *Sony Ericsson*. That controversy was resolved in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor*⁵⁵ (*Mauritius Bank v Hestia Holdings*). In that case, the dispute resolution clause was

⁵¹ See, eg, *NB Three Shipping* (n 7); see also *Wilson Taylor Asia Pacific* (n 7) [18]-[19] (Menon CJ); *Sablosky v Gordon Company* 73 NY 2d 133, 137 (NY, 1989) ('*Sablosky*'); *Manningham City Council v Dura (Australia) Constructions Pty Ltd* [1999] 3 VR 13, 17 [10] (Phillips JA); *Turner Corporation Ltd v Austotel Pty Ltd* (1992) 27 NSWLR 592, 601 (Giles J); *Kalman Floor Company v Jos. L. Muscarelle* 196 NJ 16, 29 (NJ, 1984) ('*Kalman Floor*'); *PMT Partners* (n 2); Bundesgerichtshof [German Federal Court of Justice], III ZR 141/90, 10 October 1991 reported in (1992) 45 NJW 575; Simon Nesbitt and Henry Quinlan, 'The Status and Operation of Unilateral or Optional Arbitration Clauses' (2006) 22(1) *Arbitration International* 133, 136 ('The Status and Operation of Unilateral or Optional Arbitration Clauses'); Álvaro López de Argumedo Piñeiro and Constanza Balmaseda, 'The disputed validity of hybrid and asymmetric clauses in Europe: A review of the Decision of the High Court of Appeal of Madrid of 18 October 2013' [2014] (19) *Spain Arbitration Review* 55, 61; Gary B Born et al. 'Chapter 4: Rethinking "Pathological" Arbitration Clauses: Validating Imperfect Arbitration Agreements', in Sherlin Tung et al (eds), *Finances in International Arbitration: Liber Amicorum Patricia Shaughnessy* (Kluwer Law International 2019) 35, 52.

⁵² Youssef Nassar, 'Are Unilateral Option Clauses Valid?', *Kluwer Arbitration Blog* (Blog Post, 13 October 2018) 6 <<http://arbitrationblog.kluwerarbitration.com/2018/10/13/are-unilateral-option-clauses-valid/>> ('Are Unilateral Option Clauses Valid?'); see also *Kalman Floor* (n 54) 29.

⁵³ Nassar, 'Are Unilateral Option Clauses Valid?' (n 55).

⁵⁴ See Sablosky (n 54); Deyan Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability' (2014) 31(1) *Kluwer Law International* 19, 26, 42; Nesbitt and Quinlan, 'The Status and Operation of Unilateral or Optional Arbitration Clauses' (n 54) 144.

⁵⁵ *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd & Anor* [2013] 2 All ER (Comm) 898 ('*Mauritius Commercial Bank*').

an asymmetrical jurisdiction selection clause. Although the dispute resolution clause in *Mauritius Bank v Hestia Holdings* was not an arbitration agreement, the ratio of Poppelwell J's judgment would apply equally to the validity of an arbitration agreement because the issues with which his Honour was concerned were basal considerations of public policy, including one's right to equal access to justice, which indisputably apply to the validity of an arbitration agreement.⁵⁶

The dispute resolution clause in *Mauritius Bank v Hestia Holdings* conferred a right upon Mauritius Commercial Bank Ltd to commence proceedings in a court in any jurisdiction, yet it limited Hestia Holdings Ltd to commence its proceedings in the courts of England.⁵⁷ Hestia Holdings Ltd brought an application in the Queen's Bench Division seeking an order staying all further proceedings on the basis that English courts do not have jurisdiction to hear Mauritius Commercial Bank Ltd's claims, which related to amounts alleged to have been unpaid under a finance agreement entered into by the parties. In so doing, Hestia Holdings Ltd challenged the validity of the asymmetrical dispute resolution clause on the basis, *inter alia*, that it was incompatible 'with fundamental principles regarding equal access to justice' as reflected in art 6 of the ECHR.⁵⁸ That article reads, in its relevant part: 'in the determination of his civil rights ... everyone is entitled to a fair ... hearing ...'⁵⁹

His Honour rejected the submission by Hestia Holdings Ltd that the asymmetrical dispute resolution clause was invalid for want of compliance with art 6 of the ECHR insofar as it did not grant equal jurisdictional rights upon both parties.⁶⁰ In dispensing with that submission, his Honour relevantly said that, contrary to the interpretation advanced by Hestia Holdings Ltd, art 6 of the ECHR 'is directed to access to justice within the forum chosen by the parties, not to choice of forum'.⁶¹ No forum was identified by Hestia Holdings Ltd in which its access to justice would be unequal to that of Mauritius Commercial Bank Ltd and the clause was, therefore, not inimical to public policy as Hestia Holdings Ltd submitted; quite the contrary, there are several public policy considerations that lend support for the enforcement

⁵⁶ See, eg, *Soleimany v Soleimany* [1999] QB 785; 3 All ER 847, 856-7.

⁵⁷ *Mauritius Commercial Bank* (n 58) 903 (Poppelwell J).

⁵⁸ *Mauritius Commercial Bank* (n 58) 904 (Poppelwell J).

⁵⁹ ECHR (n 25) art 6(1).

⁶⁰ *Mauritius Commercial Bank* (n 58) 911-2 [43] (Poppelwell J).

⁶¹ *Mauritius Commercial Bank* (n 58) 911-2 [43] (Poppelwell J); see also Richard Fentiman, 'Unilateral jurisdiction agreements in Europe' (2013) 72(1) *Cambridge Law Journal* 24, 24, quoted in *Mauritius Commercial Bank* (n 58) 911 [42] (Poppelwell J).

of an asymmetrical jurisdiction clause, not the least of which include enforcing the contractual bargain which the parties reached.

It can be seen from this synopsis of the jurisprudence in England and Wales that, as the law currently stands, arbitration agreements (and thus, optional asymmetrical arbitration agreements) do not require mutuality of obligation. It can also be seen that dispute resolution clauses, including optional asymmetrical arbitration agreements, do not, *ipso facto*, contravene English public policy by virtue of their asymmetry.

C Singapore

Despite the broad similarities in their respective legal systems, there are several considerable differences in the statutory arbitral regimes of Singapore and the United Kingdom. For example, unlike the United Kingdom, Singapore has adopted the *Model Law* in its *International Arbitration Act*.⁶² Nevertheless, Singaporean courts have largely embraced the approach adopted by the courts in England and Wales to the validity of optional asymmetrical arbitration agreements insofar as those courts have rejected the notion that such agreements require mutuality of obligation. Singaporean courts have not, however, considered the issue of whether optional asymmetrical arbitration agreements contravene public policy. That being so, Singaporean jurisprudence is, on balance, more likely than not to follow the approach of Poppelwell J in *Mauritius Bank v Hestia Holdings*, particularly given the frequent deference Singaporean courts display to judgments of superior courts in England and Wales.⁶³ One such example of that deference, which has pertinence to the validity of optional asymmetrical arbitration agreements in Singapore, is the Court of Appeal's decision in *Wilson Taylor Asia Pacific Pte Ltd v Dyna-Jet Pte Ltd (Wilson Taylor v Dyna-Jet)*.⁶⁴ In that case, the Court of Appeal was required to determine whether the following clause was an arbitration agreement for the purpose of s 6 of the *International Arbitration Act*.⁶⁵

⁶² *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed).

⁶³ See, eg, *Wilson Taylor Asia Pacific* (n 7) [13] (Sundaresh Menon CJ).

⁶⁴ *Wilson Taylor Asia Pacific* (n 7).

⁶⁵ *International Arbitration Act* (Singapore, cap 143A, 2002 rev ed).

Any claim or dispute or breach of terms of the Contract shall be settled amicably between the parties by mutual consultation. If no amicable settlement is reached through discussions, at the election of Dyna-Jet, the dispute may be referred to and personally settled by means of arbitration proceedings, which will be conducted under English Law; and held in Singapore.⁶⁶

The clause is clearly both optional and asymmetrical; Dyna-Jet Pte Ltd, solely, had the option to refer a dispute to arbitral proceedings. Despite having that right, Dyna-Jet Pte Ltd elected to commence curial proceedings in Singapore.⁶⁷ In its application for an order to stay the proceedings, Wilson Taylor Asia Pacific Pte Ltd sought to rely upon Dyna-Jet Pte Ltd's right of election to refer the dispute to arbitral proceedings as the basis for its stay application. Quite unlike all of the aforementioned cases, the party seeking to rely upon the validity of the arbitration agreement was not the party within whom the option to commence arbitral proceedings had been vested. In determining whether the stay ought to have been granted, the Court of Appeal first considered whether the clause was a valid arbitration agreement. In so doing, Sundaresh Menon CJ, delivering the judgment of the Court, relevantly said:

It [is] immaterial ... that the Clause: (a) entitled only the Respondent (but not the Appellant) to compel its counterparty to arbitrate a dispute (the "lack of mutuality" characteristic); and (b) made arbitration of a future dispute entirely optional instead of placing parties under an immediate obligation to arbitrate their disputes (the "optionality" characteristic). On the weight of modern Commonwealth authority ... neither of these features prevented the court from finding that there was a valid arbitration agreement between the present parties.⁶⁸

Albeit reference is not made to *Pittalis v Sherefettin* in the above extract, his Honour later refers to that decision and approved the judgment of Fox LJ.⁶⁹ Singaporean jurisprudence thus does not require mutuality of obligation for there to exist a valid arbitration agreement. Given its deference to 'Commonwealth authority', the Singaporean Court of Appeal's decision in *Wilson Taylor v Dyna-Jet* is likely to be of some importance in discerning how Australian courts will respond to a challenge to the validity of an optional asymmetrical arbitration agreement.

⁶⁶ *Wilson Taylor Asia Pacific* (n 7) [4] (Sundaresh Menon CJ).

⁶⁷ *Ibid* [1] (Sundaresh Menon CJ).

⁶⁸ *Ibid* [13] (Sundaresh Menon CJ).

⁶⁹ *Ibid* [18]-[19]; see also *China Merchants Heavy Industry Co Ltd v JGC Corp* [2001] 3 HKC 580 ('*China Merchants Heavy Industry*').

IV THE VALIDITY OF OPTIONAL ASYMMETRICAL ARBITRATION AGREEMENTS IN AUSTRALIA

As the preceding part ought to have made clear, the predominant basis upon which optional asymmetrical arbitration agreements have been declared invalid is that such agreements contravene public policy for conferring unequal jurisdictional rights upon the parties.⁷⁰ Optional asymmetrical arbitration agreements have also been declared invalid insofar as they lack mutuality of obligation, but that line of authority has largely, if not entirely, been rejected as correct in the common law world, including in Australia.⁷¹ The emerging trend thus concerns the contravention of public policy. That is certainly so with the jurisprudence emerging from the Russian Federation.⁷² However, Australian courts are not particularly concerned with Russian public policy, despite their similarities.⁷³ Australian courts are predominately concerned with Australian public policy; particularly natural justice and procedural fairness.⁷⁴ Although both Russian and Australian notions of public policy clearly include procedural fairness, the scope of procedural fairness differs markedly. One example of that difference is the parties' choice of forum. In the Russian Federation, procedural fairness includes the parties' choice of forum; that is, parties must have equal jurisdictional rights. In Australia, by contrast, procedural fairness is unlikely to include the parties' choice of forum, at least insofar as each party is able to avail itself of one forum to resolve its claims. In grappling with this distinction, this part will explain why the Australian view of procedural fairness is unlikely to include the parties' choice of forum and, in so doing, will consider the impact, if any, of art 18 of the *Model Law* as it applies as a schedule to the *IA Act*.

⁷⁰ See, eg, *Baron* (n 4); *Russian Telephone Company* (n 3); *Piramida* (n 25); *Emerging Markets Structured Products* (n 31).

⁷¹ See, eg, *Pittalis* (n 7); *China Merchants Heavy Industry* (n 67); *Wilson Taylor Asia Pacific* (n 7); *PMT Partners* (n 2).

⁷² *Russian Telephone Company* (n 3); Presidium of the Supreme Court of the Russian Federation (n 18); *Piramida* (n 25); *Emerging Markets Structured Products* (n 31).

⁷³ *Traxys Europe SA v Balaji Coke Industry Pvt Ltd* (No 2) [2012] FCA 276, [94] (Foster J) ('Traxys Europe').

⁷⁴ *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 383 (Allsop CJ, Middleton and Foster JJ) ('*TCL Air Conditioner (Zhongshan)*').

In Australia, an arbitration agreement, like any other contract, will be declared void and unenforceable if it is contrary to public policy.⁷⁵ Public policy is, however, an elusive concept that is not capable of precise definition.⁷⁶ As the High Court of Australia has explained, the question of whether there has been a breach of public policy is to be objectively ‘determined by the competent court on the evidence and submissions before it’.⁷⁷ In Australian jurisprudence, the concept of public policy has received ample judicial consideration in the context of setting aside or refusing to enforce an arbitral award pursuant to ss 8(7)(b) and 8(7A) of the *IA Act*.⁷⁸ Section 8(7A) of the *IA Act* relevantly provides that the enforcement of an award would be contrary to public policy if the ‘making of the award was induced or affected by fraud or corruption’⁷⁹ or ‘a breach of the rules of natural justice occurred in connection with the making of the award’.⁸⁰ Although ss 8(7)(b) and 8(7A) address the enforcement of an award, the listed examples of a contravention of public policy would apply equally to a court’s determination of the validity of an arbitration agreement. It is indisputable, for instance, that a contravention of the rules of natural justice would render an arbitration agreement void. The concept of natural justice in the context of an application to set aside an award for want of compliance with public policy was explained by the Full Court of the Federal Court of Australia in *TCL Air Conditioning (Zhongshan) Co Ltd v Castel Electronics Pty Ltd*⁸¹ (*TCL Air Conditioning*) in the following terms:

⁷⁵ See, eg, *Mond v Berger* (2004) 10 VR 534, 558-9; see also *Soleimany v Soleimany* [1999] QB 785; 3 All ER 847, 857.

⁷⁶ See *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Ras Al Khaimah National Oil Company* [1987] 2 All ER 769, 779 (Donaldson MR).

⁷⁷ *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia and Another* (2013) 251 CLR 533, 548.

⁷⁸ See, eg, *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248; *Traxys Europe* (n 71); *TCL Air Conditioner (Zhongshan)* (n 78); *International Relief and Development Inc v Ladu* [2014] FCA 887; *Uganda Telecom Limited v Hi-Tech Telecom Pty Ltd* [2011] FCA 131 (*‘Uganda Telecom’*).

⁷⁹ *IA Act* (n 5) s 8(7A)(a).

⁸⁰ *Ibid* s 8(7A)(b).

⁸¹ (2014) 232 FCR 361.

The rules of natural justice can ... be seen to fall within the conception of a fundamental principle of justice (that is within the conception of public policy), being, as they are, equated with, and based on, the notion of fairness ... Fairness incorporates the underlying requirement of equality of treatment of the parties. The incorporation of the rules of natural justice into the IAA embodied a fundamental principle contained within public policy and *ordre public* – fairness and equality of treatment of the parties, which is at the heart of the arbitral process in Art 18.⁸²

It can be seen that public policy considerations with which Australian courts are concerned in this context are those fundamental principles of justice and morality.⁸³ The right to be treated fairly and equally (not to be confused with equitably) have their limits, however, and should be interpreted narrowly in accordance with the prevailing jurisprudence in Australia.⁸⁴ In *TCL Air Conditioning*, Allsop CJ, Middleton and Foster JJ explained that the real question to be answered is whether a party ‘has been treated unfairly or has suffered real practical injustice’.⁸⁵ The question of whether a party ‘has been treated unfairly or has suffered real practical injustice’ must be considered in the context that:

[t]he whole rationale of the Act, and thus the public policy of Australia, is to enforce such awards wherever possible in order to uphold contractual arrangements entered into in the course of international trade, in order to support certainty and finality in international dispute resolution and in order to meet the other objects specified in s 2D of the Act.⁸⁶

The consensual conferral of unequal jurisdictional rights of the kind seen in optional asymmetrical arbitration agreements would not have the effect, despite emerging international jurisprudence, of treating either party unfairly or causing a party to suffer a real practical injustice of the kind recognised by Allsop CJ, Middleton and Foster JJ and echoed throughout Australian jurisprudence. The unfairness or practical injustice that strikes at the heart of Australian jurisprudence is, as has already been mentioned, conduct that is ‘contrary to the fundamental

⁸² *TCL Air Conditioner (Zhongshan)* (n 78) 383 (Allsop CJ, Middleton and Foster JJ), citing *Wiseman v Borneman* [1971] AC 297, 308–9, 320; *Kioa v West* (1985) 159 CLR 550, 583.

⁸³ *TCL Air Conditioner (Zhongshan)* (n 78) 383 (Allsop CJ, Middleton and Foster JJ).

⁸⁴ *Ibid* 385.

⁸⁵ *Ibid* 393.

⁸⁶ *Uganda Telecom* (n 84) [126] (Foster J).

conceptions of morality and justice’;⁸⁷ for example, ‘the making of a factual finding by a tribunal without probative evidence’.⁸⁸ It would not be contrary to fundamental conceptions of morality and justice for two parties to voluntarily exchange unequal rights, including unequal jurisdictional rights, at least insofar as both parties have at least one jurisdiction within which to ventilate their claims and are treated equally and fairly within that jurisdiction.⁸⁹ The exchange of unequal jurisdictional rights, whether considered in isolation or part of a larger bargain (i.e. the substantive agreement to which the arbitration agreement applies) is the bargain reached by the parties. The system of bargaining and exchanging jurisdictional rights, like any other right conferred by a consensual agreement, is an integral component of our common law system without which no exchanges would take place. It would belie the very foundation of our common law system of consensually exchanging one right for another if it were to be said that optional asymmetrical arbitration agreements contravene public policy because they confer unequal jurisdictional rights. Indeed, one could posit that the failure to uphold the validity of an optional asymmetrical arbitration agreement would itself be contrary to public policy for want of upholding the parties’ bargain.

That, however, is not the end of the enquiry as to whether an optional asymmetrical arbitration agreement would contravene Australian public policy. Australian public policy in the context of international commercial arbitration includes what is contained in art 18 of the *Model Law*, which applies as a schedule to the *IA Act*. That article, which has been described as the ‘Magna Carta of Arbitral Procedure’,⁹⁰ states that ‘[t]he parties shall be treated with equality and each party shall be given a full opportunity of presenting his case’.⁹¹

⁸⁷ *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKC 205, 232-3 (Sir Anthony Mason); *TCL Air Conditioning (Zhongshan)* (n 78) 383-5 (Allsop CJ, Middleton and Foster JJ).

⁸⁸ *TCL Air Conditioning (Zhongshan)* (n 78) 387 (Allsop CJ, Middleton and Foster JJ).

⁸⁹ See, eg, *Mauritius Commercial Bank* (n 58).

⁹⁰ Howard M Holtzmann and Joseph Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law International, 1989) 550.

⁹¹ *IA Act* (n 5) sch 2 art 18.

Article 18 has, by s 18C of the *IA Act*, been slightly modified such that ‘a party to arbitral proceedings is taken to have been given a full opportunity to present the party’s case if the party is given a reasonable opportunity to present the party’s case’.⁹² That notwithstanding, one’s right to equal treatment and to be given a reasonable opportunity to present one’s case are not principles of last-resort to be applied by Australian courts to strike down an arbitration agreement for any instance of inequality or unfairness.⁹³ They are, akin to how Australian courts have approached broader notions of public policy, to be construed narrowly.⁹⁴ A narrow, yet proper, interpretation of art 18 of the *Model Law* would not permit a finding that an optional asymmetrical arbitration agreement fails to treat the parties with equality. As the *travaux préparatoires* of the *Model Law* explain, art 18 ought to be complied with ‘by ... the parties when using their freedom [under art 19(1) of the *Model Law*] to lay down rules of procedure’;⁹⁵ for example, institutional arbitration rules or rules of evidence.⁹⁶ As the *travaux préparatoires* of the *Model Law* further make clear, the scope of art 18 ought to be construed as applying solely to matters internal to the arbitral proceedings; it is plainly not concerned with the forum consensually agreed to within which the parties intend to resolve their disputes.⁹⁷ Indeed, as the Ontario Superior Court of Justice acknowledged in *Corporacion Transnacional v STET International*,⁹⁸ art 18 ‘is not intended to protect a party from its failures or strategic choices’.⁹⁹ Although it is doubtless that there are limits

⁹² *IA Act* (n 5) s 18C.

⁹³ See, eg, *TCL Air Conditioning (Zhongshan)* (n 78) 403 (Allsop CJ, Middleton and Foster JJ); see also *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] 3 SLR (R) 86, [65].

⁹⁴ *TCL Air Conditioning (Zhongshan)* (n 78) 385 (Allsop CJ, Middleton and Foster JJ).

⁹⁵ *International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration – Report of the Secretary General*, UN GAOR, 18th sess, UN Doc A/CN.9/264 (25 March 1985) 46; see also *International Commercial Arbitration: Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration – Report of the Secretary General*, UN GAOR, 17th sess, UN Doc A/CN.9/246 (6 March 1984) 15.

⁹⁶ Holtzmann and Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (n 96) 551.

⁹⁷ See *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, UN GAOR, 40th sess, Supp No 17, UN Doc A/40/17 (21 August 1985) [176].

⁹⁸ *Corporacion Transnacional de Inversiones, S.A. de C.V. v STET International, S.p.A.* (1999) 45 OR (3d) 183 (*‘Corporacion Transnacional de Inversiones’*); see also *Triulziu Cesare SRL v Xinyi Group (Glass) Co Ltd* [2014] SGHC 220.

⁹⁹ *Corporacion Transnacional de Inversiones* (n 104) [73] (Lax J).

to that statement (for instance, a party cannot, by their arbitration agreement, derogate from art 18), an agreement to grant one party favourable (indeed, unequal) jurisdictional rights is a strategic choice made in the context of a bargain not only of jurisdictional rights, but also invariably of substantive rights. An Australian court is unlikely to declare an optional asymmetrical arbitration agreement invalid solely for the fact that it grants unequal jurisdictional rights, much like it is unlikely to declare any other ostensibly unequal provision within an agreement invalid.¹⁰⁰ Any other conclusion would, with respect to those decisions from the Russian Federation reaching a contrary conclusion, be a most surprising outcome and would give fertile grounds for the setting aside of an arbitration agreement for any modicum of inequality, no matter how trivial.

Australian courts would thus likely differ quite substantially from Russian courts in their approach to applying rules of procedural fairness; particularly, that one's right to equal treatment is not tantamount to equitable treatment and that art 18 of the *Model Law* ought only be invoked where there has been real and tangible injustice, neither of which can be ascribed to an optional asymmetrical arbitration agreement, at least insofar as the parties are able to be heard in one jurisdiction and are treated equally in all jurisdictions within which claims may be brought.

¹⁰⁰ Cf *Contracts Review Act 1980* (NSW).

V CONCLUSION

Optional asymmetrical arbitration agreements, such as the Sample Clause, are contentious in international commercial arbitration. There is an emerging international trend from the Russian Federation, Poland and Turkey that such agreements are invalid for want of compliance with public policy; namely, that by such agreements, the parties are not treated equally. The rationale given in these jurisdictions is that an arbitration agreement that is contrary to public policy will be declared invalid, as was the case in *Sony Ericsson*, and the parties will have bilateral jurisdictional rights conferred upon them. The courts in England and Wales have, by contrast, reached the opposite view, having concluded that asymmetrical dispute resolution clauses do not contravene public policy. Moreover, although there once existed a requirement for mutuality of obligation, courts in England and Wales, and Singapore, have jettisoned the need for mutuality of obligation for there to exist a valid arbitration agreement.¹⁰¹ Despite the importance of these issues, and that superior courts of several international jurisdictions have reached antipodal conclusions, Australian courts have not yet had an opportunity to settle the debate in the context of Australian jurisprudence. That being so, it is unlikely that Australian courts would reach the view that optional asymmetrical arbitration agreements are invalid for want of compliance with Australian public policy. It is also unlikely, in view of Australian jurisprudence and the drafting history of the *Model Law*, that Australian courts would view optional asymmetrical arbitration agreements as contravening art 18 of the *Model Law*. That view would not only be consistent with Australian jurisprudence on public policy, procedural fairness in the context of international arbitration and art 18 of the *Model Law*, but would also be consistent with the weight of Commonwealth authority upon which Australian courts frequently rely, would promote party autonomy and would be conducive to furthering the pro-arbitration approach of the New York Convention.¹⁰² In joining the debate, this article has thus sought, at least in part, to fill a lacuna in the existing literature on arbitration in Australia by proffering a view of the likely approach that Australian courts will adopt in resolving a challenge to the validity of optional asymmetrical arbitration agreements.

¹⁰¹ See also *PMT Partners* (n 2).

¹⁰² See also *IA Act* (n 5) s 2D.

A CASE FOR SMALL CLAIMS PROCEDURE IN THE WTO DISPUTE SETTLEMENT MECHANISM FOR LOW-INCOME DEVELOPING COUNTRIES AND LEAST DEVELOPED COUNTRIES

MA Ajith Anawaratna*

ABSTRACT

Low-Income Developing Countries – Trade Capacity – Dispute Settlement Mechanism – Small Claims

The dispute settlement mechanism (DSM) of the World Trade Organization (WTO) has created difficulties for low income developing countries (LIDCs) and least developed countries (LDCs) to institute cases under the dispute settlement understanding (DSU) due to their small volume of trade, inadequate remedies, and high litigation cost. This article proposes a small claims procedure for LIDCs and LDCs to address the challenges encountered by WTO members that have a small share in international trade because those countries have small claims disputes. This article revisits the current trade capacity connection with the institution of cases in the WTO Dispute Settlement Body (DSB) by LIDCs and LDCs. The existing remedies in the DSM are not suitable for these countries because of the complexity involved in the implementation of the DSB decisions and a remedy available as retaliation is not a practical option for LIDCs and LDCs due to small volume of trade. The article examines the small claims procedures in the supranational and national laws of both developed and developing countries to draw lessons and outline the structure of the small claims procedure.

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I INTRODUCTION

Establishing the WTO is a historic achievement in liberalisation of international trade.¹ The DSU has created a rule-based legal system for international trade,² which decreases uncertainty and increases the opportunities for international trade disputes to be resolved.³ As a result, the DSU has been hailed as a great leap forward because, whether a country likes it or not, a panel with compulsory jurisdiction is

¹ *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) ('WTO Agreement'); Silviano Esteve-Perezl, Salvador Gil-Pareja and Rafael Llorca-Vivero, 'Does the GATT/WTO Promote Trade? After all, Rose was Right' (2020) 156(2) *Review of World Economics* 377, 377; Andrew Lang and Joanne Scott, 'The Hidden World of WTO Governance' (2009) 20(3) *The European Journal of International Law* 575, 576; Sungjoon Cho, 'Of the World Trade Court's Burden' (2009) 20(3) *The European Journal of International Law* 675, 676; Manfred Elsig & Philipp Stucki, 'Low-income developing countries and WTO litigation: Why wake up the sleeping dog?' (2012) 19(2) *Review of International Political Economy* 292, 293; Julien Chaisse and Mitsuo Matsushita, 'Maintaining the WTO's Supremacy in the International Trade Order: A Proposal to Refine and Revise the Role of the Trade Policy Review Mechanism' (2013) 16 (1) *Journal of International Economic Law* 9, 10.

² See Marc L Busch & Eric Reinhardt, 'Bargaining in the Shadow of the Law: Early Settlement in GATT/WTO Disputes' (2000) 24 (1&2) *Fordham International Law Journal* 158, 158; see Gregory Shaffer, Michelle Ratton Sanchez and Barbara Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' (2008) 41(2) *Cornell International Law Journal* 383, 388; M Rafiqul Islam, *International Trade Law of the WTO* (Oxford University Press, 2006) 453; Fuzhi Cheng, 'The WTO Dispute Settlement Mechanism and Developing Countries: The Brazil-U.S. Cotton Case' (Case Study #9-4, 'Food Policy for Development in the Global Food System Program' Cornell University, 2007) 1, 1; Michael M. Bechtel and Thomas Sattler, 'What Is Litigation in the World Trade Organization Worth?' (2015) 69 (2) *International Organization* 375, 397; Joost Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' (2000) 94(2) *American Journal of International Law* 335, 338; Gregory Shaffer, 'What's New in EU Trade Dispute Settlement? Judicialization, Public-private Networks and the WTO Legal Order' (2006) 13(6) *Journal of European Public Policy* 832, 833; *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) annex 2 ('DSU'); *WTO Annual Report 2020*, 121.

³ Victor Mosoti, 'Africa in the First Decade of WTO Dispute Settlement' (2006) 9(2) *Journal of International Economic Law* 427, 429; Moonhawk Kim, 'Costly Procedures: Divergent Effects of Legalization in the GATT/WTO Dispute Settlement Procedures' (2008) 52(3) *International Studies Quarterly* 657, 657; James Smith 'Inequality in International Trade? Developing Countries and Institutional Change in WTO Dispute Settlement' 2004 11(3) *Review of International Political Economy* 542, 544; See Marc L Busch and Eric Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' (2003) 37(4) *Journal of World Trade* 719, 719; Marc L Busch, Eric Reinhardt and Gregory Shaffer, 'Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO' (Issue Paper No. 4, International Centre for Trade and Sustainable Development, 2008) 1; John P Gaffney, 'Due Process in the World Trade Organization: The Need for Procedural Justice in the Dispute Settlement System' (1999) 14(4) *American University International Law Review* 1173, 1182.

established automatically.⁴ Moreover, powerful members can delay,⁵ but not block the panel's establishment.⁶ However, such a rule-based system imposes enormous cost by increasing the complexity⁷ and difficulty of the procedures that LDCs and LDCs have to follow in order to institute proceedings in the DSM without a small claims procedure as these countries have small claims.⁸ Hence the DSU rules are especially burdensome on LDCs and LDCs because of economic underdevelopment and lack of expertise in investigation and litigation on international trade.⁹ LDCs and LDCs should be identified on the basis of their small volume of international trade,¹⁰ and therefore the article suggests to identify a low income developing country category by considering the trade capacity of WTO members to provide a procedure to institute small claims disputes in the WTO DSM (See the Table 1 and 2).

⁴ DSU, art 6(1), states that the DSB shall establish a panel unless the DSB decides by consensus not to establish a panel. Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above 2, 336.

⁵ See Andera M Ewart, 'Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment Through Reforms to Dispute Settlement', (2007) 35 *Syracuse Journal of International Law and Commerce* 27, 59.

⁶ See Busch and Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' above n 3, 721.

⁷ WTO case law indicates a deeper factual contextualization of WTO disputes. See Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/AB/R, WT/DS10/AB/R/ WT/DS11/AB/R (4 October 1996) 21; Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-containing Products*, WTO Doc WT/DS135/AB/R (12 March 2001) [94], [96],[101]; Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WTO Doc WT/DS269/AB/R, WT/DS286/AB/R (12 September 2005) [17]; Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products* WTO Doc WT/DS291/R, WT/DS292/R, WT/DS293R (29 September 2006) is the longest panel report and the panel's reasoning and findings go well over 800 pages; see Shaffer, Sanchez and Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' above n 2, 407; Nils Meier-Kaienburg, 'The WTO's "Toughest" Case: An Examination of the Effectiveness of the WTO Dispute Resolution Procedure in the Airbus-Boeing Dispute Over Aircraft Subsidies' (2006) 71(2) *Journal of Air Law and Commerce* 191, 194.

⁸ See Hakan Nordstrom and Gregory Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' (2008) 7(4) *World Trade Review* 587, 591; *Negotiations on the Dispute Settlement Understanding, Proposals by the African Group* WTO Doc TN/DS/W/15 (25 September 2002) [2]; see Busch and Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' above n 3, 721; see Amin Alavi, 'African Countries and the WTO's Dispute Settlement Mechanism' (2007) 25(1) *Development Policy Review* 25, 31; Kristin Bohl, 'Problems of Developing Country Access to WTO Dispute Settlement' (2009) 9 *Chicago-Kent Journal of International and Comparative Law* 130, 137.

⁹ See *Negotiations on the Dispute Settlement Understanding, Proposals by the African Group* WTO Doc TN/DS/W/15 (25 September 2002) [2]; see Busch and Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' above n 3, 721; see Alavi, above n 8, 31; Bohl, above n 8, 137.

¹⁰ See WTO Statistical Review 2021, 108,112.

This article develops the argument for small claims procedure in four parts. Part II reviews the literature on the scant use, by LIDCs and LDCs, of the DSM for trade disputes due to low volume of trade. It examines whether the composition of trade, the volume of trade, income levels, aid dependency, legal capacity, and litigation costs influence the decision to institute proceedings in the DSM and argues that there should be a small claims mechanism for LIDCs and LDCs. Part III examines whether the remedies provided for in the DSU for LIDCs and LDCs are inadequate and have a direct influence on the decision to institute proceedings before the DSM, and establishes the need to introduce a small claims procedure.¹¹ Part IV of the article considers the desirability of a small claims procedure for LIDCs and LDCs, as most of these countries have small claims on account of the size of their international trade at stake.¹² For this purpose, this article briefly examines how such small claims procedures work in municipal jurisdictions and supra-national jurisdictions and apply the lessons to suggest a small claims procedure for LIDCs and LDCs to institute proceedings before the DSM with minimal cost and time. Part V provides the conclusion.

II PARTICIPATION OF LOW INCOME DEVELOPING COUNTRIES AND LEAST DEVELOPED COUNTRIES IN THE WTO DSM

The participation of LIDCs and LDCs in the WTO DSM is very low.¹³ However, no clear consensus exists among writers that developing countries have a lower

¹¹ See Joseph Francois, Henrik Horn and Niklas Kaunitz, 'Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System' (Working Paper No. 730, Research Institute of Industrial Economics, 2008) 42.

¹² see Chad P Bown and Bernard M Hoekman, 'Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is Not Enough' (2008) 42(1) *Journal of World Trade* 177, 193; see Michelle Sanson, 'Facilitating Access to Dispute Settlement for African Members of the World Trade Organization' (2009) 2 *Indian Journal of International Economic Law* 1, 15; Bernard M Hoekman and Petros C. Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' (2000) 23(4) *World Economy* 527, 536; Z. Ntozintle Jobodwana, 'Participation of African Member States in the World Trade Organization Dispute Settlement Mechanism' (2009) 2(2) *International Journal of Private Law* 206, 219; Bernard M Hoekman and Michel M Kostecki, *The Political Economy of the World Trading System The WTO and Beyond* (Oxford University Press, 3rd ed., 2009) 118; Chad P Bown, 'The WTO Dispute Settlement System would Survive Without Doha' (19 June 2009) VOX Research-Based Policy Analysis and Commentary from Leading Economists, <[¹³ See Marc L Busch, Eric Reinhardt and Gregory Shaffer, 'Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO' above n 3; see Chad P Bown and Bernard M Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' \(2005\) 8\(4\) *Journal of International Economic Law* 861, 862; see Busch and Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement' above n 3, 726; see Joseph Francois, Henrik Horn and Niklas Kaunitz, 'Trading Profiles and Developing Country Participation in the WTO Dispute Settlement System' \(Paper No 6, International Centre for Trade and Sustainable Development, 2008\) 30.](http://www.voxeu.org>wto-dispute-settlement-sy..> accessed on 28.05.2021.</p></div><div data-bbox=)

participation rate in the DSM than developed countries. One school of thought is that the DSM is not prejudiced against developing countries and that the rate at which developing countries have initiated disputes has increased under the WTO, based on a raw count of the number of cases.¹⁴ According to another group of scholars, the DSM is prejudiced against developing countries and the likelihood of developing countries initiating disputes for trade conflicts under the WTO has not increased because of the value of trade and lack of enforcement power.¹⁵

The main focus of the academic literature is on whether developing countries institute actions in the DSM less frequently than one would expect. It is noticeable in the literature that countries with a large volume of trade are likely to confront more trade disputes than countries with a small volume of trade with limited exports.¹⁶ Horn, Nordstrom and Mavroidis observed that disputes in the DSM are more closely linked with the volume of trade than with any other factors.¹⁷ Their findings suggest that the discrepancy between the use by developed and developing countries of the dispute settlement procedures reflects differences in trade interests and trade volumes.¹⁸ Bown found that the size of a country's exports is positively related to the country's propensity to institute proceedings as a complainant and to participate as a third party.¹⁹

¹⁴ Christina R Sevilla, 'Explaining Patterns of GATT/WTO Trade Complaints' (Working Paper Series 98-01, Weatherhead Centre for International Affairs, January 1998) 25; Pretty Elizabeth Kuruvila, 'Developing Countries and the GATT/WTO Dispute Settlement' (1997) 31(6) *Journal of World Trade* 171, 203; Young Duk Park and Georg C Umbricht, 'WTO Dispute Settlement 1995–2000: A Statistical Analysis' (2001) 4(1) *Journal of International Economic Law* 213, 216; Peter Holmes, Jim Rollo and Alasdair R Young, 'Emerging Trends in WTO Dispute Settlement Back to the GATT?' (Policy Research Working Paper 3133, World Bank, 2003) 21; Kara Leitner and Simon Lester, 'WTO Dispute Settlement 1995–2008: A Statistical Analysis' (2009) 12(1) *Journal of International Economic Law* 557, 591.

¹⁵ Henrik Horn, Peteros C Mavroidis and Hakan Nordstrom, 'Is the Use of WTO Dispute Settlement System Biased?' (Discussion Paper No. 2340, Centre for Economic Policy Research, 1999) 26; Eric Reinhardt, 'Aggressive Multilateralism: The Determinates of GATT/WTO Dispute Initiation, 1948–1998' (Research Paper of Emory University) 24; Kim, above n 3, 680; Antoine Bouët and Jeanne Métivier, 'Is the Dispute Settlement System, "Jewel in the WTO's Crown", beyond Reach of Developing Countries?' (2020) 156 (1) *Review of World Economics* 1, 2.

¹⁶ See Chad P Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' (2005) 19(2) *World Bank Economic Review* 287, 300.

¹⁷ See Horn, Mavroidis and Nordstrom, 'Is the Use of WTO Dispute Settlement System Biased?' above n 15, 19.

¹⁸ *Ibid.* 26.

¹⁹ See Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' above n 16, 287; Chad P Bown 'Trade Remedies and World Trade Organization Dispute Settlement: Why are So Few Challenged?' (2005) 34(2) *Journal of Legal Studies* 515, 521; see also Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' above n 13, 863; UNCTAD, *Trade Policy Frameworks for Developing Countries: A Manual of Best Practice* (United Nations, Geneva, 2018) 42 and 43.

According to Lacarte and Gappah, the greater legalisation of the DSM has allowed developing countries in particular to institute cases in the DSM.²⁰ Lacarte and Gappah's argument was based on a study of large developing countries such as India, Brazil and Argentina. As such, they did not focus on LIDCs and LDCs as a group instituting small claims cases.

Sanson stated that African countries underutilised the DSM due to 'excessive cost and inadequate expertise; lack of domestic mechanisms; inadequate remedies; and political concerns and other priorities'.²¹ Sanson observed that Kenya had a dispute with China and Japan based around cheap imported goods from those two countries.²² Tanzania and Uganda suffered similar trade impacts due to the EU ban on fish caught from Lake Victoria.²³ What is evident from the above is that LIDCs and LDCs have trade issues which could potentially be litigated using the DSU.²⁴ Sanson's analysis was also confined to African countries.

Erasmus also observed that the involvement of large developing countries in DSU litigation has increased up to 40%.²⁵ One reason for this is that developing country membership has increased during the past decade and they now constitute the majority of countries represented on the WTO.²⁶ Another reason attributed to this is the transformation of the DSM into a formal legal system that is less dependent on political or diplomatic solutions. Conversely, Bohal observed that developing countries as a group have instituted 18% of the total complaints brought before the DSU whereas developed countries have instituted more than 80% of the complaints.²⁷

²⁰ Julio Lacarte-Muro and Petina Gappah, 'Developing Countries and the WTO Legal System: A View from the Bench' (2000) 3(3) *Journal of International Economic Law* 395, 397; Sevilla, above n 14, 25; Kuruvila, above n 14, 179.

²¹ See Sanson, above n 12, 12.

²² *Ibid.* 7.

²³ *Ibid.* 8.

²⁴ See UcheUEwelukwa, African States, Aggressive Multilateralism and the WTO Dispute Settlement System – Politics, Process, Outcomes and Prospects' (2005) <http://www.carnegiecouncil.org/publications>5>, accessed on 06.06.2021, 1, 11.

²⁵ See Gerhard Erasmus, 'The Non-Participation by African States in the Dispute Settlement System of the WTO: Reasons and Consequences' in Trudi Hartzenberg (ed.), *Dispute Settlement: An African Perspective* (Cameron, 2008) 179, 187.

²⁶ Michael Rom 'Some Early Reflections on the Uruguay Round Agreement as Seen From the Viewpoint of a Developing Country' (1996) 28 (6) *Journal of World Trade* 5, 7.

²⁷ See Bohal, above n 8, 133; see Shaffer, Sanchez and Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' above n 2, 411.

Busch and Reinhardt observed that 71% of DSU litigation instigated by developing countries ‘came from the wealthiest and most dominant developing countries’ such as Brazil, Argentina, Mexico, Chile, South Korea, Singapore, India and Thailand, because of the income disparity among developing countries.²⁸ Moreover, Busch, Reinhardt and Shaffer observed that most disputes have been instigated by the US, the European Community, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina.²⁹ According to them, ‘76 percent of all WTO disputes have been launched by this group of members’.³⁰ They suggest the following reasons for developing countries not making use of the DSU:

a lack of awareness of WTO rights and obligations; inadequate coordination between governments and the private sector; general governance challenges; capacity constraints in monitoring export trends; identification of undue trade barriers and the feasibility of legal challenge; financial and human resources limitations in lodging disputes; and lack of political will.³¹

Leitner and Lester also observe considering the WTO dispute settlement statistics from 1995 to 2015 ‘... that high income countries are the primary users of the [WTO] dispute settlement system’.³² However, the core issue remains that the rate of participation by LIDCs and LDCs in the DSM has not increased when compared to large developing countries up to 2021.³³ The WTO Dispute Settlement

²⁸ See Busch and Reinhardt, ‘Developing Countries and General Agreement on Tariffs and Trade/ World Trade Organization Dispute Settlement’ above n 3, 726; This position has not changed even in 2021 according to the WTO Dispute Settlement Report 2021. WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which <<https://www.wto.org> > `dispu_e` > `dispu_by_country_e`> accessed on 21.05.2021; Michael Ewing-Chow, Alex W. S. Goh and Akshay Kolse Patil, ‘Are Asian WTO Members Using the WTO DSU ‘Effectively’?’ (2013) 16(1) *Journal of International Economic Law* 669, 674.

²⁹ Busch, Reinhardt and Shaffer, ‘Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO’ above n 3.

³⁰ *Ibid* v.

³¹ *Ibid*; see also Gregory Shaffer, ‘The Challenges of WTO Law: Strategies for Developing Country Adaptation’ (2006) 5(2) *World Trade Review* 177, 177.

³² Kara Leitner and Simon Lester, ‘WTO Dispute Settlement 1995–2015—A Statistical Analysis’ above n 14, 292.

³³ See WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which <<https://www.wto.org> > `dispu_e` > `dispu_by_country_e`> accessed on 21.05.2021; Dispute Settlement Activity-Some Figures https://www.wto.org/tratop_e>dispustats_e> accessed on 15.02.2022.

Activity Report 2021 reveals that more than 90% of cases filed as complainants and participated as third parties in the DSU litigation process are developed and larger developing countries.³⁴

According to WTO statistics up to 31st December 2021, 607 complaints have been lodged.³⁵ Out of these complaints, more than 348 complaints have been lodged by developed countries.³⁶ Developing countries have brought more than 226 complaints. The least developed countries have brought only two cases. Bangladesh was the first least developed country to file a case in the DSU (against India, a developing country) regarding anti-dumping measures imposed on the import of batteries from Bangladesh, but it was settled.³⁷ Table 1 below indicates that LIDCs such as Sri Lanka, Pakistan, Costa Rica, Nicaragua, and Peru have instituted only 1, 5, 7, 1, and 4 disputes respectively. On the other hand, large developing countries such as India, Chile, Brazil, Argentina, Thailand, South Korea, and China have instituted 24, 10, 34, 21, 14, 2, 1 and 22 disputes respectively. Table 1 shows that no least developed countries, apart from Bangladesh and Benin, and Chad, have instituted any cases.

Therefore, low-income developing countries should be identified on the basis of their small volume of international trade. If a country has less than 1% volume of trade from their gross domestic products, such countries should be considered low-income developing countries. For this category, LDCs should also be included.³⁸

³⁴ WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which available at <https://www.wto.org/dispu_e/dispu_by_country_e> accessed on 21.05.2021; Dispute Settlement Activity-Some Figures https://www.wto.org/tratop_e/dispustats_e accessed on 15.02.2022.

³⁵ World Trade Organization *Annual Report*, Dispute Settlement 2020 http://www.wto.org/publication..eanrep20_e accessed on 24th May 2021, 116; WTO Dispute Settlement – Chronological List of Disputes Cases, https://www.wto.org/dispu_e/dispu.status_e accessed on 28.05.2021. See also WTO Annual Report 2021, 139; Dispute Settlement Activity-Some Figures https://www.wto.org/tratop_e/dispustats_e accessed on 15.02.2022.

³⁶ WTO Dispute Settlement Activity- Some Figures WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which <https://www.wto.org/dispu_e/dispu_by_country_e> accessed on 15.02.2022

³⁷ *India – Anti-dumping Measures on Batteries from Bangladesh*, WTO Doc WT/DS306/1 (28 January 2004) (Request for Consultations by Bangladesh).

³⁸ See WTO Statistical Review 2021, 108, 112; MAA Anawaratna, ‘Definition and Classification of Developing Countries in the WTO’ (2014) 3 *Sri Lanka Judges Journal* 121,123; T Ademola Oyejide, ‘Special and Differential Treatment’ in Bernard Hoekman, Aaditya Mattoo and Phillip English (eds), *Development, Trade and the WTO: A Handbook* (World Bank, 2002) 504, 507; see The DAC-DCD Guidelines, ‘Strengthening Trade Capacity for Development’ (Organisation for Economic Cooperation and Development Paper, October 2001) 7, (*DAC Guidelines*).

Table 1: WTO Member Dispute Participation as Complainant, Respondent, and Third Parties from 1995 to 31st December 2021

	Number of Times	Number of Times	Number of Times
COUNTRY	Complainant	Respondent	Third Party
Developed Countries			
Australia	11	17	117
Belgium	0	3	0
Canada	40	23	169
Denmark	1	1	0
EC/EU	108	90	215
Ireland	0	3	0
Japan	28	16	224
New Zealand	9	0	63
Norway	5	0	115
Switzerland	5	0	33
US	124	156	171
Developing Countries			
Antigua and Barbuda	1	0	0
Argentina	21	22	65
Armenia	0	2	0
Brazil	34	17	163
Chile	10	13	48
China	22	48	192
Colombia	5	7	66
Costa Rica	7	1	20
Croatia	0	1	0
Czech Republic	1	2	0
Dominican Republic	1	8	9
Ecuador	3	3	38
Egypt	0	5	33
El Salvador	1	0	23
Guatemala	10	2	59
Honduras	8	0	36
Hong Kong, China	2	0	22
Hungary	5	2	2
India	24	32	176
Indonesia	12	15	47
Malaysia	2	1	25
Mexico	25	15	111
Nicaragua	1	2	18
Pakistan	5	4	13
Panama	7	2	13
Peru	4	6	19
Philippines	5	6	18
Poland	3	1	1
Portugal	0	1	0
Romania	0	2	0
Singapore	1	0	68
Slovak Republic	0	3	0
South Africa	0	5	21

Developing Countries (cont)			
Korea Republic (South Korea)	21	19	138
Sri Lanka	1	0	4
Thailand	14	4	101
Trinidad and Tobago	0	2	4
Turkey	6	12	106
Uruguay	1	1	14
Venezuela	3	2	31
Vietnam	5	0	36
Least Developed Countries			
Bangladesh	1	0	1
Benin and Chad	0	0	1

Source: WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which available at

<<https://www.wto.org> > [dispu_e](#) > [dispu_by_country_e](#)> accessed on 15.02.2022; See also World Trade Organization Annual Report, Dispute Settlement 2021, Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement and the Advisory Centre on WTO Law' (Global Economy and Development Working Paper No. 37, Brookings and Global Economy and Development, 2009) 7.

In addition, Table 2 below shows that larger developing countries such as India, Brazil, Chile, Argentina, Thailand, South Korea and China have large trade volumes whereas LIDCs such as Sri Lanka, Pakistan, Costa Rica, Nicaragua and Peru and least developed countries such as Bangladesh, the Maldives and Chad have small trade volumes. Tables 1 and 2, when analysed together, show that the trade volumes of the US and the EU are high and their rate of instigation of disputes is also high. The US has instituted 124 cases and the EU 108 during the period of 1995 to December 2021. Tables 1 and 2 indicate that there is a correlation between trade volumes and the number of cases instituted in the DSU. Tables 1 and 2 reveal that China has instituted only 22 cases but its trade volume is high. However, China has become an active participant in the DSU after becoming a member of the WTO in 2001³⁹ and it has been involved in a high number of cases before the DSU as a third party (192 cases). From Tables 1 and 2 show that there should be a new country category be created as LIDCs for the small trading nations to participate in the DSU litigation more equitably.

³⁹ *WTO Successfully Concludes Negotiations on China's Entry*, WTO News: 2001 Press Releases, Press 243 (17 September 2001) <http://www.wto.org/english/news_e/press01__epr243_e.htm> accessed on 15 January 2022.

**Table 2: Total Merchandise Exports and Imports 2017–2020
by Region and Selected Economy (USD millions)**

Country		2017	2018	2019	2020
Argentina	Import	66937	65482	49124	42354
	Export	58644	61781	65116	54884
Antigua and Barbuda	Import	554	686	701	484
	Export	21	26	38	20
Australia	Import	228780	235386	221564	208446
	Export	231131	257098	271005	250352
Bangladesh	Import	52836	60495	59094	52410
	Export	35851	39252	39337	33605
Benin	Import	3494	4375	3932	3560
	Export	2216	3344	3053	2606
Brazil	Import	157543	188564	184370	166276
	Export	217739	239264	225383	209878
Chad	Import	1851	2550	2666	2491
	Export	2621	3160	3205	2155
Chile	Import	65230	74747	69802	59032
	Export	68823	75200	69889	71728
China	Import	1843792	2135748	2078386	2055752
	Export	2263346	2486695	2499457	2591121
Costa Rica	Import	16796	18289	17573	14942
	Export	10769	11344	11712	12174
EU	Import	5161124	5751623	5542321	5135439
	Export	5466719	5993402	5824935	5457769
India	Import	449925	514464	486059	371920
	Export	299241	324778	324340	276227
Kenya	Import	16687	17378	17655	15435
	Export	5747	6052	5839	6034
Nicaragua	Import	7708	7351	6986	6712
	Export	5170	5014	5273	5191
Maldives	Import	2360	2960	2888	1839
	Export	318	339	361	286
Mozambique	Import	5745	6944	7428	6471
	Export	4725	5012	4669	3585
Pakistan	Import	57746	60078	50349	45847
	Export	21569	23425	23334	21976
Peru	Import	36254	39885	43262	42260
	Export	45422	49068	47690	42411
Sri Lanka	Import	20980	22233	19937	15993
	Export	11360	11890	11940	10137
Swaziland (Eswatini)	Import	1612	1858	1832	1522
	Export	1801	1842	2002	1638
US Import		2408476	2614221	2567445	2407545
	Export	1546273	1663982	1643161	1431638
Uganda	Import	5596	6729	7518	7480
	Export	2901	3087	3472	3636
Zimbabwe	Import	5064	6391	4817	4953
	Export	3481	4057	4269	4057

Source: World Trade Statistical Review 2021, 108 to 115.

LIDCs and LDCs have initiated fewer complaints than developed and large developing countries due to small trade capacity, lack of legal capacity, and litigation cost.⁴⁰ According to the WTO Dispute Settlement Activity, LIDCs and LDCs have not actively participated in the DSU litigation process from 1995 up to 2021 and they have small claims.⁴¹ In the cases of *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey*,⁴² *India – Anti-Dumping Measure on Batteries from Bangladesh*,⁴³ and *Egypt – Anti-Dumping Duties on Matches from Pakistan*⁴⁴ involved complaints less than US \$10 million.⁴⁵

A Lack of Legal and Institutional Capacity

Countries with large administrative, institutional, legal and trade capacities can reap benefits from an elaborate procedure laid down in a legal system such as the DSM. Countries such as LIDCs and LDCs which do not have adequate administrative, institutional, legal and trade capacities cannot use the DSM for their trade disputes and the potential benefits of the DSM are consequently offset.⁴⁶ This is why LIDCs

⁴⁰ See Peter Holmes, Jim Rollo and Alasdair R Young, above n 14, 21; Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (EUI Working Paper LAW 2017/11) 7

⁴¹ WTO Dispute Settlement Activity – Some Figures WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which <<https://www.wto.org> > `dispu_e` > `dispu_by_country_e`> accessed on 15.02.2022; Arie Reich, 'The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis' (EUI Working Paper LAW 2017/11) 14.

⁴² Request for Consultations by Turkey, *South Africa – Definitive Anti-Dumping Measures on Blanketing from Turkey* WTO Doc WT/DS288/1, G/L/621, G/ADP/D48/1 (15 April 2003).

⁴³ Request for Consultations by Bangladesh, *India-Anti-Dumping Measure on Batteries from Bangladesh* WTO Doc WT/DS306/1, G/L/669, G/ADP/D52/1 (2 February 2004).

⁴⁴ *Request for the Establishment of Panel by Pakistan, Egypt – Anti-Dumping Duties on Matches from Pakistan* WTO Doc WT/DS327/2 (10 June 2005).

⁴⁵ Chad P Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Brookings Institute Press, 2009); Chad P Bown, 'The WTO Dispute Settlement System would Survive Without Doha' above n 12.

WTO Dispute Settlement Activity – Some Figures WTO Dispute Settlement: The Disputes, Dispute by Members, which country/territory complained against which, and which country/territory has been complained against by which <<https://www.wto.org> > `dispu_e` > `dispu_by_country_e`> accessed on 15.02.2022.

⁴⁶ See Dispute Settlement Body Special Session, *Negotiations on the Dispute Settlement Understanding Proposal by the African Group*, WTO Doc TN/DS/W/15 (25 September 2002) [2]; Francois, Horn and N Kaunitz, above n 13, 29.

and LDCs have failed to institute proceedings in the DSU.⁴⁷ It is not that these countries do not have any trade disputes, but rather their capacities constrain them from instituting proceedings in the DSU.⁴⁸

Even though the WTO dispute settlement procedure contains provisions that make special consideration by way of special and differential treatment (SDT) for developing countries,⁴⁹ the fundamental premise of the WTO dispute settlement procedure is that all contracting parties are equal in terms of their legal capacity to use the dispute settlement procedure. This means that a party asserting its rights should bring sufficient evidence and present sufficiently persuasive legal arguments.⁵⁰ However, it is questionable whether all WTO members truly possess an equal legal capacity in the context of the use of the WTO dispute settlement procedure.⁵¹ Even though the concept of a member's capacity is relative, LDCs and LDCs may lack sufficient resources to be able to identify, analyse and litigate a dispute under the DSU.⁵² According to Busch, Reinhardt and Shaffer, 'legal capacity' means 'the institutional resources required to prepare, prosecute and monitor a case, including legal, economic and diplomatic staff'.⁵³ Busch, Reinhardt

⁴⁷ Bown and Hoekman, WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' above n 13, 861.

⁴⁸ See Sanson, above n 12, 7; 'Developing country members often have no lawyers or at most have one or two to address WTO matters, whether in Geneva or in the home capital. Moreover, there are likely few, if any, private lawyers in the country knowledgeable about WTO law. Although the situation is changing in some countries, WTO as opposed to traditional 'public international law' generally has not been taught in developing countries'. Shaffer, Sanchez and Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' above n 3, 409.

⁴⁹ See DSU, arts 3.12, 4.10, 12.10, 12.11, 21.8, 24.1, 24.2 and 27.

⁵⁰ See Petros C Mavroidis, 'Development of WTO Dispute Settlement Procedures Through Case Law ('We Will Fix It)' in Federico Ortino and Ernst-Ulrich Petersmann (eds), *The WTO Dispute Settlement 1995–2003* (Kluwer Law International, 2004) 153, 167.

⁵¹ Mitsuo Matsushita, 'Some Thoughts on the WTO Dispute Settlement Procedure' in Gary P Sampson (ed), *The WTO and Global Governance Future Directions* (United Nation Press, 2008) 241, 250.

⁵² See *Negotiations on the Dispute Settlement Understanding, Proposals by the LDC Group* WTO Doc TN/DS/W/17 (9 October 2002) [1]; Andrew T Guzman and Beth A Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in the World Trade Disputes' (2005) 34 *Journal of Legal Studies* 557, 591; John Maton and Carolyn Maton, 'Independence under Fire: Extra-legal Pressures and Coalition Building in WTO Dispute Settlement' (2007) 10(2) *Journal of International Economic Law* 317, 318.

⁵³ Busch, Reinhardt and Shaffer, Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO' above n 3.

and Shaffer conducted a survey covering the period from May 2005 to May 2007 and found that most developing countries did not have Geneva-based staff to advise their governments.⁵⁴ This scenario has not changed even in 2020 because some LIDCs and LDCs do not have missions in Geneva and lack experts to conduct litigation.⁵⁵

Busch and Reinhardt observed the following in the context of the issue or rulings by a DSU panel: 'rich complainants are much more likely to get defendants to concede before a ruling is issued than poor complainants'.⁵⁶ According to Hoekman and Kostecki, large or middle income developing countries have made use of the DSM, but not LIDCs and LDCs due to various types of capacity constraints faced by those countries.⁵⁷

By way of illustration, LIDCs and LDCs do not have enough experts to detect the WTO inconsistent trade measures and they lack public-private co-operation in these countries. Therefore, there is also a need for on-going research, involving the collection and analysis of trade data, to determine whether trade of LIDCs and LDCs are affected by the violation of the WTO obligations by their counterparts. There is no such mechanism for LIDCs and LDCs,⁵⁸ without having a proper internal mechanism for collecting relevant information, there is little chance for LIDCs and LDCs to prove violations of the WTO agreements.⁵⁹ For instance, in

⁵⁴ Marc L Busch, Eric Reinhardt and Gregory Shaffer, 'Does Legal Capacity Matter? A Survey of WTO Members' (2009) 8(4) *World Trade Review* 557, 577.

⁵⁵ 'At the other end of the spectrum are the members that have no mission at all in Geneva. Non-resident status hampers a country's ability to monitor and participate fully in negotiations and related activities conducted under the auspices of WTO, not to mention the other Geneva-based institutions'. *UNCTAD, Trade Policy Frameworks for Developing Countries: A Manual of Best Practice* (United Nations, Geneva, 2018) 42.

⁵⁶ Busch and Reinhardt, 'Developing Countries and General Agreement on Tariffs and Trade/ World Trade Organization Dispute Settlement' above n 3, 731.

⁵⁷ Hoekman and Kostecki, *The Political Economy of the World Trading System The WTO and Beyond* above n 12, 99.

⁵⁸ Somesh K Mathur, 'Understanding the Rules and Procedures Governing the Settlement of Disputes: A Developing Country's Perspective' (2006) 11(2) *Lahore Journal of Economics* 169, 178.

⁵⁹ 'If developing country exporters cannot adequately monitor the conditions of foreign market access, they are ill-informed when WTO violations occur, and they will be unable to use the threat of or actual resort to WTO dispute settlement to convince trading partners to fulfil their commitments to keep markets open'. Chad P Bown, 'Developing Countries and Monitoring WTO Commitments in Response to the Global Economic Crisis' (Policy Research Working Paper No. 5301, World Bank, 2010); Constantine Michalopoulos, 'Developing Countries' Participation in the World Trade Organization' (Working Paper No 1906, World Bank, 1996) 3.

order to understand and detect potential violations of the Agreement on the Sanitary and Phytosanitary Measures (SPS),⁶⁰ the Agreement on Technical Barriers to Trade (TBT)⁶¹ and the Agreement for Intellectual Property Rights (TRIPS),⁶² special knowledge is necessary.⁶³

If firms in the importing country violate the rules, then the onus is on the exporting country's private sector to inform their government that such violations affect them. For instance, the US and the EC have been able to mobilise the private and public sectors. In the US, section 301 of the Trade Act of 1974 provides for a petition to be lodged by an individual private enterprise.⁶⁴ Once this has occurred, US Trade Representatives (USTRs)⁶⁵ investigate foreign trade barriers and take action accordingly. The EC also has a similar mechanism, called the Trade Directorate-General of the European Commission. Under art 133 of the European Treaty, a

⁶⁰ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (entered into force on 1 January 1995) Annex1A ('*Agreement on the Sanitary and Phytosanitary Measures*').

⁶¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature on 15 April 1994, 1867 UNTS 3 (entered into force on 1 January 1995) Annex1A ('*Agreement on Technical Barriers to Trade*').

⁶² *Marrakesh Agreement Establishing the World Trade Organisation*, opened for signature on 15 April 1994, 1867 UNTS 3 (which entered into force on 1 January 1995) annex 1A ('*Agreement on Trade Related Aspects of Intellectual Property Rights*').

⁶³ See *Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions*, WTO Doc WT/COMTD/W77 (25 October 2000) (Note by the Secretariat) 70; Technical Barriers to the Market Access of Developing Countries WTO Doc WT/CTE/W/101, G/TBT/W/103 (25 January 1999) (Note by the Secretariat) Market Access Implications of SPS and TBT: Bangladesh Perspective (CUTS Centre for International Trade, Economics and Environment, Research Paper, September 2002) 15; Michael Friis Jensen, 'Reviewing the SPS Agreement: A Developing Country Perspective' (Centre for Development Research Paper 02.3, February 2002) 23.

⁶⁴ On 20 October 2010, the USTRs announced that they accepted a petition filed by the US Steel Workers Union that made allegations of unfair trade practices against China. Russell Smith, 'US – China Section 301 Case Concerning Green Technologies and Rare Earth Metals' <<http://www.financialsense.com/contributors/russell-smith/us-china-section-301-case>> accessed on 8 March 2011; Panel Report, *United States – Section 301–310 of the Trade Act of 1974*, WTO Doc WT/DS152/R (22 December 1999)[2.2] ; G Richard Shell, 'Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization' (1995) 44(5) *Duke Law Journal* 829, 844.

⁶⁵ *United States Trade Act* (1974) 19 USC S2412 (a) (1974).

private group can make a complaint to the Trade Barrier Regulation (TBR).⁶⁶ Under this procedure, private enterprises can urge the EC to investigate the trade barriers and initiate claims under the DSU.

According to Guzman and Simmons, the institutional capacity of a country is a more prevalent factor than the fear of economic retribution when a country considers whether or not to institute proceedings before the DSM.⁶⁷ This idea is further developed, in the context of antidumping actions initiated in the DSM, by Busch, Reinhardt and Shaffer, who state that 'legal capacity affects patterns of dispute initiation and underlying antidumping protection among WTO members at least as much as market power if not more'.⁶⁸

In addition, according to Bohl, developing countries have difficulty instituting proceedings in the DSM due to a lack of resources as well as the fact that they find it difficult to investigate foreign trade barriers affecting the domestic markets of developing countries.⁶⁹ Small developing countries were unable to participate in the DSU litigation process due to the complexity of the procedure and the high litigation costs involved.⁷⁰

B Litigation Costs for Low Income Developing Countries

The existing WTO DSM creates difficulties for members with limited exports,⁷¹ because the litigation costs may sometimes exceed the actual amount of the claim.⁷²

⁶⁶ European Communities, *Council of Regulation* (EC) 3286/94, OJ L 349, 31.12.1994, 71 (22 December 1994) [5] European Commission website on Trade Policy Issues Explaining the Trade Barrier Regulation (TBR) <<http://ec.europa.eu/trade/tackling-unfair-trade/trade-barriers/investigations>> accessed on 8 March 2011.

⁶⁷ Andrew T Guzman and Beth A Simmons, 'Power Plays and Capacity Constraints: The Selection of Defendants in the World Trade Disputes' above n 52, 591.

⁶⁸ Busch, Reinhardt and Shaffer, 'Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO' above n 3, 14.

⁶⁹ See Bohl, above n 8, 153.

⁷⁰ Ibid 162.

⁷¹ See Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' above n 16, 288.

⁷² See Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' above n 8, 587; Bown, 'Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders' above n 16, 301; Gregory Shaffer, 'Recognizing Public Goods in WTO Dispute Settlement: Who Participate? Who Decides? The Case of Trips and Pharmaceutical Patent Protection' (2004) 7(2) *Journal of International Economic Law* 459, 473; see also UNCTAD, *Trade Policy Frameworks for Developing Countries: A Manual of Best Practice* (United Nations, Geneva, 2018) 47.

The cost of litigation is of paramount importance for a member when considering whether to have recourse to the DSM.⁷³

The WTO jurisprudence has created a kind of legal formalism as a result of the reality that it is continuously reliant upon panel and Appellate Body Reports.⁷⁴ The complexity of the WTO covered agreements mean that LIDCs and LDCs need legal advice from experts in order to assist them with their case.⁷⁵ In this kind of situation, the EU and the US rely on external sources of funding and help when pursuing a case. For example, private law firms and trade industries of developed countries are connected with multinational companies and they help at the pre-litigation and litigation stage by gathering the necessary information and forming legal arguments.⁷⁶ Therefore, the cost for developed and larger developing countries is less because they have already established their expertise and they have international networks assisting them, including commercial and diplomatic representatives. Conversely, LIDCs and LDCs lack access to experts, and as a result, they have to hire legal experts⁷⁷ from abroad, which is very expensive for those countries.⁷⁸

When litigating a case using the current DSU system, there are two types of costs involved. The first type of cost stems from the collection of data and information about the litigation. The second type of cost is related directly to the litigation process, including lawyers' fees. According to Nordstrom and Shaffer, for an average complex case to be run to completion, a country will have to spend USD500,000.⁷⁹ Nordstrom and Shaffer estimate the cost of consultation to

⁷³ See *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding Proposal by the African Group*, WTO Doc TN/DS/W/15 (25 September 2002) [3]; Haider Khan and Yibei Liu, 'Globalization and the WTO Dispute Settlement Mechanism: Making a Rule Based Trading Regime Work' (Paper No 7613, Munich Personal RePec Archive, 2008) 24.

⁷⁴ Raj Bhalal, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication' (1999) 9 *Journal of Transnational Law and Policy* 1, 17.

⁷⁵ See Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' (2002) 51(2) *International and Comparative Law Quarterly* 325, 328.

⁷⁶ Gregory Shaffer, *Defending Interests: Public/Private Partnerships in WTO Litigation* (Brookings Institution, 2003) 140; See Joost Pauwelyn, 'The Use of Experts in WTO Dispute Settlement' above n 75, 325.

⁷⁷ Shaffer, Sanchez and Rosenberg, 'The Trials of Winning at the WTO: What Lies Behind Brazil's Success' above n 2, 409.

⁷⁸ Shaffer, 'Recognizing Public Goods in WTO Dispute Settlement: Who Participate? Who Decides? The Case of Trips and Pharmaceutical Patent Protection' above n 72, 473.

⁷⁹ Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' above n 8, 601.

be USD100,000 and, if consultation fails, a country will have to spend another USD320,000 on the panel process, and another USD135,000 on the appellate procedure, totalling USD555,000.⁸⁰ Bown and Hoekman also estimate the average cost of a case with low complexity to be USD500,000.⁸¹

Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe have made several proposals regarding the high litigation costs and have said that they are unable to bear that cost.⁸² They proposed that the Appellate Body should be empowered to make a recommendation to pay USD500 000 or the amount of actual expenses in pursuing the case as a litigation cost.⁸³ African countries also submitted that the DSM of the WTO is complex and very expensive and proposed to establish ‘a permanent standing fund’ that can be used by the African countries to participate in the DSM process more equitably.⁸⁴ Therefore, the DSU should be improved and reformed in order to allow smaller countries to defray the costs of litigation.⁸⁵

An attempt was also made in 2001 to address the high litigation costs by creating the Advisory Centre on WTO Law (ACWL) in Geneva.⁸⁶ This centre provides subsidised legal assistance to developing countries. However, the ACWL

⁸⁰ Ibid 601. According to Shaffer, in the case of the *Panel Report – Japan Measures Affecting Consumer Photographic Film and Paper* WTO Doc WT/DS44/R (31 March 1998), the lawyers’ fees exceeded USD10 million. Gregory Shaffer, ‘How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies’ (Resource Paper No 5, International Centre for Trade and Sustainable Development, 2003) 16.

⁸¹ See Bown and Hoekman, ‘WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector’ above n 13, 870; see also Manfred Elsig and Philipp Stucki, ‘Low-income Developing Countries and WTO Litigation: Why Wake up the Sleeping Dog?’ (2012) 19(2) *Review of International Political Economy* 292, 297 and 311; see also Bernard M Hoekman and Petros C Mavroidis, ‘Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?’ (European University Institute Robert Schuman Centre for Advanced Studies, Global Governance Programme, EUI Working Paper RSCAS 2020/06) 6.

⁸² *Proposals on the DSU, by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, WTO Doc TN/DS/W/19 (20 September 2002) [2].

⁸³ Ibid.

⁸⁴ *Proposal by the African Group on the DSU*, WTO Doc TN/DS/W15 (25 September 2002) [3].

⁸⁵ William J Davey, ‘The WTO Dispute Settlement System: How Have Developing Countries Fared?’ (Draft, University of Illinois College of Law, 8 March 2007) 1, 31; Bernard M Hoekman and Petros C Mavroidis, ‘Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?’ above n 81, 8

⁸⁶ Advisory Centre on WTO Law (ACWL) Report on Operations, 2009; Kim Van der Borgh, ‘The Advisory Centre on WTO Law: Advancing Fairness and Equality’ (1999) 2(4) *Journal of Economic Law* 723, 725.

has neither the resources nor the mandate to advise and provide information to poor countries that have a strong case to argue before the DSM.⁸⁷ The ACWL provides a legal and economic consulting service to LIDCs and LDCs.⁸⁸ Bown, McCulloch, Hasan and Ibrahim state that the participation of developing countries has improved dramatically since the inception of the ACWL.⁸⁹ However, the ACWL does not have sufficient funds to provide LIDCs and LDCs clients with advice on the economic benefits that a country can achieve from pursuing a case in the DSU.⁹⁰ For instance, there is also a need for on-going research, involving the collection and analysis of trade data, to identify whether WTO members violate the WTO obligations. The ACWL does not provide funds for such a mechanism to LIDCs and LDCs and the assistance provided is not adequate.⁹¹

There are also procedural delays involved in the litigation process. Such delays have affected LIDCs and LDCs in particular and developing countries in general.⁹² Due to the complexity of the DSU procedure, it takes at least three years to finish a case.⁹³ For instance, the case of *Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States*⁹⁴ lasted for nearly three years.⁹⁵ The case

⁸⁷ Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' above n 13, 875.

⁸⁸ UNCTAD, *Trade Policy Frameworks for Developing Countries: A Manual of Best Practice* (United Nations, Geneva, 2018) 48.

⁸⁹ Chad P Bown and Rachel McCulloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO LAW' (Brooking Global Economy and Development Paper No 37, 2009) 14; Qaraman Mohammed Hasan & Mofaq Khalid Ibrahim, 'The Role of Advisory Centre on World Trade Organization Law (ACWL) in Supporting Developing Countries Regarding the Dispute Settlement Mechanism' (2016) 3(2) *International Journal of Social Sciences & Educational Studies* 118,125.

⁹⁰ Bown and Hoekman, 'WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector' above n 13, 875 and 876.

⁹¹ Somesh K Mathur, 'Understanding the Rules and Procedures Governing the Settlement of Disputes: A Developing Country's Perspective' (2006) 11(2) *Lahore Journal of Economics* 169, 172.

⁹² Shaffer, 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies' above n 80, 46.

⁹³ See Amin Alavi, above n 8, 34; Hoekman and Mavroidis, 'WTO Dispute Settlement, Transparency and Surveillance' above n 12, 531.

⁹⁴ Appellate Body Report, United States – Transitional Safeguard Measures on Combed Cotton Yarn from Pakistan, WTO DocWT/DS192/AB/R (8 October 2001).

⁹⁵ Ewart, above n 5, 58; Turab Hussain, 'Victory in Principle: Pakistan's Dispute Settlement Case on Combed Cotton Yarn Exports to the United States' Lahore University of Management Sciences, Centre for Management and Economic Research (CMER Working Paper No. 05, 2005) <https://core.ac.uk/download/pdy> accessed on 06.06.2021.

of *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*⁹⁶ lasted for more than three years.⁹⁷

Apart from the institutional and monetary shortcomings, political constraints also contribute to the hesitation for LIDCs and LDCs to participate in the DSM. Bown and Hoekman have discussed the effect of foreign aid on the participation rate of developing countries in the DSM as complainants. They observed that countries that depend largely on development and military aid ‘could face a bad economic outcome even if they legally win a case’ due to the threat of withdrawal of economic concessions.⁹⁸ According to Zejan and Bartels, ‘countries receiving larger amounts of aid are disinclined to initiate disputes against donors because they don’t like to antagonize the donors’.⁹⁹ Similarly, Francois, Horn and Kaunitz state that developing countries make fewer complaints when they are more aid-dependant on the respondent countries.¹⁰⁰

⁹⁶ Panel Report, *United States – Measures Affecting the Cross Border Supply of Gambling and Betting Services*, WTO Doc WT/DS285/R (10 November 2004).

⁹⁷ Ewart, above n 5, 55.

⁹⁸ See Bown and Hoekman, ‘WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector’ above n 13, 866; Chad P Bown, ‘Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes’ (2004) 27 (1) *World Economy* 59, 70; Bown, ‘Participation in WTO Dispute Settlement: Complainants, Interested Parties, and Free Riders’ above n 15, 302.

⁹⁹ Pilar Zejan and Frank L Bartels, ‘Be Nice and Get Your Money – An Empirical Analysis of World Trade Organization Trade Disputes and Aid’ (2006) 40(6) *Journal of World Trade* 1021, 1043.

¹⁰⁰ See Francois, Horn and Kaunitz, above n 13, 23; Bryan Mercurio, ‘Why Compensation Cannot Replace Trade Retaliation in the WTO Dispute Settlement Understanding’ (2009) 8(2) *World Trade Review* 315, 318.

III LACK OF EFFECTIVE REMEDIES AND HURDLES IN IMPLEMENTATION FOR LOW INCOME DEVELOPING COUNTRIES AND LEAST DEVELOPED COUNTRIES

In addition to constraints discussed in Part II, the lack of effective remedies also discourages LIDCs and LDCs to institute proceedings in the WTO DSM. Therefore, it is necessary to establish a small claims procedure for LIDCs and LDCs to participate in the WTO DSM more equitably because a small claims procedure will streamline the DSM procedure, and remove the complexity involving in implementing the WTO DSB decisions, and introduce compensations in the event of non-compliance.

The aim of the DSU remedies is to secure the withdrawal of the measures which resulted in the violation of WTO agreements on the notion that all members have equal trade capacity.¹⁰¹ The remedies provided by the DSU are not helpful for LIDCs and LDCs, because after winning a case, LIDCs and LDCs cannot enforce the remedies due to a lack of trade capacity. If a small claims procedure is established, the uncertainty surrounding the enforcement of a decision of the DSB does not arise.¹⁰² The present structure of the DSU provides for three remedies, which are complex and ineffective for LIDCs and LDCs. The first remedy relates to the removal of a WTO inconsistent measure complained of.¹⁰³ The second remedy is to pay compensation, but compensation is not compulsory.¹⁰⁴ The payment of compensation is mutually agreed by parties to disputes.¹⁰⁵ The WTO DSU does not provide law to pay compulsory compensation to LIDCs and LDCs who have won

¹⁰¹ See *Negotiations on the Dispute Settlement Understanding, Proposals by the African Group* WTO Doc TN/DS/W/15 (25 September 2002) [4] and [5].

¹⁰² See *Negotiations on the Dispute Settlement Understanding, Proposals by the African Group* WTO Doc TN/DS/W/15 (25 September 2002) [4].

¹⁰³ DSU, art 22.2.

¹⁰⁴ DSU, art 22.1; see Monika Büttler and Heinz Hauser, 'The WTO Dispute Settlement System: A First Assessment from an Economic Perspective' (2000) 16(2) *Journal of Law, Economics & Organization* 503, 527; Judith Hippler Bello, 'The WTO Dispute Settlement Understanding: Less is More' 1999) 90(3) *American Journal of International Law* 416, 417; Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' above n 8, 416.

¹⁰⁵ See Decision by the Arbitrator, *United States Section 110(5) of the US Copyright Act under Article 25 of the understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS160/R (27 July 2000).

the cases.¹⁰⁶ The suspension of concessions or other WTO obligations enshrined in the covered agreement is the third remedy.¹⁰⁷ This is simply referred to as retaliation and this is not a practical remedy for LIDCs and LDCs due to small trade volume (see part III).¹⁰⁸

A Retrospective Remedies for Low Income Developing Countries and Least Developed Countries

The question is whether remedies provided by the WTO DSU are prospective remedies or retrospective remedies. In this context, art 19.1 of the DSU sits in potential contradiction of art 4.7 of the SCM. Article 19.1 of the DSU¹⁰⁹ demonstrates that the WTO remedies are intended to ‘preserve future trade opportunities rather than past injuries’¹¹⁰ but art 4.7 of the *Agreement on Subsidies and Countervailing Measures* Agreement (SCM) contemplates even retrospective losses.¹¹¹ In *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*,¹¹² the US made a complaint to the DSB as Australia had failed to adopt the DSB

¹⁰⁶ See *Negotiations on the Dispute Settlement Understanding, Proposals by the African Group* WTO Doc. TN/DS/W/15 (25 September 2002) [5]; Pauwelyn, *Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach* above n 2, 346.

¹⁰⁷ See *DSU*, art 22.3.

¹⁰⁸ Hoekman and Mavroidis, *WTO Dispute Settlement, Transparency and Surveillance* above n 12, 531.

¹⁰⁹ ‘Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations’. *DSU*, art 19.1.

¹¹⁰ Gavin Goh and Andreas R Ziegler, ‘Retrospective Remedies in the WTO after Automotive Leather’ (2003) 6(3) *Journal of International Economic Law* 545, 555.

¹¹¹ ‘If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time period within which the measure must be withdrawn’. *Agreement on Subsidies and Countervailing Measures*, art 4.7; Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by United States*, WTO Doc WT/DS126RW (21 January 2000) [6.27] – [6.49]; see Patricio Grane, ‘Remedies under WTO Law’ (2001) 4(4) *Journal of International Economic Law* 755, 768.

¹¹² Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather Recourse to Article 21.5 of the DSU by United States*, WTO Doc WT/DS126RW (21 January 2000).

recommendations¹¹³ and as a result a panel was established under art 21.5 of the DSU. Mavroidis was of the view that art 19.1 of the DSU provides for retrospective damages and he stated that it was evident from the case of *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*.¹¹⁴ Mavroidis' view cannot be accepted with regard to art 19.1 of the DSU because it provides only for prospective damages¹¹⁵ but the language employed in art 4.7 of the SCM Agreement can be interpreted to grant retrospective damages according to the rules of treaty interpretation.¹¹⁶

However, Article 31 of the Vienna Convention on the Law of the Treaties (VCLT) states that when a treaty is interpreted it should be done by way of textual

¹¹³ Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by United States* WTO Doc WT/DS126RW (21 January 2000) [1.4].

¹¹⁴ Petros C Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' (2000) 11 *European Journal of International Law* 763, 789.

¹¹⁵ The United States refused to reimburse Sweden or adopt the GATT Panel Report in the case of *United States – Imposition of Anti-Dumping Duties on Imports of Seamless Stainless Steel Hollow Products from Sweden*, GATT Doc. ADP/47 (20 August 1990). See GATT Panel Report, *United States – Imposition of Anti-Dumping Duties on Grey Portland Cement and Cement Clinker from Mexico*, GATT Doc ADP/82 (7 September 1992) [6.2]; Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 21.5 of the Understanding on the Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/RW/ECU (6 May 1999) [6.105]; Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000); Panel Report, *Canada – Measures Affecting the Export of Civil Aircraft Under Article 21.5 of the DSU*, WTO Doc. WT/DS70/RW (4 August 2000) [5.48]; Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WTO Doc WT/DS165/R (17 July 2000) [6.106].

¹¹⁶ 'A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, vol 1155 UNTS (which entered into force on 27 January 1980) art 31.1; '[S]tatutory interpretation, as in constitutional interpretation, must be not for subjective, unenacted intent but for objective, enacted meaning of a legal text'. Laurence H. Tribe, 'Judicial Interpretation of Statutes: Three Axioms' (1988) 11(1) *Harvard Journal of Law and Public Policy* 51, 51; Arwel Davies, 'Reviewing Dispute Settlement at the World Trade Organization: A Time to Reconsider the Role/s of Compensation?' (2006) 5(1) *World Trade Review* 31, 56; See Panel Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico*, WTO Doc. WT/DS 60/R (19 June 1998)[8.1 and 8.6]; Ernst-Ulrich Petersmann, 'International Competition Rules for the GATT/WTO World Trade and Legal System' (1993) 27 (6) *Journal of World Trade* 35, 35.

or objective approach considering its preamble and annexes.¹¹⁷ When this approach is adopted, it appears that either preamble or annexes of WTO expressly have not recognised the retrospective remedies. Furthermore, Article 31 of the (VCLT) states that when a treaty is interpreted the ordinary meaning should be given to the wording of the treaty.¹¹⁸ Similarly when the WTO treaty is interpreted, ordinary meaning should be given to it. Therefore, at present the position of the WTO remedies is that the retrospective remedies are not recognised and it severely harms the economies of LIDCs and LDCs due to small trade capacity. As a result, LIDCs and LDCs are reluctant to institute cases for violation of the WTO obligations and sometimes litigation cost is higher than the damages received.¹¹⁹ Contrary to the above position, public international law provides for both prospective as well as retrospective remedies in international disputes for an internationally wrongful act.¹²⁰

The case of *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* also revealed the conflicting nature of the DSU provisions¹²¹ as well as WTO agreements¹²² because, if art. 4.7 of the SCM Agreement is interpreted as having retrospective effect, then article 19.1 of the DSU becomes meaningless and likewise, if article 19.1 of the DSU is interpreted as having only prospective effect, then article 4.7 of the SCM Agreement becomes meaningless¹²³ creating ambiguity and uncertainty of claiming damages.

When the treaty interpretation applied to article 4.7 of the SCM agreement in the case of *Australia – Subsidies Provided to Producers and Exporters of Automotive*

¹¹⁷ *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, vol 1155 UNTS (which entered into force on 27 January 1980) art 31.

¹¹⁸ *Vienna Convention on the Law of Treaties*, signed on 23 May 1969, vol 1155 UNTS (which entered into force on 27 January 1980) art 31.

¹¹⁹ See Jason Bernstein and David Skully, 'Calculating Trade Damages in the Context of the World Trade Organization's Dispute Settlement Process' (2003) 25(2) *Review of Agricultural Economics* 385, 390.

¹²⁰ See Pauwelyn, 'Enforcement and Countermeasures in the WTO: Rules are Rules – Toward a More Collective Approach' above n 2, 337; *International Law Commission Draft Articles on State Responsibility Adopted on First Reading in 1996*, UN GAOR, 51st sess, Supp No 10, UN DocA/51/10 (1996), art 42.

¹²¹ Technically speaking, there is a conflict when two treaty instruments contain obligations which cannot be complied with simultaneously ... Incompatibility of contents is essential for conflict': *Encyclopaedia of Public International Law* (North-Holland 1984) Vol 7, 468; *Panel Report, Indonesia – Automobiles* WTO Doc WT/DS54/R (2 July 1998)[14.28] footnote 649.

¹²² William J Davey, 'The Quest for Consistency: Principles Governing the Interrelation of the WTO Agreements' in Stefan Grillier (ed), *At the Crossroads: The World Trading System and the Doha Round* (Springer Wien, 2008) Vol 8, 100, 107.

¹²³ See Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather Case under Article 21.5 of the DSU* WTO Doc WT/DS126RW (21 January 2000) [6.31]; see Grane, above n 111, 768.

Leather is considered as to whether it has a retrospective effect, a question arises as to whether WTO adjudicating bodies can consider the SCM agreement in isolation without giving due consideration to WTO Agreements as a whole, and in particular the general principles set out in the DSU. The DSU and the SCM Agreements are Annexes to the Marrakesh Agreement. In *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, the Appellate Body held that the WTO Agreement and Annexes are an integral part of one treaty and therefore, it was the duty of the interpreter to give them a harmonious meaning.¹²⁴

Article 1.1 of the DSU states that the DSU rules apply to all disputes that are brought before the Panel under the covered agreements. If the special dispute settlement rules enshrined in the WTO Covered agreements, for example art 17 of the Anti-Dumping agreement and the DSU provisions, are at issue in a dispute, a question arises as to which provision prevails over the other. In the case of *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico Cement*, the Appellate Body held that ‘the consultation and dispute settlement provisions of a covered agreement [art 17 of the Anti-Dumping agreement] are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU’.¹²⁵ This decision of the Appellate Body is correct according to art 1.1 of the DSU, but it is contrary to art 1.2 of the DSU because art 1.2 states that the special rules of covered agreements prevail over the DSU rules. Therefore, the panel and the Appellate Body cannot grant compensation for loss or damage incurred in the past,¹²⁶ nor can it grant financial penalties.¹²⁷

A losing member is required to bring its measures into compliance with the WTO obligations and it does not involve any compensation for damages incurred for the violation of the WTO obligations in the past.¹²⁸ The provision of compensation is only a temporary measure and it is permissible only where impracticability

¹²⁴ Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WTO Doc WT/DS98/AB/R (14 December 1999) [75].

¹²⁵ Appellate Body Report, *Guatemala – Anti-dumping Investigation Regarding Portland Cement from Mexico Cement*, WTO Doc WT/DS60/AB/R (2 November 1998) [67].

¹²⁶ See Davies, above n 116, 55; Geraldo Vidigal, ‘Re-Assessing WTO Remedies: The Prospective and the Retrospective’ (2013) 16(3) *Journal of International Economic Law* 505, 506; Hoekman and Kostecki, *The Political Economy of the World Trading System The WTO and Beyond* above n 12, 85.

¹²⁷ Hoekman and Mavroidis, WTO Dispute Settlement, Transparency and Surveillance’ above n 12, 531; Bernstein and Skully, above n 119, 389; Bütler and Hauser, above n 104, 527.

¹²⁸ Hoekman and Mavroidis, WTO Dispute Settlement, Transparency and Surveillance’ above n 12, 531.

exists to bring the inconsistent measure of a WTO covered agreement into consistence.¹²⁹ The issue of compensation arises only where the losing party failed to bring the inconsistent measure into consistence with the covered agreement within a reasonable time and there is no choice for the winning party to request for compensation and it is a mutually agreed solution.¹³⁰

The panel and the Appellate Body give recommendations after hearing cases. A recommendation is a direction given by the panel or Appellate Body that an illegal act has been committed by a member to comply with the covered agreement. Recommendation is part of the decision and it is preferred.¹³¹ Yet the recommendation is not binding.¹³² For instance, if a member does not comply with the recommendation, LDCs and LDCs cannot enforce it due to lack of capacity. A recommendation is a public pronouncement by a competent multilateral body that an illegal act has been committed.¹³³ The panel or Appellate Body recommends the losing party to bring the illegal measures into consistence with the WTO obligations and thus provides the losing party with greater discretion to select the appropriate remedies.¹³⁴ For example, the losing member has an obligation to decide how the recommendation should be implemented within 30 days of the adoption of the report by the DSB.¹³⁵

Recommendations have legal effect once they are adopted by the DSB against the losing party, as they are considered international obligations¹³⁶ imposed on

¹²⁹ DSU art 3.7 and DSU article 22 (1 and 2).

¹³⁰ DSU art 22(1 and 2).

¹³¹ DSU arts 21 and 22.1.

¹³² See DSU, art 21.3, a, b and c.

¹³³ Mavroidis, 'Remedies in the WTO Legal System: Between a Rock and a Hard Place' above n 114, 783.

¹³⁴ Ibid 779.

¹³⁵ DSU articles 19.1 and 21.3; See Warren F Schwartz and Alan O Sykes, 'The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization' (2002) 31(1) *Journal of Legal Studies* 179, 190.

¹³⁶ '... there is a certain sense in which legal obligation may be said to arise ex consensus; the obligations of a contract in civil law, or of a treaty in international law, clearly arise in that way'. Hersch Lauterpacht and C H M Waldock, *The Basis of Obligation in International Law* (Oxford University Press, 1958) 10; Lotus P. (France vs Turkey) (Judgment) [7 September 1927] PCIJ (ser A) No 10.

the member in question to change the inconsistent measures in order to make them consistent with the rules of the WTO Agreements.¹³⁷ According to the DSU, compliance with recommendation is not mandatory.¹³⁸

Article 21.1 of the DSU states that ‘prompt compliance with recommendations or rulings of the DSU is essential in order to ensure effective resolution of disputes to the benefit of Members’. However, it is implied in art 21.3 of the DSU that immediate compliance is impracticable, as this allows a reasonable time, not exceeding 15 months, for compliance. When one looks at these two provisions, one can see that the importance of art 21.1 is diminished by the fact that art 21.3 allows a reasonable time and that the amount of time has to be determined in arbitration. Therefore, after winning a case, LIDCs and LDCs have to wait for a long time to get the relief and this affects their economies.

The issue of a reasonable period of time given to the losing party for compliance with the Panel or AB reports is problematic for LIDCs and LDCs as, after winning a case, they may have to wait for a considerable period of time¹³⁹ and there are no precise criteria to determine what constitutes a reasonable period of time after the panel or Appellate Body Report is adopted.¹⁴⁰ If a panel or the Appellate Body finds that a country has violated one or more covered agreements or WTO agreements, the DSB will recommend that the country’s actions be brought into conformity with its WTO obligations.¹⁴¹ The losing member has an obligation to decide how the recommendation should be implemented within 30 days of the adoption of the report by the DSB.¹⁴²

Article 21.1 of the DSU states that ‘prompt compliance with recommendations or rulings of the DSU is essential in order to ensure effective resolution of disputes

¹³⁷ See John H Jackson, ‘The WTO Dispute Settlement Understanding – Misunderstandings on the Nature of Legal Obligation’ (1997) 91(1) *American Journal of International Law* 60, 60 and 61; See *DSU*, art 21.3, a, b and c.

¹³⁸ ‘Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements’. *DSU*, art 22.1.

¹³⁹ See William J Davey, ‘Compliance Problems in WTO Dispute Settlement’ (2009) 42(1) *Cornell International Law Journal* 119, 121.

¹⁴⁰ Islam, above n 2, 453.

¹⁴¹ *DSU*, art 19.1.

¹⁴² *Ibid* art 21.3; See Warren F Schwartz and Alan O Sykes, ‘The Economic Structure of Renegotiation and Dispute Resolution in the World Trade Organization’ (2002) 31(1) *Journal of Legal Studies* 179, 190.

to the benefit of Members'. However, it is implied in art. 21.3 that immediate compliance is impracticable, as that article allows a reasonable time, not exceeding 15 months, for compliance. When one looks at these two provisions, one can see that the importance of art. 21.1 is diminished by the fact that art. 21.3 allows a reasonable time and that the amount of time has to be decided by arbitration. The determination of what constitutes a reasonable period of time depends on how much time the losing member needs to make constitutional changes to rectify the inconsistency of the statutes, regulations and administrative decisions with the WTO agreements.¹⁴³ This involves cost and time for implementing the decision of the DSB by a successful member and it further complicates the procedures for LIDCs and LDCs as they have already complained that they were unable to bear the cost of litigation. Therefore, LIDCs and LDCs have become onlookers in the implementation process of the DSB decisions.

B *Obstacle in the Implementation Stage for LIDCs and LDCs: Challenges with Retaliation*

The absence of an effective implementation mechanism also discourages LIDCs and LDCs from participating in the DSM. Retaliation is an act of withdrawal from an international obligation which is justified as it is taken by a state against another state in response to a wrongful international act.¹⁴⁴ The issue of retaliation arises only when a WTO member does not bring a WTO inconsistent act into compliance within a reasonable period of time.¹⁴⁵ Retaliation is not practical for LIDCs and LDCs because the withdrawal of concessions by such countries may well become a self-inflicted wound for such members.¹⁴⁶ Therefore, the result is that compliance rulings and retaliation in the DSU are still based on power relationships because compliance is self-enforcing and depends on the strength of the country in whose

¹⁴³ See Panel Report, *United States – Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/R (8 October 1999) [8.8]; Decision by the Arbitrator, *European Communities – Measures Concerning Meat and Meat Products (Hormones) Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing Settlement of Disputes*, WTO Doc WT/DS26/15, WT/DS48/13 (29 May 1998) [10].

¹⁴⁴ See Facundo Perez-Aznar and Marcelo Kohen, 'Countermeasures in the WTO Dispute Settlement System: An Analysis of their Characteristics and Procedure in the Light of General International Law' (Working Paper, Graduate Institute of International Studies, October 2005) 39.

¹⁴⁵ *DSU*, art 22.

¹⁴⁶ See *The Future of the WTO: Addressing Institutional Challenges in the New Millennium*, Report by the Consultative Board to the Director-General, Supachi Panitchpakdi, ('Sutherland Report') [243].

favour the ruling is made.¹⁴⁷ Therefore, even India, as a mid-income developing country, has complained that retaliation is not practicable under art 22 of the DSU.¹⁴⁸ The difficulties encountered at the stage of implementing a DSB decision by LIDCs and LDCs are further evident in the observation made by Davey from the following statement:

Moreover, while retaliation seems to work when threatened by a larger country against a smaller one, and has worked as between two large countries, it may not be an effective remedy for a small country (even if it can target sensitive large country sectors such as copyright holders).¹⁴⁹

If the successful party is not satisfied with the implementation of the measures taken by the losing party, the successful member can request a panel (which could possibly be the original panel) to address the issue. This panel is called a 'compliance panel'. This panel examines, within 90 days of referral of the matter, whether the implementation measures that have been taken by the losing member are adequate. This procedure is very difficult for LIDCs and LDCs who do not have a capacity to retaliate and need to wait for a long time to obtain the relief for their small claims. The whole procedure of implementation is clumsy and discouraging for LIDCs and LDCs with small claims against their trading partners.

A successful member first has to withdraw from an international obligation in the same sector in which the underlying violation occurred.¹⁵¹ Thereafter, withdrawal of the obligation in a different sector is allowed if retaliation in the same

¹⁴⁷ William J Davey, 'The WTO Dispute Settlement System: How Have Developing Countries Fared?' above n 85, 31; Bown, 'Developing Countries as Plaintiffs and Defendants in GATT/WTO Trade Disputes' above n 23, 60.

¹⁴⁸ 'The tremendous imbalance in the trade relations between developed and developing countries places severe constraints on the ability of developing countries to exercise their rights under art 22. The economic cost of withdrawal of concessions in the goods sector would have a greater adverse impact on the complaining developing-country Member than on the defaulting developed-country Member and would only further deepen the imbalance in their trade relations already seriously injured by the nullification and impairment of benefits'. *Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries, Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, WTO Doc TN/DS/W/19 (9 October 2002).

¹⁴⁹ William J Davey, 'The WTO Dispute Settlement System: How Have Developing Countries Fared?' above n 85, 31.

¹⁵⁰ DSU, art 21.5.

¹⁵¹ '[T]he general principle is that the complaining party should first seek to suspend concessions or other obligations with respect to the same sector as that in which the panel or Appellate Body has found a violation or other nullification or impairment'. DSU, art 22.3(a).

sector proves to be impracticable or ineffective.¹⁵² If the withdrawal in a different sector is not sufficient, then the retaliation is permitted under any other covered agreement.¹⁵³

When the compliance panel issues its ruling, if the respondent member does not bring the measure into conformity with the ruling, the entire effort is futile. For instance, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Ecuador as well as Guatemala, Honduras, Mexico and the US challenged the EC banana regime for the violation of GATT most favoured and national treatment obligations.¹⁵⁴ Ecuador won the case,¹⁵⁵ and at the compliance stage, Ecuador and the EC separately requested the establishment of a panel under art 21.3(c) of the DSU to determine what constituted a reasonable period of time for implementation of the DSB recommendations.¹⁵⁶ Ecuador was authorised to retaliate, but found that it was impossible to retaliate without causing severe damage to its own economy because of its small trade capacity.¹⁵⁷

The EC-Bananas dispute brought the DSU procedure and in particular the implementation provisions into question for LIDCs. This case demonstrates that respondents who lose a case take every procedural step available to delay or avoid the unfavourable ruling made against them.¹⁵⁸ It was apparent from this case that a small market economy is unable to retaliate against major economic powers. The case further highlights the fact that suspension of concessions and other obligations

¹⁵² DSU, art 22.3(b).

¹⁵³ Ibid art 22.3(c).

¹⁵⁴ See Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS27/ARB/ ECU (24 March 2000) [7.23] and [157].

¹⁵⁵ Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WTO Doc WT/DS 27/AB/R (9 September 1997) [257].

¹⁵⁶ Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Arbitration under Article 21.3(c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/15 (7 January 1998)5.

¹⁵⁷ See Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27 ARB/ ECU (24 March 2000) [2].

¹⁵⁸ Mauricio Salas and John H Jackson, 'Procedural Overview of the WTO EC – Banana Dispute' (2000) 3(1) *Journal of International Economic Law* 145, 166.

does not always work well because most of the LDCs lack the market size to launch an effective threat of retaliation against the non-complying country.¹⁵⁹ This is illustrated quite clearly by the statement of the arbitrators in the *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Dispute (EC – Bananas)* case:

Given the difficulties and 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 authorized 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. The present text of the DSU does not offer a solution for such an eventuality.¹⁶⁰

Furthermore, arts 22.4 and 22.7 of the DSU complicate the retaliatory process. For instance, art 22.4 states that the level of suspension of concessions or other obligations must be equivalent to the level of nullification and impairment. This article does not provide any guidance about ‘what [it] is that arbitrators are meant to equalize’.¹⁶¹ However, the level of loss calculated is the amount that a member has suffered due to WTO inconsistent measure.¹⁶² Measuring what is equivalent to the level of nullification or impairment does not take into consideration the gravity of the wrongful act.¹⁶³ Conversely, the gravity of the violation does not determine the level of the retaliation and the retaliation cannot cover the gravity of the infringement.

¹⁵⁹ See T Zimmermann, ‘WTO Dispute Settlement at Ten: Evolution, Experiences and Evaluation’ (2005) 60(1) *Swiss Review of International Economic Relations* 27, 37; see *Dispute Settlement Body Special Session, Negotiations on the Dispute Settlement Understanding Proposal by the African Group*. WTO Doc TN/DS/W/15 (25 September 2002) [3]; *Negotiations on the Dispute Settlement Understanding, Special and Differential Treatment for Developing Countries, Proposals on DSU by Cuba, Honduras, India, Indonesia, Malaysia, Pakistan, Sri Lanka, Tanzania and Zimbabwe*, WTO Doc TN/DS/W/19 (9 October 2002); Richard Steinberge, ‘In the Shadow of Law or Power?: Consensus-based Barraging and Outcomes in the GATT/WTO’ (2000) 56 *International Organization* 339–374; Mercurio, above n 100, 318; Cheng, above n 2, 9.

¹⁶⁰ Decision by the Arbitrator, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/ARB/ECU (24 March 2000) [177].

¹⁶¹ See Thomas Sebastian, ‘World Trade Organization Remedies and the Assessment of Proportionality: Equivalence and Appropriateness’ (2007) 48(2) *Harvard International Law Journal* 337, 343.

¹⁶² ‘Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question’ (emphasis added). *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53rd sess (A/56/10) *Yearbook of the International Law Commission*, Vol. II part two (2001) art. 51.

¹⁶³ Axel Desmedt, ‘Proportionality in WTO Law’ (2001) 4(3) *Journal of International Economic Law* 441, 448.

The purpose of WTO retaliation is to induce compliance rather than being punitive in nature.¹⁶⁴ It is difficult to quantify a retaliatory action because it is unclear what criteria should be employed in determining the level the nullification and impairment. Article 22 of the DSU is silent on this issue. The basic purpose of the retaliation enshrined in the DSU is the withdrawal of substantially equivalent concessions to the successful member for the delay in implementation of the DSB award. However, under public international law, it permits the losing party to retaliate proportionately to the violation.¹⁶⁵ According to Bernstein and Skully, damages awarded by arbitrators are ‘the amount of economic damages caused by the violation in question’ by considering ‘appropriate elasticity’ or ‘digression’.¹⁶⁶

In the *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Dispute* the arbitrator held that the level of retaliation should be calculated on the basis of a comparison of the relevant trade value of a regime that is inconsistent with the WTO, with the trade value of a regime that is consistent with the WTO.¹⁶⁷ As a result, the calculations were rather quantitative, thus rendering the retaliation less effective because a qualitative assessment of the proportionality is

¹⁶⁴ See *Decision by the Arbitrator, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/ARB/ (9 April 1999)[6.3]; *Decision of the Arbitrator, United States – Anti-dumping Act of 1916 – Recourse to Arbitration by the United States under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS136/ARB (24 February 2004) [5.7]–[7.1].

¹⁶⁵ See *International Law Commission Draft Articles on State Responsibility*, UN GAOR, 51st sess., Supp. No 10, UN Doc A/51/10 (adopted on first reading in 1996) art 49.

¹⁶⁶ Bernstein and Skully, above n 119, 389.

¹⁶⁷ *Decision by the Arbitrator, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS27/ARB/ECU (9 April 1999) [4.1],[6.5],[7.1]–[7.8]; *Decision by the Arbitrator, European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WT/DS27/ARB/ECU (24 March 2000)[168]; see also *Decision by the Arbitrator, European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Complaint by the United States* WTO Doc WT/DS26/ARB (12 July 1999) [41]–[44]. [73]; *Decision by the Arbitrator, European Communities – Measures Concerning Meat and Meat Products (Hormones) – Recourse to Arbitration by the European Communities under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, Complaint by Canada* WTO Doc WT/DS48/ARB (12 July 1999) [7]–[48], [63].

not based on the overall effects of a violation.¹⁶⁸ Furthermore, a calculation by the arbitrators of the level of nullification and impairment does not take into account the economic or trade effects.¹⁶⁹

Importantly, the arbitrators limited their focus to trade losses only, which does not take into account the damages that result from a violation.¹⁷⁰ For example, the illegal dumping of goods by a developed country or a large developing country hampers the domestic market of a LIDC and a LDC and it would cause trade loss. This trade loss could be devastating for the overall economy of the LIDCs. Therefore, in order to assess the true effect of the nullification or impairment, the broader economic impact should be taken into consideration when granting compensation under a small claims procedure.¹⁷¹ A small claim procedure is a practical solution for LIDCs and LDCs who have small trade stake to participate in the WTO DSM. Such procedure will streamline the DSM, reduce litigation cost, and introduce compensation with retrospective effect to offset the trade effect due to violation of the WTO obligations.

¹⁶⁸ Yuka Fukunaga, 'Securing Compliance through the WTO Dispute Settlement System: Implementation of DSB Recommendations' (2006) 9(2) *Journal of International Economic Law* 383, 420; Decision by the Arbitrator, *United States – Anti-dumping Act of 1916 – Recourse to Arbitration by the United States under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS136/ARB (24 February 2004) [7.2].

¹⁶⁹ Decision by the Arbitrator, *United States – Anti-dumping ACT of 1916 under Article 22.6 of the Understanding on Rules and Procedures Governing the Settlement of Disputes*, WTO Doc WT/DS136/ARB (24 February 2004) [7.2].

¹⁷⁰ See Kym Anderson, 'Peculiarities of Retaliation in WTO Dispute Settlement' (2002) 1(2) *World Trade Review* 123, 128; see *Wickard v Filburn* 317 US 111 (1942) 128. This case indicates that there is a way to calculate the economic and cumulative effect of damages caused by the violation.

¹⁷¹ This can be done '... by multiplying the value of lost trade by a macroeconomic parameter that captures the difference in "size" between the member that intends to take countermeasures and the targeted Member'. Andrea Bianchi, Lorenzo Gradoni and Melanie Samson, 'Developing Countries, Countermeasures and WTO Law: Reinterpreting the DSU against the Background of International Law' (Research Paper No 5, International Centre for Trade and Sustainable Development, December 2008) V.

IV SMALL CLAIMS PROCEDURE IN THE WTO DISPUTE SETTLEMENT MECHANISM

A small claim procedure is suitable for small claims and reduces complex procedure and litigation cost for smaller WTO members and it gives equal access to justice.¹⁷² Nordstrom and Shaffer define a small claims procedure as a ‘defined category of claims before a division of an existing lower court of general jurisdiction, be it a municipal, country or district court, although there is greater variation among jurisdictions’.¹⁷³ Sarat, who shares a similar view, defines a small claims procedure as ‘[an] efficient means for individuals to carry out legal business where the amount of money at stake was not very great’.¹⁷⁴ According to Sarat, a small claims procedure ‘[represents] very different things to those who are engaged in it: for some it represents the first step in dealing with a conflict, for some a continuation of that process and for others the culmination of it’.¹⁷⁵ Baldwin sees a small claims procedure as a more informal and simplified procedure.¹⁷⁶ According to Zucker and Her, a ‘small claims court gives litigants the opportunity to simplify their legal disputes’.¹⁷⁷ Therefore, a small claims procedure can be defined as a mechanism that helps parties to litigate claims involving small sums of money, using a forum that is devoid of the complex procedures that are commonplace in normal courts. This sort of procedure exists in the municipal laws of many jurisdictions as well as in supra-national jurisdictions.

¹⁷² [T]he creation of a small claims procedure in the WTO based on three premises. First: trade stakes vary among WTO Members. Second: claims involving smaller trade stakes are not offset by smaller litigation costs or reduced needs for domestic WTO legal expertise. Third: the alternative dispute resolution tracks provided by the DSU do not substitute for a small claims procedure’. Hakan Nordstrom and Gregory Shaffer, ‘Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?’ above n 8, 631.

¹⁷³ Ibid 609.

¹⁷⁴ See Austin Sarat, ‘Alternatives in Dispute Processing: Litigation in a Small Claims Court’ (1976) 10(3) *Law & Society Review* 339, 343.

¹⁷⁵ Ibid 369.

¹⁷⁶ J Baldwin, ‘Is There a Limit to the Expansion of Small Claims?’ (2003) 56 *Current Legal Problems* 317, 318.

¹⁷⁷ Bruce Zucker and Monica Her, ‘The People’s Court Examined: A Legal and Empirical Analysis of the Small Claims Court System’ (2003) 37 *University of San Francisco Law Review* 315, 350.

A *Municipal Law Approach to Small Claims*

Most legal systems (developed or developing countries) in the world have adopted a small claims procedure. For instance, the US, England, Australia and Sri Lanka have adopted such procedures to assist small claims litigants as, otherwise, these litigants would not be able to enforce their rights using the standard court procedures,¹⁷⁸ which are very complex, and involve a lot of time and money. In the US, small claims courts were established in early 1912 with the aim of providing a simple procedure to settle claims involving small sums.¹⁷⁹ This was done because the formal legal system in the US had failed to accommodate the needs of its citizens due to the complexities, technicalities and intricacies that were prevalent in the regular civil justice system.¹⁸⁰ The US has also created various federal small claims procedures for public law claims, such as the US Tax Court.¹⁸¹ For instance, under the California Civil Procedure Code, a small claims court has jurisdiction to hear cases involving sums of money not exceeding USD5000 and to issue writs and enforce payment for sums which do not exceed USD5000.¹⁸² According to art. 2 of 2010 Californian Civil Procedure Code (Small Claims)¹⁸³ its primary aim is to solve minor civil disputes in the most expedient and just manner possible.¹⁸⁴ Therefore, small claims courts are established for the simple and least expensive adjudication of small civil cases.¹⁸⁵ According to a study conducted by Zucker and Her, 5000 cases per calendar year, 2000 have been processed by a small claims court system in Ventura County, California Superior Court, Small Claims Divisions, with trials being conducted in an expeditious manner.¹⁸⁶

In Ireland, a small claims procedure can only be used for consumer litigation and in England and Wales, there is a small claims procedure for business people to use when the monetary value of their claim is no greater than GBP5000.¹⁸⁷ In Sri

¹⁷⁸ Juan Pablo Cortes Dieguez, 'Does the Proposed European Procedure Enhance the Resolution of Small Claims?' (2008) *Civil Justice Quarterly* 1, 1.

¹⁷⁹ Roscoe Pound, 'Administration of Justice in the Modern City' (1913) 26 (4) *Harvard Law Review* 302, 315; Suzanne E Elwell and Christopher D Carlson, 'The Iowa Small Claims Court: An Empirical Analysis' (1990) 75 (2) *Iowa Law Review* 433, 439; Zucker and Her, above n 177, 317.

¹⁸⁰ Elwell with Carlson, above n 179, 439; see Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' above n 8, 608.

¹⁸¹ William C Whiford, 'The Small-case Procedure of the United States Tax Court: A Small Claims Court that Works' (1984) 9(4) *American Bar Foundation Research Journal* 797, 798.

¹⁸² California Civil Procedure Code (2010) section [116.220(a)]; Zucker and Her, above n 177, 326.

¹⁸³ California Civil Procedure Code, section 2 Small Claims Court [116.220].

¹⁸⁵ Pound, above n 179, 315; Elwell and Carlson, 'above n 179, 434.

¹⁸⁶ Zucker and Her, above n 177, 345.

¹⁸⁷ See Dieguez, above n 178, 2.

Lanka, the Civil Procedure Code introduced a small claims procedure as far back as 1889 for civil disputes.¹⁸⁸ This procedure is simple and it also has no monetary limits. Parties can make submissions and oral hearings are also permitted before District Court.¹⁸⁹ However, the plaint and the answer can be done by way of either a written or oral statement presented to the judge.¹⁹⁰ Now if the value of the dispute is less than Rs500,000, the matter should be referred to the Mediation Board.¹⁹¹ If the matter is not settled in the Mediation Board, a non-settlement certificate should be filed in the District Court along with the plaint. In Australia, the Federal Magistrates Court is vested with jurisdiction to hear cases with regard to any civil matter if the amount of compensation claimed does not exceed AUD20,000.¹⁹² Any type of civil action within a monetary threshold can be instituted in a small claims court. In the municipal law small claims procedure has been designed to provide a speedy solution to ordinary people and small businesses who have small claims and it broadens their access to justice. Therefore, the WTO also should establish a small claims DSM to settle disputes the monetary value of which are less than USD10 million.

B Small Claims Procedure at Supra-national Level

Small claims tribunals have been created to handle small claims between various countries and it is not an unrealistic proposition. At the supra-national level, some of these small claims tribunals are established as an ad hoc basis while some are as a permanent body. For instance, the Iran–US Claims Tribunal¹⁹³ and the United Nations Compensations Commission were established under Security Council Resolution 687 (1991) as ad hoc forum to deal with distinct small claims between countries internationally. After the Iranian revolution, compensation was awarded to the affected people through a small claims tribunal for breach of contract.¹⁹⁴

¹⁸⁸ *Civil Procedure Code*, Chapter LXVI 1889 No2 (Sri Lanka) section 801.

¹⁸⁹ *Ibid.* section 819.

¹⁹⁰ *Ibid.* section 802.

¹⁹¹ Mediation Boards Act No 72 of 1988 is amended by Act No 15 of 1997, Act No 21 of 2003, Act No 4 of 2011 and Act No 9 of 2016, section 7(1).

¹⁹² See *Fair Work Act* 2009 (Cth) section 548.

¹⁹³ ‘The Tribunal was established in 1981 to handle unresolved claims following the 1979 Iranian revolution’. David D Caron, ‘The United Nations Compensation for Claims Arising Out of the 1991 Gulf War: the “Arising Prior to” Decision’ (2005) 14(2) *Florida State University Journal of Transitional Law and Policy* 217, 221.

¹⁹⁴ See David D Caron, above n, 193; Homayoun Maf, ‘A Review of the Iran–United States Claims Tribunal’ (Mission Juridica, December 2020) 98, 101.

Similarly, after the Iraqi invasion of Kuwait, a small claims tribunal was created in order to award compensation to those affected. Over 2.6 million claims were lodged with the UN Compensation Commission.¹⁹⁵ The UN Compensation Commission allowed claims by individuals if the claim did not exceed USD100,000 in value, but did not allow claims made by governments and corporations.¹⁹⁶

European Union members have their own set of small claims procedures. European Union members created a small claims procedure in July 2007, which can be used to pursue cross-border claims worth up to EUR2,000 of cross-border commercial and civil matters.¹⁹⁷ By way of background, it is important to reproduce some excerpts from introductory comments made by the EU Commission regarding small claims, because these comments are also relevant to low income developing country DSU litigation as well:

Costs, delay and vexation of judicial proceedings do not necessarily decrease proportionally with the amount of the claim. On the contrary, the smaller the claim is, the more the weight of these obstacles increases. This has led to the creation of simplified civil procedures for Small Claims in many member states. At the same time, the potential number of cross-border claims is rising as a consequence of increasing use of the EC Treaty rights of free movement of persons, goods and services. The obstacles to obtaining a fast and inexpensive judgement [sic] are clearly intensified in a cross-border context.¹⁹⁸

Furthermore, the EU and Vietnam signed an Investment Protection Agreement in 2019. It introduced provisions for the small and medium-sized enterprise to make complaints or damages claims that are relatively low under arts 3.30 (3), 3.38 (9) and 3.53 (5) of the investment agreement. The agreement also provide rules to establish tribunals considering the importance to have a separate mechanism for the small claims. Under this agreement, medium-sized enterprises' annual turnover is less than EUR50 million and small-sized enterprises' annual turnover is less than

¹⁹⁵ David D Caron, above n, 193.

¹⁹⁶ Andrea Gattini, 'The UN Compensation Commission: Old Rules, New Procedures on War Reparations' (2002) 13(1) *European Journal of International Law* 161, 166; Decision No. 1, 'Criteria for Expedited Processings of Urgent Claims', DocS/AC 26/1991/1, 2 August 1991.

¹⁹⁷ *Regulation (EC) No 861/2007* of the European Parliament and of the Council of 11 July 2007 Establishing a European Small Claims Procedure, which entered into force in all EU Member States in January 2009, article 2.

¹⁹⁸ *Commission of the European Communities, Proposal for Regulation of the European Parliament and of the Council Establishing a European Small Claims Procedure*, Com (2005) 87 Final (15 March 2005) art 2.1.1.

EUR10 million.¹⁹⁹ The domestic courts can enforce the final award of the investment tribunal and the domestic courts may question the validity of the decision.²⁰⁰

C Structure of the Small Claims Procedure in the DSU

This article argues that a small claims procedure can be adopted for the WTO DSM and provides for the following eight suggestions to overcome the difficulties in instituting cases by LIDCs and LDCs in the WTO DSM.

First, one needs to consider what type of small claims procedure should be introduced in the WTO context.²⁰¹ It is also important to implement a procedure that minimises cost, because cost is one of the main underlying problems for LIDCs and LDCs. It is also necessary to consider whether small claims should be heard by a permanent body or by an ad hoc panel, and whether appeals can be lodged only on a question of law. When addressing these issues, it is evident that, at a national level, small claims procedures have been introduced in many jurisdictions in order to relieve their citizens from protracted litigation, as these litigants have experienced problems gaining access to the existing legal mechanism. For the same reason, a small claims procedure is suitable for LIDCs and LDCs, as these countries have experienced difficulty gaining access to the DSM.

Second, countries have also made proposals to establish a permanent panel as panels are currently established by the DSB on a case by case basis,²⁰² the establishment of a panel under the present system is time consuming. In fact, it may take months because of disagreements between the parties.²⁰³ Instead of using an ad hoc panel procedure, if there was a permanent panel, then the procedure would be more expedient and it would result in experienced panellists with better decision-making abilities.²⁰⁴ The appeals should be heard by a separate division of the Appellate Body dedicated to hear appeals on small claims.

¹⁹⁹ European Commission User Guide to the SME Definition (European Union 2020) 11.

²⁰⁰ *Guide to the EU–Vietnam Trade and Investment Agreements*, available at <https://trade.ec.europa.eu/doclib.html.pdf> accessed on 13 March 2022, 70.

²⁰¹ Developed and developing countries proposed a new facilitative mechanism for market access disputes. See ‘A New Facilitative Mechanism at the WTO to Address Non-Tariff Measures: Issues for Consideration (Issue Brief, Centre for International Environmental Law, August 2006) 3.

²⁰² See *Communication from the European Communities, Contribution of the European Communities and its Member States to the Improvement and Classification of the WTO Dispute Settlement Understanding*, WTO Doc TN/DS/W38 (23 January 2003) [14].

²⁰³ See Nordstrom and Shaffer, ‘Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?’ above n 8, 630.

²⁰⁴ See William J Davey, ‘The WTO: Looking Forwards’ (2006) 9(1) *Journal of International Economic Law* 3, 21.

Third, it is also necessary to eliminate the interim review procedure. Under art 15 of the DSU, panels have to provide the parties with an interim report. Before the interim report is provided, the panels give the descriptive part to the parties, which summarises the facts and the arguments made by the parties in the course of the dispute. The parties may then submit written comments noting whether the facts and arguments are recorded correctly. Thereafter, the panels submit an interim report that includes the descriptive part as well as the findings and conclusions.²⁰⁵ The parties may then make comment and request the right to reply to specific issues in the interim report. Having done this, the panel circulates the panel report. The removal of the process of the interim review or report would help with the rapid conclusion of cases because after consultation fails the panel proceedings can commence and conclude without an interim report from the panel.²⁰⁶

Fourth, it should also be possible for a small claim complaint to be filed either from the capital city of the LIDCs and LDCs online via the internet or in-person in Geneva.²⁰⁷ This will help to reduce the litigation costs involved and will also address the legal cost of LIDCs and LDCs.

Fifth, the LIDCs and LDCs have no experts to monitor, analyse and collect information to see whether there is any violation of WTO obligations as discussed in Part II (A). Therefore, it is recommended that LIDCs and LDCs consider the establishment of a commission within the trade and commerce ministry to investigate trade barriers when private enterprises in those LIDCs and LDCs lodge a petition with the commission. Such a commission should have the power to recommend that a claim be initiated under the small claim tribunal. Such a mechanism could be created if LIDCs and LDCs are provided with technical, legal and financial assistance from the WTO based on their annual aggregate trade value.

Sixth, in order to reduce the time involved in making small claims, appeals to the Appellate Body should be allowed only on a question of law to be determined in

²⁰⁵ DSU, art 15.2.

²⁰⁶ See also *Negotiations on Improvements and Classifications of the Dispute Settlement Understanding on Improving Flexibility and Member Control in WTO Dispute Settlement*, WTO Doc TN/DS/W/52 (14 March 2003).

²⁰⁷ 'The DSU provides that some procedural requirements must be "in writing" based on "written Submission". This of course raises a serious concern in considering [on line dispute resolution] for the WTO'. Paustinus Siburian, 'WTO's Online Dispute Resolution', 'WTO's Dispute Settlement Enriching Understanding on Rules and Procedures Governing Settlement of Disputes', (July 2007) <<https://ssrn.com/abstract>> accessed on 06.06.2021.

exceptional circumstances. The parties should be permitted to submit their evidence via affidavit and oral hearings should only be permitted before such small claims courts in exceptional circumstances as, otherwise, further delays and greater costs will be incurred.

At present, the Appellate Body's function is to examine questions of law and the panels' interpretation of the relevant laws. It is not vested with the power to make factual findings.²⁰⁸ This is problematic in cases where the determination of a factual issue is critical to be able to interpret a legal issue that had not been examined by the panel. In such a situation, the Appellate Body cannot refer the case back to the panel (Remand authority).²⁰⁹

Seventh, currently, the WTO DSM does not have a mechanism under the DSU to discover documents and interrogatories. In order to simplify the procedure applying to small claims lodged in the DSM, it is recommended that new provisions governing the filing, by the parties, of interrogatories, be introduced. Interrogatories provide one method for the discovery, inspection, impounding and return of documents. This can be done at any time, not more than fifteen days before the panel commences the hearing of the dispute. This allows one way of admitting certain documents without creating issues, thus cutting short the lengthy procedure involved in the production of panel reports.

Eighth, as discussed in Part III, retaliation is not a practical remedy for countries having a small share in international trade. A small claims panel should be able to ease the award compulsory compensation. This will help ease the LIDCs' and LDCs' uncertainty surrounding the implementation of the DSB rulings. According to Nordstrom and Shaffer, with the introduction of a small claims procedure 'there would be no need for arbitration over the "reasonable period of time"'.²¹¹

Ninth, the small claims court under the DSM should be empowered to grant interim relief and retrospective remedies which prevent further violations of the

²⁰⁸ 'An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel'. *DSU*, art 17.6. 'The Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel'. *DSU*, art 17.13.

²⁰⁹ *Hong Kong WTO Ministerial Briefing Notes Dispute Settlement Force of Argument, Not Argument of Force* (2005) available at https://www.wto.ormin05_e>brif0_e> accessed on 14.02.2022.

²¹⁰ See *Civil Procedure Code*, Chapter XVI 1889 No 2 (Sri Lanka) section 94.

²¹¹ See Nordstrom and Shaffer, 'Access to Justice in the World Trade Organization: A Case for a Small Claims Procedure?' above n 8, 626.

WTO obligations. In addition, panels should be empowered to award damages proportionately considering the gravity of the nullification or impairment involved.²¹² In the event of non-compliance by a losing member, LIDCs and LDCs should be able to resort to collective retaliation as a group of LIDCs and LDCs akin to its equivalent of the value of the lost market.²¹³

V CONCLUSION

The above analysis suggests that WTO DSM is too complex, technical, costly and lengthy for LIDCs and LDCs to participate in trade disputes. The main problems for these countries relate to their lack of legal resources (in order to have quality legal representation) and their lack of market share. Developed members and mid-income developing members are better placed to use the DSM and have enjoyed much success in doing so.

In addition, all processes of dispute resolution, including consultation, take place in Geneva. LIDCs and LDCs bear the cost of dispute resolution in Geneva. Reduction of litigation cost is vital for these countries. This article emphasised the importance of making complaints via the internet to save time and money. Small trade volume also works as a disincentive for LIDCs and LDCs to participate in DSM.

This article analysed how LIDCs and LDCs are adversely affected by the fact that the DSU remedies are not retrospective. As a result, the offending member is able to maintain their WTO-inconsistent measures until the case is over.

The provisions of the DSU were drafted without giving due consideration to the trade capacity of LIDCs and LDCs. This is particularly evident in the retaliation process. The current DSU remedies are suitable to WTO members who have larger trade volumes. WTO remedies are inadequate for LIDCs and LDCs because they do not have any retaliatory capacity against a developed member or mid-income developing member.

The ability to award retrospective compensation would be beneficial for all countries, but especially for LIDCs and LDCs, as retrospective compensation would enable countries to reduce their market losses adequately. In addition, retrospective compensation may discourage WTO members from breaching their

²¹² Desmedt, above n 163, 447.

²¹³ *Negotiations on the Dispute Settlement Understanding Proposals by the LDC*, WTO Doc TN/DS/W/17 [15]; Bernard M. Hoekman and Petros C Mavroidis, 'Preventing the Bad from Getting Worse: The End of the World (Trade Organization) As We Know it?' (European University Institute Robert Schuman Centre for Advanced Studies, Global Governance Programme, EUI Working Paper RSCAS 2020/06) 8.

WTO obligations. There is no small claims procedure in WTO law that would help LIDCs and LDCs to litigate, at a lower cost, cases in which smaller trade issues are at stake.

This article contributes to the existing literature by arguing that the creation of a small claims procedure in the WTO dispute resolution system signals the beginning of a new era for LIDCs and LDCs when it comes to the resolution of disputes. Such a small claims procedure system will allow member countries to settle their disputes with less complexity, using a system that does not exacerbate the differences that exist between various countries in terms of their resources, access to technology and their operating costs.

THE WORLD TRADE ORGANIZATION AND *JUS COGENS* NORMS

Mia Bonardi*

ABSTRACT

WTO, Trade, jus cogens norms, crimes against humanity, genocide

This article proposes current World Trade Organization (WTO) Member States commit to a new, nonvoluntary agreement that conditions WTO membership on compliance with jus cogens norms. It argues that while the WTO system should not be the sole mechanism used to punish a state violating jus cogens norms, as a major multilateral economic system, it is a vital international organization to do so effectively. The WTO system should facilitate the aims of the United Nations to maintain international peace and security. By shutting its eyes to violations of jus cogens norms and pretending to be neutral, the WTO system is failing these aims.

To further this argument, this article uses as a case study the People's Republic of China's ('PRC') suppression of the Uyghur people in the Xinjiang Uyghur Autonomous Region — what the international community alleges as genocide and crimes against humanity. The prevention and punishment of genocide falls under the Genocide Convention and, while there is no international treaty dedicated to crimes against humanity, the PRC's suppression of the Uyghurs aligns with Article 7 of the Rome Statute, which defines crimes against humanity.

In the existing WTO framework, GATT Article XX is ineffective to prevent and punish genocide or crimes against humanity. While Article XX claims not to prevent Member States from unilaterally discriminating for specific reasons, it does not require Member States to act in cases where any state violates jus cogens norms.

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This article focuses on the purpose of the WTO system and with inspiration from Adeno Addis and Yuval Noah Harari argues that the WTO is an 'imagined community'. This article asks, what kind of community would the WTO system like to imagine and foster for the future of global trade governance? This is not an argument for 'linkage'. Instead, this is an argument for a moral expansion and reimagining of the WTO system to uphold jus cogens norms.

I. INTRODUCTION

Jus cogens norms and free trade are not mutually exclusive. There are ongoing arguments for trade and non-trade issues to be ‘linked’ using the existing mechanisms of the World Trade Organization (‘WTO’) system.¹ The *General Agreement on Trade-Related Aspects of Intellectual Property* (‘TRIPS’) is an example of a ‘linkage’ between trade and intellectual property.² Moving beyond arguments for the ‘linkage’ of trade and non-trade issues, this article argues for a moral expansion and reimagining of the WTO system to recognize how intertwined trade already is with genocide and crimes against humanity.³ This article argues that the WTO’s working mechanisms should be used to prevent and to punish any violation of *jus cogens* norms.⁴ To explore this argument, this article uses as a case study the international community’s challenge that the People’s Republic of China (‘PRC’) is committing genocide and crimes against humanity against the Uyghurs in the Xinjiang Uyghur Autonomous Region (‘XUAR’).⁵ The PRC went through a lengthy and infamous process of accession to the WTO and evidence of its perpetration of genocide and crimes against humanity against the Uyghurs show that the concerns about the PRC’s respect for human rights and the rule of law have come to and exceeded their fruition.⁶ Further, the PRC shows that any

¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) (*Marrakesh Agreement*); *General Agreement on Tariffs and Trade*, opened for signature 30 October 1947, 55 UNTS 187 (entered into force 1 January 1948) (‘GATT’). See, eg, Uyen P Le, ‘Online and Linked In: “Public Morals” in the Human Rights and Trade Networks’ (2012) 38(1) *North Carolina Journal of International Law and Commercial Regulation* 101; Kevin Kolben, ‘Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes’ (2007) 48(1) *Harvard International Law Journal* 203; Sungjoon Cho, ‘Linkage of Free Trade and Social Regulation: Moving beyond the Entropic Dilemma’ (2005) 5(2) *Chicago Journal of International Law* 625.

² *General Agreement on Trade-Related Aspects of Intellectual Property*, 1 January 1995 (TRIPS).

³ Sara Dillon argues ‘Of all the over-used words in the vocabulary of international trade law studies, “linkage” is the most depleted of meaning’: Sara Dillon, ‘A Farewell to Linkage: International Trade Law and Global Sustainability Indicators’ (2002) 55(1) *Rutgers Law Review* 87, 88.

⁴ See below Part VII.

⁵ See below Part II.

⁶ Raj Bhala explains ‘The former Republic of China was an original GATT contracting party, but later internal political upheaval led to its withdrawal. On October 1, 1949, the PRC was founded ... On March 6, 1950, the U.N. Secretary General received a communication from officials in Taiwan indicating that “China” was withdrawing from GATT. The withdrawal took effect on May 5, 1950 ... [but] the PRC argued for application of the law of succession ... In rebuttal, however, it can be said that ... the PRC was not a successor government to the Nationalist one, but an entirely new creature.’ Raj Bhala, ‘Enter the Dragon: An Essay on China’s WTO Accession Saga’ (2000) 15(6) *American University International Law Review* 1469, 1477–78. Bhala explains further how one of the listed concerns during the Accession Negotiations in 1996–99 was ‘Prison and Child Labor. The PRC needed to make progress toward the elimination of exports of products made with prison or child labor’: at 1487. Bhala also discusses how the President of the American Federation of Labor and Congress of Industrial Organizations, John Sweeney, said the WTO deal was ‘disgustingly hypocritical,’ and that ‘by continuing to persecute dissenters, to imprison labor leaders and worker activists, and to export goods produced by slave labor, China shows no interest in playing even by the most basic rules of the world economy.’: at 1520.

argument that expanded trade, on its own, will promote democracy and inhibit authoritarianism is sterile.⁷

Unlike the protectionist and hyper-nationalist methods used during World War II, the current WTO principles of anti-protectionism and anti-discrimination enhanced trade and resulted in member states' reciprocal reliance upon one another.⁸ Yuval Noah Harari argues that '[t]he threat of nuclear holocaust fosters pacifism; when pacifism spreads, war recedes and trade flourishes; and trade increases both the profits of peace and the costs of war'.⁹ When states are not at peace, trade is hindered for those that are not allies.¹⁰ One hundred and thirty one states are common parties to both the WTO and the *Convention on the Prevention and Punishment of the Crime of Genocide* ('*Genocide Convention*').¹¹ If WTO member states put restrictions on trade with a country violating *jus cogens* norms, they run into the risk of breaching their WTO obligations regarding non-discrimination.¹² However, when trade is flourishing and genocide is raging, states violate their obligations under the *Genocide Convention*, and to humanity.¹³

With inspiration from Adeno Addis and Harari, this article argues that the WTO is an 'imagined community'.¹⁴ Addis and Harari term genocide, markets, and states 'imagined communities'.¹⁵ Addis describes genocide as 'imagining a community in a certain way' and Harari describes markets and states as 'imagined communities' where people do not truly know each other, but imagine they do.¹⁶ This theoretical

⁷ See Dillon (n 3) 88; Bhala (n 6) 1511. Bhala further questions whether the PRC could show respect for the rule of law, internationally or domestically: Bhala (n 6) 1521. Bhala also argued in 2000 that 'the optimistic vision of a prosperous, stable, responsible China [was] by no means assured of fruition': Bhala (n 6) 1527.

⁸ *GATT* (n 1). But see Harari explaining the persistence of nationalism: Yuval Noah Harari, *21 Lessons For The 21st Century* (Spiegel & Grau, 2018) 113–14.

⁹ Yuval Noah Harari, *Sapiens: A Brief History of Humankind* (Harper, 2015) 374 ('Sapiens').

¹⁰ *Ibid.*

¹¹ Mia Bonardi, 'WTO, Genocide Convention, & Rome Statute Membership Compared', (Research Spreadsheet Comparing the States Party to the WTO, Genocide Convention, & Rome Statute, 16 April 2022) <<https://perma.cc/5PJY-6JJS>>; *GATT* (n 1); *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (*Genocide Convention*)

¹² *GATT* (n 1).

¹³ *Genocide Convention* (n 11).

¹⁴ See below Part VI.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

discussion poses the question: What kind of community would the WTO system like to imagine and foster for the future of global trade governance?¹⁷

Scholars have made various arguments to link the WTO and human rights.¹⁸ Instead of just calling for the linkage of trade issues with genocide or crimes against humanity, this article argues instead for the necessity of a moral expansion and reimagining of the WTO. While the WTO should not be the sole mechanism used to prevent and to punish genocide or crimes against humanity, as a major multilateral economic system, it is a vital organization to do so effectively. Notably, the WTO should facilitate the aims of the United Nations ('UN') to maintain international peace and security.¹⁹ By shutting its eyes to genocide or crimes against humanity and pretending to be neutral, the WTO is failing these aims.

The article argues that current WTO member states must commit to a new multilateral, nonvoluntary agreement that conditions WTO membership on compliance with *jus cogens* norms.²⁰ Depending on the circumstances, member states could boycott specific products and, if necessary, stop trade with a state engaged in genocide or crimes against humanity. As such, member states in violation of *jus cogens* norms could lose their WTO membership and its benefits.

The fact that 33 WTO member states are not states party to the *Genocide Convention* evidences that the WTO lacks the requirement of its member states to be committed to the prevention and punishment of genocide before acceding to the WTO.²¹ Further, the WTO does not require its members to prevent and to

¹⁷ Ibid.

¹⁸ Gabrielle Marceau explaining the reasons for linking the WTO and human rights: Gabrielle Marceau, 'WTO Dispute Settlement and Human Rights' (2002) 13(4) *European Journal of International Law* 753, 754. See also Robert Howse and Makau Mutua arguing 'It is absurd to expect a country that systematically violates basic human rights to faithfully execute and implement the processes that the WTO agreements require. It is necessary to draw on human rights expertise and accept the evaluations of international human rights institutions in order to guide the performance of the WTO in these matters': Robert Howse and Makau Mutua, 'Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization' <https://www.iatp.org/sites/default/files/Protecting_Human_Rights_in_a_Global_Economy_Ch.htm>; José Alvarez responding to Howse and Mutua 'Many human rights violators routinely comply with international economic agreements and many prominent defenders of human rights, including the United States, have trouble adhering to and complying with some international agreements. Further, even if we were to accept Howse and Mutua's premise as a general matter, it is risky to rely on that proposition in any particular instance. We cannot confidently predict that, for example, China, despite its notorious human rights record, will fail to abide by its WTO obligations': José Alvarez, 'How Not to Link: Institutional Conundrums of an Expanded Trade Regime' (2001) 7(1) *Widener Law Symposium Journal* 1, 2.

¹⁹ 'History of the UN', *United Nations* (online) <<https://www.un.org/un70/en/content/history/index.html>>.

²⁰ See below Part VII.

²¹ Bonardi (n 11).

punish genocide.²² Further, 38 WTO Member States are not States Party to the *Rome Statute of the International Criminal Court* ('*Rome Statute*').²³ While there is no international treaty dedicated to crimes against humanity,²⁴ the *Rome Statute* contains an extensive list of the acts which may constitute such crimes. Thus, a new agreement conditioning WTO membership on compliance with *jus cogens* norms is necessary not only for the 131 WTO member states that are also parties to the *Genocide Convention* to uphold their obligations to prevent and to punish genocide, but for the 110 member states of the WTO that are also parties to the *Rome Statute* to codify the international consensus on crimes against humanity within the international trade system.²⁵

Part II of this article presents the international communities' allegation that the PRC is committing genocide and crimes against humanity against the Uyghurs in the XUAR. Part III examines the interrelationship between trade and *jus cogens* norms and raises questions on whether global trade benefits from the breach of *jus cogens* norms, such as forced labour. Part IV examines the framework of *General Agreement on Tariffs and Trade* ('*GATT*') Article XX and argues that it is insufficient for states to uphold their commitment to *jus cogens* norms and to prohibit genocide and crimes against humanity. Part V argues that until the WTO explicitly requires discrimination against any member state violating *jus cogens* norms, states should at least invoke the limited but relevant subsections of Article XX against any state violating *jus cogens* norms states will otherwise find themselves on the wrong side of history for being complicit in such violations if they do not. Part VI argues that the WTO, like genocide, markets, and states, is an imagined community. Part VII argues for current WTO Member States to commit to a new agreement that conditions WTO membership on compliance with *jus cogens* norms.

²² See below Part II.

²³ Bonardi (n 11).

²⁴ 'Crimes Against Humanity', *United Nations Office On Genocide Prevention and the Responsibility to Protect* (online) <<https://www.un.org/en/genocideprevention/crimes-against-humanity.shtml>>.

²⁵ See below Part VII; *Genocide Convention* (n 11) art I; Bonardi (n 11).

II. INTERNATIONAL TRADE INVOLVING GENOCIDE AND CRIMES AGAINST HUMANITY

The international community presents overwhelming evidence that the PRC is currently perpetrating genocide²⁶ and crimes against humanity²⁷ in the XUAR. There are 152 states party to the *Genocide Convention*, 131 of which are WTO member states.²⁸ The UN General Assembly ('UNGA') adopted the *Genocide Convention* on 9 December 1948.²⁹ The *Genocide Convention* was the first human rights treaty the UNGA adopted — signifying the international commitment to the prevention and punishment of the crime of genocide after World War II and the Holocaust.³⁰ The *Genocide Convention* states, in relevant part:

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

²⁶ See, eg, Newlines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights, *The Uyghur Genocide: An Examination of China's Breaches of the 1948 Genocide Convention* (Report, March 2021) ('Newlines Report'); Adrian Zenz, The Jamestown Foundation, Sterilizations, IUDs, and Mandatory Birth Control: *The CCP's Campaign To Suppress Uyghur Birthrates in Xinjiang* (Report, June 2020, Updated 17 March 2021); Evidence, *Uyghur Tribunal* (Statements and testimony, 4 June–27 November 2021) <<https://uyghurtribunal.com/statements/>>.

²⁷ See, eg, Amnesty International, *'Like We Were Enemies In A War' China's Mass Internment, Torture and Persecution of Muslims in Xinjiang* (Report, June 2021); Human Rights Watch, *'Break Their Lineage, Break Their Roots' China's Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims* (Report, 19 April 2021).

²⁸ Bonardi (n 11).

²⁹ 'Crimes Against Humanity' (n 24).

³⁰ *Ibid.*

Article III

The following acts shall be punishable:

- (a) Genocide;
- (e) Complicity in genocide.³¹

The first independent expert application of the *Genocide Convention* to the PRC's treatment of the Uyghurs, conducted by the Newlines Institute for Strategy and Policy and the Raoul Wallenberg Centre for Human Rights ('Newlines Report'), reported in March 2021:

[T]he People's Republic of China (China) bears State responsibility for committing genocide against the Uyghurs in breach of the 1948 Convention [and that] [w]hile commission of any one of the *Genocide Convention*'s enumerated acts with the requisite intent can sustain a finding of genocide, the evidence ... supports a finding of genocide against the Uyghurs *in breach of each and every act prohibited in Article II (a) through (e)*.³²

Similarly, Adrian Zenz, a leading expert on Chinese Communist Party ('CCP') government policies in Tibet and the XUAR, provides evidence that the CCP's dual systematic strategy of detaining Uyghur men while also instituting a forced birth control and sterilization regime on Uyghur women meets *at least* section (d) of Article II: 'imposing measures intended to prevent births within the group'.³³ For example, '... 2020, one Uyghur region set an unprecedented near-zero birth rate target: a mere 1.05 per mille [per thousand], compared to 19.66 per mille in 2018. This was intended to be achieved through "family planning work".³⁴ Further, the unofficial and independent UK-based Uyghur Tribunal determined 'beyond reasonable doubt that the PRC, by the imposition of measures to prevent births, intended to destroy a significant part of the Uyghurs in Xinjiang as such, has committed genocide'.³⁵ The vital 'intent to destroy' element of Article II has been found in the statements by officials to 'round up everyone who should be rounded up', 'wipe them out completely ... destroy them root and branch', and 'break their lineage, break their roots, break their connections, and break their origins'.³⁶

³¹ *Genocide Convention* (n 11).

³² Newlines Report (n 26) 3 [1], 4–5 [7] (emphasis added).

³³ Zenz (n 26); *Genocide Convention* (n 11) art II(d).

³⁴ Ibid.

³⁵ 'Uyghur Tribunal Judgment' (Unofficial and Independent Judgment of the Uyghur Tribunal, 9 December 2021) <<https://uyghurtribunal.com/wp-content/uploads/2022/01/Uyghur-Tribunal-Judgment-9th-Dec-21.pdf>> ('Uyghur Tribunal').

³⁶ Newlines Report (n 26); *Genocide Convention* (n 11) art II.

In numerous cases of genocide, the evidentiary burden is not one that is sufficiently met until atrocity is perpetrated on a mass scale.³⁷ Samantha Power, former US Ambassador to the UN, explains:

We are responsible for our incredulity. The stories that emerge from genocidal societies are by definition incredible. That was the lesson the Holocaust should have taught us. In case after case of genocide, accounts that sounded far-fetched and that could not be independently verified repeatedly proved true. With so much wishful thinking debunked, we should long ago have shifted the burden of proof away from the refugees and to the skeptics, who should be required to offer persuasive reasons for disputing eyewitness claims. A bias toward belief would do less harm than a bias toward disbelief.³⁸

In 2021, Reporters Without Borders ranked China 177 out of 180 countries globally according to the level of freedom available to journalists.³⁹ Only Turkmenistan, North Korea, and Eritrea ranked lower than China on media freedom.⁴⁰ Reporters Without Borders explains:

By relying on the massive use of new technology, President Xi Jinping's regime has imposed a social model based on control of news and information and online surveillance of its citizens. China's state and privately-owned media are under the [CCP's] ever-tighter control, while the administration creates more and more obstacles for foreign reporters.⁴¹

It is noteworthy that despite the difficulty in collecting evidence on the ground in China, there is still overwhelming evidence provided by the Newlines Report, Adrian Zenz's Report, the Uyghur Tribunal, and public testimony to support the conclusion that the PRC's acts against the Uyghurs amount to genocide under the *Genocide Convention*.⁴² As Ambassador Power argues, the burden of proof must shift to the skeptics and to the PRC: If the PRC is not committing genocide and crimes against humanity against the Uyghurs and has nothing to hide, why does it limit media freedom and impede international journalism and UN investigations?⁴³

³⁷ Samantha Power, *A Problem From Hell: America and The Age of Genocide* (Basic, 2002).

³⁸ *Ibid.* at 543.

³⁹ 'Ranking 2021', *Reporters Without Borders* (online) <<https://rsf.org/en/ranking>>.

⁴⁰ *Ibid.*

⁴¹ 'China', *Reporters Without Borders* (online) <<https://rsf.org/en/china>>.

⁴² Newlines Report (n 26); Uyghur Tribunal (n 26); Zenz (n 26).

⁴³ See 'China' (n 53); and AlJazeera reporting that the PRC has agreed to allow the UN High Commissioner for Human Rights, Michelle Bachelet, to visit the XUAR after the Beijing Winter Olympics 'on the condition the trip should be "friendly" and not framed as an investigation.': 'UN human rights chief allowed to visit Xinjiang after Olympics', *AlJazeera* (online) <<https://www.aljazeera.com/news/2022/1/28/un-rights-chief-allowed-to-visit-xinjiang-after-olympics-report>>.

While some international human rights organizations have yet to label the PRC's treatment of the Uyghurs as genocide, they have concluded that the CCP is *at least* committing crimes against humanity against Uyghurs and other Muslims in the XUAR. While there is no international treaty dedicated to crimes against humanity, the *Rome Statute* contains the most comprehensive definitions of the acts constituting crimes against humanity and has the largest definitional consensus with 123 states party to the *Rome Statute*.⁴⁴ The *Rome Statute* establishes the International Criminal Court ('ICC') which independently investigates and prosecutes war crimes, crimes against humanity, genocide, and the crime of aggression.⁴⁵ Article 7 of the *Rome Statute* states, in relevant part:

Article 7

Crimes against humanity

1. For the purpose of this Statute, "crime against humanity" means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
 - (a) Murder;
 - (b) Extermination;
 - (c) Enslavement;
 - (d) Deportation or forcible transfer of population;
 - (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
 - (f) Torture;
 - (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
 - (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
 - (i) Enforced disappearance of persons;
 - (j) The crime of apartheid;
 - (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.⁴⁶

⁴⁴ 'Crimes Against Humanity' (n 24); Bonardi (n 11).

⁴⁵ *Rome Statute* of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

⁴⁶ *Ibid.*

The PRC's suppression of the Uyghurs aligns with crimes against humanity as defined by the *Rome Statute*. Amnesty International's June 2021 report concluded 'the Chinese government has committed *at least* the following crimes against humanity: imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; and persecution'.⁴⁷ Similarly, an April 2019 Human Rights Watch report concluded 'that the Chinese government has committed — and continues to commit — crimes against humanity against the Turkic Muslim population' and that the acts its report details 'implicate the following crimes against humanity: murder; enslavement; imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; torture; persecution; enforced disappearance; and other inhumane acts'.⁴⁸

Despite the fact that some international human rights organizations have not labeled the PRC's treatment of the Uyghurs as genocide, there is overwhelming evidence provided by the Newlines Report, Adrian Zenz's Report, the Uyghur Tribunal, and public testimony to support the conclusion that the PRC's acts against the Uyghurs amount to genocide under the *Genocide Convention*.⁴⁹ Thus, this article will name and shame the Uyghur Genocide with those that do because the statements of intent coupled with *at least* one act defined as genocide under the *Genocide Convention* is genocide.⁵⁰

A State Recognitions

While states dragged their heels far too long to recognize the Uyghur Genocide, some have begun to do so.⁵¹ The US was the first state to officially recognize the Uyghur Genocide as such.⁵² On 19 January 2021, the last day of the Trump

⁴⁷ Amnesty International explains that evidence also shows that the CCP has seriously violated other human rights, including the rights to liberty and security of person; to privacy; to freedom of movement; to opinion and expression; to thought, conscience, religion and belief; to participate in cultural life; and to equality and non-discrimination.: Amnesty International (n 27) (emphasis added).

⁴⁸ Human Rights Watch (n 27).

⁴⁹ Newlines Report (n 26); Zenz (n 26); *Uyghur Tribunal* (n 26).

⁵⁰ *Genocide Convention* (n 11) art II.

⁵¹ See, eg, Jonathan Swan, 'Exclusive: Trump Held Off on Xinjiang Sanctions for China Trade Deal', AXIOS (online, 21 June 2020) <<https://www.axios.com/trump-uyghur-muslims-sanctions-d4dc86fc-17f4-42bd-bdbd-c30f4d2ffa21.html>>; Daniel Lippman and Nahal Toosi, 'Trump Administration Weighs Accusing China of "Genocide" Over Uighurs', *POLITICO* (online, 25 August 2020, 12:58 PM EDT) <<https://www.politico.com/news/2020/08/25/trump-administration-china-genocide-uyghurs-401581>>.

⁵² See Benjamin Fearnow, 'United States Becomes First Country in World to Declare China's Uighur Treatment Genocide', *Newsweek* (online, 19 January 2021, 1:56 PM EST) <<https://www.newsweek.com/united-states-becomes-first-country-world-declare-chinas-uyghur-treatment-genocide-1562717>>; John Hudson, 'At the 11th hour, Trump administration declares China's treatment of Muslims in Xinjiang "genocide"', *The Washington Post* (19 January 2021, 1:46 PM EST) <https://www.washingtonpost.com/national-security/trump-china-genocide-uyghur-muslims/2021/01/19/272a9df4-5a7f-11eb-aaad-93988621dd28_story.html>.

Administration's term, Secretary of State Mike Pompeo declared that the PRC is currently committing genocide and crimes against humanity against Uyghurs in the XUAR.⁵³ On 27 January 2021, the first day on the job for the new Secretary of State Antony Blinken under the Biden Administration, Blinken reiterated Pompeo's determination, highlighting the Biden Administration's recognition of the Uyghur Genocide.⁵⁴

Furthermore, on 30 March 2021, the US State Department's 2020 Human Rights Report confirmed the Uyghur Genocide as such:

Genocide and crimes against humanity occurred during the year against the predominantly Muslim Uyghurs and other ethnic and religious minority groups in Xinjiang. These crimes were continuing and include: the arbitrary imprisonment or other severe deprivation of physical liberty of more than one million civilians; forced sterilization, coerced abortions, and more restrictive application of China's birth control policies; rape; torture of a large number of those arbitrarily detained; forced labor; and the imposition of draconian restrictions on freedom of religion or belief, freedom of expression, and freedom of movement.⁵⁵

Significantly, in the Spring of 2000 when the PRC negotiated its accession to the WTO, the US State Department observed the pronounced decline in human rights in the PRC – specifically the freedom of religion, expression, and association – in its annual human rights report and the UN High Commissioner for Human Rights,

⁵³ While this should be considered an official recognition of the Uyghur Genocide by the US government, the motive of this announcement should be questioned due to the timing (the last day of the Trump Administration's term) and lack of any substantial change to the available facts regarding the plight of the Uyghurs. Secretary of State Mike Pompeo stated 'I have determined that the People's Republic of China is committing genocide and crimes against humanity in Xinjiang, China, targeting Uyghur Muslims and members of other ethnic and religious minority groups . . . These acts are an affront to the Chinese people and to civilized nations everywhere. The People's Republic of China and the CCP must be held to account'. Secretary of State Mike Pompeo, 'Determination of the Secretary of State on Atrocities in Xinjiang' (Press Statement, US Department of State, 19 January 2021) (transcript available at <<https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang//index.html>>); @SecPompeo, (Twitter, 19 January 2021, 12:19 PM) <<https://twitter.com/SecPompeo/status/1351580135464558593?s=20>>. See also Hudson (n 52).

⁵⁴ Humeyra Pamuk and David Brunnstrom, 'New U.S. secretary of state favors cooperation with China despite genocide of Uighurs', *Reuters* (27 January 2021, 4:08 PM) <<https://www.reuters.com/article/us-usa-china-blinken/new-u-s-secretary-of-state-favors-cooperation-with-china-despite-genocide-of-uighurs-idUSKBN29W2RC>>.

⁵⁵ Bureau of Democracy, Human Rights and Labor, US Department of State, *2020 Country Reports on Human Rights Practices: China (Includes Hong Kong, Macau, and Tibet)* (Annual Report 2021) ('*2020 China Report*'). But see reporting that there had previously been insufficient evidence to prove genocide against the Uyghurs, even after official recognition by both the Trump and Biden Administrations: Column Lynch, 'State Department Lawyers Concluded Insufficient Evidence to Prove Genocide in China', *Foreign Policy* (online, 19 February 2021, 11:36 AM) <<https://foreignpolicy.com/2021/02/19/china-uighurs-genocide-us-pompeo-blinken/>>.

Mary Robinson, denounced the PRC for similar findings.⁵⁶ Nearly twenty years later, the human rights degradations leading to the Uyghur Genocide are cited as the same in the 2000 US State Department report: freedom of religion, expression, and association.⁵⁷

After the US, Canada became the second state to recognize the Uyghur Genocide via a House of Commons vote.⁵⁸ The third state to recognize the Uyghur Genocide, and the first European state, was the Netherlands.⁵⁹ The UK also recognized the Uyghur Genocide via a House of Commons vote.⁶⁰ Lithuania's parliament recognized the Uyghur Genocide as such, 'voting to call for a U.N. investigation of internment camps and to ask the European Commission to review relations with Beijing'.⁶¹ However, efforts to officially recognize the Uyghur Genocide as such in Australia, Turkey, and other states, have failed thus far.⁶² Whether any official recognitions will translate into effective responses remains to be seen.

However, even before some of these states officially recognized the Uyghur Genocide, some began to take specific responses. For example, the US, EU, UK, and Canada, imposed sanctions on certain actors perpetrating the Uyghur

⁵⁶ Bhala (n 6) 1529.

⁵⁷ *2020 China Report* (n 55).

⁵⁸ 'Canada's parliament declares China's treatment of Uighurs "genocide"', *BBC* (online, 23 February 2021) <<https://www.bbc.com/news/world-us-canada-56163220>>.

⁵⁹ Reuters Staff, 'Dutch parliament: China's treatment of Uighurs is genocide', *Reuters* (online, 25 February 2021, 11:51 AM) <<https://www.reuters.com/article/us-netherlands-china-uighurs/dutch-parliament-chinas-treatment-of-uighurs-is-genocide-idUSKBN2AP2C1>>.

⁶⁰ Patrick Wintour, 'UK MPs declare China is committing genocide against Uyghurs in Xinjiang', *NBC News* (online, 22 April 2021, 13:34 EDT) <<https://www.theguardian.com/world/2021/apr/22/uk-mps-declare-china-is-committing-genocide-against-uyghurs-in-xinjiang>>.

⁶¹ Andrius Sytas, 'Lithuanian parliament latest to call China's treatment of Uyghurs "genocide"', *Reuters* (online, 20 May 2021, 7:52 AM EDT) <<https://www.reuters.com/world/china/lithuanian-parliament-latest-call-chinas-treatment-uyghurs-genocide-2021-05-20/>>.

⁶² Alim Seytoff, Mamatjan Juma, and Paul Eckert reporting that lawmakers in Australia rejected a motion to recognize human rights violations in the XUAR as genocide: Alim Seytoff, Mamatjan Juma, and Paul Eckert, 'Dismaying Uyghurs, Legislatures of Australia and Turkey Reject Motions on China Genocide Label', *Radio Free Asia* (online, 15 March 2021) <<https://www.rfa.org/english/news/uyghur/turkey-australia-genocide-03152021185120.html>>; The Stockholm Center for Freedom reporting that Turkey's ruling Justice and Development Party (AKP) voted down a motion which would have recognized the CCP's treatment of the Uyghurs in the XUAR as genocide: 'Turkey's ruling party rejects motion calling China's treatment of Uyghurs "genocide"', *Stockholm Center for Freedom* (online, 11 March 2021) <<https://stockholmcf.org/turkeys-ruling-party-rejects-motion-calling-chinas-treatment-of-uyghurs-genocide/>>.

Genocide.⁶³ There have also been proposals for other specific responses to the Uyghur Genocide. For example, on 17 September 2020, US Senator Tom Cotton (R-Arkansas) introduced a Bill to revoke the PRC's MFN status.⁶⁴ However, these efforts, if successful, will only emphasize individual member states' worst instincts of protectionism and will not allow for the development of a global community committed to free trade and the prevention and punishment of genocide.⁶⁵

There were also efforts in the UK to add a 'genocide amendment' to its *Trade Act 2021*.⁶⁶ These efforts failed, although 'The amendment would have created a parliamentary judicial committee to make independent assessments of whether allegations of genocide are substantiated'.⁶⁷ However, both Houses of the UK parliament agreed on new amendments to allow a Commons committee to indicate reports of genocide and demand a parliamentary debate if the government's response is unsatisfactory.⁶⁸ Again, whether any responses taken are sufficient to prevent ongoing genocide, or are just enough for states party to the *Genocide Convention* to say they were not complicit, remains to be seen.⁶⁹

The PRC has an infamous history of accession to the WTO and evidence of its perpetration of the Uyghur Genocide and other human rights violations shows that the concerns over its accession have come to and exceeded their fruition.⁷⁰ The PRC provides evidence that expanded trade, on its own, will not promote democracy and inhibit authoritarianism. Thus, the WTO must require its member states to be committed to the prevention and punishment of genocide before acceding to the WTO.

⁶³ Emily Rauhala, 'U.S., E.U., Canada and Britain announce sanctions on China over the abuse of Uyghurs', *The Washington Post* (online, 22 March 2021, 2:19 PM EDT) <https://www.washingtonpost.com/europe/union/2021/03/22/1b0d69aa-8b0a-11eb-a33e-da28941cb9ac_story.html>; Secretary of State Antony J. Blinken, 'Promoting Accountability for Human Rights Abuse with Our Partners', (Press Statement, US Department of State, 22 March 2021) <<https://www.state.gov/promoting-accountability-for-human-rights-abuse-with-our-partners/>>.

⁶⁴ 'Cotton Introduces Bill to End China's Permanent Most-Favored-Nation Status', *Tom Cotton Senator for Arkansas* (online, 17 September 2020) <<https://www.cotton.senate.gov/news/press-releases/cotton-introduces-bill-to-end-china-and-146s-permanent-most-favored-nation-status>>.

⁶⁵ Ibid.

⁶⁶ *Trade Act 2021* (UK); Andrew Woodcock, 'Government sees off Tory rebellion to defeat "genocide amendment"', *Independent* (online, 22 March 2021, 20:56) <<https://www.independent.co.uk/news/uk/politics/china-xinjiang-genocide-trade-bill-b1820812.html>>.

⁶⁷ Woodcock (n 66).

⁶⁸ 'Lords agrees to Commons Trade Bill compromise', *UK Parliament* (online, 24 March 2021) <<https://www.parliament.uk/business/news/2020/september/lords-debates-trade-bill/>>.

⁶⁹ *Genocide Convention* (n 11) art III(e). See below Part V.

⁷⁰ Bhala (n 6).

III. TRADE AND *JUS COGENS* NORMS

It is generally established in international law that the prohibition of genocide and the prohibition of crimes against humanity are on the short list of *jus cogens* norms.⁷¹ *Jus cogens* norms are those that are internationally recognized to be both the highest of accepted norms in society and obligatory to follow.⁷² Since *jus cogens* norms are obligatory, they induce obligations *erga omnes*.⁷³ Such obligations are ‘owed to the international community as a whole, in which all states have a legal interest’.⁷⁴ The 2019 International Law Commission Report explains: ‘Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts’.⁷⁵ *Jus cogens* norms are peremptory because they are non-derogable.⁷⁶ The 2019 International Law Commission Report also provides a non-exhaustive list of examples of current *jus cogens* norms:

- (a) The prohibition of aggression;
- (b) The prohibition of genocide;
- (c) The prohibition of crimes against humanity;
- (d) The basic rules of international humanitarian law;
- (e) The prohibition of racial discrimination and apartheid;
- (f) The prohibition of slavery;
- (g) The prohibition of torture;
- (h) The right of self-determination.⁷⁷

For example, the International Court of Justice (‘ICJ’) explains in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* the *jus cogens* nature of genocide:

The principles underlying the [Genocide] Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation ... [and have a] universal character both of the condemnation of genocide and of the cooperation required ‘in order to liberate mankind from such an odious scourge’.⁷⁸

⁷¹ *International Law Commission Report on the Work of Its Seventy-First Session*, UN Doc A/74/10 (2019) 145 [56, Conclusion 17] (‘2019 International Law Commission Report’).

⁷² *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 32 (‘VCLT’).

⁷³ *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Judgment)* [1970] ICJ Rep 3. 32 [34]. See also *2019 International Law Commission Report* (n 71) 145 [56, Conclusion 17].

⁷⁴ *2019 International Law Commission Report* (n 71) 145 [56, Conclusion 17].

⁷⁵ *Ibid.*

⁷⁶ *Ibid.* 142 [56, Conclusion 2].

⁷⁷ *Ibid.* 146 [56, Conclusion 23].

⁷⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion)* [1951] ICJ Rep 15.

Trade and *jus cogens* norms should not, and cannot, be bifurcated in the way that they have been and currently are.⁷⁹ The WTO system currently only deals with trade and does not directly address the violation of *jus cogens* norms.⁸⁰ However, *GATT* Article XXI(c) states: ‘Nothing in this Agreement shall be construed ... (c) to prevent any contracting party from taking any action in pursuance of its obligations under the UN Charter for the maintenance of international peace and security’.⁸¹

Further, Article 53 of the *Vienna Convention on the Law of Treaties* (*VCLT*) states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

As such, the WTO must account for *jus cogens* norms (peremptory norm of general international law).⁸² The 2019 International Law Commission Report explains the application of *jus cogens* norms within the context of the WTO system:

A resolution, decision or other act of an international organization that would otherwise have binding effect does not create obligations under international law if and to the extent that they conflict with a peremptory norm of general international law (*jus cogens*) ... Other international organizations, such as ... the World Trade Organization may also produce resolutions, decisions or other acts that, but for the rule set forth in this draft conclusion, would have binding effect.⁸³

This is because a *jus cogens* norm ‘is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’.⁸⁴ Thus, via *GATT* Article XXI(c) and *VCLT* Article 53, there are specific contexts to bring violations of *jus cogens* norms within the scope of the WTO system.⁸⁵

The relationship between trade coupled with genocide and crimes against humanity is not a new one. For example, Isaac Kamola argues that the global coffee

⁷⁹ *GATT* (n 1); *Genocide Convention* (n 11).

⁸⁰ *Ibid.*

⁸¹ *GATT* (n 1) art XXI(c).

⁸² *VCLT* (n 72) art 53; *GATT* (n 1) art XXI(c); Sarah H. Cleveland, ‘Human Rights Sanctions and International Trade: A Theory of Compatibility’ (2002) 5(1) *Journal of International Economic Law* 133, 149. See also 2019 *International Law Commission Report* (n 71) 145 [56, Conclusion 16].

⁸³ 2019 *International Law Commission Report* (n 71) 145 [56, Conclusion 16].

⁸⁴ *Ibid.* 142 [56, Conclusion 2].

⁸⁵ *GATT* (n 1) art XXI(c); *VCLT* (n 72) art 53.

trade played a key role leading up to the Rwandan Genocide and argues trade similarly plays a role in other conflicts as well:

Today most of the academic production concerning the genocide in Rwanda remains wedded to the concept of 'ethnic conflict' which, while necessary to explain the genocide, is not sufficient. Reducing the violence to an exceptional 'ethnic conflict' threatens to depoliticise academic representation by giving the genocide no explanation other than itself. This trend is also pervasive in contemporary academic reproduction of conflicts in Congo, Bosnia, Liberia, Haiti, Sudan, Palestine, Chechnya, Sierra Leone, Iraq, Kosovo, Somalia and Afghanistan, among other places, which tends to focus on the local ethnic, religious or nationalist extremism as the essential cause of violence. These accounts help insure that the complex and violent contradictions produced within the capitalist global mode of production [sic] are treated as merely isolated exceptions and, therefore, invisible to critique.⁸⁶

Kamola demonstrates that genocide contains different dimensions ripe for exploration, apart from the 'ethnic conflict' itself.⁸⁷ One of these dimensions is the impact trade has on genocide and crimes against humanity and another is the impact genocide and crimes against humanity have on trade.

Another example is the Kimberley Process Certification Scheme (KPCS) which was established to remove conflict diamonds from the global supply chain.⁸⁸ The KPCS helped to jumpstart investigations into conflict diamonds and former ICC Chief Prosecutor Louis Moreno Ocampo initiated an investigation into companies and businesses in 29 countries suspected of dealing in conflict diamonds taken from the Democratic Republic of Congo, explaining that such companies and businesses may have been complicit in genocide.⁸⁹ While the success of the KPCS is debated by scholars, the KPCS has resulted in the reduction of the conflict diamond trade to less than 1 percent of the world's diamond trade, which is down significantly from

⁸⁶ Isaac A Kamola, 'The Global Coffee Economy and the Production of Genocide in Rwanda' (2007) 28(3) *Third World Quarterly* 571, 587. See also Katie McQue, 'The Global Coffee Trade's Role in The Rwandan Genocide', *New Internationalist* (online, 17 April 2019) <<https://newint.org/features/2019/04/17/global-coffee-trade's-role-rwandan-genocide>>.

⁸⁷ Kamola (n 99).

⁸⁸ 'What is the Kimberley Process?', *Kimberley Process* (online) <<https://www.kimberleyprocess.com/en/what-kp>>. See also 'Firms face 'blood diamond' probe', *BBC* (online, 23 September, 2003, 17:17 GMT) <<http://news.bbc.co.uk/2/hi/business/3133108.stm>>; Julie L. Fishman, 'Is Diamond Smuggling Forever? The Kimberley Process Certification Scheme: The First Step Down the Long Road to Solving the Blood Diamond Trade Problem' (2005) 13(2) *University of Miami Business Law Review* 217.

⁸⁹ Fishman (n 101).

the range of between 4 to 15 percent that the KPCS estimated it was previously between the mid-1990s to the beginning of the 2000s.⁹⁰

The inextricable relationship between world trade and the PRC's genocide and crimes against humanity against the Uyghurs is that the targeted internment of Uyghur and Turkic Muslim people for their religious practice allows for a forced labor regime in the XUAR, which in turn supplies the global economy with products of genocide and crimes against humanity.⁹¹ A challenge the WTO must overcome is that to prevent genocide and crimes against humanity states should be able to restrict the trade of certain goods. Further, the prevention of genocide and crimes against humanity could lead to the demise of the trade in certain goods if, as is the case here, a major producer of those goods is the one committing genocide and crimes against humanity.⁹² A February 2021 Report by the Center for Strategic & International Studies explains how the XUAR produces around twenty percent of the world's cotton and the PRC is the world's largest producer and exporter of yarn, textiles, and apparel.⁹³ The same report concludes:

Commitments and laws aimed at eliminating inputs linked to XUAR forced labor from the supply chain may remain mostly symbolic until: (1) the capacity to trace products back to their source is significantly strengthened; and (2) stakeholders work together to rapidly develop alternative sourcing hubs that provide cost-effective alternatives that abide by labor rights.⁹⁴

However, experts report that the development of new sourcing hubs typically requires around 10 years *without government intervention*.⁹⁵ Thus, with government intervention, the WTO system has the potential to overcome this challenge by committing to a new, nonvoluntary agreement that conditions WTO membership on compliance with *jus cogens* norms – including the prohibitions of genocide and crimes against humanity.

⁹⁰ Cf Nigel Davidson describing three major problems with the KPCS, including (1) the role of diamonds in ongoing conflicts in Côte d'Ivoire, the DRC and Zimbabwe; (2) that Zimbabwe and Venezuela do not comply with the KPCS; and (3) calls for KPCS to be ended: Nigel Davidson, *The Lion that Didn't Roar: Can the Kimberley Process Stop the Blood Diamonds Trade?* (ANU Press, 2016) chs 2, 9.; Tracey Michelle Price, 'The Kimberley Process: Conflict Diamonds, WTO Obligations, and the Universality Debate' (2003) 12(1) *Minnesota Journal of International Law* 1, 69 (concluding that the universality requirement of the KPCS does not violate the *GATT*).

⁹¹ See, eg, John Sudworth, 'China's "tainted" cotton', BBC (December 2020) <<https://www.bbc.co.uk/news/extra/nz0g306v8c/china-tainted-cotton>>.

⁹² *GATT* (n 1); *Genocide Convention* (n 11) art I.

⁹³ Amy K Lehr and Henry C Wu, *Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region Collective Action to Develop New Sourcing Opportunities* (Report from the Center for Strategic & International Studies, February 2021) ch 5.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

IV. IS THE WTO COMPATIBLE WITH *JUS COGENS* NORMS?

The WTO currently has requirements of nondiscrimination in trade, and exceptions therefrom, but no requirement to comply with *jus cogens* norms or face specific discrimination.⁹⁶ However, while preventing protectionism and promoting nondiscrimination can have workable exceptions, compliance with *jus cogens* norms cannot and does not have exceptions.⁹⁷

GATT Article XX covers the “General Exceptions” to the *GATT*.⁹⁸ The chapeau of Article XX provides two restrictions when such measures are applied by states, explaining that measures must not (1) ‘constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ or (2) be ‘a disguised restriction on international trade’.⁹⁹ However, none of the “General Exceptions” listed in Article XX provides direct recourse for Member States to justifiably discriminate against another states goods when that Member State is violating *jus cogens* norms – specifically the prohibitions of genocide and crimes against humanity.¹⁰⁰ Rachel Harris and Gillian Moon explain:

GATT art XX is an exceptions clause, as opposed to a true ‘defence’ ... *GATT* obligations ... only extend to the point where they do not encroach upon the policy areas reserved in art XX’s sub-articles ... Whether or not a measure will fall within the policy space reserved by art XX requires the application of open-textured tests ... which subject prima facie *GATT* non-compliant measures to certain conditions, rather than prohibiting them outright. This lack of binary sanction or prohibition militates against the finding of ‘hard’ legal conflicts between the *GATT* and human rights norms.¹⁰¹

Article XX states, in relevant part, that the *GATT* does not ‘prevent the adoption or enforcement by any contracting party of measures: (a) necessary to protect public morals; (b) necessary to protect human ... life or health; ... (e) relating to the products of prison labour’.¹⁰² Regarding Article XX(a), in *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, the Panel stated that ‘the term “public morals” denotes standards of right and wrong conduct

⁹⁶ *GATT* (n 1) arts I, III.

⁹⁷ *VCLT* (n 72). See, eg, *GATT* XXIV allows for the formation of customs unions and free trade areas: *GATT* (n 1) art XXIV.

⁹⁸ *GATT* (n 1) art XX.

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*

¹⁰¹ Rachel Harris and Gillian Moon describing James Harrison’s interpretation that ‘public morals’ is broad enough to include all human rights norms and principles and Robert Howse’s similar interpretation: Rachel Harris and Gillian Moon, ‘*GATT* Article XX and Human Rights: What Do We Know from the First Twenty Years?’ (2015) 16 *Melbourne Journal of International Law* 1, 22. See also Howse and Mutua (n 17).

¹⁰² *GATT* (n 1) art XX.

maintained by or on behalf of a community or nation'.¹⁰³ Also, in China – *Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, the Panel commented that 'the content and scope of the concept of "public morals" can vary from Member to Member, as they are influenced by each Member's prevailing social, cultural, ethical and religious values'.¹⁰⁴ Harris and Moon explain further that 'GATT art. XX(b) is also open to broad interpretation. This may include measures that protect all aspects of physical and psychological health and wellbeing'.¹⁰⁵ However, it is unclear whether Article XX(b) refers to the human health and life of the people of another member state against whose products restrictions are imposed, as states usually invoke Article XX to protect the health of their own people. Also, Omphemetse Sibanda explains that '[i]t is worth noting the absence of the "necessary" qualification in GATT Article XX(e) on prison labour, which is present in a similar provision in the Agreement of Government Procurement. GATT Article XX(e) only requires that the measure be "relating to" products of prison labour'.¹⁰⁶

In the case of the PRC's genocide and crimes against humanity against the Uyghurs, Article XX(e) provides at least some scope for member states, but it is not enough. Article XX only allows exceptions for each member state to unilaterally object, and does not require member states to act.¹⁰⁷ Member states also face impractical enforcement of their unilateral objections under Article XX through domestic customs.¹⁰⁸ In the context of the PRC's genocide and crimes against humanity against the Uyghurs, US federal law 'prohibits the importation of merchandise mined, manufactured, or produced, wholly or in part, by forced labor, including convict labor, forced child labor and indentured labor'.¹⁰⁹ In June 2020, the US Customs and Border Protection ('CBP') issued a Withhold Release Order ('WRO') against certain human hair products produced by Lop County Meixin

¹⁰³ *United States — Measures Affecting the Cross-Border Supply of Gambling and Betting Services* ('US — Gambling'). See also Harris and Moon (n 114) 21–22.

¹⁰⁴ *China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*. See also Harris and Moon (n 114) 21–22.

¹⁰⁵ *Ibid.* 22.

¹⁰⁶ Omphemetse Sibanda, 'A human rights approach to World Trade Organization trade policy: Another medium for the promotion of human rights in Africa' (2005) 5(2) *African Human Rights Law Journal* 378, 402.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*

¹⁰⁹ 19 USC § 1307.

Hair Product Co. Ltd (Meixin) in the XUAR ‘based on information that reasonably indicated the use of prison labor with additional situations of forced labor’.¹¹⁰ As a result, that same month, the CBP seized thirteen tons of human hair products taken from Uyghurs interned and manufactured with forced labor.¹¹¹ In September 2020, the CBP subsequently announced several WROs against certain re-education and forced labor camps in the XUAR.¹¹² Also, in January 2021, the CBP issued WROs against cotton and tomato products produced in the XUAR ‘based on information that reasonably indicates the use of detainee or prison labor and situations of forced labor’.¹¹³ These WROs are seemingly *GATT* compliant in that they fall under Article XX(e) ‘relating to the products of prison labour’.¹¹⁴ While the WROs are well-focused, they surely cannot be implemented broadly enough to effectively prevent all products of forced labor from being imported.¹¹⁵

The chapeau of Article XX provides two restrictions when the ‘General Exceptions’ are used by member states.¹¹⁶ First, measures must not ‘constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail’ and second, they must not be ‘a disguised restriction on international trade’.¹¹⁷ In *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body explained ‘The task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking

¹¹⁰ ‘CBP Issues Detention Order on Hair Products Manufactured with Forced Labor in China’, (Press Release, US Customs and Border Protection, 17 June 2020) <<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-hair-products-manufactured-forced-labor-0>>.

¹¹¹ Martha Mendoza, ‘AP Exclusive: Hair Weaves from Chinese Prison Camps Seized’ *AP News* (online, 3 July 2020) <<https://apnews.com/article/fff5fc7925f09916bf6b9d5f79bb4132>>; Rebecca Wright et al., ‘“Black Gold”: How Global Demand for Hair Products is Linked to Forced Labor in Xinjiang’, *CNN* (October 2020) <<https://www.cnn.com/interactive/2020/10/asia/black-gold-hair-products-forced-labor-xinjiang/>>.

¹¹² ‘DHS Cracks Down on Goods Produced by China’s State-Sponsored Forced Labor’, *US Department of Homeland Security* (online, 14 September 2020) <<https://www.dhs.gov/news/2020/09/14/dhs-cracks-down-goods-produced-china-s-state-sponsored-forced-labor>>.

¹¹³ ‘CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang’, (Press Release, US Customs and Border Protection, 13 January 2021) <<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>>.

¹¹⁴ *GATT* (n 1) art XX.

¹¹⁵ See, eg, ‘CBP Issues Detention Order on Hair Products Manufactured with Forced Labor in China’ (n 95).

¹¹⁶ *GATT* (n 1) art XX.

¹¹⁷ *Ibid.*

out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions (e.g., Article XI) of the *GATT* 1994' [sic] and that this balance must be determined on a case-by-case basis.¹¹⁸ In the case of genocide or crimes against humanity, the first requirement that measures cannot 'constitute a means of arbitrary or unjustifiable discrimination' could result in whataboutism or round-about finger-pointing with accusations that a member state claiming the exception is also engaged in genocide or crimes against humanity.¹¹⁹ The second requirement that measures cannot be 'a disguised restriction', functioning as a defense where a member state claims another member is engaged in genocide or crimes against humanity for political purposes or in order to restrict trade, would degrade the use of the terms 'genocide' or 'crimes against humanity'.¹²⁰ The requirement that measures not constitute arbitrary discrimination would hopefully account for this, but it is still possible.

Article XX, as an exception, should only be used in exceptional cases and should not have to be the norm of recourse for countries trying to prevent and to punish genocide or crimes against humanity.¹²¹ The Article XX exceptions specifically reflect an international recognition at the WTO level that what a government allows to be imported reflects that government's values. What does the hindrance of Article XX's chapeau and the ineffective unilateral enforcement via customs in cases of genocide or crimes against humanity say about the values of the WTO, its member states, and their collective goals and priorities?

V. THE WTO AND COMPLICITY IN GENOCIDE AND CRIMES AGAINST HUMANITY

The way countries trade internationally has implications for their potential complicity in genocide or crimes against humanity. In the context of the PRC's genocide and crimes against humanity against the Uyghurs, it is apparent that the WTO and the *Genocide Convention* are not currently compatible.¹²² This must change. The Preamble of the *GATT* 1947 describes how WTO members currently

¹¹⁸ Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/R. (12 October 1998) [156], [159].

¹¹⁹ *GATT* (n 1) art XX.

¹²⁰ *Ibid.*

¹²¹ *GATT* (n 1) art XX; *Genocide Convention* (n 11) art I.

¹²² *GATT* (n 1); *Genocide Convention* (n 11).

enter ‘into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce ...’¹²³ However, member states engage in trade at the expense of explicitly preventing and punishing violations of *jus cogens* norms – specifically genocide and crimes against humanity.¹²⁴ As a result, the WTO is antithetical to the purpose of the *Genocide Convention* where countries, who are ironically parties to both treaties, have agreed to ‘undertake to prevent and to punish’ genocide.¹²⁵

This incompatibility puts current member states in the position of either complying with their obligations to the WTO (to not discriminate against goods exported from the PRC) or the *Genocide Convention* (to prevent and to punish the Uyghur Genocide being perpetrated in the PRC), but being unable to satisfy both.¹²⁶ Thus, regarding the Uyghur Genocide, states party to both the WTO and the *Genocide Convention* that are currently upholding their obligations under the WTO could be committing a violation under the *Genocide Convention* of ‘complicity in genocide’ and those that are trying to comply with their obligations under the *Genocide Convention* by discriminating against the PRC because of the Uyghur Genocide could be violating the *GATT*.¹²⁷ Complicity in genocide is distinguishable from aiding and abetting genocide:

[A]n individual found guilty of committing the crime of complicity in genocide has knowledge, or has recklessly disregarded knowledge, that his actions will assist in the destruction, in whole or in part, of a national, ethnical, racial, or religious group. The perpetrator pursues his actions, not because of the victims’ status, but because this action may result in economic profit or territorial or political gain or for any other non-specific motive.¹²⁸

¹²³ *GATT* (n 1).

¹²⁴ *GATT* (n 1); *Genocide Convention* (n 11) art I.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *GATT* (n 1); *Genocide Convention* (n 11) art III(e); Bonardi (n 11). See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 222.

¹²⁸ Daniel Greenfield further distinguishes the crimes of complicity in genocide and aiding and abetting genocide: Daniel M Greenfield, ‘The Crime of Complicity in Genocide: How the International Criminal Tribunals for Rwanda and Yugoslavia Got It Wrong, and Why It Matters’ (2008) 98(3) *Journal of Criminal Law and Criminology* 921, 924.

For instance, there is overwhelming evidence that the Myanmar military perpetrated genocide against the Rohingya population, and the case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* is currently before the ICJ.¹²⁹ Myanmar needs arms to continue its genocide and crimes against humanity against the Rohingya population.¹³⁰ A UN Report published by the Independent International Fact-Finding Mission on Myanmar explains:

Of 14 companies identified as having supplied military equipment to the Tatmadaw since 2016, 12 are foreign SOEs. The Mission identified SOEs of China, Democratic People's Republic of Korea, India, Russia, and Ukraine involved in major arms or arms-related deals with Myanmar. Israel also exported arms to Myanmar before an order of its Supreme Court prohibited further sales . . . [And that b]ased on the types of items and assistance provided, China, Democratic People's Republic of Korea, Israel, Russia, and Ukraine knew or ought to have known that doing so would have a direct and reasonably foreseeable adverse impact on the human rights of people in Myanmar.¹³¹

As such, other states are facilitating genocide and crimes against humanity by supplying arms to Myanmar.¹³² Similar to the case of the PRC's genocide and crimes against humanity, states' continued trade with Myanmar could amount to complicity in genocide and crimes against humanity.¹³³

Here, the member states that have recognized the Uyghur Genocide specifically have knowledge, and the member states that have not recognized the Uyghur Genocide have *recklessly disregarded knowledge* that their continued importation of products from the XUAR will assist the PRC to continue its genocide or crimes against humanity against the Uyghur.¹³⁴ The ICJ explained in *Application of the*

¹²⁹ In 2019, the Independent International Fact-Finding Mission on Myanmar concluded that Myanmar is failing to prevent or investigate genocide against the Rohingya population: Independent International Fact-Finding Mission on Myanmar, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN Doc A/HRC/42/CRP.5 (16 September 2019) 176 [667]. See also Hannah Beech, Saw Nang, and Marlise Simons, '“Kill All You See”: In a First, Myanmar Soldiers Tell of Rohingya Slaughter' (online, 8 September 2020, Updated 19 October 2021) < <https://www.nytimes.com/2020/09/08/world/asia/myanmar-rohingya-genocide.html>>. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Order)* [2020] ICJ Rep 3.

¹³⁰ The Independent International Fact-Finding Mission on Myanmar also concluded that India and the Philippines should not have transferred arms to the Tatmadaw: Independent International Fact-Finding Mission on Myanmar, *The economic interests of the Myanmar military*, UN Doc A/HRC/42/CRP.3 (12 September 2019) 55 [154], 59 [167].

¹³¹ Ibid.

¹³² Ibid.

¹³³ *Genocide Convention* (n 11) art III(e).

¹³⁴ While recognition certainly creates obligations under the *Genocide Convention* to respond to genocide, such obligations should not prevent states from recognizing genocide whenever and wherever it is perpetrated. See above Part II, Subsection A.

Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro):

In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit.¹³⁵

In the existing WTO framework, Article XX(e), which allows an exception 'relating to the products of prison labour', is the only recourse for WTO members to uphold their *erga omnes* obligations to *jus cogens* norms. If member states do not *at least* invoke Article XX(e) against the PRC, they are at risk of being complicit in the Uyghur Genocide.¹³⁶ Furthermore, WTO member state or not, any state that continues their trade with the PRC, a state actively engaged in genocide and crimes against humanity, is arguably complicit in such crimes.

While Article XX claims not to prevent member states from unilaterally discriminating for specific reasons, it does not go far enough and mandate that member states must act in certain cases where a state violates *jus cogens* norms.¹³⁷ Further, Article XX's effectiveness is inhibited in cases of genocide or crimes against humanity by the requirements of Article XX's chapeau that measures cannot 'constitute a means of arbitrary or unjustifiable discrimination' or be 'a disguised restriction' and the burden on states to unilaterally enforce trade restrictions via customs.¹³⁸ However, Article XX is currently the only WTO recourse for the 131 governments that are States Party to both the WTO and the *Genocide Convention* as a means to prevent and to punish genocide or crimes against humanity indirectly.¹³⁹ Thus, until the WTO explicitly requires discriminatory trade measures against a member state committing genocide or crimes against humanity, WTO Members

¹³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) (Judgment)* [2007] ICJ Rep 43, 222.

¹³⁶ *Genocide Convention* (n 11) art III(e); Bonardi (n 11). However, because necessary products are exported from the XUAR to many countries, invoking relevant subsections of Article XX may disturb supply chains unless a new source origin is established. See generally Hannah Abdulla, 'What will it take to cut Xinjiang cotton from apparel supply chains?' (online, 10 February 2021) <https://www.just-style.com/analysis/what-will-it-take-to-cut-xinjiang-cotton-from-apparel-supply-chains_id140676.aspx>.

¹³⁷ *GATT* (n 1) art XX.

¹³⁸ *Ibid.*

¹³⁹ *GATT* (n 1); *Genocide Convention* (n 11) art I; Bonardi (n 11).

that do not *at least* invoke the limited scope of Article XX (such as Article XX(e)) against the products of a state committing genocide or crimes against humanity are at risk of being complicit in genocide.¹⁴⁰

The facts that 131 governments are states party to *both* the WTO system and the *Genocide Convention* and 110 member states of the WTO system are also states party to the *Rome Statute* should show a great deal of international commitment to free trade as well as preventing and punishing genocide and crimes against humanity. Nevertheless, ironically at present the continuation of international trade is valued at the expense of upholding *jus cogens* norms.¹⁴¹ If States are committed to *jus cogens* norms under their *erga omnes* obligations, then the current WTO must be reimagined.¹⁴²

VI. THE WTO: AN IMAGINED COMMUNITY

Addis and Harari describe genocide, markets, and states as ‘imagined communities’.¹⁴³ In cases of genocide, the perpetrators imagine a community in which their victim group no longer exists.¹⁴⁴ Addis explains, ‘Genocide is a pivotal event which is both a consequence and a cause of imagining communities in a certain way. To be sure, the community imagined is perversely premised on the negation of the very existence of the target community’.¹⁴⁵ Genocide brings about an imagined community.¹⁴⁶

In the case of the Uyghur Genocide, the PRC imagines a community with a Han Chinese dominance and the eradication of the Uyghurs.¹⁴⁷ The Uyghurs are a

¹⁴⁰ *GATT* (n 1); *Genocide Convention* (n 11) art. III(e); Bonardi (n 11); Cleveland asking whether the *GATT* requires member states to trade with other member states engaged in genocide or other human rights abuses: Cleveland (n 95) 148.

¹⁴¹ *GATT* (n 1); *Genocide Convention* (n 11) art I; Bonardi (n 11).

¹⁴² *Ibid.*

¹⁴³ Harari, *Sapiens* (n 9) 362; Adeno Addis, ‘Genocide and Belonging: Processes of Imagining Communities’ (2017) 38(4) *University of Pennsylvania Journal of International Law* 1041, 1055.

¹⁴⁴ Addis (n 165).

¹⁴⁵ *Ibid* 1055–56.

¹⁴⁶ *Ibid.*

¹⁴⁷ See, eg, Newlines Report quoting officials saying to ‘“round up everyone who should be rounded up,” “wipe them out completely ... destroy them root and branch,” and “break their lineage, break their roots, break their connections, and break their origins”’: Newlines Report (n 26) 3 [4]; Zenz concluding ‘The population control regime instituted by CCP authorities in Xinjiang aims to suppress minority population growth while boosting the Han population through increased births and in-migration’: Zenz (n 26) 3.

predominately Muslim, distinct Turkic group indigenous to the XUAR.¹⁴⁸ Ethnic tensions between China and the Uyghurs are decades and even centuries old.¹⁴⁹ The PRC has worked to integrate the XUAR through the ‘in-migration’ of a Han Chinese population since 1949.¹⁵⁰ In July 2009, the PRC’s integration efforts culminated in deadly ethnic violence between Uyghurs and Han Chinese in the XUAR.¹⁵¹ The outcome of this was that the PRC conflated Uyghurs with terrorists to suppress separatism.¹⁵² The PRC thus began its genocide and crimes against humanity on Uyghurs to solidify a Han Chinese dominance in the XUAR under the guise of combatting terrorism.¹⁵³ As such, the PRC’s genocide and crimes against humanity against the Uyghurs is working to bring about the imagined community of a harmonized Han Chinese dominance.¹⁵⁴

Similarly, Harari describes an imagined community as ‘a community of people who don’t really know each other, but imagine that they do’.¹⁵⁵ Markets are an imagined community because they can be global and far-reaching but allow market members to imagine that they know each other because, for example, they wear the same clothes.¹⁵⁶ States are also imagined communities because, similarly, they allow large groups of people to imagine that they all know each other because they, for example, fly the same flag, but in fact, no single person in a state of millions can know everyone.¹⁵⁷ Harari describes how ‘Markets and states today provide most of the material needs once provided by communities ... by fostering “imagined communities” that contain millions of strangers, and which are tailored to national and commercial needs’.¹⁵⁸ It follows that markets and states not only

¹⁴⁸ Chiao-Min Hsieh and Victor C Falkenheim, ‘Xinjiang’ *Encyclopedia Britannica* (online, 9 August 2018) <<https://www.britannica.com/place/Xinjiang>>; Syrian Accountability Project, *The 2022 Winter Olympics and Genocide: A History of Enabling Atrocities and the Path Forward* (Report, January 2022).

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

¹⁵² Ibid.

¹⁵³ Ibid.

¹⁵⁴ *Newlines Report* (n 26); Zenz (n 26).

¹⁵⁵ Harari, *Sapiens* (n 9) 362.

¹⁵⁶ Ibid.

¹⁵⁷ Harari, *Sapiens* (n 9) 362; Harari explaining how difficult it is to identify with a nation: ‘I can name my two sisters and eleven cousins and spend a whole day talking about their personalities, quirks, and relationships. I cannot name the eight million people who share my Israeli citizenship, I have never met most of them, and I am very unlikely to ever meet them in the future. My ability to nevertheless feel loyal to this nebulous mass is not a legacy from my hunter-gatherer ancestors but a miracle of recent history’: Harari, *21 Lessons For The 21st Century* (n 8) 111.

¹⁵⁸ Harari, *Sapiens* (n 9) 362.

provide material needs for the ‘millions of strangers’, but they also get to choose the sources.¹⁵⁹ Thus, when another state is engaged in genocide, do markets and states imagine their ‘millions of strangers’ working, eating, sleeping, and living using products of genocide? Do markets and states question whether the strangers will care? Whether the strangers will know?

Since states are imagined communities, it follows that the WTO is an imagined community of states.¹⁶⁰ The Preamble of the *Marrakesh Agreement*, built upon the Preamble of the *GATT* 1947, describes the community it imagined:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to 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 ...¹⁶¹

Notably, the Preamble of the *Marrakesh Agreement* does not refer to upholding *jus cogens* norms.¹⁶² While the WTO should not be the sole mechanism used to prevent and to punish genocide or crimes against humanity, as a major multilateral economic system, it could be a vital organization to do so effectively. The WTO should facilitate the aims of the UN to maintain international peace and security.¹⁶³ Compliance with *jus cogens* norms clears the way for maintaining international peace and security.

The world has developed and changed significantly since the WTO was established in 1994. The world has experienced the impacts of globalization, saw the rise of e-commerce, terrorism, war, genocide, increasing climate disaster, and pandemics.¹⁶⁴ It is time for the WTO member states to imagine more.¹⁶⁵ So, what kind of global community would the WTO like to imagine and foster for the future of global trade governance?

¹⁵⁹ See generally Abdulla (n 154).

¹⁶⁰ Harari, *Sapiens* (n 9) 362.

¹⁶¹ *Marrakesh Agreement* (n 1); *GATT* (n 1).

¹⁶² *Ibid.*

¹⁶³ ‘History of the UN’ (n 19).

¹⁶⁴ See generally Angelo Young and John Harrington, ‘World history: These are among the most important global events to happen annually since 1920’ *USA Today* (online, 6 September 2020, 7:00 AM ET) <<https://www.usatoday.com/story/money/2020/09/06/the-worlds-most-important-event-every-year-since-1920/113604790/>>.

¹⁶⁵ *Ibid.*

VII. CONDITIONING WTO MEMBERSHIP ON COMPLIANCE WITH *JUS COGENS* NORMS

The argument for linkage is sterile.¹⁶⁶ Instead, '[t]he real debate is not about linkage. It is about the shape of a growing interest in an imagined global governance'.¹⁶⁷ If respect for *jus cogens* norms was embedded in the Preamble of the WTO, this would justify states' actions to uphold *jus cogens* norms. *VCLT* Article 31 states, in relevant part:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise . . . its preamble and annexes.¹⁶⁸

If respect for *jus cogens* norms was incorporated into the Preamble, then any relevant provisions would be read in the context of the Preamble.¹⁶⁹ However, an amendment to the *GATT* Preamble or Article XX would not be sufficient to make the WTO compatible with the *Genocide Convention*.¹⁷⁰ While an amendment to the *GATT* Preamble mandating member states' compliance with *jus cogens* norms would be considered within the 'context' of the WTO itself, an amendment to the Preamble would be impracticable because the complexity of the prohibition of genocide and crimes against humanity necessitates further elaboration in an additional agreement. For instance, *TRIPS* regulates trade in intellectual property, but including a provision on intellectual property in the preamble of the WTO is impracticable.¹⁷¹

Also, an amendment to Article XX would be insufficient because the 'General Exceptions' under Article XX are elective and Member States are not required to take such action.¹⁷² Further, the requirements of the chapeau of Article XX that

¹⁶⁶ Dillon arguing 'Of all the over-used words in the vocabulary of international trade law studies, "linkage" is the most depleted of meaning': Dillon (n 3) 88.

¹⁶⁷ Dillon (n 3) 92–93. But see Harari arguing that '[T]he only real solution is to globalize politics. This does not mean establishing a "global government" – a doubtful and unrealistic vision. Rather, to globalize politics means that political dynamics within countries and even cities should give far more weight to global problems and interests': Harari, *21 Lessons For The 21st Century* (n 8) 126.

¹⁶⁸ *VCLT* (n 72) art 31.

¹⁶⁹ *Ibid.*

¹⁷⁰ *GATT* (n 1); *Genocide Convention* (n 11).

¹⁷¹ *TRIPS* (n 2).

¹⁷² *GATT* (n 1) art XX.

measures must not (1) 'constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' or (2) be 'a disguised restriction on international trade' would pose a political barrier and uphill battle to implementing such measures.¹⁷³ As such, an amendment to Article XX would not be an enumeration of compliance with *jus cogens* norms, but rather would contradict the non-derogable nature of *jus cogens* norms by allowing member states to permissively comply with them.¹⁷⁴ Thus, such an amendment to either the *GATT* Preamble or Article XX would be impracticable and insufficient for the WTO system to become compatible with *jus cogens* norms.

As such, the WTO system could become compatible with *jus cogens* norms and *erga omnes* obligations with a new agreement to ensure such compliance.¹⁷⁵ The fact that 33 WTO member states are not states party to the *Genocide Convention* evidences that the WTO system lacks the requirement that its member states be committed to the prevention and punishment of genocide and crimes against humanity before acceding to the WTO.¹⁷⁶ Further, the overwhelming evidence that the PRC, a WTO member state, is currently alleged to be committing genocide and crimes against humanity against the Uyghurs shows that the WTO does not require its members to prevent and to punish genocide or crimes against humanity.¹⁷⁷ Further, 38 WTO member states are not states party to the *Rome Statute*.¹⁷⁸ While there is no international treaty dedicated to crimes against humanity, the *Rome Statute* contains an extensive list of the acts which may constitute crimes against humanity.¹⁷⁹

Membership in the WTO should be conditioned on compliance with *jus cogens* norms.¹⁸⁰ While the WTO should not be the sole mechanism used to prevent and to punish genocide and crimes against humanity, as a major multilateral economic system, it is a vital organization to do so effectively. José Alvarez argues that 'If the past is prologue, the WTO will need to build a political consensus (at both national

¹⁷³ Ibid.

¹⁷⁴ See above Part III.

¹⁷⁵ *GATT* (n 1); *Genocide Convention* (n 11).

¹⁷⁶ *GATT* Article XXXIII states 'A government not party to [the *GATT*] ... may accede to [the *GATT*] ... on terms to be agreed between such government and the contracting parties': *GATT* (n 1) art XXXIII; *Genocide Convention* (n 11); Bonardi (n 11).

¹⁷⁷ *GATT* (n 1); *Genocide Convention* (n 11) art I; Bonardi (n 11).

¹⁷⁸ Bonardi (n 11).

¹⁷⁹ 'Crimes Against Humanity' (n 24).

¹⁸⁰ *GATT* (n 1); *Genocide Convention* (n 11).

and international levels) before it tries to build a viable trade constitution that fully encompasses issues like human rights'.¹⁸¹ This consensus already exists because 131 of the 162 WTO member states are States Party to the *Genocide Convention*.¹⁸²

In addition to conditioning WTO membership on compliance with *jus cogens* norms, a new agreement could also call for collective sanctions against any member state in violation of *jus cogens* norms.¹⁸³ This new agreement would allow member states to uphold their obligations under the *Genocide Convention* and incorporate them into the WTO via a new agreement.¹⁸⁴ The goals of a collective objection with sanctions and specific discrimination would: (1) provide a mechanism for member states to impose sanctions against states that sponsor the violation of *jus cogens* norms – specifically genocide or crimes against humanity; and (2) force member states committing genocide or crimes against humanity to lose their WTO benefits and face specific discrimination and sanctions until they remedy their violation(s) of *jus cogens* norms.¹⁸⁵

This new agreement could be modelled on, but distinct from other WTO Agreements.¹⁸⁶ Some of the provisions of these agreements could be beneficial to use as starting points for a new agreement.¹⁸⁷ For example, *TRIPS* Article 42 provides that 'Members shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by [*TRIPS*]'.¹⁸⁸ This is relevant to an agreement regarding *jus cogens* norms because, in the early stages of genocide or crimes against humanity, a judicial remedy could provide victims the right to petition their governments and the ability for a record of violations to be created. However, it would still leave each member state's government in control of implementing internal judicial procedures to enforce against any violation of a of *jus cogens* norm. Such a provision would also be ineffective in a case of genocide

¹⁸¹ Alvarez (n 18) 19.

¹⁸² *GATT* (n 1); *Genocide Convention* (n 11); Bonardi (n 11).

¹⁷² *Ibid.*

¹⁸⁴ *Ibid.*

¹⁸⁵ *Ibid.*

¹⁸⁶ 'World Trade Organization Agreements', *International Trade Administration, US Department of Commerce* (online) <<https://www.trade.gov/wto-agreements>>.

¹⁸⁷ *Ibid.*

¹⁸⁸ *TRIPS* (n 2).

or crimes against humanity in which the government is the perpetrator. Such considerations would have to be made during the drafting of a new agreement. Still, a new agreement incorporating *jus cogens* norms could use the *TRIPS* or other WTO Agreements and their specific provisions as starting points.¹⁸⁹

Since there is overwhelming evidence that the PRC, a WTO member state, is currently committing genocide and crimes against humanity against the Uyghurs, a new agreement to comply with *jus cogens* norms is necessary not only to prevent the genocide and crimes against humanity and to punish the PRC, but for the other member states to avoid being complicit in the crimes by boycotting specific products and, if necessary, stopping trade with the PRC.¹⁹⁰ Thus, the WTO should add a new agreement to be compatible with the *Genocide Convention* and to ensure member states' compliance with *jus cogens* norms.¹⁹¹

Although 131 WTO members support the prevention and punishment of genocide and 110 member states agree on the international definition for crimes against humanity, the difficulty in reaching a new agreement cannot be overstated. For example, due to the COVID-19 pandemic, global supply chains have already been stressed.¹⁹² Such an agreement could also disrupt certain chains if back-up sourcing hubs were not in place beforehand.¹⁹³ While reaching a new agreement would be a tremendous political hurdle, states must expand and reimagine the WTO system to reflect their obligations to prevent and to punish genocide and crimes against humanity.¹⁹⁴

¹⁸⁹ *TRIPS* (n 2); 'World Trade Organization Agreements' (n 186).

¹⁹⁰ *GATT* (n 1); *Genocide Convention* (n 11) arts I, III(e); Bonardi (n 11).

¹⁹¹ *GATT* (n 1); *Genocide Convention* (n 11).

¹⁹² Matt Egan, 'The global supply chain nightmare is about to get worse', *CNN Business* (online, 13 October 2021, 7:28 AM ET) <<https://www.cnn.com/2021/10/12/business/global-supply-chain-nightmare/index.html>>; Chuin-Wei Yap, William Boston, and Alistair MacDonald, 'Global Supply-Chain Problems Escalate, Threatening Economic Recovery', *The Wall Street Journal* (online 8 October 2021, 1:42 PM ET) <<https://www.wsj.com/articles/supply-chain-issues-car-chip-shortage-covid-manufacturing-global-economy-11633713877>>.

¹⁹³ See, eg, Lehr and Wu (n 93).

¹⁹⁴ *Genocide Convention* (n 11) art I.

VIII. CONCLUSION

The current WTO system fails to prohibit the violation of *jus cogens* norms.¹⁹⁵ *GATT* Article XX is insufficient at preventing and punishing genocide and crimes against humanity because, while it claims not to prevent member states from unilaterally discriminating for specific reasons, it does not go far enough and mandate that member states must take action in certain cases.¹⁹⁶ Also, Article XX's effectiveness is inhibited in cases of genocide and crimes against humanity by the requirements of Article XX's chapeau that measures cannot 'constitute a means of arbitrary or unjustifiable discrimination' or be 'a disguised restriction' and the burden on member states to unilaterally enforce trade restrictions via customs.¹⁹⁷ Despite the ineffectiveness of Article XX in cases of genocide and crimes against humanity, it is currently the only WTO recourse to prevent and to punish genocide or crimes against humanity indirectly for the 131 governments that are states party to both the WTO and the *Genocide Convention*.¹⁹⁸ Until the WTO explicitly requires discrimination against a member state committing genocide or crimes against humanity, a WTO member state that continues to trade with another member state perpetrating genocide or crimes against humanity, is at risk of being complicit in such crimes.¹⁹⁹

Again, since the WTO is an imagined community, what kind of community would the WTO system like to imagine and foster for the future of global trade governance? If it is one in which it perpetuates a fiction where trade is uncoupled with genocide and crimes against humanity, the accumulation of wealth from trade will be at the cost of a repressed community subject to genocide and crimes against humanity. Instead, if the WTO system re-imagined its narratives and recognized its prior commitments, it could realize a greater potential and the 'profits of peace'.²⁰⁰ Harari explains:

¹⁹⁵ See above Part IV.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ See above Part V.

²⁰⁰ Harari, *Sapiens* (n 9) 374.

While war [has become] less profitable, peace [has become] more lucrative than ever. In traditional agricultural economies long-distance trade and foreign investment were sideshows. Consequently, peace brought little profit, aside from avoiding the costs of war ... In modern capitalist economies, foreign trade and investments have become all-important. Peace therefore brings unique dividends. As long as China and the USA are at peace, the Chinese can prosper by selling products to the USA, trading in Wall Street and receiving US investments.²⁰¹

Can *any* state, regardless of whether it is a state party to the *Genocide Convention* or the *Rome Statute* ever be at peace with a state perpetrating genocide or crimes against humanity?²⁰² Should it be? Thus, a new agreement conditioning WTO membership on compliance with *jus cogens* norms is necessary for states to uphold their obligations to humanity and respect *jus cogens* norms.²⁰³

There may be hope for a new agreement in light of the new, and the first woman and African American, WTO Director-General, Dr Ngozi Okonjo-Iweala.²⁰⁴ In her acceptance speech for the position, Director-General Okonjo-Iweala described her ‘courage and passion ... to undertake the wide ranging reforms the WTO needs to reposition itself for the future’.²⁰⁵ Specifically, she explained how ‘The preamble [to the Marrakesh Agreement] says it all! The WTO is about people! It’s about decent work! Let us place its overarching purpose front and centre as a driver for all we seek to accomplish for the multilateral trading system’.²⁰⁶ Here, a consensus that the WTO system is about people will be the beginning of WTO member states formally recognizing the fundamental rights of those people and coming to a new agreement conditioning WTO membership on compliance with *jus cogens* norms.

²⁰¹ Ibid 373–74.

²⁰² *Genocide Convention* (n 11) art I; Bonardi (n 11).

²⁰³ GATT (n 1); *Genocide Convention* (n 11) art I; Bonardi (n 11).

²⁰⁴ ‘WTO Director-General: Ngozi Okonjo-Iweala’, *World Trade Organization* (online) <https://www.wto.org/english/thewto_e/dg_e/dg_e.htm>.

²⁰⁵ Ngozi Okonjo-Iweala, ‘Statement of Director-General Elect Dr. Ngozi Okonjo-Iweala to the Special Session of the WTO General Council’, (Statement, 13 February 2021) <https://www.wto.org/english/news_e/news21_e/dgno_15feb21_e.pdf>.

²⁰⁶ Ibid.

Public Lecture

‘The Perils of Independence: The Australian Human Rights Commission’s Role In Protecting Human Rights In Australia’

Sir Ronald Wilson Lecture 2021*

4 August 2021

ACKNOWLEDGEMENTS

Thank you Matthew McGuire for your welcome to country and Kendra Turner as MC.

I am speaking from the traditional lands of the Gadigal people of the Eora nation, in the city of Sydney, and pay my respects to elders past, present and emerging. I also acknowledge the Whadjuk people of the Noongar nation, on whose lands I was hoping to speak today.

Thank you to the Law Society of Western Australia and Curtin University, the partners for this event, for inviting me to deliver such an important address. I acknowledge Professor Robert Cunningham, Dean of Law and, from the Law Society of WA, Greg McIntyre SC, Immediate past President and Rebecca Lee, Senior Vice President, as well as Counsellor Coster, and online, Law Society President, Jocelyne Boujous.

I am honoured by so many distinguished guests in attendance. I particularly want to acknowledge the Hon Robert French AC and the Hon Robert Nicholson AO (online) (both prior speakers in this Lecture series), and the Hon Ralph Simmonds (whom I have known in various roles over the years).

If I were to acknowledge everyone, I would eat up a goodly portion of my allocated time so let me acknowledge, generally, other members of the Western Australian judiciary, senior students and their teachers, colleagues, friends.

* Emeritus Professor Rosalind Croucher, President of the Australian Human Rights Commission. ITBLR is grateful to the Law Societies of Western Australia and Curtin University for their permission to publish this public lecture.

INTRODUCTION

In this lecture I hope to honour Sir Ronald Wilson in his role as President of the Australian Human Rights Commission (AHRC – or the Human Rights and Equal Opportunity Commission (HREOC), as it was at the time.

I have deliberately chosen the title ‘Perils of Independence’ and linked it to the *Bringing them Home* Report – the one most identified with Ronald Wilson, which he led jointly with the Aboriginal and Torres Strait Islander Social Justice Commissioner at the time, Mick Dodson. It was an inquiry into the forced removal of Aboriginal children from their families and communities and has become known as the ‘Stolen Generations’ report (the ‘Report’).

I will use *Bringing Them Home* as a case study of the Commission’s role in protecting human rights in Australia.

The Report detailed the historical policy and practice of the removal of Aboriginal children from their families – something that had not been done in an official report before.

The Report also concluded that these practices could be considered as ‘genocide’. The stories told in the Report, and this finding, were shocking and reverberated across the nation. The reaction of government was very negative. Funding cuts followed.

However, over time, the *Bringing Them Home* inquiry and the Report demonstrate the power of independence and the ability of the Commission to contribute to change over a long horizon. The Report is the Commission’s most downloaded report and the educational resources about it also the most accessed.² It is a report of enduring and continuing influence.

There are clear connections with the year 11 and 12 Politics and Law units of the senior school curriculum – on accountability, the protection of rights in Australia and the status of international treaties in this regard, and democracy and the rule of law. I note also that the year 12 syllabus includes ‘Aboriginal and Torres Strait Islander histories and cultures’ as a cross curriculum priority.

I will start with Sir Ronald’s journey to the role of President of HREOC.

¹ The Human Rights and Equal Opportunity Commission, established in 1986 was renamed the Australian Human Rights Commission (AHRC) in 2008. This edition of the public lecture refers to both AHRC and HREOC as Commission.

² See *Bringing Them Home* – Australian Human Rights Commission. The series of resources were developed to mark the 20th anniversary of the report in 2017.

Sir Ron – his journey to President of HREOC³

On 7 February 1990, Sir Ronald Wilson became part-time President of HREOC. He was 67 years of age. He served in that role for seven and a half years.

‘Just call me Ron’, he would say. So I will.⁴

At 5 ft 4 in. in imperial measurements,⁵ Ron was ‘short in stature’, but ‘long in energy’.⁶ Born on 23 August 1922, the youngest of five children, Ron had lost both parents by the time he was 12. At age 14 he left school and on his 15th birthday, he became a permanent public servant in the Record Office of the Crown Law Department in Perth. He learnt to touchtype as part of his administrative exams.⁷ In November 1941, Ron joined the Australian Imperial Forces and served in the Royal Air Force during the Second World War.

After the war, Ron went to the University of Western Australia and, in 1949, graduated with a Bachelor of Laws with First Class Honours and was articled to the Crown Law Department. In 1957, he was appointed the Chief Crown Prosecutor and built a ‘formidable reputation as a forceful, and some would even say a ruthless, prosecutor’.⁸ With increasing civil work, Ron was appointed Crown Counsel in 1961. In November 1963, at age 41, Ron became the youngest person to be appointed a Queens Counsel in Western Australia. In 1969, Ron was made Western Australia’s Solicitor-General.

Ron was appointed to the High Court bench in 1979, under the Coalition government of the Hon Malcolm Fraser MP, where he was regarded as a leading authority on constitutional law.

³ Biographical details of Wilson are drawn principally from: Antonio Buti, *Sir Ronald Wilson: A Matter of Conscience* (University of Western Australia Press, 2007); Antonio Buti, ‘Sir Ronald Wilson: a brief view of his life’ (August, 2005) *Brief* 16; ‘From basement to bench: An interview with Sir Ronald Wilson, first published in *Brief* February 1994’ (August 2005) *Brief* 6; Fred Chaney, ‘Sir Ronald Wilson’ (August, 2005) *Brief* 19; Robert Nicholson, ‘Sir Ronald Wilson: An Appreciation’ (2007) 31 *Melbourne University Law Review* 499; Antonio Buti, ‘The Man and the Judge: Judicial Biographies and Sir Ronald Wilson’ (2011) 32 *Adelaide Law Review* 47. There is also an entry on Wilson by Peter Durack, in Tony Blackshield, Michael Coper and George Williams (eds) *Oxford Companion to the High Court of Australia* (Oxford University Press, 2001), 714–716.

⁴ Antonio Buti, *A Matter of Conscience: Sir Ronald Wilson* (UWA Publishing, 2007) 291 (*Matter of Conscience*)

⁵ Around 162 cm.

⁶ Robert Nicholson, ‘Sir Ronald Wilson: An Appreciation’ (2007) 31 *Melbourne University Law Review* 499 (*Sir Ronald Wilson: An Appreciation*).

⁷ ‘From basement to bench: An interview with Sir Ronald Wilson’, first published in *Brief* February 1994’ (August 2005) *Brief* 6; Fred Chaney, ‘Sir Ronald Wilson’ (August, 2005) *Brief* 6.

⁸ *Matter of Conscience* (n 4) 16.

Ron was the first Western Australian to be appointed to the High Court bench and brought considerable criminal law experience to the role. As was the usual course for appointees to the High Court, Ron was knighted. He was 56 years of age.

Human rights lawyer and academic, Frank Brennan SJ, then a theological student, attended Ron's swearing-in in Brisbane. At the end of Ron's remarks, Brennan recalls turning to a friend and saying, 'I think they have just put a saint on the High Court'.⁹

It was, however, an appointment that Ron accepted reluctantly, out of a sense of duty and loyalty to his State.¹⁰

During his tenure of the High Court, Ron marked himself out as a dissident in the 4:3 decisions in the *Koowarta and Tasmanian Dam* cases.¹¹ He was a legal positivist. His decisions in such crucial constitutional matters concerning the scope of the external affairs power earned him the label of a 'States-righter'.¹²

As Antonio Buti said in his biography of Ron, on which I will draw heavily in this paper::

[Ron] did not much care for such labels. For him, what was important was to be honest to his oath to faithfully uphold the law and the constitution, which included the balance of the Commonwealth-State federal polity. This even meant making decisions that went against what his heart wanted: what he felt compelled to do was reach a decision based solely on reasoned analysis and the law as he saw it. This led him to make decisions that he was later often questioned about, particularly decisions that impacted on Aboriginal people.¹³

In 1989, at age 66 and after nine years on the bench, Ron left the High Court. Shortly after, he became the National President of the Uniting Church of Australia for a three-year term.

⁹ Frank Brennan, 'The Law and Politics of Human Rights in an Isolated Country without a Bill of Rights' Sir Ronald Wilson Lecture 2003, 2 ('The Law and Politics of Human Rights').

¹⁰ He turned down the first invitation to be appointed to the High Court, and accepted 'out of a sense of loyalty to his State Premier, who had urged him to accept in the interests of Western Australia': Antonio Buti, 'The Man and the Judge: Judicial Biographies and Sir Ronald Wilson' ((2011) 32 *Adelaide Law Review* 47, 51; See *Matter of Conscience* (n 4) 175–176.

¹¹ *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1. See eg, the discussion of this period in Nicholson, 'Sir Ronald Wilson', 507–513. It is also considered in Durack's entry on Wilson in the *Oxford Companion to the High Court*.

¹² *Matter of Conscience* (n 4) 263.

¹³ *Ibid* 17.

In February 1990, Ron was appointed as President of HREOC by the Hon. Robert Hawke MP Labor Government, to replace Marcus Einfeld.¹⁴

Ron also became Deputy Chair of the Council for Aboriginal Reconciliation. As Robert Nicholson observed, in that role ‘he tackled some of the most difficult issues of justice facing the nation’.¹⁵

Speaking at the time of his HREOC appointment, Ron said, ‘It never occurred to me I’d have an opportunity to enrich my retirement in this way. I’m delighted’.¹⁶ His attraction to the human rights field was because of his involvement with the Uniting Church, of which he was then National President, and because of the time he had spent with Aboriginal people, ‘listening to their concerns’ and helped to start the Aboriginal Legal Service.¹⁷ (I note the role played by the Hon Robert French to establish the Aboriginal Legal Service of Western Australia).¹⁸

Ron was charismatic. In contrast to the ‘turbulent and tense tenure’ of his HREOC predecessor, Ron was ‘universally liked and admired’. He was welcomed warmly by the Commission staff and his fellow Commissioners.¹⁹

Susan Roberts, who joined the Commission as a senior legal officer in 1994, said that Ron ‘engendered love and respect from the staff and he could light up a room with his presence’.²⁰ The Commission’s Executive Director from September 1995, Diana Temby, said that Ron also had ‘a wicked sense of humour and steely determination’, and that he was ‘absolutely impossible to resist and it was impossible to deal with him on a day to day basis and not love him’.²¹

¹⁴ Ibid 262; Einfeld had been criticised for a number of actions and had become estranged from his staff, including a public disagreement between Einfeld and his colleague, Brian Burdekin, the human rights Commissioner. Buti states that ‘It was this disagreement that many within and outside HREOC saw as “life threatening” for the organisation, particularly in light of the stated objective of the Liberal-National Party Coalition opposition of wanting to abolish it’.

¹⁵ *Sir Ronald Wilson: An Appreciation* (n 4) 514.

¹⁶ *Matter of Conscience* (n 4) 261.

¹⁷ Chris Connolly and Paul Vout, ‘A New Era for the Human Rights Commission?’ 1990 (1) *Polemic* 20, 21.

¹⁸ Noted, for example, in the remarks on behalf of the Law Society of Australia marking the elevation of French J to the High Court <[<https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-October-2008/Welcom-Chief-Justice-Robert-French-\(1\)>](https://www.liv.asn.au/LIV-Home/Practice-Resources/Law-Institute-Journal/Archived-Issues/LIJ-October-2008/Welcom-Chief-Justice-Robert-French-(1))>.

¹⁹ *Matter of Conscience* (n 4) 291.

²⁰ Ibid 291.

²¹ Ibid.

Ron's approach to law and human rights

At the beginning of his time as HREOC President, Ron was described as 'circumspect', and not wanting to embroil the Commission in political controversy. This is particularly understandable given the concerns about his predecessor.²²

But, in the ensuing years, Ron was to become 'more forceful' in expressing his views. Not only did he feel 'unshackled' from the restrictions of judicial office, but he also saw his responsibility as President to speak out on human rights.²³

Ron found his role 'liberating'.²⁴ 'Once again', he said, 'I could do what I loved doing the most – that is, advocating, and now I could do it for the disadvantaged'.²⁵

In September 1991, Ron voiced some of his thoughts about human rights while delivering the Mitchell Oration lecture – an initiative of the Equal Opportunity Commission of South Australia in honour of Dame Roma Mitchell, who had been the foundation President of the Human Rights Commission, the predecessor Commission to HREOC, from 1981 to 1986 (among other roles).

In this Oration, Ron's lecture title was framed as a question: '*Human Dignity for All: A Pie in the Sky?*'

Ron referred to the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* – which together form what is described as the 'International Bill of Human Rights'. He also listed the other human rights instruments then in place,²⁶ and noted that a Declaration on the Rights of Indigenous Peoples was in the process of preparation.

All of this, he said, was a 'respectable body of "law" designed to encourage members of the UN to fulfil the hopes of 1945',²⁷ when the founding document of the UN, the UN Charter, was signed.²⁸

²² Ibid 296.

²³ Ibid 263.

²⁴ Ibid 293.

²⁵ Ibid 293.

²⁶ He referred to the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *Convention on the Elimination of All Forms of Discrimination against Women* and the *Convention on the Rights of the Child*. He added the international standards for refugees, the Declaration on the Rights of Persons with Disabilities, the Convention against torture, the Declaration on the elimination of religious intolerance and discrimination, Principles on the rights of mentally ill persons.

²⁷ Ronald Wilson, '*Human Dignity for All: A Pie in the Sky?*' (Lecture, The Mitchell Oration, 1991) 3 ('*Human Dignity for All*').

²⁸ *Charter of the United Nations*.

In an address to Murdoch University students in 1993, Ron expressed his philosophy on human rights:

It's a question of the inherent dignity belonging to every human being, simply and solely by virtue of his or her humanity. It's a question of equality of opportunity. It is a question of freedom, justice and peace for the whole world community. It is a question of international law and the obligations that Australia has assumed by its adoption and ratification of these instruments.²⁹

To Ron, it was unacceptable for Australia to ratify international human rights instruments and then only *partially* enforce them. He considered that it was his obligation in his role as President of the Commission to advocate for human rights, particularly for the marginalised and disadvantaged sections of the community.³⁰

In an address to the Press Council in Perth in 1991, Ron reflected on how Australia stood with respect to human rights and how our human rights record was 'relatively good by international standards':

Compared with oppressive conditions in many other countries, we can derive some comfort from the way things are in this country. We can point to reasonable laws and considerable expenditure on social welfare. But welfare of itself does little for the human dignity of the recipient. If welfare is not set in the context of a recognition of human worth it will always be deficient. In any event, in assessing a human rights record, the legal framework and well-intentioned administrative measures are only the starting point. The ultimate criteria are to be found in what is happening to people and the attitudes towards each other of those who belong to the one community.

One way of combating complacency is to cease dealing in abstractions, in the currency of noble sentiments and fine words detached from the immediacy and tensions of real life, and to remember that behind every human rights problem there are some people hurting, people longing for a sense of dignity and self-respect, of having a sense of worth in themselves.³¹

He had an acute understanding of his statutory role as President of the Commission and the 'respectable body' of international law that framed it.

And through the exercise of the role in the context the *Bringing Them Home* inquiry, Ron was transformed.

²⁹ Ronald Wilson, 'Why Human Rights Matter for Everyone' (1996) 3(3) *Murdoch University Electronic Journal of Law*, [4] ('*Why Human Rights Matter*').

³⁰ *Matter of Conscience* (n 4) 293.

³¹ *Human Dignity for All* (n 27) 4–5.

Bringing Them Home

On 11 May 1995, the then Attorney-General, the Hon. Michael Lavarch MP, under the Keating Labor Government, appointed the Commission to conduct a National Inquiry on the forcible removal of Aboriginal and Torres Strait Islander children from their families.³² The report was completed in April 1997.

Under the terms of reference, the Commission was asked to do a number of things, including:

to trace –

- the past laws, policies and practices which resulted in the separation of Aboriginal and Torres Strait Islander children from their families, by compulsion, duress or undue influence
- the effects of those laws, policies and practices;

to examine –

- the adequacy of and the need for any changes in current laws, policies and practices relating to services and procedures available to those who were affected
- the principles relevant to determining the justification for compensation for persons affected
- current laws, policies and practices with respect to the placement of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination for Aboriginal and Torres Strait Islander peoples.

The inquiry was initiated, as the Report explains:

in response to increasing concern among key Indigenous agencies and communities that the general public's ignorance of the history of forcible removal was hindering the recognition of the needs of its victims and the provision of services.³³

It was two and half years after International Human Rights Day 1992, when Prime Minister Paul Keating had said in an address at Redfern, to launch the UN International Year of the World's Indigenous Peoples, that 'We took the children from their mothers'.

The inquiry was led by Ron and Mick Dodson, the Aboriginal and Torres Strait Islander Social Justice Commissioner. They took primary responsibility for conducting the hearings of the Inquiry. They were assisted by other HREOC commissioners and by the Queensland Discrimination Commissioner. In each region that the Commission visited, it appointed an Indigenous woman as a co-commissioner.³⁴

³² see *Bringing Them Home: National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, April 1997) ('*Bringing Them Home Report*'); The Terms of Reference are included as an Appendix to this paper.

³³ *Ibid* 18; outlined in Antonio Buti, *A Matter of Conscience: Sir Ronald Wilson* (UWA Publishing, 2007) ch 13.

³⁴ see acknowledgments in *Bringing Them Home Report* (n 32) app 12.

Hearings were held in every state and territory capital city, as well as 32 country centres. The Commission heard from 535 Aboriginal individuals and, in total, from 770 people and organisations. The Commission also received about 1,000 stories in writing and numerous other written submissions, including voluminous submissions from state governments.³⁵

The inquiry led to the *Bringing Them Home Report*.³⁶

Robert Nicholson remarked that Ron's leadership on this inquiry has 'brought to the fore all his considerable personal talents and professional experience, as well as his beliefs and humanity as an individual'.³⁷

But it was also Ron's 'blowtorch moment'.

Blowtorch moment

In my first formal speech in my role as President of the Australian Human Rights Commission, at a conference of the International Bar Association in Sydney, I coined this phrase. I said:

Having a 'Devil's Advocate' for human rights is a healthy, indeed necessary, thing in the context of the promotion and protection of those rights. Even if it means we should expect criticism – for calling out Government against the commitments made to the international community in signing up to the international treaties that set the benchmark for human rights. Even if it means that Government sees us more of the Devil's Blowtorch than the Devil's Advocate.³⁸

One of the questions I have been musing upon in reflecting on the history of the Commission, and especially this year, which marks the 40th anniversary of our establishment following Australia's ratification of the ICCPR, is the 'blowtorch moment' that my predecessors may have faced.

This was Ron's.

Among other recommendations, the *Bringing Them Home Report* recommended the following:

- that an apology should be given for separation, to be participated in by Parliaments and churches, as well as restitution, rehabilitation and monetary compensation.³⁹

³⁵ *Matter of Conscience* (n 4) 311.

³⁶ *Bringing Them Home Report* (n 32).

³⁷ *Sir Ronald Wilson: An Appreciation* (n 4) 514; *Matter of Conscience* (n 4) 325. The suggestion for making it the title of the report is credited to Meredith Wilkie.

³⁸ Rosalind Croucher, 'National Human Rights Commissions – What's the point?', International Bar Association Section on Public and Professional Interests (12 October 2017), 9.

³⁹ *Bringing Them Home Report* (n 32) 284–94, 302–13, 415–21.

- For a national ‘Sorry Day’ to be commemorated.⁴⁰
- For the Commonwealth to legislate and implement fully in domestic law, the *Convention on the Protection and Punishment of the Crime of Genocide* (Genocide Convention), which Australia had ratified in July 1949.⁴¹

The *Bringing Them Home Report* also concluded that:

The Australian practice of Indigenous child removal involved both systematic racial discrimination and genocide as defined by international law. Yet it continued to be practised as official policy long after being clearly prohibited by treaties to which Australia had voluntarily subscribed.⁴²

A section of the Report focused on international human rights.⁴³ It was here that the discussion on genocide is found.⁴⁴

As explained in the *Bringing Them Home* report:

The [Genocide Convention] confirmed that genocide is a crime against humanity. This expressed a shared international outrage about genocide and empowered any country to prosecute an offender. A state cannot excuse itself by claiming the practice was lawful under its own laws or that its people did not (or do not) share the outrage of the international community.⁴⁵

The definition of genocide includes the forcible transfer of children from a racial, ethnic or national group to another group with the intention of destroying that group.⁴⁶

The *Bringing Them Home Report*’s analysis of the application of the Convention’s meaning of ‘genocide’ was a technical one, traversing policies of assimilation and ‘mixed motives’, including the evident ‘good intentions’ of some policies. The conclusion was that the label ‘genocidal’ could properly be applied to the ‘forcible removal of children from Indigenous Australians to other groups for the purpose of raising them separately from and ignorant of their culture and people’:

⁴⁰ Ibid Recommendation 7a.

⁴¹ Ibid 292–5.

⁴² Ibid 266.

⁴³ Ibid 266–275.

⁴⁴ It noted the obligations imposed on Australia under the UN Charter of 1945, as well as the UDHR 1948 and the *International Convention on the Elimination of All Forms of Racial Discrimination* of 1965. It also noted that ‘genocide’ was declared to be a ‘crime against humanity’ by a UN Resolution of 1946, followed by the adoption of the Convention on the Prevention and Punishment of Genocide (Genocide Convention) in 1948.

⁴⁵ *Bringing Them Home Report* (n 32) 270.

⁴⁶ Article II. Australia ratified the Genocide Convention on 8 July 1949.

Official policy and legislation for Indigenous families and children was contrary to accepted legal principle imported into Australia as British common law, and from late 1946, constituted a crime against humanity. It offended accepted standards of the time and was the subject of dissent and resistance. The implementation of the legislation was marked by breaches of fundamental obligations on the part of officials and others to the detriment of vulnerable and dependent children whose parents were powerless to know their whereabouts and protect them from exploitation and abuse.⁴⁷

Within the Commission, however, the question of whether to use the ‘genocide’ label generated a ‘significant debate’.⁴⁸

Ron recognised the shock that would attach to the genocide label, but willingly agreed to it. As Buti explained, the inquiry hearings had been a life changing experience for him:

He had heard story after story of sorrow and pain that had convinced him a major injustice had been done that needed to be understood by all Australians and measures taken to rectify the historical injustices. He, along with the other HREOC commissioners, believed that they had been trusted with the stories, and had to honour that trust. This meant ensuring that the report presented the story and the case for justice, no matter how uncomfortable it would be for White Australia. Wilson was prepared to proceed with and argue the case that the past removal policies and practices constituted genocide.⁵⁰

Mick Dodson, however, was not so sure about the wisdom of using this label.⁵¹

At the November 1996 meeting in Sydney of all the HREOC commissioners, inquiry hearing commissioners, and the Indigenous Advisory Council to discuss the final draft report, Dodson was ‘sceptical of the genocide finding and was not prepared to agree to it’.⁵²

Ron, however, ‘passionately argued with Dodson that the removal practices and policies constituted genocide as proscribed in the Genocide Convention’.⁵³ As Buti explained:

⁴⁷ *Bringing Them Home Report* (n 32) 275.

⁴⁸ Dr Sarah Pritchard and Meredith Wilkie, staff working independently on the research and writing, both concluded that genocide was relevant to the findings and conclusions of the inquiry. Wilkie was a law lecturer at Murdoch, who had been recommended by Chris Sidoti, HREOC’s human rights commissioner to lead the work on the report within the Commission. She was seconded to HREOC for the duration of the inquiry. Under her guidance, consultants were hired to write research papers and draft chapters. Pritchard was briefed from UNSW to deal with the report’s international law dimensions and to assist Wilkie in editing parts of the report. She had completed her PhD at the University of Tübingen in 1994; See *Matter of Conscience* (n 4) 321.

⁴⁹ *Matter of Conscience* (n 4) 324.

⁵⁰ *Ibid* 324.

⁵¹ The Commission’s Annual Report for 1995–96 lists 25 hearing commissioners across all states and territories.

⁵² *Matter of Conscience* (n 4) 325.

⁵³ *Ibid* 325.

Dodson worried about the political ramifications of such a finding. His concerns were prophetic. However, after listening to Wilson's arguments he was persuaded to agree to the genocide finding, as were the other commissioners. It was decided that the term genocide was correct and appropriate and, as Wilson said, 'it gave greater force and persuasion the claims for reparations'.⁵⁴

The 'crux of the argument' was that the removal policy's intention was 'to destroy the Aboriginal race by assimilating the next generation of Aborigines into mainstream European society and culture. The policies intended to assimilate Aboriginal children into white society, so that they would lose their 'Aboriginality'.⁵⁵

The recommendation was a symbolic one: 'That the commonwealth legislate to implement the Genocide Convention with full domestic effect'.⁵⁶

In his Sir Ronald Wilson Lecture, Robert Nicholson said that, '[t]hese and other recommendations entered the political realm and became the subject of intense debate and, by some, intense anger'.⁵⁷

Shooting the Messenger

Where Terms of Reference are provided by an Attorney-General, as distinct from an inquiry at the initiative of the Commission itself, it may well be that governments change in the middle, so that the Attorney, and Government, that commissioned the inquiry, is not the one to receive its result. This was the case for the *Bringing Them Home* report.

The inquiry was given to the Commission by the Hon. Michael Lavarch MP, of the Paul Keating Labor Government. On 5 April 1997 the 689-page report was delivered to then Attorney-General, the Hon. Daryl Williams AM QC MP, of the Coalition Government of John Howard, which had been elected on 11 March 1996, ending a record 13 years of Coalition opposition.

The political environment could hardly have been more different than in 1992, when Paul Keating made his Redfern speech.

There were other elements in the environment: Pauline Hanson was elected in 1996; the *Wik* case was decided on 23 December 1996,⁵⁸ the High Court holding that

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ *Bringing Them Home Report* (n 32) Recommendation 10.

⁵⁷ *Sir Ronald Wilson: An Appreciation* (n 4) 514.

⁵⁸ *The Wik Peoples v The State of Queensland & Ors; The Thayorre People v The State of Queensland & Ors* (1996) 187 CLR 1.

native title could coexist on pastoral leases, and the Government's 'Ten Point Plan' was announced late in April 1997, watering down native title rights, in response.⁵⁹

This was not an environment to be receptive of the *Bringing Them Home* report, let alone a finding of 'genocide'. As Buti observed:

It was a report the government did not want, about an inquiry it did not call, at a time that could hardly have been less welcome.⁶⁰

Buti's chapter that considers the aftermath of the Report is titled, unsurprisingly, 'In the Eye of the Storm'.⁶¹

I describe this section of my presentation as a case of 'shooting the messenger'.

The Report was tabled on 26 May 1997, the first day of the Reconciliation Conference in Melbourne.⁶²

However, leading up to the tabling, Buti describes the 'subterranean campaign ... to discredit both *Bringing Them Home* and its principal author'.⁶³ Although 28 commissioners had signed the report, it was Ron who was 'the focus of the media and critics of the report'.⁶⁴

On 20 May 1997, *The Sydney Morning Herald* ran a front-page story referring to 'unnamed government sources' condemning the report, even though it had not yet been tabled. Margo Kingston also wrote about the attempt to discredit Ron, in an article entitled, 'Report that Won't Stay under the Carpet'. Margo Kingston referred to the advice of Sir Humphrey Appleby to politician Jim Hacker, about how to suppress an inconvenient official report. The advice was: 'Discredit the man who produced the report. This must be done OFF THE RECORD'.⁶⁵

In terms of Sir Humphrey's strategy of 'discrediting the man', Margo Kingston commented that the Government had a problem:

[He] is a former Liberal-appointed High Court judge, widely respected and a man near retirement. Sir Humphrey's lines of attack – that the inquirer harboured a grudge against

⁵⁹ *Matter of Conscience* (n 4) 330–331.

⁶⁰ *Ibid.*

⁶¹ *Ibid* ch 14.

⁶² The Attorney-General had '15 sitting days' to table the report: *Human Rights and Equal Opportunity Commission Act 1986* (Cth) s 46. Looking at the sitting calendar for 1997, 5 April was a Saturday and the House of Representatives did not sit again until 13 May. Fifteen sitting days, counting from 13 May, takes the window of tabling to 19 June. But there was much expectation that the report would be tabled by the time of the Reconciliation Conference in Melbourne on 26–27 May.

⁶³ *Matter of Conscience* (n 4) 331.

⁶⁴ *Ibid.*

⁶⁵ *Ibid* 332; Margo Kingston, 'Report That Won't Stay under the Carpet', *The Sydney Morning Herald* (20 May 1997) 6.

the government, was a publicity seeker or was trying to get a knighthood—were not available.⁶⁶

A Government press statement was made on 21 May 1997, referring to aspects of the not-yet-tabled report. The statement attacked the report's genocide finding and dismissed any suggestion of awarding compensation.⁶⁷

This is a classic case of 'shooting the messenger'.

On 26 May 1997, the opening day of the Reconciliation Conference, the Report was tabled. By then, however, as a result of the 'acrimonious build up', many of the key findings and recommendations in the report – at least in general terms – had become public knowledge before its release.⁶⁸ As well as the genocide finding and the compensation recommendations, it was widely known that the Report would call on governments to apologise for the child removal practices.

The mood at the opening of the conference was very heightened – the atmosphere, as Buti described it, was 'electric, and poisonous'.⁶⁹

The former Prime Minister John Howard was jeered and heckled as he defended his 10-point plan on native title. He refused to make, or commit the government to making, an official apology, or to providing compensation.

Many turned their backs on John Howard. The Prime Minister did make a *personal* apology for past treatment of Aborigines, but said that Australians should not engage in national guilt and shaming, 'rather we [Australians] should acknowledge past injustices and focus our energies on addressing the root causes of the current and future disadvantage among our Indigenous people'.⁷⁰

As the report was now tabled, Ron could speak about it. In an ABC radio interview on the first day of the Reconciliation Conference, Ron said that he and those involved in the inquiry:

... would continue the 'fight' for justice for the 'stolen generations', irrespective of the Commonwealth's response. He also fervently defended the claim of genocide. He maintained that the removal process came within the definition of genocide in the UN Genocide Convention. He reiterated his determination to fight for the recognition of the plight of the 'stolen generations', saying: 'Governments come and go', and '[we] are on a long haul perhaps but we are heading for reconciliation'.⁷¹

Officially launching the Report on the second day of the conference, Ron said it was no ordinary report. He was wearing a black sweater, emblazoned with Aboriginal

⁶⁶ *Matter of Conscience* (n 4) 333; Margo Kingston, 'Report That Won't Stay under the Carpet', *The Sydney Morning Herald* (20 May 1997) 6.

⁶⁷ *Matter of Conscience* (n 4) 334.

⁶⁸ *Ibid* 334–445.

⁶⁹ *Ibid* 335–336.

⁷⁰ *Ibid* 336.

⁷¹ *Ibid* 337.

art depictions and the words ‘Walking Together’. He said the inquiry was a ‘life-changing experience’ and presented him ‘with the greatest discipline’ of his career:

I had to learn to listen. Not just with my legally trained mind, nor my Presidential demeanour. But as a human being stripped bare of preconceptions and judgements, and available to be moved and changed.⁷²

‘Listening’, he said, ‘is the key to understanding. Understanding is the key to acknowledgement. And acknowledgment is the key to reparation’.⁷³

On return to Canberra after the opening session of the conference, the Leader of the Opposition, the Hon Kim Beazley MP, suggested that the House of Representatives observe a minute’s silence as a mark of respect to Aborigines who had suffered injustice. The Prime Minister said it would be churlish and insensitive to oppose the motion. All but one, the Western Australian Liberal member for Canning, Don Randall, rose to observe the silence.⁷⁴

Buti wrote how the attacks on Ron and his role in the inquiry began to mount, and that the debate over the Report ‘raged across the land among politicians, columnists, in intellectual magazines like *Quadrant*, and at the dinner table’.⁷⁵

What Ron was doing was using international law principles in the domestic context – his brief under his statutory mandate. The ‘genocide’ finding was a technical one in that context, and it was not accompanied by recommendations of specific actions against anyone or anybody.

The inquiry also followed the ‘van Boven reparation principles’,⁷⁶ with a focus on civil compensation, symbolic measures and guarantee of non-repetition of human rights abuses.⁷⁷

To accusations that he followed a ‘politically correct’ line, Ron said:

In a democracy, the majority can look after themselves. It’s the people who are marginalised who need help. Political correctness is invoked as a term of abuse for those who have sought to bring marginalised people into the framework of a unified nation. I am happy to be seen as politically correct if that means being sensitive to the problems of the disadvantaged and working to overcome them.⁷⁸

⁷² Ibid 339.

⁷³ Ibid 339.

⁷⁴ Ibid.

⁷⁵ Ibid 342.

⁷⁶ See, Theo van Boven, ‘The United Nations Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law’, (2010) *United Nations Audiovisual Library of International Law*. https://legal.un.org/avl/pdf/ha/ga_60-147/ga_60-147_e.pdf.

⁷⁷ *Matter of Conscience* (n 4) 343.

⁷⁸ Tony Stephens, ‘A Leader of Conscience’, *The Sydney Morning Herald*, 20 July 2005; In 1996 Ron expounded on this idea as part of *Why Human Rights Matter* (n 29) [12].

Despite the criticisms, there was a sympathetic reception by most of the media, the academy and many Australians.⁷⁹

But the messenger was shot on other levels.

The Commission's *Annual Report* for 1997–1998 is most telling in this regard, reporting a 40% reduction in HREOC's budget over a three year forward period.⁸⁰ This was just after Ron had delivered the *Bringing Them Home* report.

In considering the criticism that Ron received in the wake of the *Bringing Them Home* Report, I was struck by reflections of the Hon. Robert French AC in his own Sir Ronald Wilson lecture of 2017. Its title was '*Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial independence*'. It framed what I call 'shooting the messenger' as the 'populist' response to judicial decisions.

One aspect of French's speech concerned the importance of independent judiciaries and the dangers of attacking judicial officers for their judgments:

While politicians, frustrated by judicial decisions, will often blame the law in question and seek legislative reform, the populist response to decisions hindering their political agenda is to blame the courts themselves.⁸¹

...

Like all human institutions [the Courts in Australia] have weaknesses, they make mistakes and they may be criticised for their decisions and processes. However, criticism is one thing. Populist abuse is another.⁸²

French J noted the judicial review of executive action as important in the responsibilities of Australian courts, at Federal and State levels. To illustrate his argument about the dangers of populism, French J cited an example of an attack on the United States Federal Judge, James Robart, by then President Donald Trump. Robart J had issued a temporary restraining order against the implementation of the President's first Immigration Banning Order. It was a regular exercise of judicial review of executive action. But Trump tweeted, '[t]he opinion of this so-called judge, which essentially takes law enforcement away from our country is ridiculous and will be overruled'.

⁷⁹ *Matter of Conscience* (n 4) 343.

⁸⁰ Human Rights and Equal Opportunity Commission, *Annual Report 1997–1998*, 12–13.

⁸¹ Robert French, 'Judicial Review: Populism, the Rule of Law, Natural Justice and Judicial Independence' (Sir Ronald Wilson Lecture, 1 August 2017) 5.

⁸² *Ibid* 6.

French J found this deeply troubling, ‘because it was expressed as a denigration of the judge and his judicial authority, carrying the implication that his decision was somehow undemocratic’.⁸³ He also added that:

That kind of denigration from a political leader, whether in the United States or Australia, will not deter any judge or court worthy of the name from carrying out its function. Nevertheless, it can be seen as calculated to undermine public respect for the rule of law by calling into question the legitimacy of the institutions that support it. In that sense, it undermines respect for a fundamental part of our societal infrastructure.⁸⁴

French J argued that:

the most effective protection against the pernicious effects of populist rhetoric is the work of the courts themselves, expressing in that work their independence, impartiality, competence and efficiency and affirming in every decision they make, the rule of law’.⁸⁵

The courts, he concluded, are ‘indispensable to the rule of law in our society’.⁸⁶

There will always be debates about what the courts do, whether they are doing it well and whether they have kept to their proper constitutional function. Informed debate about such matters is a sign of a healthy democracy. That health is not enhanced by the use of populist rhetoric. The courts and our democracy are too important for that.⁸⁷

There are deep resonances in French J’s speech, about the importance of independence and the courts, with the role of the Australian Human Rights Commission as an independent agency.

Having strong, independent, national human rights institutions is an expression of the robustness of the commitments of governments across the globe in signing and ratifying international conventions and treaties.⁸⁸

⁸³ Ibid 7.

⁸⁴ Ibid.

⁸⁵ Ibid 8.

⁸⁶ Ibid 16.

⁸⁷ Ibid 17.

⁸⁸ There is a process of accreditation for National Human Rights Institutions (NHRIs), reflecting the centrality of the idea of independence, and principles concerning appointment and tenure of Commissioners and adequate funding to be able to operate independently of government, and not be subject to financial control: Principles relating to the Status of National Institutions (Paris Principles), <https://humanrights.gov.au/our-work/commission-general/principles-relating-status-national-institutions-paris-principles-human/>

Australia was a founding signatory to each of the major human rights instruments, as well as to the Charter of the United Nations itself. Overall, we have signed up to seven major treaties and a number of associated protocols.⁸⁹

I note, in this respect, that if you look at the treaties Australia has committed to and ratified, it is an *equal split* of Coalition and Labor support. It is neither a ‘Labor’ nor a ‘Coalition’ project.

The commitment to respecting, protecting and fulfilling human rights, therefore *should* be above politics.

But governments have had a love-hate relationship with the Commission, despite the commitment to the world beyond our shores.

The language of ‘human rights’ and international law

The adoption of the *Universal Declaration of Human Rights* of 1948 (‘UDHR’),⁹⁰ was one of the first decisions of the UN, and Australia’s own Evatt was in the Chair as President of the General Assembly on that significant occasion. It was an aspirational document, without binding effect. It was a moment that was also embraced and marked across Australia. Former Justice of the High Court and a profound legal scholar hon Michael Kirby remembers clearly the UDHR being given to every schoolchild in Australia, on that flimsy aerogramme paper that some of you may remember.

While the act of ratifying subsequent treaties is a government commitment to give effect to human rights in Australian law, policy and practice, little has been done to enact the rights and freedoms protected by these instruments into Australian law—despite the aspirations perhaps encouraged in the schoolchildren of Michael Kirby’s young years.

This means that the rights and freedoms enshrined in these international human rights instruments are not *directly* enforceable in Australia—no matter how loudly protesters over the past year and a half may invoke them.

⁸⁹ The International Covenant on Civil and Political Rights (ICCPR); the International Covenant on Economic, Social and Cultural Rights (ICESCR); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on the Rights of the Child (CRC); and the Convention on the Rights of Persons with Disabilities (CRPD).

⁹⁰ *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948).

While Australia has not ‘domesticated’ these international commitments, we did get anti-discrimination laws. On this subject I should note that the Commission is at the final stages of a major project and will be releasing our discrimination law reform agenda in the near future.

But looking at rights and freedoms more generally, the central piece – direct implementation in a Human Rights Act – never happened, despite repeated and current pressure to do so.

When the Commission was put on a permanent footing in 1986, as HREOC, it was designed in tandem with an accompanying Australian *Bill of Rights Act*. The Bill was passed in the House of Representatives, but did not pass the Senate. More recently, the idea was the principal recommendation of the National Human Rights Conversation led by Fr Frank Brennan SJ, over a decade ago.⁹¹ The past President of the Law Council of Australia, Pauline Wright, called for an Australian Bill of Rights in her Press Club address in 2020, joining many voices to do so. This amplified the conversation to do at the federal level what the ACT, Victoria and Queensland have done in relation to State and Territory decision making and accountability.⁹²

While every other country in the Commonwealth of Nations has moved forward by introducing comprehensive human rights protections in legislation, commonly referred to as a ‘Charter of Rights’ or a ‘Human Rights Act’, Australia stands alone for not having introduced such protection, at least at the federal level. Fr Frank Brennan framed his Sir Ronald Wilson lecture in 2003 around the absence of such legislation.⁹³

From the perspective of the Commission’s jurisdiction, it is still unfinished legal architecture. We are like a doughnut – with a hole in the middle.

The functions under the ICCPR and other treaties for Australia are there, but essentially invisible to the general public. Even without a formal enactment of a ‘Human Rights Act’, people can bring a complaint to the Commission on the basis of the ICCPR and other rights in the instruments scheduled to our Acts.⁹⁴ But it is not judiciable, nor can there be enforceable remedies.

⁹¹ *National Human Rights Consultation* (Report, September 2009).

⁹² *Charter of Human Rights and Responsibilities Act 2006* (Vic), *Human Rights Act 2004* (ACT), *Human Rights Act 2019* (QLD).

⁹³ *The Law and Politics of Human Rights* (n 9).

⁹⁴ Most notably, however, these instruments do not include the ICESCR.

So, for example, we have a particular and growing set of complaints invoking the right to return to the country and for children to enter or leave Australia for the purpose of family reunification.⁹⁵ These are complaints that do not sit under the category of ‘unlawful discrimination’ in the four anti-discrimination laws, but in what we describe as our ‘human rights’ jurisdiction that links to the treaties.

Complaints under our Acts have increased by 500% with COVID-19 – masks, travel caps, travel bans, family reunion, people with disability and COVID restrictions and vaccinations. Our overall complaint caseload has also more than doubled over the past year.

The beauty of a Human Rights Act, and other measures that frontload rights-mindedness, is that they are expressed in the positive: affirming rights and freedoms – not just implying them – and giving a clear anchor for decision making. It frontloads human rights thinking.

This is the focus of the other major part of the current project that I am leading, Free and Equal: the national conversation on human rights, advancing the case for a Human Rights Act and other complementary reforms.

International not domestic framing

But until such time, a challenge that the Commission must continue to navigate is that our entire functions are framed through the lens of international law.

Section 11(1) of *Australian Human Rights Commission Act 1986* (Cth) gives HREOC certain powers including for example, powers to examine laws and proposed laws for determining whether they are inconsistent with, or contrary to any human right. ‘Human rights’ in this context are directly referable to the international treaties. We can also seek to intervene, with the leave of the court, in proceedings that involve human rights issues.

While hon French J was speaking of criticism of courts and judges in their role within the Australian legal system, the challenge in the role of the Commission is to apply Australian laws due to its relationship with international law and the instruments of the United Nations.

For the complaints that reference the international treaties, a challenge is also that the respondent is principally the Commonwealth, because the ‘acts or practices’ that we can consider are those ‘by or on behalf of the Commonwealth or an authority

⁹⁵ For individuals alone – Art 12 ICCPR; for family groups – Art 12,17 and 23 of ICCPR; and family groups with children, all of the above plus Arts 3, 8, and 10 of the CRC.

of the Commonwealth', which at many times places us in an oppositional position to government.

Moreover, the acts or practices may well be *lawful* under domestic law, but contrary to international human rights obligations. So the Commonwealth has a clear answer to the complaints in domestic law. But in international law, that is no defence.

A classic illustration concerns 'arbitrary detention'.

In *Al-Kateb v Godwin* [2004] HCA 37 there was a challenge to the legality of administrative detention by the Commonwealth under the provisions of the *Migration Act 1958* (Cth). Although there is much discussion about the implications of the case, the essential principle is that virtually indefinite detention may be lawful under Australian law.

In the context of our international obligations however, article 9 of the ICCPR provides that '[n]o one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law'.

Article 9 has been the subject of a large amount of Commission work, particularly—but not only—in the context of immigration detention.⁹⁶

Since 1992, Australia has had a system of mandatory detention. Any non-citizen who is in Australia without a valid visa must be detained according to the *Migration Act*. These people may only be released from immigration detention if they are granted a visa, or removed from Australia.

In a continuing series of reports in relation to human rights complaints, the Commission has sought to point out that the approach to mandatory detention, and particularly closed detention, is approaching the problem in the wrong way.

The question appears *not* to be asked whether an individual poses a risk to the community and, if there are risks, can they be appropriately mitigated through conditions? The approach taken by the government has been to consider whether there is any need for an individual to be released from detention, rather than whether it is necessary to continue to detain the individual.

I should note however, that we have established constructive and regular forms of engagement with the Australian Border Force and with the Department of Home

⁹⁶ Australian Human Rights Commission, *Immigration detention following visa refusal or cancellation under section 501 of the Migration Act 1958 (Cth)* (Report, 2021), a grouped report involving a number of complainants raising similar issues. Because the complaints pre-dated the 2017 amendments, the Attorney-General was obliged to table the report. Some of the text here is drawn from this report.

Affairs as part of seeking to address these broader policy issues, within the current policy settings of government.

We are still continuing that conversation.

But, when it comes to our function to consider human rights complaints, domestic laws and international expectations are at loggerheads.

The *Migration Act* also purports to expressly exclude procedural fairness in the exercise of a statutory power, by providing, for example, that natural justice does not apply to particular decisions. This was also a topic that Fr Brennan considered in his Ronald Wilson Lecture.⁹⁷ The Australian Law Reform Commission (ALRC) suggests that a review on immigration laws is needed to review the laws in relation to mandatory cancellation of visas on character grounds. ALRC pointed out the importance to consider whether the exclusion of the duty to afford procedural fairness is proportionate given the gravity of the consequences for those affected by the relevant decision.⁹⁸

No ordinary report – no ordinary man

Ron considered that the *Bringing Them Home Report* was ‘like no other report he has been involved in’. He was determined that it should not ‘gather dust on the shelf’, and argued that a positive response to the Report by the political leadership of the country and the public was needed.⁹⁹

Ron openly confessed that the hearing of the *Bringing Them Home* inquiry changed him. In a speech on 28 October 1997, presented in the Senate chamber of Old Parliament House some five months after the tabling of the report, Ron said:

I came to this inquiry a couple of years ago as a man over the hill at 73 with about 50 years or more behind me as a hardboiled lawyer mixing it with all sorts of antagonists and people in the courts here and in England and yet this inquiry changed me. The reason it changed me is that it penetrated the heart, it got away from my mind ...¹⁰⁰

The *Bringing Them Home Report* included the voices of people who have experienced removal. Ron and his colleagues wanted the Report to tell their stories.¹⁰¹ It is ‘laden with stories and quotes from Aborigines about removal as children from their families; their loss of culture; the abuse they suffered in receiving homes and missions; and their ongoing pain and suffering’.¹⁰²

⁹⁷ *The Law and Politics of Human Rights* (n 9).

⁹⁸ Australian Law Reform Commission, *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Interim Report 127, 3 August 2015).

⁹⁹ *Matter of Conscience* (n 4) 328.

¹⁰⁰ *Ibid* 345–346.

¹⁰¹ *Ibid* 325.

¹⁰² *Ibid*.

Ron spoke of the ‘patent display of courage’ in the sharing of stories in the inquiry, coupled with ‘the pain associated with their utterance’, which convinced him and his fellow Commissioners that they were involved in ‘an exercise of the heart’ – as if the words ‘were being literally wrenched out of the heart’. He said, ‘I had never been exposed to such pain before’.¹⁰³

Ron considered that it was scandalous for people to speak dismissively of the accounts of trauma, by saying it was ‘ancient history’ – the ‘tears of the storytellers convinced him that they were reliving the pain’: it was ‘current suffering’.¹⁰⁴

In delivering the Commission’s Human Rights Day Oration for 2019, the Hon. Peter McClellan AM QC, commissioner for the Institutional Responses to Child Sexual Abuse Royal Commission, made observations which resonate with Ron’s remarks about pain, recollection and truth. McClellan referred to the common use of the expression ‘historical sexual assault’, as somehow implying a lesser offence or an allegation less likely to be true:

Neither proposition is correct. As our research indicated, children are most unlikely to report a sexual assault until they are well into their adult years, in many cases more than 20 and often more than 30 years after the offence. That does not mean that some greater degree of scepticism should infect the determination as to whether the complainant is telling the truth.¹⁰⁵

Grief and loss were the predominant themes of the *Bringing Them Home* Report.¹⁰⁶ The removal as children and the abuse the individuals experienced at the hands of the authorities or their delegates ‘permanently scarred their lives’. Moreover, the ‘harm continues in later generations, affecting their children and grandchildren’.¹⁰⁷

Ron’s remarks in his Mitchell Oration of 1991 were to become the reality of the report –

to remember that behind every human rights problem there are some people hurting, people longing for a sense of dignity and self-respect, of having a sense of worth in themselves.¹⁰⁸

The focus of the *Bringing Them Home Report* was on healing and reconciliation – for the benefit of all Australians. But this could only happen, if ‘the whole community listens with an open heart and mind to the stories of what has happened in the past’.¹⁰⁹

¹⁰³ Ibid 313.

¹⁰⁴ Ibid 346.

¹⁰⁵ Peter McClellan, ‘Human Rights Day Oration’ (Speech, 10 December 2019).

¹⁰⁶ *Bringing Them Home Report* (n 32) 3.

¹⁰⁷ Ibid.

¹⁰⁸ *Human Dignity for All* (n 27) 4–5.

¹⁰⁹ *Bringing Them Home Report* (n 32) 2–3.

In terms of the ongoing impact of the report, apologies have now been delivered by every Australian Parliament. Compensation schemes have been established in most Australian jurisdictions, either directly for members of the stolen generation, for the stolen wages of Aboriginal domestic workers, or for victims of institutional child sexual abuse.¹¹⁰

There is also now an accepted understanding, demonstrated in the language of the National Agreement on Closing the Gap,¹¹¹ that the actions of the past affect the health and other outcomes of the present. The truth of what was reported in *Bringing them Home Report* is now accepted and taught across our schools nationally.

In 2000, over half a million people are estimated to have joined People's Walks for Reconciliation in cities and towns across Australia.

In addition to raising the awareness of the Australian public, the *Bringing Them Home* inquiry played an important role in raising the profile of the Commission among Aboriginal and Torres Strait Islander communities. Through their participation in the Inquiry, people learned about the Commission and its work. And through the ongoing dedicated and hard work of subsequent Social Justice Commissioners, the Commission has remained respected in Indigenous communities. In December 2020, the current Social Justice Commissioner, June Oscar AO, delivered her report, *Wiyi Yani U Thangani: Women's Voices*,¹¹² which provides an example of the Commission's engagement.

For Ron, his experience as President of HREOC was 'the richest experience' of his life.

To have been able to have a retirement in which I have continued to be an advocate – I loved advocacy. That is why I became a lawyer. That is why I enjoyed my legal life. But now, in retirement, to have spent seven years as an advocate for the disadvantaged is the most privileged experience that I can imagine.¹¹³

¹¹⁰ On 5 August 2021, the day after delivering this Lecture, the Prime Minister Scott Morrison announced the new Closing the Gap implementation plan would include a \$378 million new redress scheme for Stolen Generations survivors. A \$75,000 payment will be made to Stolen Generation survivors from the Northern Territory, Australian Capital Territory and Jervis Bay in recognition of the harm of their forced removal. Minister for Indigenous Australians Ken Wyatt said it is an important part of intergenerational healing. Other measures include \$254 million to upgrade health clinics and \$160 million for improving childcare and maternal services. [PM to unveil \\$1 billion Closing the Gap Implementation plan](https://www.news.com.au/national/pm-to-unveil-1-billion-closing-the-gap-implementation-plan/video/75521bf41d9789ffbe411373320c1c69?from_r=hp) (news.com.au); 'PM to unveil \$1 billion Closing the Gap Implementation plan' News.com.au (Web page, 5 August 2021) <[https://www.news.com.au/national/pm-to-unveil-1-billion-closing-the-gap-implementation-plan/video/75521bf41d9789ffbe411373320c1c69](https://www.news.com.au/national/pm-to-unveil-1-billion-closing-the-gap-implementation-plan/video/75521bf41d9789ffbe411373320c1c69?from_r=hp)>

¹¹¹ National Agreement on Closing the Gap, <https://www.closingthegap.gov.au/national-agreement>.

¹¹² June Oscar, *Wiyi Yani U Thangani (Women's Voices): Securing Our Rights, Securing Our Future* (Report, 9 October 2020).

¹¹³ *Matter of Conscience* (n 4) 325.

Robert Nicholson concluded his essay, from which his Ronald Wilson Lecture of 2005 formed part, by saying:

Ron Wilson was a great Australian, a great Western Australian and a great lawyer. He led with humility and with talent. His memory is secure in Australian public and legal history and in the hearts of those who worked with him or observed him in his professional and public endeavours. It is fitting that after his life the vast reach of his ideals should be remembered both for his merit and its continuing inspiration.¹¹⁴

Nicholson said that the *Bringing Them Home Report* still challenges our nation,¹¹⁵ and as Buti remarked, ‘The furore that followed the handing down of the Report would forever change [Ron’s] place in Australian history’.¹¹⁶

One former staff member also commented to me that men like Ron were ‘men you would crawl over broken glass for’.¹¹⁷

Human rights and the Australian Human Rights Commission needs such champions.

Sir Ronald Wilson died on 15 July 2005. He was only 82.

In his obituary for Ron, the Hon. Fred Chaney AO, said Ron ‘was always there when he was needed ... he used his great legal talent not to enrich himself but to serve and lift his country.’¹¹⁸ He was, as Fr Frank Brennan remarked, ‘Western Australia’s gift to the nation’.¹¹⁹

¹¹⁴ *Sir Ronald Wilson: An Appreciation* (n 4) 515.

¹¹⁵ *Ibid* 514.

¹¹⁶ *Matter of Conscience* (n 4) 330.

¹¹⁷ James Iliffe. Conversation with the author.

¹¹⁸ Fred Chaney, ‘Sir Ronald Wilson’ (2005) 32(7) *Brief* 19, 19.

¹¹⁹ *The Law and Politics of Human Rights* (n 9) 33.

APPENDIX

Terms Of Reference¹²⁰

I, MICHAEL LAVARCH, Attorney-General of Australia, HAVING REGARD TO the Australian Government's human rights, social justice and access and equity policies in pursuance of section 11(1)(e), (j), and (k) of the *Human Rights and Equal Opportunity Commission Act 1986*, HEREBY REVOKE THE REQUEST MADE ON 11 MAY 1995 AND NOW REQUEST the Human Rights and Equal Opportunity Commission to inquire into and report on the following matters:

To:

- (a) trace the past laws, practices and policies which resulted in the separation of Aboriginal and Torres Strait Islander children from their families by compulsion, duress or undue influence, and the effects of those laws, practices and policies;
- (b) examine the adequacy of and the need for any changes in current laws, practices and policies relating to services and procedures currently available to those Aboriginal and Torres Strait Islander peoples who were affected by the separation under compulsion, duress or undue influence of Aboriginal and Torres Strait Islander children from their families, including but not limited to current laws, practices and policies relating to access to individual and family records and to other forms of assistance towards locating and reunifying families;
- (c) examine the principles relevant to determining the justification for compensation for persons or communities affected by such separations;
- (d) examine current laws, practices and policies with respect to the placement and care of Aboriginal and Torres Strait Islander children and advise on any changes required taking into account the principle of self-determination by Aboriginal and Torres Strait Islander peoples.

IN PERFORMING its functions in relation to the reference, the Commission is to consult widely among the Australian community, in particular with Aboriginal and Torres Strait Islander communities, with relevant non-government organisations and with relevant Federal, State and Territory authorities and if appropriate may consider and report on the relevant laws, practices and policies of any other country.

THE COMMISSION IS REQUIRED to report no later than December 1996.

Dated 2 August 1995

MICHAEL LAVARCH

¹²⁰ *Bringing Them Home Report* (n 32) Terms of Reference.

Book Reviews

***THE NATIONALITY OF CORPORATE INVESTORS
UNDER INTERNATIONAL INVESTMENT LAW***

by Anil Yilmaz Vastardis

HART PUBLISHING, STUDIES IN INTERNATIONAL TRADE AND INVESTOR LAW, VOL 22
(MARCEAU, SCHEFER, ORTINO AND SCHAFFER (EDS)) (OXFORD, 2020)

Vivienne Bath*

This comprehensive and well-researched book addresses the increasingly controversial issue of corporate nationality – particularly manufactured or strategically acquired nationality – in the context of international investment. The analysis necessarily deals not just with the concept and definition of corporate nationality, but also discusses the contested question of what constitutes – or should constitute – the link between an investor and a contracting state which should entitle the investor and its investments to protection under an international investment treaty. As set out in the Introduction,¹ the author has thus asked the questions, first, ‘whether nationality is an appropriate legal bond for connecting a corporation to a state for the purpose of’ international investment law and, secondly, if it is (or could be), what is and should be the standard for determining nationality? The author’s answers to these questions come in Part III, which goes through what the author sees as the issues and offers suggestions for resolving the problems of existing approaches.

There is an ever-increasing number of international investment cases brought by foreign investors against host states. Current international debates on the fairness and appropriateness of international investment arbitration in its current form include the issue of ‘treaty shopping’ by corporations and their owners and controllers and the concurrent issue of parallel claims against a host state relating to the same investment brought by multiple levels of corporate investors. For

⁴ Professor of Chinese and International Business Law, University of Sydney.

¹ P4.

example, UNCITRAL's Working Group III (Investor-State Dispute Settlement Reform) included the issues of multiple proceedings and counterclaims, including shareholder claims and reflective loss, in its discussions in the thirty-ninth session,² although without, it appears, reaching a clear conclusion. The author's thorough survey and discussion of the many different decisions on the question of corporate nationality, the jurisdictional entitlement of an entity or individual to make a claim as an "investor" under a treaty, the policy considerations that are relevant to this issue, and, in particular, recommendations on possible ways forward, have thus resulted in a very useful and timely contribution to the literature in this area.

The author is clear from the outset that she is opposed to what she describes as the 'expansionist approach' to the personal scope of protections under international investment law – that is, the tendency of arbitral tribunals to allow investors to structure their investments so as to take advantage of the favourable provisions of bilateral treaties between states even where there is no clear or real link between the investor and the claimed host state. She argues (very persuasively) that – contrary to the argument that expanding the concept of 'investor' encourages foreign investment, to the benefit of the host state, and contributes to good governance at a state level by imposing international standards of behaviour, the loose interpretations of corporate nationality and the personal scope of treaties adopted by arbitral tribunals undermine the reciprocal nature of the underlying treaties and the substance of the bargain between the negotiating states. This argument is laid out in the Introduction and further developed throughout.

Part I lays the framework for the discussion. Chapter 1 addresses the various ways in which investors can access international investment protection, drawing a distinction between the requirements of the main multilateral instrument in the area of international investment law (the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [the 'ICSID Convention']), Article 25 of which specifies nationality of a Convention state as a jurisdictional requirement for both individuals and corporations. The author then addresses non-ICSID investment arbitration, generally under a bilateral investment agreement, which usually draws on the concept of a home state 'investor', a concept which is often, in the case of an individual, tied to nationality, but, in the case of a corporation, may be undefined or consist of loosely defined connecting factors

² United Nations Commission on International Trade Law Fifty-fourth session, Vienna, 28 June–16 July 2021, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-ninth session, A/CN.9/1044.

linking the investor to the home state. The flexibility which this affords investors in bringing themselves within the terms of a particular treaty is the basis for the author's argument that the concept of nationality could play a role in creating a stronger and less ambiguous link between the investor and the home state under the relevant international investment treaty. In Chapter 2, she looks at the concepts of individual and corporate nationality under international law. Chapter 3 then looks more closely at the features of corporations for purposes of determining their corporate nationality and provides a useful overview of the purposes for which corporations may need to be linked to a particular state and the theories pursuant to which this link is formed. She also, drawing on a range of sources in this area such as the 2011 OECD Guidelines for Multinational Enterprises and Muchlinski's *Multinational Enterprises and the Law*,³ focusses on a number of important matters in relation to corporations and international investment – the existence of multinational enterprises with international presence and multiple subsidiaries and shell corporations (that is, companies the sole purpose of which is to hold interests in other entities in order to obtain regulatory, tax and other advantages) and, in this context, the existence and potential availability of regulatory jurisdictions which offer significant advantages and structuring opportunities in relation to international investment due to their wide network of investment treaties.

In Part II, the author looks more closely at international law approaches to corporate nationality. She starts with nationality for the purposes of diplomatic protection and for the purposes of war-time sanctions, the consequent difficulties presented by the use of the place of incorporation as the main determinant of nationality, and the use of a real or substantial link requirement going beyond incorporation. She then looks in detail at international investment cases. Chapter 5 begins with an examination of the application of Article 25 of the ICSID Convention in determining the nationality of corporate investors, based on a detailed and extensive review of ICSID cases which have dealt with this issue. Article 25(2)(B) sets out two unclear criteria for determining corporate nationality for jurisdictional purposes: where a juridical person had the nationality of a Contracting State other than the State against whom the claim is brought at the date of consent to submit a dispute to arbitration or where a juridical person had the nationality of the State which was the subject of the claim and, which, because of foreign

³ 2nd edn (Oxford, Oxford University Press, 2007).

control, the parties have agreed the person should be treated as a foreign national for the purposes of the Convention. The author's detailed and interesting discussion dissects the divergent and inconsistent decisions in this area under both parts of the Article. As a number of commentators, and UNCITRAL Working Group III, have noted, the tendency of tribunals to allow shareholders (both direct and indirect) of companies based in the host State which may have suffered losses to recover as if they themselves suffered the losses (reflective losses), combined with divergent decisions on nationality under both parts of Article 25(2)(B) (as well as decisions on the scope and meaning of 'protected investors' under bilateral investment treaties) have facilitated treaty shopping and multiple or parallel claims. In the second half of this chapter, the author looks at the links between investors and contracting states set out in investment treaties, which may include nationality, but also specify a number of different types of links (such as place of incorporation, seat, economic activity, nationality of controllers and so on) which, as the author comments, resemble the different criteria proposed in relation to corporate nationality. The author also examines the attempts of State parties in more recent treaties to respond to the wide interpretation of these links taken by tribunals to limit the scope of the 'protected investor', and their limited success in this endeavour.

In Part III, having laid out the issues in relation to nationality and other links between investors and states which might provide a basis for investment protection, the author looks at what she sees as the conceptual problems presented by the jurisprudence and presents her suggestions for solutions. This Part contains a detailed and well-organised summary of the issues presented by the cases, particularly the undermining of the legitimacy of international investment arbitration through the creation of a framework which allows corporate investors to manipulate their nationality in order to obtain access to preferential regimes. The author discusses various solutions proposed by learned commentators in order to deal more effectively with the prevalence of treaty shopping, primarily by applying the concept of 'abuse of rights' with more vigour and interpreting denial of benefits clauses in treaties more strictly to prevent multinational companies and others from launching multiple parallel claims or selecting the most favourable venue from among a menu of treaties. Her well-argued analysis of these possible remedies concludes that they are of limited utility, largely due to the way in which tribunals have limited their application and efficacy.

Finally, in response to the issues laid out in the book so far, the author proposes the adoption of a 'real seat' standard to determine corporate nationality, that is, the place where the claimant corporation has its central administration and important corporate activities are concentrated. This would deal with the issue of

shell companies, and multiple intermediary holding companies, for the purposes of applying the provisions of the ICSID Convention on nationality and, the author suggests, should be incorporated specifically in investment treaties in order to define the personal scope of parties entitled to bring claims under the treaties. The tribunal should therefore work upwards from the actual investment entity in order to arrive at the location where the entity or person which actually exercises management and decision-making control is located. A particularly interesting part of Chapter 7 is the author's analysis of how applying this test would have changed the result in a number of well-known arbitral decisions.

The book is well-organised, and the argument is developed systematically and clearly. Although the author's writing style is very clear and the different themes are clearly laid out and presented, the content of the book is dense, and readers would benefit from a certain amount of understanding of international law generally, and international investment law in particular. The issues which are raised are highly topical and the author takes a practical approach in putting forward nationality (subject to a new tighter definition) as a means of limiting claimants' ability to engage in treaty shopping and instituting multiple arbitrations. The difficulty of reforming a system where the jurisprudence created by arbitral tribunals in this area has arguably moved well beyond the intention of the states. The author's final comment reflects that states which do wish to reform the standards in international investment law relating to coverage of investors, should revise their treaties by both incorporating denial of benefit clauses and defining the substantial links to determine the corporate nationality of entities entitled to protection. The revision should ensure that these clauses are sufficiently detailed to limit tribunals' interpretative discretion to the extent possible. In summary, this interesting, well-written and well-researched discussion provides considerable room for thought about international investment law, the role of treaties and the unanticipated consequences of delivering the development of jurisdiction into the hands of arbitral tribunals and constitutes a very readable and useful addition to the literature in this area.

***INVESTMENT TREATIES AND THE LEGAL
IMAGINATION: HOW FOREIGN INVESTORS PLAY
BY THEIR OWN RULES***

by Nicolás M Perrone

OXFORD UNIVERSITY PRESS, 2021

Sebastian Boccardo*

Few areas in the global economic order have generated more controversy than international investment law. Amid a growing global pushback against international investment treaties and investor-state dispute settlement (ISDS), Nicolás M Perrone's *Investment Treaties and the Legal Imagination: How Foreign Investors Play by their Own Rules* offers a timely rebuke of the worldview underpinning foreign investment relations. This worldview, or 'legal imagination' as Perrone describes it, privileges the interests of global business over state or domestic interests to protect the power of investors. Perrone attributes this legal imagination to the 'norm entrepreneurs' of the 1950s and 1960s – a coalition of bankers, lawyers and business leaders who lobbied governments and international organisations for foreign investors to have a direct right to sue states before international arbitral tribunals and the inclusion of such dispute settlement mechanisms in a multilateral convention. In highlighting the influential role played by these interest groups, Perrone presents a fresh narrative about the development of international investment law that places influential professionals and their associations at its centre.

The book argues that the norm entrepreneurs did succeed in promoting a legal imagination about foreign investment relations, which consolidated in the 1990s, and that this imagination thrives in both international investment law and investment awards. Perrone innovatively knits together the historical beginnings of this movement with contemporary practice to offer a new interpretation on the origins and evolution of international investment law and the present ISDS regime. Adopting a transnational and socio-legal approach to property rights and contracts, Perrone offers rich insights into why arbitrators make certain decisions beyond anything that might be drawn from a mere review of ISDS cases. Although the book is primarily written for international lawyers, some of the matters it explores may also be of interest to legal historians, philosophers and policy makers.

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The book starts out by developing an analytical framework for examining how the rights of foreign investors affect the relations between foreign investor, state and local communities. ISDS is portrayed as a mechanism designed to protect foreign investor rights by replacing domestic judiciaries, selectively interpreting facts and applying legal doctrines favourable to the foreign investor. However, it is the second chapter where the book makes its most important contribution. Perrone presents the norm entrepreneurs – who they were, their networks, and how they promoted their ambitious world-making project for international investment law. Two of the leading figures in this movement were banker, Hermann Abs, and lawyer, Hartley Shawcross. Perrone sees their efforts in lobbying for the adoption of their draft convention as less of a personal quest than the work of the most visible faces of a global coalition.

The following two chapters maintain a chronological course, tracing the early efforts of the norm entrepreneurs to the competing legal imaginaries of the long 1970s to the emergence of ISDS practice in the 1990s and since. Perrone's well-researched account of how the legal imagination of the norm entrepreneurs came to occupy the space of international investment law seeks to demonstrate that current ISDS practice is not a coincidence but the product of a deliberate campaign by influential individuals and organisations devoted to the international protection of foreign investment. This narrative recasts the current regime as a one-way system built to protect the interests of its creators. Although the views of the norm entrepreneurs were challenged by developing states and the labour movement in the 1970s, Perrone shows that it was the norm entrepreneurs who triumphed in the long run.

By the 1990s, organisations such as the World Bank and the United Nations Conference on Trade and Development (UNCTAD) were promoting policies 'quite consistent with the norm entrepreneurs' world-making project'.¹ Even when the first ISDS cases were decided, arbitrators 'followed a reasoning remarkably similar to the legal imagination of the norm entrepreneurs', for example, by protecting the 'legitimate expectations' of foreign investors.² Notwithstanding the shift to proportionality and proceduralism, Perrone argues that the application of these standards to the facts of a dispute on a case-by-case basis does not guarantee a fair outcome. Perrone identifies three reasons: (1) the application of these standards depends on the definition of the rights and purpose of the legal regime; (2) tribunals may conflate substantive and procedural protection; and (3) in assessing the 'reasonableness' of a public measure, arbitrators rely on technical and scientific evidence to determine whether the state had 'good reasons' for change.

¹ Nicolás M Perrone, *Investment Treaties and the Legal Imagination: How Foreign Investors Play By Their Own Rules* (Oxford University Press, 2021) 96.

² *Ibid* 121.

The discussion of the norm entrepreneurs' world-making project sets the stage for the detailed analysis of influential ISDS cases in the book's second half. It is here that Perrone links the conceptual to the practical. He seeks to demonstrate how the legal imagination of the norm entrepreneurs continues to manifest itself in not only the outcomes of investor-state disputes but the way in which arbitrators approach the task of resolving these disputes. This approach is significant in two respects. First, consistent with the book's socio-legal lens, it portrays arbitrators as actors with agency rather than passive, neutral decision-makers. Second, by examining the ideas framing ISDS practice, it eschews the dominant analytical framework that focuses solely on the principles of ISDS case law. In privileging ideas over law, Perrone attempts to frame the problems with ISDS as stemming less from legal principles than the entrenched belief system that underpins those principles and the broader ISDS regime.

Perrone makes some valuable findings from his review of ISDS cases. He finds that while there have been marginal changes in favour of states' right to regulate, the interpretation of this right remains embedded in global institutions. Indeed, the shift to proceduralism 'obscures substantial continuities in the dominant imaginary of foreign investment relations'.³ Regulations are only reasonable when they are based on sufficient scientific or technical advice, consistent with the vision of the norm entrepreneurs. One can imagine how this standard might be problematic for a state seeking to implement a socially beneficial measure that departs from global standards. Further, Perrone finds that arbitrators often describe the facts of disputes in a transactional manner without regard to local context. As a consequence, awards silence local needs and hamper the ability of states to address domestic imperatives.

The book not only examines the consequences of the norm entrepreneurs' legal imagination for foreign investor relations with states, but also for investor relations with local communities. The chapter on ISDS and local communities is illustrative for the way in which investment treaties and ISDS make the complexity of state measures invisible. The limited engagement of foreign investment scholarship with the situation of local communities is perhaps indicative that the legal imagination that informs ISDS practice also narrows the scope of scholarly inquiry. Perrone attempts to address this lacuna through a review of ISDS cases involving local communities. He shows that consistent with the ambitions of the norm entrepreneurs, local communities are invisible under international investment law. Not only do foreign investment treaties make no mention of local non-state actors and their rights, but local communities cannot be parties to a dispute and may only submit

³ Ibid 149.

amicus curiae briefs. Further, the reasoning of arbitrators shows that local opposition is in itself insufficient to justify state measures and that their primary concern is on whether the state has acted consistently. The fact that a local claim is channelled through established institutional mechanisms such as in *Bilcon v Canada* does not prevent a tribunal from finding in favour of the investor.

Perrone's discussion of the challenges faced by local communities under ISDS puts investor power play further in perspective. By contrasting the favourable treatment of foreign investors with the non-recognition of local communities he highlights the different international standards that apply to these two non-state actors. This double standard speaks to a broader blind spot in international law. Perrone prompts us to question why foreign investors are granted favourable treatment under the ISDS regime while local communities enjoy modest recognition of their rights under international law. Unsurprisingly, the answer is that foreign investors were supported by a network of influential individuals and organisations who lobbied for them and their worldview. Conversely, local communities face systemic disadvantage in enforcing their rights under international law, a disadvantage only magnified by ISDS.

What sets Perrone's critique of investment treaties and ISDS apart from much of the current debate is that he challenges the regime itself. He presents himself as an outsider looking in on a field captured by the legal imagination of the norm entrepreneurs, an imagination that 'has contributed to blocking a broad debate about the role for foreign investment in sustainable development'.⁴ This debate, he laments, 'seems trapped in a binary discussion, restricted to approving or rejecting investment treaties and ISDS'.⁵ Unlike others, Perrone is not satisfied with reform proposals such as the creation of a permanent court or procedural innovations. It is also not worth waiting for the law to evolve and change incrementally. Arbitrators' shift to proceduralism has also not produced a marked change in their interpretations and the outcome of cases. For Perrone, tinkering with the rules is not the answer to the problems of the current regime. What is required is more ambitious, that is, a radical rethink of the rules governing foreign investment relations. Given the fundamental weaknesses of the current regime identified by Perrone, developing a different set of international rules for foreign investment is certainly an admirable goal.

Perrone stops short of proposing an alternative legal imagination or ideal model for governing foreign investment relations. However, this is not the book's objective. Having set out the problem, Perrone leaves it to other scholars to devise the solution. He calls for 'constructive discussions and debates' about the future

⁴ Ibid 202.

⁵ Ibid 205.

of foreign investment relations and for others to consider what a competing legal imagination that substantively recognises the rights of states and local communities would look like.⁶ The starting point requires ‘shifting the focus from investments to social relations’.⁷ On what this shift would mean in practical terms, Perrone is silent. Perhaps it entails dismantling the current regime in its entirety and instituting something new in its place. Indeed, what would this new regime look like. Will it require a new international organisation? New rules creating legal obligations for foreign investors? A requirement that investors exhaust domestic remedies before proceeding to international arbitration? The tenets of a new legal imagination and the regime that would flow from it are topics that could be explored more thoroughly.

Although foreign investment relations undoubtedly require significant reform, one cannot help but doubt the prospects of realising this ambition. The book makes clear that the legal imagination of the norm entrepreneurs is alive and well. The rights of foreign investors are firmly embedded in the global economic order and arbitrators continue to interpret treaties in ways that privilege the global embeddedness of these rights over domestic imperatives. If the tenacity of the norm entrepreneurs in promoting their legal imagination is anything to go by, it is difficult to imagine foreign investors readily relinquishing the privileged position they enjoy under international investment law. It seems more likely that these powerful interests will seek to prevent any revision of the rules that denies them extraordinary treatment. Further, even if significant reform is made, it does not automatically follow that the entrenched views of foreign investors and arbitrators will also change. Changing the system is one thing; changing an ideology is another matter. On how to convince others of the need for a new international framework, Perrone calls on supporters to learn lessons from the efforts of the norm entrepreneurs: be ambitious and demonstrate conviction that their approach to the law is correct.

In examining the underexplored role of the post-war norm entrepreneurs in shaping international investment law, *Investment Treaties and the Legal Imagination* seeks to do more than provide a historical account of the development and evolution of this field. It compellingly links past, present and future to offer a fresh perspective on foreign investment relations that interrogates the fundamental principles on which the system was built, thereby bringing into question the very existence of the system itself. The challenge now is to take the book’s insights and translate them into practice.

⁶ Ibid 205.

⁷ Ibid 206.

Comments and Case Notes

BILATERAL TRADE RELATIONSHIP AND DISPUTES BETWEEN AUSTRALIA AND CHINA IN THE AFTERMATH OF COVID-19

Katarzyna Basta-Zima*

ABSTRACT

In 2020 the economic and social relationship between Australia and China was severely impacted by the COVID-19 pandemic. Their bilateral trade relationship deteriorated quickly, despite the significant historical associations between the two countries. This commentary intends to understand how the COVID-19 pandemic has flared up the trade disputes between Australia and China. It further explores the significance of the conflict between the two countries and considers how the current economic and social changes happening against the backdrop of the COVID-19 pandemic will impact the future development of Australia-China bilateral trade in the pandemic period and post-pandemic world. Although the current disagreements are still ongoing, a new economic order and mutual economic relationship are possible, but both countries must be willing to negotiate. Considering that the COVID-19 pandemic is still an incessant issue, the long-term impact of the COVID-19 pandemic and normalisation of the bilateral trade is still uncertain.

I INTRODUCTION

Years 2020 and 2021 have brought an unprecedented disruption to the global order. The COVID-19 pandemic has changed the human perception of health, community, technology, and economy. The pandemic has impacted and shifted everything, starting from how people live and work to how the countries interact in terms of international trading. The COVID-19 pandemic disruption of the global economy has also been unprecedented and daunting. All the governments across the globe introduced measures to protect their citizens from trade-related challenges of the pandemic period and to mitigate the impact COVID-19 has on their economies.

Prior to the COVID-19 pandemic, Australia and China had a fully developed, mutually beneficial economic relationship. The two countries have been nurturing

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their connections through China's progress from export-related focus to developing consumption demands, with Australia helping satisfy those demands. China was Australia's most significant market for commodities, including iron ore, coal, wool and barley.¹ In turn, China became one of the top investors in Australia, contributing to its economic growth.² For many years, these economies have complemented each other in terms of export, import and investment.³ However, Australia's reliance on trade with China was concerning and has been perceived by some as a vulnerability.⁴ Despite occasional conflicts, the partnership has been largely beneficial for both countries, especially when guided by a proper diplomatic architecture and strategic dialogue.⁵ However, since the COVID-19 pandemic, tensions between Australia and China have escalated mainly due to Australia's support of an independent investigation into China's role in the COVID-19 pandemic development. These rising tensions have led to large-scale trade disputes between Australia and China that ultimately threaten Australia's position in the international economy and jeopardise the ongoing relations between China and Australia for many years to come.

This commentary explores the significance of the animosity between the two countries caused by the COVID-19 pandemic and its impact on the further development of Australia-China bilateral trading in the post-COVID-19 world. This commentary is divided into five parts. After outlining the structure in the introduction, the second part explores the political and economic relationships between Australia and China from

¹ Wilson Au-Yeung, Alison Keys and Paul Fischer, 'Australia-China: Not just 40 years', *Australia Government the Treasury* (Web Page, 12 December 2012) <<https://treasury.gov.au/publication/economic-roundup-issue-4-2012/australia-china-not-just-40-years>>.

² Ibid.

³ Ibid.

⁴ 'Australia Nervous at Losing Chinese Market', *Global Times* (Web Page, 4 November 2020) <<https://www.globaltimes.cn/content/1205750.shtml>>.

⁵ Anne Holmes, 'Australia's economic relationships with China' Parliament of Australia <https://www.aph.gov.au/about_parliament/parliamentary_departments/parliamentary_library/pubs/briefingbook44p/china>. In her article Dr Holmes postulates that Australia can benefit from the Chinese economic boom which will be supported by the Free Trade Agreement 'to build other trade and investment links and to resolve disputes.'; Weihuan Zhou, 'Chinese Investment in Australia: A Critical Analysis of the China-Australia Free Trade Agreement' (2017) 407 *Melbourne Journal of International Law* <<http://www5.austlii.edu.au/au/journals/MelJIL/2017/18.html>>. Weihuan Zhou in his article observes that the economic relationships between Australia and China have been positively impacted due to the ChAFTA and it is expected that both countries will benefit from further review and amendment of the rules that will allow for 'future development of the international economic legal order'; Weihuan Zhou and James Laurenceson, 'Demystifying Australia – China Trade Tensions' [2021] UNSWLRS 36 *University of New South Wales Law Research Series* 31 <<http://138.25.65.17/au/journals/UNSWLRS/2021/36.pdf>>. Zhou and Laurenceson analysed the trade measures issues utilised by Chinese Government and their impact on the Australia-China relationship in the Covid-19 pandemic era. Their point of view is that understanding of the cause behind the economic and political frictions will enable both countries to find a path to recover from the relational deterioration.

a historical perspective. Particularly, it delves into the evolution of their relationship through a political and economic background to further understand the transformation Australia and China have been through and the potential challenges they face. The third part analyses the impact of the COVID-19 pandemic on both economies, with a particular focus on the trade relationship between Australia and China. Part four analyses the current trade disputes between Australia and China referred to the World Trade Organisation ('WTO'). Part five concludes this commentary by emphasising the need for greater co-operation to overcome the adverse effects of the ongoing trade disputes between the two countries.

II AUSTRALIA AND CHINA: RELATIONSHIP IN RETROSPECT

To understand the complexity of the Australia-China relationship and the associated impact of the COVID-19 pandemic, it is crucial to first understand the history of Australian-China relations, which goes back more than three centuries. The first reports of Chinese traders in Australia were recorded in the 1750s.⁶ The two cultures intertwined for a long time, and in the mid-nineteenth century, approximately 3.3 percent of the Australian population was Chinese, equating to roughly 40,000 people.⁷ Australians also travelled to and lived in China for various reasons, ranging from journalism, study and business-related activities.⁸ Despite their fair share of conflict over the years,⁹ both countries developed mutually respectful relationships through local engagement and official undertakings. However, the global epidemic of COVID-19 deteriorated the diplomatic and economic relations between Australia and China that had developed over the years.

A *Political Relations*

The COVID-19 pandemic tested the strength of the Australia-China partnership on many levels. Despite various political alliances between Australia and China, their relationship ebbed due to the COVID-19 epidemic. As a result, the political relations that flourished over the 20th and early 21st century deteriorated quickly in 2020–2021, adding to the bilateral trade tension between the countries.

The political relationship between China and Australia can be traced back to the early 1900s when the first diplomatic connections were formed.¹⁰ In 1941, the

⁶ Au-Yeung, Keys and Fischer (n 1).

⁷ Ibid.

⁸ Ibid.

⁹ Stephen Sherlock, 'Australia's Relations with China: What's the Problem?', *Parliament of Australia* (Web Page, 1996–1997) <https://www.aph.gov.au/sitecore/content/Home/About_Parliament/Parliamentary_Departments/Parliamentary_Library/Publications_Archive/CIB/CIB9697/97cib23>.

¹⁰ Au-Yeung, Keys and Fischer (n 1).

first diplomatic official was appointed in China, strengthening Australia's attempts at political engagement with the government of China.¹¹ In the late 1940s, China's political landscape changed, which slowed down the progress of the Australia-China relationship. Australia disagreed with the establishment of the People's Republic of China (PRC), honouring its diplomatic ties with the country's previous government, which relocated to Taiwan in the meantime.¹² The normalisation of Australian-China affairs saw progress in the mid-1950s after Australia decided to recognise the new government of the PRC as the only government of China.¹³

In 1973, Australia opened its Embassy in Peking (now Beijing). Australian Prime Minister Gough Whitlam visited China, and the two countries signed the first bilateral trade agreement.¹⁴ Ever since, both countries' officials have regularly visited each other, which helped with the dialogue over the years and supported various engagements related to tourism, investment, and trade.

However, despite the years of working on diplomatic and political relations, the ties between the two nations have been marked by various tensions caused by conflicting values, such as the Australian stance on human rights issues in China¹⁵ or Chinese political influence on Australia's decision-making.¹⁶ The pandemic of COVID-19 had a further, overwhelming impact that caused the alliance to deteriorate. The growing political differences of opinions have spilt over onto economic relations exacerbated by the trade disputes amidst the COVID-19 pandemic.

B Economic Relations

Australia-China economic ties have been steadily growing over the past several decades and have been crucial to developing the relationship between the two countries. This alliance was a source of economic benefits for both countries. However, the political tension between the two countries, which escalated between 2020 and 2021 during the COVID-19 pandemic, impacted the mutually advantageous trade links.

The 1970s marked the origin of the modern economic relationship between Australia and China, which has progressed rapidly since.¹⁷ China's growing demand for bilateral trade stands behind its economic reforms and 'Go Global' policy, where the Chinese government encouraged its companies to expand outside of the China

¹¹ Ibid.

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

¹⁵ Au-Yeung, Keys and Fischer (n 1).

¹⁶ Nick McKenzie, Chris Uhlmann, Richard Baker and Sashka Koloff, 'Australian sovereignty under threat from influence of China's Communist Party' (Web Page, 6 June 2017) <<https://www.abc.net.au/news/2017-06-04/australian-sovereignty-under-threat-from-chinese-influence/8583832>>.

¹⁷ Yeung, Keys and Fischer (n 1).

market.¹⁸ This plan was formalised and implemented in the first decade of the twenty-first century. The government started promoting globalising of its companies; the change was exceptional and visible in the growth of China's Overseas Direct Investment (ODI) from US\$1.8 billion in 2004¹⁹ to over US\$170 billion in 2016.²⁰ In turn, this brought an increase in China's investments in Australia, concentrated mainly on the mining industry, real estate, or agribusiness.²¹

From an Australian perspective, Chinese investment boosted the economy and resulted in the manufacturing goods trade growth.²² China's merchandise trade with Australia has made up approximately 90 percent of Australian imports since the 1980s.²³ The manufacturing import from China changed over the years from textile and footwear through household to more high-tech products and influenced China's rapidly growing economy. This increase has generated a demand for various resources like iron ore and coal to keep up with China's needs for energy and transportation.²⁴ Australia provided China with over 45 percent of its iron ore requirements, making it the largest iron ore exporter to China.²⁵ This bilateral trading exchange complemented both economies and promoted a friendly relationship, further strengthened by the tourism and education industries. China and Australia have had a strong flow of visitors ever since the 1970s, supported by an increased number of airline routes. Chinese students coming to Australia increased significantly throughout the same period, from just five students starting in 1975²⁶ to over 210,000 students at the end of 2019.²⁷

The two countries' bilateral relationships grew and evolved constantly. It has been further significantly improved by the China–Australia Free Trade Agreement (ChAFTA), which entered into force on 20 December 2015 after a decade of

¹⁸ Weihuan Zhou, 'Chinese Investment in Australia: A Critical Analysis of the China-Australia Free Trade Agreement' (2017) 407 *Melbourne Journal of International Law* <<http://www5.austlii.edu.au/au/journals/MelbJIL/2017/18.html>>.

¹⁹ James Laurenceson, *Chinese Investment in Australia* (Economic Papers No 27(1), 2008) 87, 91.

²⁰ '中国非金融外直接投资 [Statistics for China's Non-Financial Outbound Direct Investment]', The Ministry of Commerce of China, (Web Page, January–December 2016) <<http://hzs.mofcom.gov.cn/article/date/201701/20170102504421.shtml>>.

²¹ Zhou (n 18).

²² Yeung, Keys and Fischer (n 1).

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ 'Students Numbers', Australian Government Department of Education, Skills and Employment, (Web Page, June 2021) <<https://internationaleducation.gov.au/research/datavisualisations/Pages/Student-number.aspx>>.

negotiations.²⁸ It secured ‘more bilateral trade, investment, a larger market ... and provided a framework for closer economic co-operation’.²⁹ Furthermore, the ChAFTA allowed both countries to access the markets across various industries, including agricultural, services, investment, tourism, and education. The ChAFTA complemented both economies even further. Australia received much needed foreign capital, allowing it to grow and prosper.³⁰ At the same time, China was provided with resources, a liberalised investment approval process, and a Chinese temporary workers’ movement,³¹ resulting in an economic win-win for both countries.

Ultimately, Australia and China have both enjoyed the advantages of the economic dialogue and co-operation. However, those benefits have been undermined by the COVID-19 pandemic. Strains in their relationship became palpable as the global outbreak developed; the COVID-19 pandemic impacted how Australia and China liaised politically and exposed their diplomatic tension, further deteriorating their relations.

III THE IMPACT OF THE PANDEMIC ON AUSTRALIA – CHINA ECONOMIC AND POLITICAL RELATIONSHIP

SARS-Cov-2 (COVID-19) was initially recorded in Wuhan in China. However, the disease quickly spread worldwide, with various variants of the virus constantly emerging throughout the world.³² The World Health Organisation (WHO) declared it a pandemic on 11 March 2020.³³ The two years of the COVID-19 pandemic caused over 4,400,000 deaths to date³⁴ and had a profound impact on the economy across the entire world by changing consumption levels, impacting supply chains and employment.³⁵

In addition to transforming many aspects of international trade, the COVID-19 pandemic also affected a number of partnerships, including Australia and China.

²⁸ Zhou (n 18).

²⁹ Chaoying Qi, James Xiaohe Zhang, *The economic impacts of the China-Australia Free Trade Agreement – A general equilibrium analysis* (2018) 1-11 *Economic China Review* 47 1 <https://www.researchgate.net/publication/320883246_The_economic_impacts_of_the_China-Australia_Free_Trade_Agreement_-_A_general_equilibrium_analysis>.

³⁰ Zhou (n 18).

³¹ *Ibid.*

³² ‘Coronavirus disease (COVID-19)’ World Health Organization (Web Page, 24 August 2021) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

³³ ‘Listings of WHO’s response to COVID-19’, World Health Organization (Web Page, 29 June 2020) <<https://www.who.int/news/item/29-06-2020-covidtimeline>>.

³⁴ ‘Coronavirus disease (COVID-19)’ World Health Organization (Web Page, 24 August 2021) <<https://www.who.int/emergencies/diseases/novel-coronavirus-2019>>.

³⁵ McKinsey & Company, ‘The coronavirus effect on global economic sentiment’ (Web Page, 29 October 2021) <<https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/the-coronavirus-effect-on-global-economic-sentiment>>.

The economic shock, coupled with diplomatic and political tensions, exposed the actual state of relationships between the two countries. Australia's exposure to the COVID-19 pandemic has made the country particularly vulnerable by revealing the country's weaknesses in the health system and supply chains and further exposing the underlying problems in managing the critical relationship with China.

Like most of the world, Australia also struggled with the challenges of the COVID-19 pandemic. Within one year since the pandemic started, the businesses in Australia reported a 66 per cent reduction in turnover.³⁶ At the same time, unemployment was at the highest point in over 20 years, caused mainly by the stringent lockdown rules.³⁷ The COVID-related expenses presented a challenge to the Australian budget, with the support committed by the Australian government estimated at \$291 billion till May 2021.³⁸ In spite of that, the pandemic's impact on the Australian economy was less severe than initially expected. Department of Foreign Affairs and Trade (DFAT) informed that the Australian export of goods to China has been steady regardless of the COVID-19 pandemic impact on the global economy.³⁹ However, some industries have become more economically unstable. The export of services has been affected the most. Still, the consequences were the most daring for the tourism and education services, which were under the most pressure, mainly due to the people movement disruption.⁴⁰ It may be argued that the most significant risk stemmed from Australia's reliance on its largest export market thus far, China.⁴¹ Consequently, when the COVID-19 pandemic exposed and increased frictions between the two countries, it reignited the debate about whether Australia should reduce its dependence on China.⁴²

³⁶ 'One year of COVID-19: Aussie jobs, business and the economy', *Australian Bureau of Statistics* (Web Page, 17 March 2021) <<https://www.abs.gov.au/articles/one-year-covid-19-aussie-jobs-business-and-economy>>.

³⁷ Shannen Higginson et al, 'COVID-19: The need for an Australian economic pandemic response plan' (28 August 2020) PMID: PMC7452864 PMID: 32874859 <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7452864>>.

³⁸ 'Economic Response to COVID-19', *Australian Government the Treasury* (Web Page) <<https://treasury.gov.au/coronavirus>>.

³⁹ Joint Standing Committee on Foreign Affairs, Defence and Trade, 'Inquiry into the implications of the COVID-19 pandemic for Australia's foreign affairs, defence and trade', *Parliament of the Commonwealth of Australia* (Web Page, December 2020) 25 [4.20] <https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024552/toc_pdf/InquiryintotheimplicationsoftheCOVID-19pandemicforAustralia%e2%80%99sforeignaffairs,defenceandtrade.pdf;fileType=application%2Fpdf>.

⁴⁰ Andrew Dowse and Sasha-Dominik Dov Bachmann, Submission No 7 to Joint Standing Committee FADT *Inquiry into the implications of the COVID-19 pandemic for Australia's foreign affairs, defence and trade* 4.

⁴¹ Daniel Hurst, 'How much is China's trade war really costing Australia?', *The Guardian* (Web Page, 28 October 2020) <<https://www.theguardian.com/australia-news/2020/oct/28/how-much-is-chinas-trade-war-really-costing-australia>>.

⁴² Frances Mao, 'How reliant is Australia on China', *BBC News* (Web Page, 17 June 2020) <<https://www.bbc.com/news/world-australia-52915879>>.

The COVID-19 pandemic has severely complicated international connections between Australia and China. The benefit of hindsight allows observing that although, from an economic perspective, the relationship between the two countries was steadily developing over the last two decades, politically, the countries were slowly disuniting. The multitude of arguments between the two countries caused the two nations to enter the path of economic decoupling. The first trigger for China was the call by Australian Prime Minister Scott Morrison into the origins of the COVID-19 pandemic in April 2020, later repeated numerous times, including during the 75th annual United Nations General Assembly on 25 September 2020.⁴³ China took the Australian Prime Minister's statement as a political attack and retaliated with a series of trade sanctions and tariffs.⁴⁴

To begin with, in May 2020, China introduced a ban on beef imported from Australia's four largest meat processing facilities.⁴⁵ Later that same month, the Chinese government announced 80 per cent anti-dumping and anti-subsidy duties on Australian barley exports expected to last five years.⁴⁶ Throughout the same time, Australia reviewed and retained a number of anti-dumping measures and investigations on Chinese products, mainly relating to steel.⁴⁷ In June 2020, the Chinese Minister of Education issued an official warning against travel to Australia, especially for students who intend to travel to Australian schools.⁴⁸ In August 2020, China launched an anti-dumping and anti-subsidy investigation into Australian wine. The following month China also suspended barley imports from

⁴³ Colin Packham, 'Australia says world needs to know origins of COVID-19', *Reuters* (Web Page, 26 September 2020) <<https://www.reuters.com/article/us-health-coronavirus-australia-china-idUSKCN26H00T>>.

⁴⁴ Kirsty Needham 'Australia faces down China in high-stakes strategy', *Reuters Investigates* (Web Page, 04 September 2020) <<https://www.reuters.com/investigates/special-report/australia-china-relations/>>; Johnathan Kearsley, 'There it was, China's list of grievances': How 9News got the dossier at the heart of the latest diplomatic scuffle between Canberra and Beijing', *9News* (Web Page, 23 November 2020) <<https://www.9news.com.au/national/china-dossier-canberra-beijing-diplomatic-tensions-how-jonathan-kearsley-broke-the-story/216a985d-3289-4988-8781-e6dc479f0d74>>.

⁴⁵ Kirsty Needham, Colin Packham 'China halts beef imports from four Australian firms as COVID-19 spat sours trade', *Reuters* (Web Page, 12 May 2020) <<https://www.reuters.com/article/us-australia-china-beef-idUSKBN2200FB>>.

⁴⁶ Dominique Patton, Colin Packham, 'China hits Australia with barley tariff in latest blow to relations', *Reuters* (Web Page, 18 May 2020) <<https://www.reuters.com/article/us-china-australia-barley-idUSKBN22U1J6>>.

⁴⁷ Su-Lin Tan, 'China-Australia relations: what's happened over the past year, and what's the outlook?', *China Macro Economy* (Web Page, 20 April 2021) <<https://www.scmp.com/economy/china-economy/article/3130109/china-australia-relations-whats-happened-over-past-year-and>>.

⁴⁸ Ministry of Education the People's Republic of China, 'MOE issues first warning statement in 2020 for students preparing to study abroad', 10 June 2020 <http://en.moe.gov.cn/news/press_releases/202006/t20200619_467021.html>.

Australian business CBH Grain due to the harmful pest found in the shipment, despite the firm denial from the exporter.⁴⁹ Then, in October 2020, China verbally instructed its buyers not to buy Australian coal⁵⁰ and cotton.⁵¹ Finally, in November 2020, the Chinese government decided to use another level of economic pressure on Australia and blocked Australian sugar, coal, barley, log timber, red wine, and lobster in the Chinese ports by way of further verbal bans.⁵² The above sanctions, stemming from Australia's stance on the inquiry into the origins of the COVID-19 pandemic, furthered the animosity between the two governments.⁵³ Subsequently, it led to the Chinese government effectively blocking Australian imports hoping that this would force the Australian government into submission and recant their call for an independent investigation into the origins of the COVID-19 pandemic.⁵⁴

The growing antagonism between the two countries has been further exacerbated by China imposing additional anti-dumping measures on Australian wine. Initially, these measures were supposed to be temporary,⁵⁵ however, some are now expected to last up to five years.⁵⁶ In December 2020, China blocked beef exports from another Australian meat facility.⁵⁷ Meanwhile, on 16 December 2020, the Australian government decided to lodge an appeal against China's ban on Australian barley.

During this time, the World Health Organisation (WHO) was working on sending a mission to probe into the origins of COVID-19 in China. Unfortunately, although the team was supposed to start work in January 2021, the Chinese government was not ready by then. This delay was met with international criticism.

⁴⁹ Hallie Gu, Colin Packham, 'China suspends barley imports from Australia's largest grain exporter', *Reuters* (Web Page, 16 September 2020) <<https://www.reuters.com/article/china-australia-barley-idUSKBN25T0RK>>.

⁵⁰ Michael Smith and Andrew Tillett, 'China orders steel makers to stop buying Australian coal, say traders' *Financial Review* (Web Page, 13 October 2020) <<https://www.afr.com/world/asia/china-orders-some-steelmakers-to-stop-buying-australian-coal-traders-20201013-p564hs>>.

⁵¹ Colin Packham, Dominique Patton, 'China tells cotton mills to stop buying Australian supplies – sources', *Reuters* (Web Page, 16 October 2020) <<https://www.reuters.com/article/idUSL4N2H710G>>.

⁵² Shivani Singh, 'Tension between China and Australia over commodities trade', *Reuters* (Web Page, 12 December 2020) <<https://www.reuters.com/business/energy/tension-between-china-australia-over-commodities-trade-2020-12-11/>>.

⁵³ Needham (n 44).

⁵⁴ *Ibid.*

⁵⁵ Kirsty Needham, Sophie Yu, 'China to impose temporary anti-dumping measures on Australian wine imports', *Reuters* (Web Page, 27 November 2020) <<https://www.reuters.com/article/us-china-australia-wine-idUSKBN28703A>>.

⁵⁶ Ryan Woo and Yilei Sun, 'China to impose anti-dumping measures on Australian wine imports', *Reuters* (Web Page, 26 March 2021) <<https://www.reuters.com/article/us-china-australia-wine-idUSKBN2B115F>>.

⁵⁷ Dominique Patton and Hallie Gu, 'China suspends beef imports from sixth Australian beef supplier', *Reuters* (Web Page, 7 December 2020) <<https://www.reuters.com/article/china-australia-trade-beef-idUKKBN28H135>>.

Australia's Foreign Minister Marise Payne urged China to stop the delays and provide the WHO experts with access to conduct an independent investigation into the origins of coronavirus.⁵⁸ These demands were not received positively by the Chinese government. Although China eventually begrudgingly agreed to the investigation by the WHO, it again backfired towards Australia by way of further trade restrictions. In May 2021, China eventually announced an indefinite suspension of economic activities carried on under the framework of the China–Australia Strategic Economic Dialogue. This move was considered a retaliation after the Australian government cancelled the Victoria's Belt and Road Initiative in April 2021 on the grounds of inconsistency with Australia's foreign policy.⁶⁰ This has brought further damage to the relationship between the two countries as China considered this a provocative action by Australia.⁶¹

The series of economic and diplomatic disputes intensified during the COVID-19 pandemic. Those events have left Australia with a very asymmetric bilateral trade relationship with China and caused various Australian industries significant economic problems. China, in turn, opposed the Australian policies that they felt were oppressive and discriminatory. As the rivalry continued, trade disputes escalated, and economic ties declined, driving both governments to defend their sovereignty more assertively.

⁵⁸ Colin Packham, 'Australia urges China to give access to WHO coronavirus experts 'without delay'', *Reuters* (Web Page, 7 January 2021) <<https://www.reuters.com/world/china/australia-urges-china-give-access-who-coronavirus-experts-without-delay-2021-01-07/>>.

⁵⁹ Tim Callanan, 'What is China's Belt and Road Initiative and what were the four deals the federal government tore up?', *ABC News* (Web Page, 22 April 2021) <<https://www.abc.net.au/news/2021-04-22/what-was-in-victoria-belt-and-road-deal-with-china/100086224>>. The Strategic Economic Dialogue, originally established in 2014, intended to bring together Australian and Chinese governments as well as the business, academic and social representatives, in order to discuss any political, economic, cultural or social issues that could impact the countries' relationship: 'China country brief – Bilateral relations', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/geo/china/china-country-brief>>.

⁶⁰ The Victoria's Belt and Road Initiative was a part of international Chinese strategy promoting cultural and economic connectivity and aiming to develop bilateral cooperation through enhancement of trade partnerships, encouragement of political support and development of digital infrastructure: 'Belt and Road Initiative - Framework Agreement', *VIC.GOV.AU* (Web Page, 5 May 2021) <<https://www.vic.gov.au/sites/default/files/2019-02/Belt-and-Road-Initiative-MOU.pdf>>; 'Decisions under Australia's Foreign Arrangements Scheme', *Minister for Foreign Affairs, Minister for Women* (Web Page, 21 April 2021) <<https://www.foreignminister.gov.au/minister/marise-payne/media-release/decisions-under-australias-foreign-arrangements-scheme>>.

⁶¹ 'Chinese Embassy Spokesperson's Remarks', *Embassy of the People's Republic of China in the Commonwealth of Australia* (Web Page, 21 April 2021) <https://www.mfa.gov.cn/ce/ceau/eng/sghdxwfb_1/t1870484.htm>.

IV AUSTRALIA – CHINA TRADE DISPUTES REFERRED TO THE WHO

COVID-19 has dramatically disrupted the partnership between Australia and China and has rapidly diminished their trading relationship, not showing any hope for improvement at the time of writing this commentary. Severe trade challenges and a lack of ability to reach mutual agreement have caused the two countries to seek resolutions through an independent body – World Trade Organisation (WTO).

WTO is a global organisation with a system of principles and rules to regulate international trade. Dispute resolution is one of WTO's essential processes that allows the trading between nations to be more effective and predictable. However, despite the successful utilisation of the dispute resolution system by the WTO, the mechanics of settling a dispute can be quite lengthy.⁶² Although the whole prescribed process should take no longer than 15 months, even with the appeal included,⁶³ it can be extended to a much longer timeframe, leading to a challenging situation with the indefinite implementation of the dispute ruling.⁶⁴ Additionally, the ruling does not account for retrospective damages, which some perceive as another deficiency in the dispute settling process.⁶⁵ Therefore, the WTO's preference is to settle disputes amicably via bilateral consultation, and this solution is available for the countries throughout the duration of the dispute settling process.⁶⁶

As an organisation that provides amicable processes to settle disputes, the WTO plays an essential role in a COVID-19 strained relationship between Australia and China. The Dispute Settlement Body (DSB) of the WTO resolves trade disputes between members when their rights under the WTO Agreements are infringed. WTO Members have up to 60 days for consultation, where they discuss the matter between each other.⁶⁷ If the consultation fails, the WTO, within 45 days, appoints independent experts as a 'Panel'.⁶⁸ The Panel reviews both parties' written and oral submissions. If the Panel considers that either party has breached a WTO

⁶² World Trade Organization 'Dispute settlement' (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm>.

⁶³ World Trade Organization 'A unique contribution' (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm>.

⁶⁴ Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect?' (2019) 22(3) *Journal of International Economic Law* 297; Weihuan Zhou, 'WTO Dispute Settlement Mechanism Without the Appellate Body: Some Observations on the US–China Trade Deal' (2020) 9(2) *Journal of International Trade and Arbitration Law* 443.

⁶⁵ Mark Wu, 'China's Export Restrictions and the Limits of WTO Law' (2017)16(4) *World Trade Review* 673.

⁶⁶ World Trade Organization 'A unique contribution' (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/displ_e.htm>.

⁶⁷ 'World Trade Organization', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://dfat.gov.au/trade/organisations/wto/Pages/the-world-trade-organization>>.

⁶⁸ *Ibid.*

Agreement, the Panel provides a report that includes recommendations on the measures that must be taken. A losing party may appeal the Panel's decision to the Appellate Body.

As a country whose economy relies heavily on open global trading, Australia has been a member of the WTO since its establishment on 1 January 1995.⁶⁹ China joined the WTO on 11 December 2001,⁷⁰ after a lengthy negotiation process with all the WTO members, as China's WTO accession required significant changes to the Chinese economy and policies.⁷¹ The process resulted in China liberalising its trade regime to integrate with the global economy as per its commitments under the WTO agreements.⁷²

As analysed above, Australia and China's political and economic relationship amidst the COVID-19 pandemic is strained, resulting in the suffering of bilateral trade between these two countries. Their attempts to resolve their trade disputes privately failed and this commentary outlines the ongoing trade disputes between Australia and China.

A *Australia's Complaint – Barley*

China launched an investigation into Australian barley export between October 2017 and September 2018. The Chinese government suspected Australia of dumping barley; in other words, selling it for a lower price in China than it would be generally sold in the Australian market. They also suspected that Australia might provide its producers with subsidies or tax benefits to compensate for the dumping of the product on the Chinese market. The Chinese government eventually ruled that dumping and subsidies took place and imposed an 80.5 percent tariff as countervailing duties on Australian barley.⁷³ The Australian government regarded those sanctions as inconsistent with China's obligations under the provisions of the WTO agreements.⁷⁴ On 16 December 2020, Australia requested consultations

⁶⁹ World Trade Organization 'Australia and the WTO' (Web Page) <https://www.wto.org/english/thewto_e/countries_e/australia_e.htm>.

⁷⁰ Ibid 'Chinese and the WTO' <https://www.wto.org/english/thewto_e/countries_e/china_e.htm>.

⁷¹ Ibid 'WTO successfully concludes negotiations on China's entry' <https://www.wto.org/english/news_e/pres01_e/pr243_e.htm>.

⁷² Ibid 'WTO Ministerial Conference approves China's accession' <https://www.wto.org/english/news_e/pres01_e/pr252_e.htm>.

⁷³ Liangyue Cao and Jared Greenville, 'Understanding how China's tariff on Australian barley exports will affect the agricultural sector', *Australian Government Department of Agriculture, Water, and the Environment* (Web Page, 13 January 2021) <<https://www.agriculture.gov.au/abares/research-topics/trade/understanding-chinas-tariff-on-australian-barley>>.

⁷⁴ *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Docs WT/DS598/1m G/L/1382m G/ADP/D135/1 and G/SCM/D130/1 (21 December 2020) (Request for Consultations by Australia) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/598-1.pdf&Open=True>> ('Duty Measures on Barley').

with the Chinese Government as a first step in the WTO dispute resolution process.⁷⁵ In its request for consultation, Australia provided a list of grievances. The list included complaints that China improperly and without sufficient evidence initiated investigations and did not offer Australia an opportunity to provide relevant evidence. Australia further alleged China based their determination on the improper information and used inadequate methodology to determine the subsidisation resulting in improper countervailing duties on Australian barley.⁷⁶

Australia's consultation with China took place on 28 January 2021. However, the countries failed to resolve the issue during the meeting. On 15 March 2021, Australia requested the establishment of a Panel.⁷⁷ Australia complained that China's initiation and conduct of investigation were incorrect and that China's imposition of countervailing duties was improperly established, causing material injury to the Australian domestic industries.⁷⁸ A Dispute Settlement Body attempted to establish a Panel on 28 April 2021. However, China refused to participate as the Chinese government was disappointed that Australia decided to pursue the dispute.⁷⁹ The Panel was eventually established on 28 May 2021, with Brazil, Canada, the European Union, India, Japan, New Zealand, Norway, the Russian Federation, Singapore, Ukraine, the United Kingdom, and the United States reserving the third-party rights to participate in the Panel's proceedings.⁸⁰ The delegations of Australia and China mutually agreed on arbitration procedures on 27 July 2021,⁸¹ and both countries are currently awaiting the report.⁸²

⁷⁵ 'Summary of Australia's involvement in disputes currently before the World Trade Organization', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/trade/organisations/wto/wto-disputes/summary-of-australias-involvement-in-disputes-currently-before-the-world-trade-organization>>.

⁷⁶ *Duty Measures on Barley*, WTO Docs WT/DS598/1m G/L/1382m G/ADP/D135/1 and G/SCM/D130/1 (n 74).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ Dispute Settlement Body, *Minutes of Meeting Held in The Centre William Rappard on 28 May 2021 Chairman: H.E. Mr Didier Chambovey (Switzerland)*, WTO Doc WT/DSB/M/452 (12 July 2021) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DSB/M452.pdf&Open=True>>.

⁸⁰ 'DS598: China — Anti-dumping and countervailing duty measures on barley from Australia', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS598_e.htm>.

⁸¹ *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/5 (20 August 2021) (Agreed Procedures for Arbitration Under Article 25 Of the DSU) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/598-5.pdf&Open=True>>.

⁸² *China – Anti-Dumping and Countervailing Duty Measures on Barley from Australia*, WTO Doc WT/DS598/7 (20 March 2022) (Communication from the Panel) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS598-7.pdf&Open=True>>.

Due to China's high tariff, Australia's barley farmers lost their premium market during the COVID-19 pandemic. Australia is currently looking for barley export options into other countries, which further weakens the Australia–China trade relations.

B *Australia's Complaint – Wine*

The relationship between Australia and China has further deteriorated due to China's high tariff on Australian wine. China's timing of this trade measure coincided with Australia's demand for an international investigation into the COVID-19 virus outbreak in Wuhan.⁸³ China's repercussions involved restrictions on the originally sizable Australian wine export.⁸⁴

In 2020, Australia was the largest supplier of bottled wine to China, and China was, in value, Australia's largest export market.⁸⁵ However, on 26 March 2021, the Chinese government declared that the anti-dumping and countervailing investigation led them to introduce the anti-dumping measures of 116.2 to 218.4 percent tariff on Australian suppliers of various wines.⁸⁶

Australia officially requested on 22 June 2021 to commence the WTO's dispute resolution proceedings by seeking to start a consultation process.⁸⁷ Australia claimed that the Chinese anti-dumping and countervailing measures on bottled wine are inconsistent with China's obligations under WTO's agreements.⁸⁸ The complaints listed in the Request for Consultation on China's anti-dumping and countervailing duty measures on wine from Australia were largely similar to the list of grievances regarding barley.⁸⁹ The list included complaints that China initiated the investigation

⁸³ Colin Packham, 'Australia urges China to give access to WHO coronavirus experts 'without delay'', *Reuters* (Web Page, 7 January 2021) <<https://www.reuters.com/world/china/australia-urges-china-give-access-who-coronavirus-experts-without-delay-2021-01-07/>>.

⁸⁴ Glyn Wittwer and Kym Anderson, 'COVID-19 and global beverage markets: Implications for wine', Australian National University No. 2021/12 (Web Page, April 2021) <https://acde.crawford.anu.edu.au/sites/default/files/publication/acde_crawford_anu_edu_au/2021-04/acde_td_wittwera_and_anderson_2021_12.pdf>.

⁸⁵ Trish Gleeson, Donkor Addai and Liangyue Cao 'Australian wine in China: Impact of China's anti-dumping duties' *Australian Government Department of Agriculture, Water and the Environment ABARES* (Web Page, 27 July 2021) <<https://www.agriculture.gov.au/abares/research-topics/trade/australian-wine-in-china>>.

⁸⁶ *Ibid.*

⁸⁷ 'Summary of Australia's involvement in disputes currently before the World Trade Organization', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/trade/organisations/wto/wto-disputes/summary-of-australias-involvement-in-disputes-currently-before-the-world-trade-organization>>.

⁸⁸ *China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia*, WTO Docs WT/DS602/1, G/L/1390 G/ADP/D137/1 and G/SCM/D132/1 (28 June 2021) (Request for Consultations by Australia) <<https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/602-1.pdf&Open=True>>.

⁸⁹ *Ibid.*

improperly and erred in its interpretation of the definitions of specific terms related to the wine market. Furthermore, China allegedly refused to provide Australia with an opportunity to provide relevant evidence and imposed provisional anti-dumping and countervailing duties on Australian wine without proper investigation and adequate procedures.⁹⁰ Those anti-dumping measures, together with China's initial temporary anti-dumping tariffs imposed on Australian wine suppliers in November 2020, now rendered the Chinese market practically infeasible for export.⁹¹

On 9 August 2021, Australia and China held a consultation.⁹² As the formal discussion did not resolve the dispute within 60 days, Australia submitted a request to establish the Panel, which took place on 26 October 2021.⁹³ However, although panellists were selected on 4 March 2022, at the point of writing this commentary, no panel report has been circulated, and no withdrawal or mutually agreed solution was notified by either of the parties.⁹⁴

The wine dispute, further escalated by the COVID-19 pandemic, continues to adversely impact the relations between the two countries. The challenges faced by the wine industry due to China's prohibitive tariffs on wine imports and the COVID-19 pandemic will have a long-term impact on the wine industry and force the Australian winemakers to change their export strategies significantly.⁹⁵ The concern is that even if Australia and China reach a satisfactory agreement, their partnership will take a long time to normalise, especially considering the other ongoing disputes.

C *China's Complaint – 'Certain Products'*

Relations between Australia and China plummeted even further after China filed to the WTO a complaint against measures imposed by Australia on products imported from China. After a number of investigations over the years, the Australian government imposed anti-dumping measures on wind towers, deep drawn stainless steel sinks, railway wheels, and countervailing measures on deep drawn stainless

⁹⁰ Ibid.

⁹¹ Gleeson, Addai and Cao (n 85).

⁹² 'DS602: China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds602_e.htm>.

⁹³ 'Panel established to examine Chinese duties on imported Australian wine', *World Trade Organization* (Web Page) <https://www.wto.org/english/news_e/news21_e/dsb_26oct21_e.htm>.

⁹⁴ 'China – Anti-Dumping and Countervailing Duty Measures on Wine from Australia', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds602_e.htm>.

⁹⁵ Wittwer and Anderson (n 84).

steel sinks imported from China.⁹⁶ Australia referred to these various products as Certain Products in its request for a consultation with China.⁹⁷ The Australian government concluded that it must impose those additional duties as the dumped and subsidised imported products caused material injury to the Australian industries, such as loss of sales, profit, revenue, and capacity utilisation, as well as negatively impacted prices and employment.⁹⁸

Australia applied anti-dumping measures to wind towers since 2014, railway wheels since 2019, and stainless-steel sinks since 2015.⁹⁹ In April 2019, the anti-dumping measures on wind towers from China were varied and are now ranging from 15 to 15.6 per cent.¹⁰⁰ In 2020 Australia also decided to maintain the anti-dumping and countervailing duties on stainless-steel sinks, which range currently from 3.3 to 49.5 per cent.¹⁰¹ Tariffs on railway wheels are still ongoing and at 17.4 per cent.¹⁰²

On 29 June 2021, China took the trade dispute concerning anti-dumping and countervailing measures imposed by the Australian government over the wind towers, deep drawn stainless steel sinks, and railway wheels to WTO DSB.¹⁰³ The Chinese government claimed that Australia's anti-dumping and countervailing duties abused trade remedy measures. The PRC strongly opposed these measures

⁹⁶ Australia – *Anti-Dumping and Countervailing Duty Measures on Certain Products from China*, WTO Docs WT/DS603/1, G/L/1391 G/ADP/D138/1 and G/SCM/D133/1 (29 June 2021) (Request for Consultations by China) <<https://www.dfat.gov.au/sites/default/files/ds603-the-peoples-republic-china-request-consultations-australia-anti-dumping-countervailing-measures-certain-products-china.pdf>> ('*Duty Measures on Certain Products*').

⁹⁷ Ibid.

⁹⁸ '*Anti-dumping and countervailing system*' (Web Page, 24 September 2021) <<https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system>>; *Alleged Dumping of Deep Drawn Stainless Steel Sinks Exported from The People's Republic of China and Alleged Subsidisation of Deep Drawn Stainless Steel Sinks Exported from The People's Republic of China* (Report No. 238, 19 February 2015) 57, ch 8 <<https://www.industry.gov.au/sites/default/files/adc/public-record/102-finalreport-anti-dumpingcommission.pdf>>.

⁹⁹ '*Duty Measures on Certain Products*', WTO Docs WT/DS603/1, G/L/1391 G/ADP/D138/1 and G/SCM/D133/1 (n 96).

¹⁰⁰ 'Investigation – Wind towers from China, Korea', *Australian Department of Industry, Science, Energy and Resources* (Web Page, 16 April 2014) <<https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/epr-221>>.

¹⁰¹ 'Investigation – Deep drawn stainless steel sinks from China', *Australian Department of Industry, Science, Energy and Resources* (26 March 2015) <<https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/epr-238>>.

¹⁰² 'Investigation – Dumping and Subsidisation, railway wheels from China, France', *Australian Department of Industry, Science, Energy and Resources* (15 July 2019) <<https://www.industry.gov.au/regulations-and-standards/anti-dumping-and-countervailing-system/anti-dumping-commission-archive-cases/466>>.

¹⁰³ '*Duty Measures on Certain Products*', WTO Docs WT/DS603/1, G/L/1391 G/ADP/D138/1 and G/SCM/D133/1 (n 96).

since they hurt Chinese businesses and contradict WTO rules.¹⁰⁴ The Request for Consultation was perceived by Australia as another tit-for-tat.¹⁰⁵ The Chinese government stipulated in its complaint document that Australia was inconsistent with its obligations under the WTO Agreements.¹⁰⁶ Amongst their grievances, China specified that Australia did not calculate the cost of production correctly in the anti-dumping investigation.

Additionally, China imputed that during the investigation in assessing the countervailing duties, Australia had applied unlawful standards and methodologies to determine the financial contribution in the form of subsidy received by the deep drawn stainless steel sinks exporters.¹⁰⁷ The consultation between China and Australia took place on 11 August 2021, but the countries did not reach a resolution, and China requested the establishment of the Panel.¹⁰⁸ On 13 January 2022, DSB agreed to establish a Panel, but the panellists were not selected at the time of writing this commentary.¹⁰⁹

V CONCLUSION

The ongoing, openly hostile political and economic tension between China and Australia resembles a 21st-century version of the cold war. The constant back and forth between the two countries represents an uneven battle between verbal arguments and responses through trade restrictions. For the past two years, both countries have been experiencing constant challenges when engaging in dialogue. This economical tit-for-tat left both countries with deeply strained relations. In the aftermath of Australia's insistence on the full COVID-19 pandemic investigation in Wuhan, Australia and China found themselves engaged in a number of trade disputes referred to the WTO DSB. Chinese economic coercion against Australia resulted in Australia's loss of exports worth approximately \$6.6 billion over the eight

¹⁰⁴ 'MOFCOM Regular Press Conference (June 24, 2021)', Ministry of Commerce of People's Republic of China, (Web Page, 26 June 2021) <<http://english.mofcom.gov.cn/article/newsrelease/press/202107/20210703174033.shtml>>.

¹⁰⁵ Ibid.

¹⁰⁶ The GATT 1994, the Anti-Dumping Agreement and the SCM Agreement.

¹⁰⁷ 'Duty Measures on Certain Products', WTO Docs WT/DS603/1, G/L/1391 G/ADP/D138/1 and G/SCM/D133/1 (n 96); *Alleged Dumping of Deep Drawn Stainless Steel Sinks Exported from The People's Republic of China and Alleged Subsidisation of Deep Drawn Stainless Steel Sinks Exported from The People's Republic of China* (Report No. 238, 19 February 2015) 57, ch 8 <<https://www.industry.gov.au/sites/default/files/adc/public-record/102-finalreport-anti-dumpingcommission.pdf>>.

¹⁰⁸ 'DS603: Australia — Anti-Dumping and Countervailing Duty Measures on Certain Products from China', *World Trade Organization* (Web Page) <https://www.wto.org/english/tratop_e/dispu_e/cases_e/DS603_e.htm>.

¹⁰⁹ Ibid.

months from July 2020.¹¹⁰ For China, the consequences at this point are somewhat speculative. The loss of reputation in the global economic market might potentially have the most significant impact resulting in difficulty finding sustainable partnerships. Although commencing a formal process with WTO might appear as an attempt to solve long-standing economic issues, the COVID-19 pandemic era has become a catalyst for deep resentment that has caused the relationship between Australia and China to sour. Bilateral relations between Australia and China are the worst they've been in decades, and the governments will struggle to return to the mutually beneficial union.

Surprisingly, despite the tension around trade and economic relationship, China remains one of Australia's largest trading partners.¹¹¹ Reducing the mutual dependency of these countries without serious consequence is an unlikely occurrence.¹¹² Australia's economic dependence means the country is vulnerable to the Chinese government's economic coercion. Additionally, despite presenting its disappointment with the Australian government for not following the Chinese lead and continuing the diplomatic spat, the Chinese economy still relies on Australia regarding iron ore.¹¹³ As China's demands for Australian goods constantly grow, corresponding to China's industrial growth, it seems unlikely that this trade avenue would be threatened any time soon.¹¹⁴ Therefore, separating those two economies would not be straightforward. It would bring a lot of anguish and stress to the global economy and the individuals on both sides of the barricades. Australia has a great challenge ahead. Its government needs to learn to balance a robust economic relationship with China while at the same time diversifying the trade market. An opportunity for improvement exists, but both countries would need to engage in diplomatic conversations for their mutual economic growth.

¹¹⁰ Ron Wickes, Mike Adams and Nicolas Brown, 'Economic Coercion by China: The Impact on Australia's Merchandise Exports' (Working Paper No 04/2021, Institute for International Trade, The University of Adelaide, July 2021) <<https://iit.adelaide.edu.au/ua/media/1479/wp04-economic-coercion-by-china-the-effects-on-australias-merchandise-exports.pdf>>.

¹¹¹ 'China country brief - Bilateral relations', *Australian Government Department of Foreign Affairs and Trade* (Web Page) <<https://www.dfat.gov.au/geo/china/china-country-brief>>.

¹¹² Weihuan Zhou and James Laurenceson, 'Demystifying Australia – China Trade Tensions' [2021] UNSWLRS 36 *University of New South Wales Law Research Series* 31 <<http://138.25.65.17/au/journals/UNSWLRS/2021/36.pdf>>.

¹¹³ Ibid; Ben Butler, 'Could China Replace Australian Iron Ore with Metal from Africa?', *The Guardian* (Web Page, 3 December 2020) <<https://www.theguardian.com/business/2020/dec/02/could-china-replace-australian-ironore-with-metal-from-africa>>.

¹¹⁴ 'International Merchandise Trade, Preliminary, Australia', *Australian Bureau of Statistics* (Web Page, 22 July 2021) <<https://www.abs.gov.au/statistics/economy/international-trade/international-merchandise-trade-preliminary-australia/latest-release>>.

WTO DISPUTE ON AUSTRALIA'S PLAIN PACKAGING MEASURES IN THE TOBACCO EPIDEMIC

Sara Dofash*

I – INTRODUCTION

Tobacco use is one of the leading causes of preventable disease and death around the world,^{1,2} contributing to approximately 6 million deaths each year globally.³ In 2010, 15.1 per cent of Australians aged 14 years or over were smoking daily and about three million were smoking at least daily or weekly.⁴

In June 2020, the World Trade Organization (WTO) Appellate Body (AB) published its decision to uphold Australian laws restricting the branding and design of tobacco packaging. In 2012, Australia introduced tobacco plain packaging measures (TPP measures) which prohibited the placing of any branding or design features on all tobacco packaging and products sold, offered for sale, or otherwise supplied in Australia.⁵ These measures were implemented as part of a comprehensive approach to protect the public health by reducing the uptake of smoking by young people, based on evidence that the attractive appearance of tobacco packaging encouraged smoking, especially among the youth.⁶

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¹ World Health Organization, *WHO Report on the Global Tobacco Epidemic* (Report, 2008) <https://apps.who.int/iris/bitstream/handle/10665/43818/9789241596282_eng.pdf?sequence=1&isAllowed=y>.

² World Health Organisation, *Tobacco* (Blog Post, 26 July 2021) <www.who.int/mediacentre/factsheets/fs339/en/>.

⁴ Commonwealth of Australia, *National Tobacco Strategy 2012-2018* (Strategy Report, 2012) <https://www.health.gov.au/sites/default/files/national-tobacco-strategy-2012-2018_1.pdf>; Australian Institute of Health and Welfare, *2010 National Drug Strategy Household Survey* (Report No 25, 27 July 2011) <<https://www.aihw.gov.au/reports/illicit-use-of-drugs/2010-ndshs/summary>>.

⁵ These measures are provided in the *Tobacco Plain Packaging Act 2011* (Cth); the *Tobacco Plain Packaging Regulations 2011* (Cth) (as amended by the *Tobacco Plain Packaging Amendment Regulation 2012* (No. 1) (Cth)); and the *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011* (Cth).

⁶ *Australia – Certain Measures Concerning Trademarks, Geographical Indications and other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS441/DS435 (2 October 2018) (Executive Summary of Australia's Appellee Submission) [7].

These measures created restrictions on trademarks and geographical indications on tobacco products, leading to concerns that they were inconsistent with Australia's international obligations under:

- the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS Agreement'),⁷
- the *Agreement on Technical Barriers to Trade* ('TBT Agreement');⁸ and
- the *General Agreement on Tariffs and Trade 1994* ('GATT').⁹

Accordingly, Honduras, followed by the Dominican Republic, Cuba, and Indonesia requested consultations with Australia in 2012. In March 2014, a Panel in the WTO Dispute Settlement Body was established to hear their claims. In June 2018, the Panel circulated the Panel Report,¹⁰ where it dismissed all the claims against Australia finding that allegations had not been established on the evidence.

The Honduras and the Dominican Republic (the Appellants)¹¹ appealed to the AB on three main grounds, submitting that the Panel erred in its interpretation and application of:

1. Article 2.2 of the TBT Agreement
2. Article 16.1 of the TRIPS Agreement
3. Article 20 of the TRIPS Agreement.

This case-note discusses these grounds of appeal, and the AB's reasons for upholding the Panel's decision and dismissing the claims against Australia.

⁷ *Marrakesh Agreement Establishing the World Trade Organization*, Opened for signature 15 April 1995, 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Trade-Related Aspects of Intellectual Property Rights*) arts 2.1, 3.1, 15.4, 16.1, 16.3, 20, 22.2(b), 24.3.

⁸ *Marrakesh Agreement Establishing the World Trade Organization*, Opened for signature 15 April 1995, 1867 UNTS 3 (entered into force 1 January 1995) (*Agreement on Technical Barriers to Trade*) arts 2.1, 2.2.

⁹ *Marrakesh Agreement Establishing the World Trade Organization*, Opened for signature 15 April 1995, 1867 UNTS 3 (entered into force 1 January 1995) (*General Agreement on Tariffs and Trade 1994*) art III(4).

¹⁰ Panel Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging* WTO Doc WT/DS435/R; WT/DS441/R; WT/DS458/R; WT/DS467/R (28 June 2018) ('Panel Report'); note that separate panels heard each complainant's claim, however the separate panels combined their decisions into the single Panel Report.

¹¹ Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/AB/R; WT/DS441/AB/R (9 June 2020) ('AB Report'); note that the Appellants challenged the Panel's findings in separate appeals, however the Appellate Body decided them in a single panel.

II – THE APPEAL

A – Article 2.2 of the TBT Agreement

1 – Background

Article 2.2 of the TBT Agreement prohibits members from adopting laws and regulations which create unnecessary obstacles to international trade. It requires that regulations should not be ‘more trade-restrictive than necessary’ to fulfil a legitimate objective, considering the risks created by their non-fulfilment. It outlines the protection of human health or safety as a possible legitimate objective.

It was argued before the Panel that the TPP measures contravened art 2.2 of the TBT Agreement for being more trade-restrictive than necessary, because they were not apt to contribute to Australia’s objectives of improving public health.¹² ‘Well-accepted’ axioms of social and medical science were adduced to support the argument that the TPP measures are ineffective at achieving Australia’s public health goals. The Panel assessed evidence of the TPP measures’ design, structure, and expected operation to determine their anticipated effect. The Panel also assessed evidence of actual effects of the TPP measures following their enforcement.¹³ The Panel found that the evidence supported the view that the TPP measures, in combination with Australia’s other tobacco-control measures, are apt to contribute to Australia’s objective to reduce the use and exposure to tobacco products. It accepted that the TPP measures to an extent were trade-restrictive, because they reduced the use and volume of imported tobacco products.¹⁴ However, the Panel was not persuaded that they unduly limited trade,¹⁵ especially comparing with the ‘grave’ public health consequences that would occur by failing to take action.¹⁶ It concluded on the totality of the evidence that the TPP measures did in fact contribute to Australia’s objective and that the complainants failed to demonstrate that their proposed measures would have a lesser adverse effect on trade while contributing equivalently to the intended purpose.¹⁷ Accordingly, the complainants’ claim under art 2.2 failed.¹⁸

¹² *Panel Report* (n 9) [7.426], [7.437].

¹³ *AB Report* (n 10) [6.16]; *Panel Report* (n 9), section 7.2.5.3.5.

¹⁴ *Panel Report* (n 9) [7.1208], [7.1255].

¹⁵ *Panel Report* (n 9) [7.1255].

¹⁶ *Panel Report* (n 9) [7.1322].

¹⁷ *Panel Report* (n 9) [7.1025], [7.1043].

¹⁸ *Panel Report*(n 9) [7.1732].

2 – Grounds of Appeal

The Appellants appealed to the AB, claiming that the Panel erred in its application of art 2.2's legal standard to the facts by overlooking the impact of the TPP measures on the competitive opportunities for tobacco products.¹⁹ They claimed that the Panel unduly focused on the TPP measure's degree of contribution to Australia's objective which led the concept of 'trade restrictiveness' to be construed too narrowly. They argued that had the Panel considered 'trade restrictiveness' more broadly, it would have found that the TPP measures are more trade-restrictive than necessary. The Appellants proposed alternative measures reasonably available to Australia to achieve its purported legitimate purpose, which would not similarly limit the competitive opportunities for tobacco products.²⁰ These include:

- (i) increasing the minimum legal purchase age for tobacco products from 18 to 21 years of age;
- (ii) increasing the taxation of tobacco products in Australia;
- (iii) improving anti-smoking social marketing campaigns; and
- (iv) creating a pre-vetting mechanism for tobacco packaging.

3 – Analysis and Decision

The AB dismissed the Appellants' claims, noting that their claims concerned the Panel's appreciation of the facts and evidence, rather than the Panel's application of the legal standard under art 2.2.²¹ The AB outlined that to determine whether a measure is more trade-restrictive than necessary under art 2.2, a 'relational analysis' is needed to evaluate the trade-restrictiveness of a regulation; the degree that the regulation contributes to the achievement of a legitimate objective; and the risks created by non-fulfilment.²² The AB found that the Appellants did not sufficiently prove that the TPP measures are more trade-restrictive than necessary to fulfil a legitimate objective, within the meaning of art 2.2 of the TBT Agreement.²³ Neither did they prove that the alternative measures proposed were 'less trade-restrictive' measures available which would contribute equally to Australia's objective.²⁴ Thus the AB upheld the Panel's decision in favour of Australia.

¹⁹ *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS435/23 (19 July 2018) (Notification of an Appeal by Honduras Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing The Settlement of Disputes and Under Rule 20(1) of the Working Procedures for Appellate Review) [552] ('Honduras' Appellant's Submission').

²⁰ *AB Report* (n 10) [6.467]; *Honduras' Appellant's Submission* (n 18) [560], [565], [574]; *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc WT/DS441/23 (23 August 2018) (Notification of an Appeal by Dominican Republic Under Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing The Settlement of Disputes and Under Rule 20(1) of the Working Procedures for Appellate Review) [1390], [1419] ('Dominican Republic's Appellant's Submission').

²¹ *AB Report* (n 10) [6.25].

²² *AB Report* (n 10) [6.3]; Appellate Body Report, *United States – COOL*, WTO Doc WT/DS384/39 and WT/DS386/40 (11 December 2015) [374].

²³ *AB Report* (n 10) [6.522].

²⁴ *AB Report* (n 10) [6.522].

B – Article 16.1 of the TRIPS Agreement

1 – Background

Article 16 of the TRIPS Agreement gives trademark owners the exclusive right to prevent others from using signs that are ‘similar or identical’ with their trademarks, where such use would result in a ‘likelihood of confusion’ in trade.²⁵

The complainants argued before the Panel that the TPP measures contravened art 16.1 of the TRIPS Agreement. Their claim was made on the assumption that art 16.1 implied a right for trademark owners to protect the ‘distinctiveness’ of their trademarks, and that by prohibiting the use of trademarks on tobacco packaging and products, the TPP measures ‘eroded the distinctiveness’ of those trademarks, constraining the rights under art 16.1.²⁶ The Panel dismissed this claim, finding that art 16.1 does not give a trademark owner the right to protect the distinctiveness of their mark.²⁷ It clarified that art 16.1 only protects a trademark owner’s right to prevent the infringement of their trademarks by others, such as by using a similar mark in a way that would likely cause confusion.²⁸ Relevantly, the Panel was not persuaded on the facts that the TPP measures would create a ‘likelihood of confusion’,²⁹ noting that the measures only restricted the use of trademarks on tobacco packaging and products, and not on other uses (such as advertising and promotion).³⁰ Accordingly, the Panel held that the TPP measures did not contravene art 16.1.

2 – Grounds of Appeal

The Appellants appealed the Panel’s findings on art 16.1 to the AB. They argued that in order to be able to give effect to the exclusive rights under art 16.1, it was implied under art 16.1 for trademark owners to have the right to ‘use’ their trademark.³¹ The Appellants supported this argument with reference to Australia’s *Trade Marks Act 1995* which grants trademark owners the exclusive right to ‘use’ the trademark in relation to the goods and services for which the trademark is registered.³² The Appellants also contended the Panel’s finding that the implications of the TPP measures were partly mitigated by the fact that consumers could distinguish the source of tobacco products using permitted word marks.³³

²⁵ *AB Report* (n 10) [6.580].

²⁶ *Panel Report* (n 9) [7.1971].

²⁷ *Panel Report* (n 9) [7.1972].

²⁸ *AB Report* (n 10) [6.559]; *Panel Report* (n 9) [7.2002].

²⁹ *AB Report* (n 10) [6.557].

³⁰ *AB Report* (n 10) [6.556].

³¹ *Honduras’ Appellant’s Submission* (n 18) [153], [327]-[333], [353].

³² *Trade Marks Act 1995* (Cth) s 20(a).

³³ *Panel Report* (n 9) [7.2570].

3 – Analysis and Decision

The AB dismissed the Appellants' argument.³⁴ It held that the language in art 16.1 does not expressly provide a trademark owner the right to 'use' the trademark.³⁵ The ordinary meaning of art 16.1 only gives a trademark owner the right to prevent certain unauthorised activities.³⁶ The AB outlined that the TRIPS Agreement in general grants 'negative rights to prevent certain acts' rather than 'positive rights to exploit or use'.³⁷ The AB supported this meaning by noting that the nature of the rights conferred under TRIPS Agreement are generally negative rights for the owner to *prevent* certain acts, rather than positive rights to exploit or use certain subject matter.³⁸ It outlined that nothing in the provisions of other codes and conventions referred to in the TRIPS Agreement allow a positive right to use its trademark or to protect its distinctiveness.³⁹

The AB clarified that the Australian *Trade Marks Act* has no bearing on the rights conferred under art 16.1, and thus is irrelevant to the dispute.⁴⁰ The AB instead outlined that for the purposes of the WTO dispute, a contravention under art 16.1 is established if Australia's TPP measures prevent trademark owners from exercising their right to prevent infringements of their trademark.⁴¹ Article 16.1 is not contravened if the measures merely undermine the distinctiveness of registered trademarks, or do not provide owners a 'minimum opportunity' to use a trademark.⁴² As the TPP measures do not deny trademark owners from protecting their marks against infringement, the AB concluded they did not contravene art 16.1.

Furthermore, the AB confirmed the Panel's finding that consumers may still distinguish the source of the tobacco products using permitted word marks.⁴³ In coming to this finding, the AB highlighted that the complainants did not adduce any evidence suggesting that consumers have actually been unable to distinguish the source of the tobacco products.⁴⁴

³⁴ *AB Report* (n 10) [6.588].

³⁵ *AB Report* (n 10) [6.595].

³⁶ *AB Report* (n 10) [6.550].

³⁷ *AB Report* (n 10) [6.565]; Panel Report (n 9) [7.2015].

³⁸ *AB Report* (n 10) [6.586].

³⁹ *Paris Convention (1967)* referred to in Article 2.1 of the TRIPS Agreement which provides that '[i]n respect of Parts II, III and IV of this Agreement, Members shall comply with Articles 1 through 12, and Article 19, of the *Paris Convention (1967)*'; *AB Report* (n 10) [6.586].

⁴⁰ *AB Report* (n 10) [6.594].

⁴¹ *AB Report* (n 10) [6.595].

⁴² *AB Report* (n 10) [6.564]; [6.602].

⁴³ *AB Report* (n 10) [6.673].

⁴⁴ *AB Report* (n 10) [6.673].

C – Article 20 of the TRIPS Agreement

1 – Background

Article 20 of the TRIPS Agreement provides that the use of a trademark in the course of trade must not be unjustifiably encumbered by special requirements.⁴⁵

It was argued before the Panel that the TPP measures are inconsistent with art 20 of the TRIPS Agreement for unjustifiably encumbering the use of trademarks in the trade of tobacco. In determining this issue, the Panel held that the TPP measures did encumber the use of trademarks in the course of trade, however this encumbrance was justifiable. The Panel interpreted ‘unjustifiably’ to refer to ‘an absence of good reasons sufficient to support the measure’.⁴⁶ To determine whether a measure is justifiable, the nature and extent of the encumbrance caused must be balanced against the reasons for the measure being implemented (such as any societal interests).⁴⁷ Panel determined on the evidence that Australia’s public health concerns justified the prohibitions by the TPP measures and did not contravene art 20.⁴⁸

The Panel accepted that the TPP measures prevented trademark owners from using their design features and from extracting economic value from their trademarks,⁴⁹ but noted that this prevention of positive branding was ‘the very purpose of the TPP measures’.⁵⁰ It noted that the complainants had not demonstrated that the prohibitions did in fact disable consumers from distinguishing the commercial source of tobacco products.⁵¹ Instead, it observed that consumers could still distinguish the source of tobacco products through permitted word marks, which mitigated the effects of the prohibitions on the TPP measures.⁵²

The Appellants appealed these findings to the AB, arguing that the Panel erred in its interpretation of the term ‘unjustifiably’,⁵³ submitting instead that art 20 imposes a ‘general prohibition banning all governmental encumbrances on the use

⁴⁵ Such as use with another trademark, use in a special form or use in a manner detrimental to its capability to distinguish the goods or services of one undertaking from those of other undertakings.

⁴⁶ *AB Report* (n 10) [6.637]; *Honduras’ Appellant’s Submission* (n 18) [105].

⁴⁷ *AB Report* (n 10) [6.628]; *Panel Report* (n 9) [7.2430].

⁴⁸ *AB Report* (n 10) [6.634]; *Panel Report* (n 9) [7.2605]-[7.2606].

⁴⁹ *AB Report* (n 10) [6.669]; *Panel Report* (n 9) [7.2569].

⁵⁰ *AB Report* (n 10) [6.668]; *Panel Report* (n 9) [7.2567].

⁵¹ *Panel Report* (n 9) [7.2564].

⁵² *Panel Report* (n 9) [7.2570].

⁵³ *Honduras’ Appellant’s Submission* (n 18) [102]-[259]. Honduras does not challenge other elements of the Panel’s interpretation of Article 20 of the TRIPS Agreement.

of trademarks.⁵⁴ Alternatively, they submitted that in finding that the TPP measures contributed to reducing tobacco use,⁵⁵ the Panel incorrectly applied the legal standard it had developed to the facts by incorrectly focussing on the economic value of trademarks,⁵⁶ and by rejecting alternative, less trademark-encumbering measures proposed.⁵⁷

2 – Analysis and Decision

1. Interpretation of the Term ‘Unjustifiably’

The AB affirmed that measures restricting the use of trademarks may be permitted so long they do not ‘unjustifiably’ encumber the trademark.⁵⁸ The AB referred to the ordinary meaning of the term ‘unjustifiably’, outlining that it derives from the adjective ‘unjustifiable’, which means ‘not justifiable’ or ‘indefensible’.⁵⁹ Other definitions include ‘unacceptable and wrong because there is no good or fair reason for it’⁶⁰ or something which cannot be reasonably explained.⁶¹ This suggests that special requirements which encumber the use of a trademark are permissible, if their implementation can be rationalised.

The AB supported this finding with reference to other provisions in the TRIPS Agreement. For example, art 8.1 expressly allows members to ‘adopt measures necessary to protect public health and nutrition’ provided the measures are consistent with the TRIPS Agreement.⁶² This provision clearly indicates that intellectual property rights can be justifiably impacted to pursue public health objectives, so long as the measures are consistent with the TRIPS Agreement.⁶³ The AB also referred to art 19.1 of the TRIPS Agreement, which recognises that government requirements outside the trademark owner’s control are valid reasons for the owner’s non-use of the trademark (relevant to questions of the trademark’s registrability). Because this provision contemplates that governments may impose restrictions affecting the ability to use a trademark, it implies that there is scope for encumbrances to be imposed under the TRIPS Agreement. The AB also contrasted the term ‘unjustifiably’ with the term ‘necessity’ used in other provisions of the

⁵⁴ *Honduras’ Appellant’s Submission* (n 18) [141].

⁵⁵ *Honduras’ Appellant’s Submission* (n 18) [280]-[284].

⁵⁶ *Honduras’ Appellant’s Submission* (n 18) [264]-[276].

⁵⁷ *Honduras’ Appellant’s Submission* (n 18) [285]-[298].

⁵⁸ *AB Report* (n 10) [6.641].

⁵⁹ *Shorter Oxford English Dictionary* (6th ed, 2007) ‘unjustifiable’.

⁶⁰ *Cambridge Dictionary* (online at 24 February 2020) ‘unjustifiable’.

⁶¹ *AB Report* (n 10) [6.645].

⁶² *AB Report* (n 10) [6.649].

⁶³ *AB Report* (n 10) [6.649].

TRIPS Agreement.⁶⁴ It observed that using the term ‘unjustifiably’ which requires a lower degree of rationalisation supports the interpretation that encumbrances may be permitted.⁶⁵ The AB thus rejected the Appellants’ submissions, finding that art 20 does not prohibit all measures which may encumber the use of a trademark.⁶⁶

2. *Focus on the Economic Value of Trademarks*

The Appellants claimed that the Panel erred by focusing the inquiry under art 20 on the ability for trademark owners to extract economic value from their trademarks. The Appellants claimed that the relevant inquiry under art 20 is not whether a trademark owner can still distinguish their goods despite the encumbrances, but more generally, whether the measures affect the trademark owner’s ability to use trademarks to distinguish between goods.⁶⁷ The AB rejected this argument, finding that as Appellants did not seek to establish that the TPP measures actually disabled consumers from being able to distinguish the sources of tobacco products, it was appropriate for the Panel to examine the owners’ potential to extract economic value from their trademarks instead.⁶⁸

3. *Contribution of the TPP Measures to Reduction of Tobacco Use*

The Appellants claimed that the Panel erred in finding that the TPP measures were justified, because it failed to consider the weight of the resulting encumbrances caused on the use of trademarks.⁶⁹ The AB rejected this claim,⁷⁰ recalling that the Panel did in fact examine and weigh public health concerns against the resulting encumbrances.⁷¹ It referred to the Panel’s observations that the TPP measures were imposed on the basis that removing design features on tobacco products reduces the appeal of tobacco products and assists in reducing the uptake of smoking,⁷² stating the view that that preserving human life and health is ‘important in the highest degree’.⁷³

⁶⁴ Eg under art 41.2, procedures concerning the enforcement of intellectual property rights ‘shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays’; art 3.2 concerns ‘exceptions are necessary to secure compliance with laws and regulations’; art 8.1 concerns ‘measures necessary to protect public health and nutrition’; art 27.2 provides that ‘inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality’; Article 39.3 states that ‘except where necessary to protect the public’.

⁶⁵ *AB Report* (n 10) [6.647].

⁶⁶ *AB Report* (n 10) [6.641], [6.651].

⁶⁷ *AB Report* (n 10) [6.671]; *Honduras’ Appellant’s Submission* (n 18) [266].

⁶⁸ *Panel Report* (n 9) [7.2571].

⁶⁹ *AB Report* (n 10) [6.677]-[6.679]; *Panel Report* (n 9) [7.2592].

⁷⁰ *AB Report* (n 10) [6.681].

⁷¹ *AB Report* (n 10) [6.677].

⁷² *AB Report* (n 10) [6.680]; *Panel Report* (n 9) [7.2586]; This finding was also made in the Panel’s analysis of Article 2.2 of the TBT Agreement.

⁷³ *AB Report* (n 10) [6.679]; *Panel Report* (n 9) [7.2592].

4. Available less encumbering alternative measures

The Appellants submitted that the Panel erred by finding that it is not necessary to examine the availability of less trademark-encumbering alternative measures.⁷⁴ The AB however dismissed this claim, finding that the need to examine alternative measures under art 2.2 is not necessary for determining whether the use of a trademark was ‘unjustifiably’ encumbered.⁷⁵ Such a requirement would have the effect of equating the term ‘unjustifiably’ with the term ‘unnecessary’ used in other places in the TRIPS agreement,⁷⁶ as well as in art 2.2 of the TBT Agreement.⁷⁷ This would defy the drafters’ intention to provide greater latitude by using the term ‘unjustifiably’, which allows for measures to be imposed even if they are not strictly necessary. In any case, the AB outlined that the Panel had addressed the alternative measures in its analysis under art 2.2.⁷⁸ The AB thus found the TPP measures to be consistent with art 20, and that any resulting ‘far-reaching’ encumbrances caused were sufficiently supported by the legitimate public health reasons.⁷⁹

⁷⁴ *AB Report* (n 10) [6.676]; *Honduras’ Appellant’s Submission* (n 18) [285]-[298].

⁷⁵ *AB Report* (n 10) [6.681], [6.653], [6.687].

⁷⁶ See (n 63).

⁷⁷ *AB Report* (n 10) [6.655].

⁷⁸ *AB Report* (n 10) [6.689]; *Panel Report* (n 9) [7.2599].

⁷⁹ *AB Report* (n 10) [6.697].

III – CONCLUSION

The dispute on Australia's TPP measures continued for eight years, making it one of the longest disputes in WTO's history.⁸⁰ Despite being an arduous international dispute, Australia has managed to initiate a world-leading movement towards reducing tobacco consumption by introducing plain packaging laws. Since the implementation of the TPP measures in 2012, various studies assessing the post-implementation evidence have confirmed that the TPP measures were in fact achieving their intended effect.⁸¹ For example, the Australian Government's National Drug Strategy Household Survey in 2016 recorded a notable decrease in smoking between 2013 and 2016 among Australian teenagers, reporting a drop from 3.4% to 1.5% for persons aged 12–17, and from 10.8% to 4.6% for persons aged 18–19 years.⁸² The impact of plain packaging on smoking prevalence in Australia was also assessed by an independent consultant retained by Australia's Department of Health, who analysed data collected through a nationally represented and repeated cross-sectional survey on participants aged 14 and above.⁸³ The expert report found a statistically significant decline in smoking rates between December 2012 to September 2015, and attributed this decline to the plain packaging measures.⁸⁴

An increasing number of international studies are also confirming the effectiveness of plain packaging on reducing the prevalence of smoking.⁸⁵ In 2014, the World Health

⁸⁰ Joseph Rieras, 'The WTO's Decision on Australia's Plain Packaging Tobacco Measures Explained' *United States Food and Drug Administration* (Blog Post, 16 December 2020) <<https://www.fda.gov/international-programs/international-programs-news-speeches-and-publications/wtos-decision-australias-plain-packaging-tobacco-measures-explained#1>>.

⁸¹ Tasneem Chipty, 'Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia' (Independent Report, 24 January 2016) <<https://www.health.gov.au/sites/default/files/study-of-the-impact-of-the-tobacco-plain-packaging-measure-on-smoking-prevalence-in-australia.pdf>> [6].

⁸² Australian Institute of Health and Welfare, *National Drug Strategy Household Survey 2016 – Key Findings* (1 June 2017) <<https://www.aihw.gov.au/reports/illicit-use-of-drugs/ndshs-2016-key-findings/contents/tobacco-smoking>>.

⁸³ Tasneem Chipty, 'Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia' (Independent Report, Analysis Group Incorporated, 24 January 2016) <<https://www.health.gov.au/sites/default/files/study-of-the-impact-of-the-tobacco-plain-packaging-measure-on-smoking-prevalence-in-australia.pdf>>.

⁸⁴ Tasneem Chipty, 'Study of the Impact of the Tobacco Plain Packaging Measure on Smoking Prevalence in Australia' (Independent Report, 24 January 2016) <<https://www.health.gov.au/sites/default/files/study-of-the-impact-of-the-tobacco-plain-packaging-measure-on-smoking-prevalence-in-australia.pdf>> [6].

⁸⁵ Stead M et al., 'Is Consumer Response to Plain/Standardised Tobacco Packaging Consistent with Framework Convention on Tobacco Control Guidelines? A Systematic Review of Quantitative Studies' (2013) 8(10) *PLOS ONE* <doi:10.1371/journal.pone.0075919>; Christine M White, et al., 'The Potential Impact of Plain Packaging of Cigarette Products Among Brazilian Young Women: An Experimental Study' (2012) 12(737) *BMC Public Health* <https://bmcpubhealth.biomedcentral.com/articles/10.1186/1471-2458-12-737>; Nicole Hughes, Monika Arora, and Nathan Grills, 'Perceptions and Impact of Plain Packaging of Tobacco Products in Low and Middle Income Countries, Middle to Upper Income Countries and Low-Income Settings in High-Income Countries: A Systematic Review of the Literature' (2016) 6(3) *BMJ Open* <<https://bmjopen.bmj.com/content/6/3/e010391#xref-ref-34-1>>.

Organisation released an evidence brief which recommended other countries to follow Australia's example, based on the strong evidence that plain packaging measures discouraged consumers from purchasing and using tobacco products.⁸⁶ Also in 2014, the European Union adopted a new Directive on tobacco-products, expressly allowing numerous European Union countries to adopt domestic plain-packaging laws.⁸⁷ Australia's successful implementation of TPP measures and winning of the WTO's *Tobacco Plain Packaging* dispute is a landmark to uphold public health at the global level. This success has encouraged numerous countries to legislate similar plain packaging requirements on tobacco products, including France, the United Kingdom,⁸⁸ New Zealand,⁸⁹ Norway,⁹⁰ Ireland,⁹¹ Saudi Arabia,⁹² Canada,⁹³ and Hungary,⁹⁴ among others, with other countries in the process of drafting equivalent legislation.

⁸⁶ World Health Organization, *Plain Packaging of Tobacco Products: Measures to Decrease Smoking Initiation and Increase Cessation* (Evidence Brief, 2014) <https://www.euro.who.int/__data/assets/pdf_file/0011/268796/Plain-packaging-of-tobacco-products,-Evidence-Brief-Eng.pdf>, 2; Wakefield MA et al., 'Introduction effects of the Australian plain packaging policy on adult smokers: a cross-sectional study' (2013) 3(7) *BMJ Open* 1-9 <<http://www.deepdyve.com/lp/pubmed-central/introduction-effects-of-the-australian-plain-packaging-policy-on-adultsmokers-a-cross-sectional-study>>; Young JM et al., 'Association between tobacco plain packaging and quitline calls A population-based, interrupted, time-series analysis' (2014) 200(1) *Medical Journal of Australia* 29-32 <<https://www.mja.com.au/journal/2014/200/1/association-between-tobacco-plainpackaging-and-quitline-calls-population-based>>.

⁸⁷ European Commission, *Questions & Answers: New Rules for Tobacco Products* (Memorandum. 26 February 2014) <http://europa.eu/rapid/press-release_MEMO-14-134_en.htm>; This provision was upheld by the European Court of Justice in *Philip Morris Brands SARL and Others v Secretary of State for Health* (Court of Justice of the European Union, C 547/14), ECLI:EU:C:2016:325, 4 May 2016).

⁸⁸ *The Standardised Packaging of Tobacco Products Regulations 2015* (UK).

⁸⁹ *Smokefree Environments and Regulated Products Act 1990* (NZ); *Smoke-free Environments Regulations 2017* (NZ).

⁹⁰ 'Norway Adopts Standardised Packaging to Save Lives and Prevent Suffering from Tobacco Use' *Union for International Cancer Control*, (Web Page, 7 June 2019) <<https://www.uicc.org/news/norway-adopts-standardised-packaging-save-lives-and-prevent-suffering-tobacco-use>>.

⁹¹ *Public Health (Standardised Packaging of Tobacco) Act 2015* (Ireland).

⁹² 'Saudi Arabia to Implement Plain Packaging on Tobacco Products', *Compelo* (Web Page, 18 December 2018) <<https://web.archive.org/web/20190413030958/https://www.compelo.com/packaging/news/saudi-plain-packaging-tobacco/>>.

⁹³ *Tobacco and Vaping Products Act*, SC 1997, c 13; *Tobacco Products Regulations (Plain and Standardized Appearance)*.

⁹⁴ The Decree 239/2016 of 16 August 2016.

DEFINING CASUAL EMPLOYMENT FOR THE PURPOSE OF *THE FAIR WORK ACT 2009* (CTH)

Tracey Ram*

ABSTRACT

Industrial Law (CTH) – Contract of Employment – Meaning of a Casual Employee – Nature of Casual Employment – Nature of Employment Relationship

*This case note will explore the High Court’s decision in *WorkPac Pty Ltd v Rossato* (Rossato).¹ Part II provides an overview of the facts relating to Rossato. Part III explores the case law which led to the meaning of a ‘casual employee’ being settled in the common law. Part IV makes observations on the High Court’s decision in Rossato. Part V concludes with the suggestion that the nature of the employment relationship should be assessed using a different approach than that upheld in the High Court’s Rossato decision in an attempt to discourage a state of impermanency of casuals in a casualised workforce.*

I – INTRODUCTION

In recent times, the meaning of a ‘casual employee’ has been controversial. It reached a critical point in the *WorkPac v Skene* (Skene)² and *WorkPac v Rossato* (Rossato)³ decisions from the Full Court of the Australian Federal Court (Full Court). In these cases, both respondents were found to be mistakenly characterised as casuals and therefore entitled to paid leave entitlements.⁴ As a result, *WorkPac* sought special leave to the High Court of Australia to reconsider the Full Court’s *Rossato* decision.⁵ The High Court later overturned the Full Court’s decision in *Rossato* finding that Mr Rossato was a ‘casual’ under the *Fair Work Act 2009* (Cth) (‘the Act’).⁶

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¹ [2021] HCA 23.

² *WorkPac Pty Ltd v Skene* [2018] FCAFC 131.

³ *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

⁴ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131; *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

⁵ *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

⁶ *Ibid* [118]; It is of note that an amendment was made in March 2021 to the *Fair Work Act 2009* (Cth), where section 15A was inserted, that provides for the meaning of a ‘casual employee’; and the casual employee definition in the Act preceded the High Court’s decision in *Rossato*.

II – FACTS

WorkPac Pty Ltd is a labour hire company.⁷ Mr Rossato had been engaged by WorkPac from the period of July 2014 until his retirement in April 2018 to work at various mine sites in Queensland.⁸ Mr Rossato was engaged under six contracts,⁹ on an assignment-by-assignment basis, which described him as a casual employee under the WorkPac Pty Ltd Mining (Coal) Industry Enterprise Agreement 2012 ('2012 Agreement').¹⁰ Mr Rossato was paid the twenty-five per cent loading for casual employment.¹¹ He was a 'drive in, drive out' employee.¹² He worked principally on a seven day on/seven day off roster which was planned in advance by the mining company.¹³ He also stayed in accommodation on the mine site that was provided to him by the mining company.¹⁴ After Mr Rossato resigned from WorkPac, in light of the decision in *Skene*, he wrote to WorkPac claiming that he was not a casual employee and as such was entitled to paid leave entitlements under the Act and 2012 Agreement.¹⁵

III – DEFINITION OF 'CASUAL EMPLOYEE'

*Hamzy v Tricon ('Hamzy')*¹⁶

To firmly grasp the landmark case of *Rossato*, it is important to understand the background leading to the High Court's decision to find that Mr Rossato is a casual under the Act.¹⁷

The leading case in Australia to define the meaning of a 'casual employee' is the Federal Court's decision in *Hamzy*. The legal question in *Hamzy* concerned whether Mr Hamzy's casual employment was legitimate, which in turn would bar him from the benefits of termination provisions as set out in the *Workplace Relations Act 1996* (Cth).¹⁸ Wilcox, Marshall and Katz JJ in *Hamzy* held that: 'the essence of casualness is the absence of a firm advance commitment as to the duration of the

⁷ Ibid [1].

⁸ Ibid [2].

⁹ Ibid [13].

¹⁰ Ibid [4].

¹¹ Ibid [5].

¹² Ibid [19].

¹³ Ibid [20].

¹⁴ Ibid [19].

¹⁵ Ibid [4].

¹⁶ *Hamzy (By his tutor Hamzy) v Tricon International Restaurants (t/a KFC)* [2001] 115 FCA 1589.

¹⁷ *WorkPac Pty Ltd v Rossato* [2021] HCA 23 [118].

¹⁸ *Hamzy (By his tutor Hamzy) v Tricon International Restaurants (t/a KFC)* [2001] 115 FCA 1589 [1].

employee's employment or the days (or hours) the employee will work'.¹⁹ This is regardless that that employee's work pattern may turn out to be regular and systematic. Additionally, their Honours relying on Moore J's construction of casual employment,²¹ held that an employee engaged on a casual basis is determined on engagement where the parties agree that the employment is to be irregular and not likely to continue for any length of time.²²

A – *The Full Court in Skene*

In 2018, the Full Court revisited the meaning of a 'casual employee' in *Skene*. The *Skene* case concerned a casual worker employed by WorkPac.²³ Mr Skene was contracted through WorkPac to work at a mining company from April 2010 to April 2014²⁴ on an even time roster.²⁵ Mr Skene claimed that he was a permanent employee, even though he was hired and paid as a casual.²⁶ As a consequence, he sought a declaration that would entitle him to annual leave²⁷ in accordance with the 2007 Agreement.²⁸

In *Skene*, the Full Court took a different approach than *Hamzy* to assess the characterisation of the employment relationship of Mr Skene.²⁹ Using the totality of the relationship approach, their Honours unanimously confirmed that Mr Skene was not a casual under the Act and therefore was entitled to paid leave entitlements.³⁰ Their Honours' reasoning was: (a) WorkPac's enterprise agreement did not define 'casual employment';³¹ (b) Mr Skene's contract of employment did not describe him as a casual employee;³² and (c) Mr Skene's pattern of work was set where there was an expectation that he would be available for work, on an ongoing basis, and to perform the duties required of him in accordance with his roster.³³

¹⁹ Ibid [38].

²⁰ Ibid.

²¹ Ibid [37].

²² Ibid.

²³ *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 [10].

²⁴ Ibid [8].

²⁵ Ibid [21].

²⁶ Ibid [9].

²⁷ Ibid [14].

²⁸ Ibid [7].

²⁹ Ibid [159].

³⁰ Ibid [238].

³¹ Ibid [187].

³² Ibid.

³³ Ibid [183].

B – The Full Court in Rossato

The *Skene* decision formed the basis from which Mr Rossato relied in bringing his action against WorkPac.³⁴ In relying on *Skene*, Mr Rossato claimed that his employment arrangement was not dissimilar to that of Mr Skene's.³⁵ Mr Rossato claimed he was improperly characterised as a casual employee, because of the way he had worked meant he was a permanent full-time employee, and relevantly, had an entitlement to paid leave entitlements.³⁶

WorkPac sought declarations that Mr Rossato could not make claims with respect to paid leave entitlements under the National Employment Standards because he 'was a casual employee at common law and within the meaning of ss 86, 95 and 106 of the Act'.³⁷

Bromberg, White and Wheelahan JJ rejected WorkPac's argument,³⁸ and held that Mr Rossato was not a casual under the Act and was entitled to paid leave entitlements.³⁹ The reason for their Honours' decision was that they relied on the characterisation of the employment relationship approach as applied in *Skene*.⁴⁰ Their Honours applied the totality of the relationship approach which considered Mr Rossato's employment contract and his post-contractual conduct, i.e. he worked principally on a seven day on/seven day off roster which was planned in advance by the mining company.⁴¹ The Full Court ordered WorkPac to compensate Mr Rossato with paid leave entitlements.⁴² Further to this, the Full Court rejected WorkPac's request for restitutionary relief, where WorkPac sought to have the casual loading already paid to Mr Rossato offset against payments for his paid leave entitlements.⁴³

³⁴ *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 [3].

³⁵ *Ibid.*

³⁶ *Ibid.*

³⁷ *Ibid* [5].

³⁸ *Ibid.*

³⁹ *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

⁴⁰ *Ibid* [44].

⁴¹ *Ibid* [115].

⁴² *Ibid* [1010]-[1018].

⁴³ *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 [1021]; It is of note that WorkPac's restitutionary relief argument did not prevail as Mr Rossato was found to be a 'casual employee'. *The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) deals with the restitution matter.

C – The High Court of Australia in *Rossato*

The Full Court’s decision in *Rossato* was of widespread importance because it could apply to a significant number of employees in Australia⁴⁴– the impact of the decision being that most casual employees would be entitled to annual leave payments pursuant to the Act.

The High Court granted special leave against the Full Court’s *Rossato* decision.⁴⁵ In summary, WorkPac’s grounds of appeal were: (a) Mr Rossato was a casual employee for the purposes of the Act;⁴⁶ (b) Mr Rossato was a casual for the purposes of WorkPac’s Enterprise Agreement;⁴⁷ and (c) or alternatively, if Mr Rossato were found to be other than a casual employee,⁴⁸ WorkPac sought to set off the casual loading already paid to Mr Rossato against his entitlements as a permanent employee. On the other hand, Mr Rossato’s claim was that due to his pattern of work, he was not a casual for the purposes of the Act or the 2012 Agreement.⁴⁹

The High Court unanimously rejected the Full Court’s approach in *Rossato*.⁵⁰ The plurality decision was given by Kiefel CJ and Keane, Gordon, Edelman, Steward and Gleeson JJ. Gageler J gave a separate judgment. The plurality found that the approach by the Full Court in *Rossato* to assess employment status based on entirely the employment relationship which centres upon the conduct of the parties and the ‘real substance, practical reality and true nature of that relationship’ was plainly wrong.⁵¹

The plurality confirmed that:

... a court can determine the character of a legal relationship between the parties only by reference to the legal rights and obligations which constitute that relationship. The search for the existence or otherwise of a “firm advance commitment” must be for enforceable terms, and not unenforceable expectations or understandings that might be said to reflect the manner in which the parties performed their agreement.⁵²

⁴⁴ *WorkPac Pty Ltd v Rossato* [2021] HCA 23 [109].

⁴⁵ *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

⁴⁶ *Ibid* [5].

⁴⁷ *Ibid*.

⁴⁸ *Ibid*.

⁴⁹ *Ibid* [3].

⁵⁰ *Ibid* [57].

⁵¹ *Ibid* [66].

⁵² *Ibid* [57].

To this end, in deciding that Mr Rossato was a casual, the High Court took into consideration the following terms of his contract:

- the employment contract provided employment on an assignment-by-assignment basis for discrete periods of time;⁵³
- the assignments could be either accepted or rejected by Mr Rossato. WorkPac did not commit to further work on the completion of each assignment;⁵⁴
- the assignments could be terminated with one hours notice;⁵⁵
- the daily working hours as set out in the contract were provided as a guide which could be varied;⁵⁶ and the assignments provided reference to a casual rate of pay and the twenty-five per cent casual loading.⁵⁷

On that footing, Mr Rossato had no ‘firm advance commitment’ to ongoing work, and that his work pattern was entirely consistent with the concept of casual employment in the Act.⁵⁸ Moreover, it is worthy of noting that in his Honour’s separate Judgment, Gageler J stated that the legal question in the appeal related to the meaning of ‘casual employee’ in the Act ‘which defined “employee” by reference to the ordinary meaning of the term’.⁵⁹ However, the importance of the question diminished with the subsequent insertion into the Act of a definition of ‘casual employee’ which operates comprehensively for the future, and operates retrospectively subject to very limited exceptions.⁶⁰ His Honour said that the legislation confined the appeal to a process of reasoning that did not require a more expansive approach than to determine the rights of the parties.⁶¹ In the case, Mr Rossato relied on his hours of work and roster to argue that there was a ‘firm advanced commitment’ for the duration of his employment.⁶² Gageler J took the same view as the plurality that the terms of each contract of employment negated any ‘firm advanced commitment’ provided by WorkPac to Mr Rossato.⁶³

⁵³ Ibid [88].

⁵⁴ Ibid.

⁵⁵ Ibid [90].

⁵⁶ Ibid [76].

⁵⁷ Ibid [77].

⁵⁸ Ibid [96].

⁵⁹ Ibid [109] Gageler J.

⁶⁰ Ibid.

⁶¹ Ibid.

⁶² Ibid [117].

⁶³ Ibid [118].

IV – THE *ROSSATO* DECISION IN PERSPECTIVE

The High Court's *Rossato* decision clarifies the meaning of a 'casual employee' in Australia's workplace relations system.⁶⁴

In the Full Court's decision in *Rossato*, Bromberg J held, in relation to the assessment of Mr Rossato's characterisation of employment, that it was not 'necessary for the firm advance commitment to be a contractual term'.⁶⁵ His Honour found that 'a mere subjective expectation of continuing work according to an agreed pattern of work would not be sufficient, but an objectively justified expectation of that kind would ordinarily suffice'.⁶⁶ Accordingly, Bromberg J found that the facts of each of Mr Rossato's employments, including the contractual facts, justified the conclusion that a characteristic of each was that a 'firm advance commitment' was given to Mr Rossato and therefore he was other than a casual under the Act.⁶⁷ In drawing this conclusion, Bromberg J used the same characterisation of employment approach as established in the Full Court's Skene decision.⁶⁸ Nevertheless, the High Court found that Bromberg J's approach erred.⁶⁹

The High Court's decision in *Rossato* settled in law that a 'casual employee' is to be assessed based on the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party.⁷⁰ The critical criteria to assess whether an employee is to be categorised as a 'casual employee' under the Act is that there is a non-existence of a 'firm advanced commitment' to ongoing work in the contract of employment.⁷¹ In the case of Mr Rossato, the High Court found that he was employed on an assignment-by-assignment basis,⁷² with the option to accept or reject the offer of an assignment.⁷³ In the findings, the plurality said that Mr Rossato's rostered working hours had limited significance in the legal issue.⁷⁴ As a consequence, the High Court made declarations that Mr Rossato was a casual and therefore was not entitled to paid leave entitlements.⁷⁵

⁶⁴ *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

⁶⁵ *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 [212].

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid* [211].

⁶⁹ *WorkPac Pty Ltd v Rossato* [2021] HCA 23 [57].

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Ibid* [88].

⁷³ *Ibid.*

⁷⁴ *Ibid* [93].

⁷⁵ *Ibid* [118].

It is clear from the dictum in the High Court's *Rossato* decision, the plurality showed an unwillingness to assess the characterisation of the employment relationship using the totality of the relationship approach.⁷⁶ In future, it will be interesting whether the meaning of a 'casual employee' is further explored that gives rise to a challenge to the characterisation of the employment relationship approach as held in the High Court's *Rossato* decision. This is not such a fanciful consideration, as according to Professor Peetz, the impact of the High Court's *Rossato* decision will likely lead to many more employees being continually described as casuals by their employers, where those employees are leave-deprived, even though they hardly could be described as 'genuinely flexible casuals'.⁷⁷

V – CONCLUSION

The High Court's *Rossato* decision provides clarity on casual employment arrangements. The decision provides information to employers on how to draft contracts of employment that demonstrate that the employment relationship is a casual one.

The impact of the High Court's *Rossato* decision is that there is such clarity on the nature of casual employment that it will likely encourage many employers to opt to engage their future employees under casual employment arrangements. In effect, the decision may encourage a state of impermanency of casuals in a casualised workforce.

Although, the High Court's *Rossato* judgment does not support the totality of the relationship approach as adopted by the Full Court, it is thought provoking for law makers to consider that that approach would go a long way to assist in resolving the problematic issue where employers are describing employees as casuals, where these employees are leave deprived, even though they hardly could be described as 'genuinely flexible casuals'.⁷³

⁷⁶ Ibid [101].

⁷⁷ David Peetz, *What do the data on casuals really mean?* (27 November 2020) Centre for Work, Organisation and Wellbeing, Griffith University https://www.griffith.edu.au/__data/assets/pdf_file/0024/1212675/What-do-the-data-on-casuals-really-mean-v5.pdf.

⁷⁸ Ibid.

DEFINING THE MEANING OF A ‘DAY’ UNDER SECTION 96(1) OF *THE FAIR WORK ACT 2009* (CTH)

Tracey Ram*

ABSTRACT

Industrial Law (CTH) – ‘10 Days’ Paid Personal/Carer’s Leave Entitlement – Meaning of ‘Day’ Under Section 96(1) of The Fair Work Act 2009 (CTH) – Statutory Interpretation – ‘Notional Day’ or ‘Working Day’ Construction?

This case note will explore the High Court of Australia’s Mondelez¹ decision in detail. Part II provides an overview of the facts relating to Mondelez. Part III sets out an employee’s entitlement to paid personal/carers leave pursuant to s 96(1) of the Fair Work Act 2009 (Cth) (‘the Act’), and it also discusses the case laws on the meaning of a ‘day’ under s 96(1) of the Act being settled in the common law. Part IV makes observations on the High Court’s judgment in Mondelez. Part V concludes that the ‘notional day’ construction was not only the intention of Parliament; it was also an outcome that upheld the legislative purpose of fairness in the Act.

I – INTRODUCTION

The legal issue in the High Court case of *Mondelez* relates to the meaning of a ‘day’ for the purpose of calculating an employee’s entitlement to paid personal/carers leave under s 96(1) of the Act.² In particular, the question in law was whether a ‘day’ under s 96(1) of the Act consists of ‘one-tenth of the equivalent of an employee’s ordinary hours of work in a two-week period’ (‘notional day’ construction), or ‘the portion of a 24-hour period that would otherwise be allotted to working’ (‘working day’ construction).³ These two methods of construction produce considerably different outcomes in terms of calculating an employee’s accrual and taking of paid personal/carers leave.⁴ Hence, the legal issue was of significant importance to both the national system employer and employees.

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¹ *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (Known as the Australian Manufacturing Workers Union (AMWU))* [2020] HCA 29, 94 ALJR 818.

² *Ibid* [1].

³ *Ibid*.

⁴ *Ibid*.

II – FACTS

Mondelez is a national system employer.⁵ Mondelez engaged Ms Natasha Triffitt and Mr Brendon McCormack as full-time employees.⁶ Their work roster is 3 days on / 4 days off, at 12 hours per shift.⁷ Both employees are employed under the Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Agreement 2017 ('the EBA').⁸ The EBA provided each employee paid personal/carer's leave of 96 hours per annum.⁹ The Australian Manufacturing Workers Union (AMWU), Ms Triffitt and Mr McCormack claimed that a 'day' under s 96(1) of the Act has a 'working day' construction and therefore they were entitled to paid personal/carer's leave of 120 hours per annum.¹⁰

III – DEFINING THE MEANING OF A 'DAY' UNDER S96(1) OF THE ACT

A – Section 96(1) of the Act

To firmly grasp the landmark case of Mondelez, it is important to understand the background leading to the majority of the High Court deciding that a 'day' has a 'notional day' construction under s 96(1) of the Act.¹¹

The provision of s 96(1) of the Act is an enforceable minimum term and condition under the National Employment Standards.¹² Section 96(1) of the Act relates to an employee's entitlement to paid personal/carer's leave.¹³ The provision reads as follows: 'For each year of service with an employer (other than periods of employment as a casual employee of the employer), an employee is entitled to 10 days of paid personal/carer's leave'.¹⁴

B – Mondelez – Full Court

The Mondelez case arose as a consequence of the AMWU, Ms Triffitt and Mr McCormack claiming that a 'day' under s 96(1) of the Act means a '24 hour period', which is a 'working day' construction.¹⁵ The 'working day' construction

⁵ Ibid [4].

⁶ Ibid [5].

⁷ Ibid [6].

⁸ Ibid [5].

⁹ Ibid [8].

¹⁰ Ibid [10].

¹¹ Ibid [110].

¹² Ibid [19].

¹³ Ibid.

¹⁴ *Fair Work Act 2009* (Cth) s 96(1).

¹⁵ *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU) ('Mondelez')* [2019] FCAFC 138 [5].

would result in additional paid personal/carer's leave entitlements for both Ms Triffitt and Mr McCormack.¹⁶ On the other hand, Mondelez claimed that a 'day' under s 96(1) of the Act means an employee's average daily ordinary hours of work based on a five-day working week, which is a 'notional day' construction.¹⁷ Mondelez submitted that Ms Triffitt and Mr McCormack were already receiving under the EBA an additional 20 hours of paid personal/carer's leave (based on a 'notional day' construction) than what is provided for under s 96(1) of the Act.¹⁸

The Full Court, in a 2/1 majority (Bromberg and Rangiah JJ, O'Callaghan J dissenting), held that s 96(1) of the Act was to be read as a 'working day' opposed to a 'notional day' construction,¹⁹ where the former results in an additional leave entitlement accrual of paid personal/carer's per annum for employees who work condensed shifts in a weekly period. To this end, the majority of the Full Court interpreted the word 'day' under s 96(1) of the Act to have its ordinary meaning.²⁰ As a consequence of the decision, Ms Triffitt and Mr McCormack, who both work condensed shifts (i.e. 3 days on/4 days off at 12 hours), were entitled to an additional 24 hours paid personal/carer's leave for each 12 months of completed service.²¹

Mondelez and the Minister for Jobs and Industrial Relations sought 'special leave' to appeal the Full Court's decision to the High Court on the grounds that the majority of the Full Court erred on construing a 'day' under s 96(1) of the Act as having a 'working day' construction.²²

C – Mondelez – High Court of Australia

The legal issue to be determined was the meaning of the word 'day' for the purpose of calculating an employee's entitlement to paid personal/carer's leave under s 96(1) of the Act.²³

In the circumstances where Parliament does not provide a specific definition of a particular statutory word there is a duty of the courts to give effect to the meaning of the statutory word as intended by Parliament.²⁴ Kiefel CJ, Nettle and Gordon JJ gave a joint judgment, Edelman J a separate judgment, and Gageler J a dissenting judgment in this case.

¹⁶ Ibid [36].

¹⁷ Ibid [28].

¹⁸ Ibid [18].

¹⁹ Ibid [204].

²⁰ Ibid [101].

²¹ Ibid [203].

²² *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union (Known As The Australian Manufacturing Workers Union (AMWU))* [2020] HCA 29 [10], [12].

²³ Ibid [1].

²⁴ Ibid [95].

The High Court (Gageler J dissenting)²⁵ found that a ‘day’ does not bear its ordinary meaning in the context and history of s 96(1) of the Act by referring to its predecessor provision of s 246 of the *Workplace Relations Act 1996* (Cth) and the Explanatory Memorandum to the *Fair Work Bill 2008* (Cth) (‘the explanatory memorandum’).²⁶ The majority held that the meaning of a ‘day’ in s 96(1) of the Act is to have a “notional day” construction.²⁷ Their findings were consistent with the legislative purposes of the Act, the extrinsic materials and the legislative history.²⁸ In particular, the majority’s decision was based on the following: (a) s 246 of the *Workplace Relations Act 1996* (Cth) reinforced that s 96(1) of the Act was intended to ensure that the amount of leave to be accrued over a period is not to be affected by condensed work patterns worked in a week;²⁹ (b) the explanatory memorandum indicated that the quantum of paid personal/carer’s leave in s 96(1) of the Act is to be calculated using the ‘notional day’ method of calculation;³⁰ and (c) the explanatory memorandum also stated that the National Employment Standards ‘will not change the quantum of the entitlement to personal/carer’s leave from that provided in the *Workplace Relations Act*’.³¹

Kiefel CJ, Nettle and Gordon JJ summed up the decision in *Mondelez* clearly, where they said:

The expression ‘10 days’ in s 96(1) of the Fair Work Act 2009 (Cth) [sic] means an amount of paid personal/carer’s leave accruing for every year of service equivalent to an employee’s ordinary hours of work in a week over a two-week (fortnightly) period, or 1/26 of the employee’s ordinary hours of work in a year. A ‘day’ for the purposes of s 96(1) refers to a ‘notional day’, consisting of one-tenth of the equivalent of an employee’s ordinary hours of work in a two-week (fortnightly) period.³²

Gageler J’s judgment (in dissent)³³ took a purposive contextual construction to the text where his Honour found that s 96(1) of the Act is to have a ‘working day’

²⁵ Ibid [89].

²⁶ Ibid [99].

²⁷ Ibid [109].

²⁸ Ibid [2].

²⁹ Ibid [103].

³⁰ Ibid.

³¹ Ibid.

³² Ibid [45].

³³ Ibid [89].

construction.³⁴ Thus, ‘10 days’ means 10 periods each of 24 hours.³⁵ His Honour’s view was that the modern approach to statutory interpretation requires consideration for the context, which includes consideration of the legislative history and extrinsic material.³⁶ He said ‘the quality and extent of the assistance extrinsic materials provide in fixing the meaning of statutory text is not uniform’.³⁷ Therefore, this resulted in his Honour placing limited emphasis on the explanatory memorandum and the predecessor provision of s 96(1) of the Act (i.e. s 246 of the *Workplace Relations Act 1996* (Cth)) in reaching his decision.³⁸ While, Gageler J did consider the explanatory memorandum, he purported that the statutory examples shown did not prove that s 96(1) of the Act was to have a ‘notional day’ construction (i.e. 76 hours of paid personal /carer’s leave).³⁹ His Honour said that the examples were purely illustrative.⁴⁰ To this end, his Honour rejected the majority’s decision.

The appeal was allowed.⁴¹ The High Court, in a 4/1 majority, overturned the Full Court’s decision in *Mondelez* to find that a ‘day’ refers to a ‘notional day’ construction under s 96(1) of the Act.⁴²

IV – THE MONDELEZ DECISION IN PERSPECTIVE

The High Court has provided employers with a collective sigh of relief when, by a majority of 4/1, it reversed the Full Court’s decision in *Mondelez*.⁴³

The Full Court’s decision in *Mondelez* did have far reaching implications for employers with respect to calculating an employee’s entitlement to paid personal /carer’s leave under s 96(1) of the Act.⁴⁴ The majority of the High Court found that under a ‘working day’ construction, the anomalies and inequities included: (a) entitling every employee, regardless of their pattern of work or distribution of hours, to be absent without loss of pay on ten working days per year;⁴⁵ and (b) in

³⁴ Ibid [46].

³⁵ Ibid.

³⁶ Ibid [67].

³⁷ Ibid.

³⁸ Ibid [72].

³⁹ Ibid [52].

⁴⁰ Ibid.

⁴¹ Ibid [110].

⁴² Ibid

⁴³ Ibid.

⁴⁴ Ibid [3].

⁴⁵ Ibid.

some circumstances, part-time employees would be entitled to more paid personal/carer's leave than full-time employees.⁴⁶

In overturning the Full Court decision in *Mondelez*, the majority of the High Court took a strict statutory approach to define the meaning of the word 'day' under s 96(1) of the Act.⁴⁷ The majority held that the 'notional day' construction was Parliament's intention for s 96(1) of the Act.⁴⁸ The majority interpretation of the word 'day' drew heavily from the explanatory memorandum and its illustrative examples, and the predecessor provision of s 96(1) of the Act.⁴⁹ The majority held that these extrinsic materials indicate that Parliament intended for the word 'day' under s 96(1) of the Act to have a 'notional day' construction.⁵⁰ The majority's approach was plainly correct as it followed the modern statutory rules in deciding what Parliament had intended the word 'day' under s 96(1) to mean.⁵¹ Moreover, Kiefel CJ, Nettle and Gordon JJ cited that had the alternative construction been accepted, it would have given rise to absurd results and inequitable outcomes, and would have been 'contrary to the legislative purposes of fairness and flexibility in *Fair Work Act*, the extrinsic materials and the legislative history'.⁵²

A point worthy of noting, while Edelman J did reject the majority of the Full Court (O'Callaghan J dissenting) decision in *Mondelez*,⁵³ his Honour made reference to Bromberg and Rangiah JJ's approach and said that their judgment did have 'considerable force because the same word ("day") is used in the *Fair Work Act* in provisions that appear before and after the relevant provision (s 96(1)) with its ordinary meaning'.⁵⁴ Nevertheless, Edelman J found that a 'working day' construction did not support the legislative purposes of the Act.⁵⁵

Gageler J's judgment (in dissent)⁵⁶ was to reject *Mondelez*'s construction and instead held that a 'day' in s 96(1) of the Act refers to 'the portion of a 24 hour period that would otherwise be allotted to work'.⁵⁷ Thus, this is a 'working day' construction. Interestingly, Gageler J was aware of the inequity that a 'working

⁴⁶ Ibid [42].

⁴⁷ Ibid [103].

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid.

⁵¹ Ibid [109].

⁵² Ibid [3].

⁵³ Ibid [110].

⁵⁴ Ibid [99].

⁵⁵ Ibid [110].

⁵⁶ Ibid [89].

⁵⁷ Ibid [46].

day' construction of the entitlement produces, ie in some circumstances, part-time employees would be entitled to more paid personal/carer's leave than full-time employees.⁵⁸ Nevertheless, his Honour favoured a form of income protection during periods of illness or injury for Ms Triffitt and Mr McCormack.⁵⁹ In fact, based on Gageler J's judgment, there was a clear intention by his Honour, that in the circumstances where Ms Triffitt and Mr McCormack could not attend their shift due to illness or injury, they would be paid for their 12 hour shift (as per the 'working day' construction) opposed to 9.6 hours for the shift (as per their contractual conditions).⁶⁰ While his Honour's viewpoint is laudable that an employee should not be disadvantaged in pay for a sick leave day taken, the majority of the High Court did not share that view.⁶¹

V – CONCLUSION

The High Court overturned the majority of the Full Court decision in *Mondelez* on how paid personal/carer's leave is to be dealt with by national system employers.⁶² The majority of the High Court's approach in *Mondelez* was to interpret the word 'day' in s 96(1) of the Act by informing itself of the full context and history of s 96(1) of the Act, and aligning the meaning of s 96(1) of the Act with the meaning of its predecessor provision of s 246 of the *Workplace Relations Act 1996* (Cth).⁶³ From this, the majority found that a 'day' in s 96(1) of the Act consists of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week period (a 'notional day' construction).⁶⁴ Therefore, the majority of the High Court found that the Full Court (O'Callaghan J dissenting) had erred when it determined that the meaning of a 'day' for the purposes of s 96(1) of the Act was to be construed on a 'working day' construction.⁶⁵

The majority of the High Court has interpreted the statutory word in a manner that gives effect to its parliamentary intention.⁶⁶ The meaning of 'day' under s 96(1) of the Act was given a 'notional day' construction by the majority which directly drew from the text of the explanatory memorandum and its legislative history.⁶⁷ It is also further evident that the majority interpreted the word 'day' as having a

⁵⁸ Ibid [87].

⁵⁹ Ibid [84].

⁶⁰ Ibid [85].

⁶¹ Ibid [110].

⁶² Ibid.

⁶³ Ibid [103].

⁶⁴ Ibid [2].

⁶⁵ Ibid.

⁶⁶ Ibid [103].

⁶⁷ Ibid.

‘notional day’ construction due to the anomalies and inequities that a ‘working day’ construction produces, ie, employees who work condensed shifts would be entitled to the same amount of leave as, or more leave than, full-time employees.⁶⁸ This view is supported by Kiefel CJ, Nettle and Gordon JJ’s comment as they said that a ‘working day’ construction would have given rise to an absurd result that would have created inequities amongst employees who work diverse working patterns relating to their accrual and taking of paid personal/carer’s leave entitlements.⁶⁹

It is now settled in law the meaning of a ‘day’ has a ‘notional day’ construction for the purpose of calculating an employee’s entitlement to paid personal/carer’s leave under s 96(1) of the Act.⁷⁰ Therefore, a paid personal/carer’s leave accrues progressively according to ordinary hours worked at a rate of 1/26 for all full-time and part-time employees, with leave being deducted progressively on the basis of ordinary hours taken as leave. Therefore, the method on how a paid personal/carer’s leave⁷¹ is to be calculated for s 96(1) of the Act remains the same, as it was prior to the *Mondelez* case.

⁶⁸ Ibid [3].

⁶⁹ Ibid.

⁷⁰ Ibid [2].

⁷¹ Ibid [23].