# International Trade and Business Law Review

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# International Trade and Business Law Review

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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 wide ranging topics surrounding international trade and business. All forms of commercial activities today – from bilateral investments to multilateral trade to clandestine transnational businesses – are being shaped by powerful actors and mundane actors alike. The legal architecture of trade, commerce and finance is more fluid than ever before.

The diverse stakes of legal rules and rights in and around debates about international trade, investment, money, property, contract, and business give rise to novel inquiries, experiments and possibilities for lawyers, interdisciplinary scholars, activists, and policy entrepreneurs. The ITBLR plays a part in these shared and contested intellectual efforts to rethink global business and trade.

The ITBLR was founded by Professor Gabriël A Moens, Emeritus Professor of Law, The University of Queensland. 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 publication in the International Trade and Business Law Review may be sent to Dr Sharmin Tania or Dr Mostafa Haider <ITBLR@curtin.edu.au>.

## EDITORIAL TEAM




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# Acknowledgement of Country

We respectfully acknowledge the Traditional Owners of the land where we are, the Whadjuk people of the Noongar Nation, and the Indigenous Elders, custodians, their descendants and kin of this land past and present.

# INTERNATIONAL TRADE AND BUSINESS LAW REVIEW
# VOLUME XXIV 2024

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# Foreword to Volume XXIV

**Mostafa Haider, Sharmin Tania and Robert Cunningham**

## Editorial Note

We are pleased to introduce Volume XXIV of the *International Trade and Business Law Review* (ITBLR). With Volume XXIV, we have transitioned to digital and open access publication to consolidate our commitment to sustainability and accessibility. We are also pleased to report that the ITBLR has an updated website.

Volume XXIV contains a new part entitled *Conversation with Book*. The new part is intended to be a close, critical and diverse reading of a recently published book in the form of review essays along with author responses. The goal is to generate thought-provoking conversations in global trade, business and governance in the face of rapid regulatory and technological changes, which underpins the ITBLR's editorial agenda.

One of the ITBLR's key focuses is to better understand contemporary digital governance and its implications for local and global businesses. Curtin Law School has for some years been involved in the Digital Finance Cooperative Research Centre (DFCRC). We are keen to explore the implications of digital technology not only in finance but also institutions and businesses engaged in various regimes of governance.

For the first iteration of *Conversation with Book*, we invited Prof Fleur Johns, the author of *#HELP: Digital Humanitarianism and the Remaking of International Order*, and a few interested reviewers, to be part of this new initiative by the ITBLR. The result is an interesting set of dialogues by way of three review essays and Prof Johns' reply to the three reviews. *#HELP* is an innovative mapping of the changing grammar of global humanitarian governance in an age of digital transformation and a detailed analysis of the manifold uses of digital technologies for humanitarian activities, often dressed up in legal fabric. We hope the ITBLR initiated conversations with *#HELP* will foster further debates for this embattled and unequal world to take a more humane and equitable direction, which is also an underlying objective of *#HELP*.

We have several student editors who have worked with us in this volume. We are grateful to Paris McNeil, Rachel Jupp, Kira Elliott and Alissa Farruggio for their editorial work. Curtin Law School Business Manager, Amanda Sullivan, has coordinated the ITBLR web updates with patience and determination and we cannot thank her enough. Our sincerest thanks to Lynn Roarty for her excellent copyediting of the entire volume. Finally, we are immensely grateful to all reviewers of articles without whom no journal can possibly function.

## Volume XXIV Summary:

Volume XXIV is divided into three parts. Part I has four journal articles, Part II contains three review essays on, and author's responses to, *#HELP*, and Part III provides commentary and case notes by students enrolled in the Law Review unit.

In the first article of Part I, Prof Islam and Dr Zaman offer a critique of the WTO investment facilitation agreement proposed at the 2017 Ministerial Conference in an age of already waning multilateralism. They argue that the majority of least developed and developing countries will gain little out of this agreement in that it reinforces the old power structures that are inimical to economic development of all nation states.

Prof Evans evaluates, in the second article, the role of expert determination for commercial dispute settlement. Situating expert determination within the broader framework of alternative dispute resolution procedure, the article highlights both potential and limits to its wider application in resolving commercial disputes.

In the third article, Mr Ding analyses the EU and China's articulations and practices of cross-border subsidies and countervailing measures within the WTO legal framework on subsidies and countervailing measures. Pitting China's globalising efforts of its Belt and Road Initiative against the EU's countervailing measures, the article attempts to envision the regulation of cross-border subsidies as global public goods.

In the final article in Part I, Dr Zhang looks at contractual and private international law issues arising out of Chinese courts' treatment of parties subject to English anti-suit injunctions in bills of lading disputes. In its exploration of differing legal practices of English and Chinese regimes in tackling maritime disputes regarding bills of lading, the article suggests some ways forward for Chinese courts to be more open and accommodating in dealing with anti-suit injunctions.

Part II, *Conversation with Book*, posits three reviews of *#HELP: Digital Humanitarianism and the Remaking of International Order* and a response by Prof Johns, the author of #HELP. The first review by Dr Farid frames #HELP mainly against the legal history of humanitarianism in the colonised world and highlights #HELP's inadequate engagement with and elaboration on issues and concerns relevant to the postcolonial world.

Dr Dizon, in the second review, provides a brief overview of #HELP with some pointers to what Johns might have done better. As much as Dizon characterises #HELP as theoretically original and philosophically nuanced, he points out #HELP's apparent unwillingness to provide any guidance to the practical and policy world of digital humanitarians.

Dr Mannan, in the third review, makes novel connections between digital humanitarianism and crypto humanitarianism in an engaging conversation with #HELP. Leveraging ideas and insights from #HELP, Mannan's essay also points towards abundant research opportunities in the crypto humanitarianism domain.

Finally, Prof Johns engages with some criticisms and connections made in the three reviews of #HELP and reflects briefly on how these critical conversations with #HELP can lead to a richer exploration of the fields of law, technology and humanitarianism.

Part III opens with a commentary by Paris McNeil on the global food crisis surrounding the war in Ukraine. Rachel Jupp summarises two High Court of Australia decisions: One on appropriate stakeholder consultation in offshore projects and another on Australia's pro-

arbitration stance in Kingdom of Spain v Infrastructure Services Luxembourg S.A.R.L.. Kira Elliott and Alisa Farruggio jointly author a case note relating to employment law in Australia. Kira Elliott writes a further case note on unfair preferences, and Alisa Farruggio on the difficulties in assessing statutory unconscionability in relation to Indigenous consumers whose cultural values and practices came to the forefront of assessing unconscionability.

We trust you will find volume XXIV insightful.

# ARTICLES

# AN INVESTMENT FACILITATION AGREEMENT WITHIN THE WTO: A POLICY RESPONSE BELYING ITS RELEVANCE TO THE WTO AND ITS MAJORITY DEVELOPING/LEAST DEVELOPED COUNTRY MEMBERS

M RAFIQUL ISLAM* AND KHORSED ZAMAN**


## ABSTRACT

*The adoption of a multilateral agreement on investment facilitation for development under the World Trade Organization ('WTO') was proposed at the 2017 Ministerial Conference. This article debunks its relevance to the WTO and its majority developing/least developed country (LDC) members. The WTO is in a crisis of unilateralism and protectionism, hamstringing its ability to regulate trade affairs. Relying on it for investment facilitation involving multi-tiered decision-making by several national authorities is a far-fetched idea. The peripheral policy approach to investment's developmental role has caused the perennial problem of asymmetric protection for corporate interest. Capital-exporting countries, with a partisan pro-investment mindset, have no appetite to embrace any developmental role; nor can the capacity-constrained WTO deliver it. The prospective investment facilitation agreement's developmental role is no more than a platitude to appease opponents. The promise by the WTO of trade-induced prosperity for all remains elusive in many developing/LDC members. This article argues that a WTO investment facilitation agreement will only accentuate inequality and poverty already created by lopsided trade incomes and the digital divide.*



## KEY WORDS

Investment facilitation agreement–WTO–developed and developing members–sustainable development



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## I INTRODUCTION

The integration of 'investment facilitation' in multilateral trade has become an intrusive global economic agenda over the last five years. There has been a persistent effort supporting the adoption of an agreement on a multilateral framework for investment facilitation (MFIF), similar to the WTO Trade Facilitation Agreement 2013, for development at the WTO. This investment facilitation agenda has sparked discussions across several forums, including the United Nations Conference on Trade and Development (UNCTAD), the Organisation for Economic Co-operation and Development (OECD), the G-20, and the WTO. While investment facilitation is necessary for the free and efficient flow of foreign capital, technology and expert knowledge into host countries for their resource development and economic growth, it did not appear as a pressing issue at the Uruguay Round negotiations in 1986-90. In 2017, at the Eleventh WTO Ministerial Conference (MC-11), 70 WTO members adopted a Joint Statement Initiative (JSI) on 'Investment Facilitation for Development' (IFD), where they agreed for 'structured discussions' aimed at developing a 'multilateral agreement for investment facilitation'.[1] The initiative for an IFD has both supporters with tremendous enthusiasm and doubters with great scepticism. Relying on the past performance of the WTO and the cut-throat trade diplomacy of the capital-exporting WTO members, this article rebuts the appropriateness of the WTO for such an IFD and its utility for the majority capital importing developing/LDC members of the WTO.

Foreign investment has become a prime source of external private capital for development. However, the peripheral policy approach to its developmental role has led to the perennial problem of asymmetrical protection for corporate interests at the expense of the competing interests of host developing/LDC countries. This failure hamstrings the pursuit of investment-induced development in many such countries. The ongoing culture of overarching investment protections is indicative that the proposed MFIF under the WTO is pushing the boundaries of neoliberalism to a new height through further liberalised and simplified investment facilitation with no measurable mandatory commitment to contribute to the development of host developing/LDC countries. Further marginalisation of the competing interests of host

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1 Facilitation for Development, WTO Doc WT/MIN(17)/59 (13 December 2017) (Joint Ministerial Statement on Investment) ('Facilitation for Development').

developing/LDC countries due to the intrusion of a digital divide appears to be the potential outcome, aggravating the existing inequality and poverty caused by lopsided trade-induced incomes under the WTO.

The premise of this article is based on the dilemmatic trade-regulatory environment that demands development-friendly foreign investments in host countries where host developing/LDC countries are required to be investment facilitation-friendly. This reciprocity has been lost in the margins of corporate profit. There is no reason yet to be optimistic that the ailing post-war partisan pro-investment policy at the epicentre of capital-exporting WTO members would be radically reformed to be conducive to achieving the sustainable development goals (SDGs), national interests, and public policy space of capital importing WTO members. Hence, it is unlikely that a future agreement on MFIF under the WTO would be development-friendly for its overwhelming majority host developing/LDC members. The remainder of this article will proceed in four parts. Part II will shed light on the historical debates and updates on introducing investment disciplines in the WTO. Part III reveals the capacity constraints of the WTO and the intricacies of incorporating MFIF for development into the WTO system. Part IV examines the implications for the Third World if MFIF is integrated into the WTO's current mechanism and Part V concludes the article.

## II INVESTMENT FACILITATION DEBATES WITHIN THE WTO

The relationship between trade and investment was considered at the WTO Singapore Ministerial Conference 1996. While the conference formed a Working Group to analyse and explore this relationship, there were no negotiations of new rules or commitments on the issue.[2] WTO members at the Cancun Conference 2003 differed irreconcilably over the Singapore issues (investment, competition, trade facilitation, and procurement). As part of the WTO's binding single undertaking by January 2005, the European Commission (EC) and the OECD proposed to start negotiations on the Singapore issues to conclude multilateral agreements. This proposal was opposed by a coalition of 70 developing countries and LDCs on the ground that the Doha Declaration 2001 sought to start negotiations at Cancun only if there was an 'explicit consensus' on the modalities of negotiations, without which they refused to launch negotiations

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2 World Trade Organisation, 'Investment, Competition, Procurement, Simpler Procedures', Understanding the WTO: Cross-Cutting and New Issues (Web Page) <http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm>.

on the Singapore issues. They feared that any binding obligation-creating agreement would have serious marginalising effects on their economic development and public policy space. Instead, they underscored the urgency of making meaningful progress in agricultural trade liberalisation in developed countries. Commitment to free agricultural trade was the priority of the Doha Development Agenda 2001. Although due to take place by January 2005, as of 2024 this commitment had not been fulfilled. Developed countries resisted agricultural trade liberalisation as a precondition of negotiations on the Singapore issues. This impasse over the Global North-South conflict of interests resulted in the collapse of the Cancun Conference.[3]

The July 2004 package prioritised negotiations on trade facilitation and failed to prioritise the other three Singapore issues, with no plan to start their negotiations. The WTO General Council declared that no work would take place towards negotiations on trade and investment within the WTO.[4] The Hong Kong Ministerial Conference in 2005 dropped the three Singapore issues from negotiating items.[5] Since then, no formal discussions on the trade-investment nexus have occurred in the WTO.

The idea of an agreement on MFIF for development has re-emerged at the WTO, coined in 2015 by the E15 Initiative of International Centre for Trade and Sustainable Development (ICTSD) and World Economic Forum (WEF) to support the achievement of sustainable development objectives.[6]In parallel, a group of developing and LDC members formed 'friends of investment facilitation for development' (FIFD), headed by China and the MIKTA Group, and launched discussions in April 2017 on investment facilitation for development in the WTO.[7] A coalition of 70 high, upper-middle and middle income members co-sponsored a joint ministerial expression of interest at the MC-11 in Buenos Aires in December 2017 to engage in 'structured discussions', with the objective of adopting an agreement on MFIF.[8] On 22

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3 Martin Knor, An Analysis of the WTO's Fifth Ministerial Conference' <https://www.g24.org/wp-content/uploads/2016/01/Session-2_5.pdf>; Martin Khor, *Battles in the WTO: Negotiations and Outcomes of the WTO Ministerial Conferences* (Third World Network, 2020) ch 5; Robert E. Baldwin, 'Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies' (2006) 29(6) *The World Economy* 677.

4 *Test of the 'July Package' – the General Council's post-Cancún Decision,* WT/L/579 (01 August 2004) (Decision Adopted by the General Council).

5 *Doha Work Programme,* WTO Doc WT/MIN(05)/DEC (22 December 2005, adopted 18 December 2005) (Ministerial Declaration).

6 International Center for Trade and Sustainable Development, 'WTO: Path Forward - Crafting a Framework on Investment Facilitation' (Policy Brief, 12 January 2018), <https://ictsd.iisd.org/themes/services-and-digital-economy/research/crafting-a-framework-on-investment-facilitation> (ICTSD has ceased to exist); Sofia Baliño, Martin D. Brauch and Reshmi Jose, 'Investment Facilitation: History and the latest developments in the structured discussions' (2020) *International Institute for Sustainable Development & CUTS International* <https://www.iisd.org/publications/report/investment-facilitation-history-and-latest-developments-structured-discussions>.

7 FIFD consists of 11 WTO Members: Argentina, Brazil, Chile, China, Colombia, Hong Kong, Kazakhstan, Korea, Mexico, Nigeria, and Pakistan; MIKTA is an informal partnership between Mexico, Indonesia, South Korea, Turkey, and Australia.

8 *Facilitation for Development* (n 1).

November 2019, a second 'Joint Statement on Investment Facilitation for Development' was released, with 98 Members endorsing the Joint Ministerial Statement of 2017.[9] A third joint statement for a future MFIF agreement was issued on 10 December 2021. In this statement, the signatories pledged that they would continue to step up their outreach efforts so as to conclude the text negotiations by the end of 2022.[10]

Negotiations on MFIF began in September 2020. Over the past three and a half years, the 'structured discussions' have steadily progressed into a 'negotiating mode'.[11] Whilst participating members have claimed to have made significant progress on key issues of a future MFIF agreement, the term 'investment' is yet to be defined due to the enormous complexities associated with incorporating investment matters into the WTO system.[12] The negotiating members have compiled (i) a compendium of text-based examples, which contains investment facilitation elements that could be included in a future MFIF agreement;[13] (ii) a *Working Document*, which builds on the compendium and focuses on areas of convergence emerging from previous discussions;[14] and (iii) a *Streamlined Text*,[15] which is based on the *Working Document* and aims 'to help Members further develop the elements and specific provisions' of a MFIF for development. An *Informal Consolidated Text*,[16] called the *Easter Text,*[17] based on the *Streamlined Text* and proposals by members, was circulated to members at the end of April 2020. Participants in the negotiations continued to work in 2021, and throughout the first half of 2022, with the aim of completing the text-based negotiations by the end of the year. WTO Members finalised a negotiated text by the end of November 2023 with an objective to incorporate the IFD text as a plurilateral agreement in the Annex 4 of the Marrakesh Agreement

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9 *Investment Facilitation for Development*, WT/L/1072/Rev.1 (22 November 2019) (Joint Ministerial Statement) (*Investment Facilitation for Development 2019)'.*

10 *Investment Facilitation for Development*, WTO Doc. WT/L/1130 (10 December 2021) (Joint Ministerial Statement) ('*Investment Facilitation for Development 2021').*

11 WTO, 'Structured Discussions on Investment Facilitation for Development Move into Negotiating mode'(Web Page, 25 September 2020) <https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm>; *Baliño*, *Brauch* and *Jose* (n 6).

12 Christian Pitschas, 'Defining Investment in a Future WTO Agreement on Investment Facilitation for Development' (No. 339, *Columbia FDI Perspectives* September 2022) <https://ccsi.columbia.edu/sites/default/files/content/docs/fdi%20perspectives/No%20339%20-%20Pitschas%20-%20FINAL.pdf>.

13 *Structured Discussions on Investment Facilitation for Development* WTO Doc. INF/IFD/RD/5/Rev.3 (7 October 2020). (Informal Consolidated Text – Revision).

14 *Structured Discussions on Investment Facilitation for Development*, WTO Doc. INF/IFD/RD/39 (24 July 2019) (Working Document).

15 *Structured Discussions on Investment Facilitation for Development,* WTO Doc. INF/IFD/RD/45 (17 January 2020) (Streamlined Text).

16 *Structured Discussions on Investment Facilitation for Development,* WTO Doc. INF/IFD/RD/50 (22 April 2020) (Informal Consolidated Text).

17 *Structured Discussions on Investment Facilitation for Development,* WTO Doc. INF/IFD/RD/74 (12 April 2021) (Consolidated Document by the Coordinator) ('Easter Text') <https://www.bilaterals.org/IMG/pdf/wto_plurilateral_investment_facilitation_draft_consolidated_easter_text.pdf>; WTO, 'Easter text to facilitate negotiations for an investment facilitation agreement' ( April 2021, Web Page) <https://www.wto.org/english/news_e/news21_e/infac_27apr21_e.htm>.

establishing the WTO. Due to the lack of consensus, finally, the proposed plan to include the IFD Agreement was dropped from the agenda of 13 Ministerial Conference which was held in Abu Dhabi in February 2024.

## III THE WTO: ITS CAPACITY CONSTRAINTS FOR INVESTMENT FACILITATION

While an investment facilitation agreement for development seems intuitively appealing, there are strong factors that debunk its appropriateness under the WTO. The investment facilitation process involves several national authorities of host countries making autonomous decisions, at multi-tiered levels, on the suitability of a foreign investment for economic development and public policy space. Being a trade organisation, the WTO is ill-equipped to accomplish a balance between the competing interests of the stakeholders.

### A *The WTO lacks a mandate*

The initiative to bring investment facilitation under the WTO falls beyond the mandate of the WTO for want of an 'explicit consensus' among its membership. The Singapore Declaration expressly provided that 'future negotiations, if any, regarding multilateral disciplines in these areas will take place only after an *explicit consensus* decision is taken among WTO members regarding such negotiations'.[18] The Doha Ministerial Conference negotiated a mandate for the commencement of negotiations on the Singapore issues after the Cancun Ministerial Conference in 2003 'on the basis of a decision to be taken, by *explicit consensus*, at that session on modalities of negotiations'.[19] This position was reiterated and reaffirmed in the Nairobi Ministerial Declaration 2015.[20] The proposal for a WTO agreement on MFIF is suffering from a mandate crisis because many WTO members openly oppose it. This is generally argued on the basis that the inclusion of this new issue will obscure and detract the WTO from advancing long overdue negotiations on higher priority issues, most notably agricultural trade liberalisation.

Evidently, no consensus was reached on this new initiative and no multilateral mandate exists for the WTO to launch negotiations on investment facilitation, which has persistently encountered serious opposition from many developing/LDC members. Should such a risk of

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18 *Singapore WTO Ministerial 1996*, WT/MIN(96)/DEC (Adopted 13 December 1996) (Ministerial Declaration) para 20 (emphasis added).

19 *Doha Declaration,* WT/MIN(01)/DEC/1 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration) para 20 (emphasis added).

20 *Nairobi Declaration*, WT/MIN(15)/DEC (Adopted 19 December 2015) (Ministerial Declaration).

dividing the membership eventuate, it would further undermine the relevance and effectiveness of the WTO. The WTO has been struggling to deal with many perennial trade issues and the unilateralism of its powerful members, whilst mitigating trade-induced income inequality among members who have the most and those who have the least. The Doha Round aimed to achieve reform through the introduction of lower trade barriers and revised trade rules to improve the trading prospects of developing/LDC members.[21] The Doha Development Agenda's priority mandate for negotiations included agricultural trade liberalisation, Mode 4 service trade, and pharmaceutical patent for affordable access to life-saving drugs. The trade-induced development and capacity-building through technical assistance for developing/LDC members initiated by the Doha Development Agenda remains undelivered in 2024. Bringing investment facilitation as a new negotiating item into the WTO would introduce a corresponding depreciation in negotiations on many unresolved pressing trading rights and interests of developing/LDC members. The WTO would be bewildered by new non-trade issues at a time when it cannot deliver its core trade commitments.

### B *The WTO is a trade organisation*

The WTO was established for developing binding *disciplines* to regulate multilateral trade liberalization. Developing a regulatory regime for investment facilitation would be a non-trade issue and beyond the realm of the WTO. It would increase the burden on the WTO, which cannot perform its immediate responsibilities by securing consensus. The strength of this argument flows from the same rationale that prevented mainstreaming labour standards and human rights into the WTO.[22] The trade-link between labour standards and production costs imparts the relevance of labour standards to the WTO.[23] Issues such as cheap labour, child labour, and sweatshop working conditions clearly have a human rights dimension and are relevant to Mode 4 of the General Agreement on Trade in Services (GATS). Yet, most WTO members (developing countries, LDCs and even some developed countries such as Australia) strenuously reject linking trade and labour standards/human rights, which has prevented a

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21 *The Doha Round* (Web Page) <https://www.wto.org/english/tratop_e/dda_e/dda_e.htm>.

22 Ernst-Ulrich Petersmann, 'Human Rights and the Law of the WTO', (2003) 37(2) *Journal of World Trade* 248, 255, 270; Garrett Brown, 'Labour Standards: Where Do They Belong on the International Trade Agenda?', (2001) 15(3) *Journal of Economic Perspectives* 100-101; Ernst-Ulrich Petersmann, 'From "Negative" to "Positive" Integration in the WTO: Time for Mainstreaming Human Rights into WTO Law?', (2000) 37 *Common Market Law Review* 1363.

23 Hans-Michael Wolffgang, and Wolfram Feuerhake, 'Core Labour Standards in World Trade Law: The Necessity for Incorporation of Core Labour Standards in the WTO', (2002) 36(5) *Journal of World Trade* 886-87; Kofi Addo, 'The Correlation Between Labour Standards and International Trade', (2002) 36(2) *Journal of World Trade* 299-300.

global consensus on this issue. This argument is made on the basis that labour standards and human rights are non-trade issues and matters for the ILO and UN respectively. The WTO is a trade liberalising body, not responsible for enforcing labour standards and human rights. The WTO would be over-burdened by having to administer non-trade issues.[24] This circumscribed understanding of 'trade' classifying 'labour standards and human rights' as 'non-trade issues' should also be applied to classify 'investment' as a 'non-trade issue' and hence beyond the realm of the WTO.

It would seem that investment facilitation would be an integral part of reshaping international investment law and policy for SDGs, given that it requires not all investments but only those that 'alleviate poverty, create jobs, accelerate the clean energy transition and infrastructure to provide goods and services for all'.[25] As a trade organisation, the WTO lacks the necessary experience in investment governance to allow it to interact with sustainable development issues. It is unsuited to reappraise and restructure investment facilitation policies to advance sustainable development in host countries. Its uniform and binding rules, backed by the rule-based dispute settlement process, militate against its competence to pursue a cooperative approach to investment facilitation involving all stakeholders.[26] The specific aspect of investment having possible linkage with and implications for trade liberalisation has previously been addressed in the WTO Agreement on Trade-Related Investment Measures (TRIMs). It is too farfetched a proposition to expand this limited nexus to encompass investment facilitation within the WTO.

Developing a framework for investment facilitation is better left to organisations that have an already established record of dealing with investment matters. UNCTAD has an extensive body of research-oriented works on investment policy, review, and an action menu on promotion and facilitation for sustainable development. It has been engaged in developing investment facilitation 'through policy formulation, technical assistance and consensus-building'. It is also

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24 WTO, 'Labour Standards, Consensus, Coherence and Controversy' *Understanding the WTO: Cross-cutting and New Issues* (Web Page) <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm>; *Statement by the Honourable Tim Fischer, M.P,* WTO Doc. WT/MIN(96)/ST/26 (9 December 1996) (Ministerial Conference); Tapiwa Warikandwa and Patrick Osode, 'Human Rights, Core Labour Standards and the Search for a Legal Basis for a Trade-Labour Linkage in the Multilateral Trade Regime of the WTO', (2014) 18 *Law, Democracy and Development* 240; Luke Arnold, 'Labour and the WTO: Towards a Reconstruction of the Linkage Discourse', (2005) 10(1) *Deakin Law Review* 84; Swan Turnel, 'Core Labour Standards and the WTO', (2002) 13(1) *Economics and Labour Relations Review* 105.

25 International Institute for Sustainable Development (IISD), 'Investment Law & Policy' (Web Page) <https://www.iisd.org/topic/investment-sustainable-development>.

26 IISD, 'A Risky Tango? Investment Facilitation and the WTO Ministerial Conference in Buenos Aires' (December 2007, Web Page) <https://www.iisd.org/library/risky-tango-investment-facilitation-and-wto-ministerial-conference-buenos-aires>.

considering the development of practical solutions to bridge the digital divide, which is currently a barrier to investment facilitation in many host developing/LDC countries.[27] The UNCTAD Global Action Menu for Investment Facilitation envisages that investment facilitation is crucial for 'sustainable development and inclusive growth' and emphasises that 'any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda'. [28]

It is remarkable that the informal consolidated text of an agreement on MFIF does not contain any obligations for home countries of investing entities to facilitate outward investment by supporting and promoting investment into developing members or LDCs for development.[29] The text contains an *optional* provision on sustainable development in the preamble, urging WTO members to adopt corporate social responsibility (CSR) rules *voluntarily* at national levels.[30] While investment facilitation purports to be a mandatory WTO agreement, its SDGs are ultimately left to the national good faith and goodwill gesture of members–the same old negotiating techniques that made intellectual property protection compulsory but transfer of technology optional in the WTO Trade-Related Aspects of Agreement on Intellectual Property Rights (TRIPS) .[31] Furthermore, there is no specific reference in the so-called *Easter text* to any considerations pertaining to gender equality and social inclusion.

This context underlines the fact that the ongoing MFIF negotiations in WTO (i) overlook the 'complex interactions between managing and facilitating the entry of investment and achieving the sustainable development goals that developing countries seek to achieve from that investment'; and (ii) aim to bypass developing economies' essential necessity of investment for 'capacity building, information sharing and cooperative processes that can enhance policies, practices and legal provisions at the national level'.[32] These requirements suggest that the WTO is inapt to grapple with the complex and extensive national, regional, and international aspects of investment facilitation. Neither a multilateral nor a binding approach of the WTO has been

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27 UNCTAD, <Investment Policy Hub, https://investmentpolicy.unctad.org/>.

28 UNCTAD, 'Global Action Menu for Investment Facilitation' (May 2017) <https://investmentpolicy.unctad.org/uploaded-files/document/Action%20Menu%2023-05-2017_7pm_web.pdf> 4.

29 *Structured Discussions on Investment Facilitation for Development* WTO Doc. INF/IFD/RD/50/Rev.6 (4 December 2020) (Informal Consolidated Text – Revision).

30 Ibid.

31 WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press,1999) 321.

32 IISD, 'Southern African Development Community (SADC) Investment Facilitation Workshop) (IISD Report, January 2019) ('SADC/IISD Report'), <https://www.iisd.org/sites/default/files/publications/sadc-iisd-investment-facilitation-workshop.pdf>.

deemed appropriate for a future MFIF agreement. It is high time for the WTO to move away from guarding the economic interests of its wealthy members and devote itself wholeheartedly to liberalising trade on a fair, equitable, and non-discriminatory basis for the benefit of all its members. To fulfill the pledge made in its preamble for sustainable development and inclusive economic growth,[33] the WTO and its members should now turn their energy to seriously address the alarming surge in trade-induced income disparities between developed and developing/LDC members after a quarter of a century of WTO-sponsored trade liberalisation.

### C *Differences between investment facilitation and trade facilitation*

The proposition of incorporating a MFIF agreement finds similarity between trade facilitation and investment facilitation, and purports to develop an investment facilitation framework much along the lines of the WTO Agreement on Trade Facilitation (TFA) 2013. However, trade facilitation and investment facilitation are markedly different in form and orientation; and their comparison appears to be a simplistic solution to a complex problem. Trade facilitation focuses on the custom measures pertaining to the movement, release, and clearance of imported goods, while involving a limited number of authorities and regulatory laws to deal with very specific importation. Its administration is instant and simple. In contrast, investment facilitation would be much broader and complex in reach, involving multiple national authorities from investment promotion to regulation for national interest and public policy considerations. While the screening authorities involved in entry procedures consider the net economic benefits of an investment application, there are additional policy compliance authorities that assess whether the proposed investment complies with the national environmental, health and safety, labour, taxation, competition, land acquisition, security, heritage, resource exploitation, and other public policies of host countries. This is a complex and long review process that is necessary to balance the interests of public and private economic actors and community stakeholders.[34]

The relationship that exists between the TFA and other WTO covered agreements is also significantly different from the prospective nexus that could exist between the WTO and MFIF agreement. The preamble of the TFA establishes a clear link with the WTO. It explains that the TFA aims to 'clarify and improve relevant aspects of Articles V, VIII and X of GATT 1994'.

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33 WTO, Marrakesh Agreement Establishing the World Trade Organization, Preamble.

34 Howard Mann and Martin Brauch, 'Facilitation for Sustainable Development: Getting it Right for Developing Countries' (Research Report No. 259, Columbia FDI Perspectives, Colombia University, 26 August 2019), http://hdl.handle.net/10419/254093; SADC/IISD Report (n 31) 4-6.

This statement is consistent with the agreed mandate for TFA negotiations, and it substantiates that the TFA applies to all relevant measures that are covered by GATT 1994. In contrast to the TFA, the core substance of MFIF is investment, which is not neatly connected with the types of measures (such as trade in goods, services, and TRIPS) covered under the WTO agreements. Therefore, MFIF appears to be a discordant agenda in the WTO. The relationship between trade and investment does not necessarily signify that their facilitation and regulation are related and similar. At an international level, investment facilitation requires a proper understanding of the needs, cooperation, and capacity-building of developing/LDC members, which the WTO has failed to deliver in the case of trade. There is no reason to believe that it would be capable of delivering these needs in administering investment facilitation.

### D *The term 'investment facilitation for development' lacks specificity*

The current push to promote 'investment facilitation for development' remains unarticulated and undefined. The MFIF texts do not define the terms 'investment', 'investment facilitation' or 'development'.[35] There is nothing in the 'Easter text' to guarantee and measure such a developmental outcome of an investment.[36] This may well imply that the scope of the application of MFIF is unclear and potentially limitless, given that investment facilitation can be an expansive notion which may be confused with the concepts of investment promotion and investment retention.[37] Investment facilitation entails wide-ranging institutional roles, administrative procedures, and regulatory measures to ensure its fast and efficient flow. It calls for transparency on policy and regulations, simplicity of entry procedures, and predictability of outcomes. It means best practice standards of investment protection, expeditious and fair decisions on applications, streamlined and sound approval, effective deterrents to corruptions, reliable physical infrastructure, cost-effective transportation, prompt business services, efficient labour forces, property rights protection, and aftercare support to retain investments. Essentially, these are the duties of host countries and the rights of investors.[38]

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35 Investment Facilitation for Development (n 10)16.

36 'Easter Text' (n 17).

37 Rodrigo Polanco, 'Towards a multilateral investment facilitation framework: Elements in international investment agreements', The E15 Initiative (12 October 2018), <https://e15initiative.org/blogs/towards-a-multilateral-investment-facilitationframework-elements-in-international-investment-agreements/>.

38 Joe Zhang, 'Investment Facilitation: Making Sense of Concepts, Discussions and Processes', (IISD Briefing Note, 2018) <https://www.iisd.org/library/investment-facilitation-making-sense-concepts-discussions-and-processes>.

Two prominent multilateral organisations, UNCTAD and OECD, have been dealing with investment facilitation.[39] The Asia Pacific Economic Cooperation (APEC) has opted for a regional approach in its own *Investment Facilitation Action Plan*.[40] Bilateral approach is also prevalent in some countries, exemplified by Brazil's *Investment Co-operation and Facilitation Model*.[41] Some identified elements of investment facilitation are common in investment promotion. While UNCTAD draws a distinction between investment facilitation and promotion, APEC and Brazil models draw no such distinction. There are demonstrated differences as to what investment facilitation would precisely entail. This multiplicity defies any identifiable consensus on the issue. MFIF is not based on any credible empirical studies on the specific elements of investment facilitation and requirements of development, let alone sustainable development. Sustainable development must be a decision-making task of governments, whose priorities vary due to their diverse economies.[42] Therefore, it is unrealistic to adopt a one-size-fits-all approach to what 'investment facilitation for development' encompasses. Even UNCTAD and OECD recognise that while 'investment facilitation stands increasingly high in the global economic agenda', they note 'little conceptual research has been undertaken on the topic'.[43] This lack of clarity and specificity is even more acute in the context of investment facilitation for sustainable development.

The ongoing 'structured discussions' seek to develop a regime to pursue 'investment facilitation for development'. This means that the negotiations would be limited to the facilitation of specific investments that would contribute to development, presumably in host countries. This would require advance formulation of rules to quantify contributions, regulatory objectives, the process of identifying quality of sustainable investment for development, and the consequences of failure to deliver. Achieving SDGs is high on the UN economic agenda.

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39 UNCTAD, Global Action Manu for Investment Facilitation (Investment and Enterprise Division, 2016); OECD, 'Work on Investment Promotion and Facilitation' (Web Page) ('Work on Investment Promotion') <https://www.oecd.org/investment/investment-promotion-and-facilitation.htm>.

40 Investment Facilitation Action Plan, APEC Doc. 2008/MRT/R/004 (31 May 2008).

41 Natali Moreira, 'Cooperation and Facilitation Investment Agreements in Brazil: The Path for Host State Development', Kluwer Arbitration Blog (Blog Post, 13 September 2018) <http://arbitrationblog.kluwerarbitration.com/2018/09/13/cooperation-and-facilitation-investment-agreements-in-brazil-the-path-for-host-state-development/>.

42 UNCTAD, 'Investment Policy Framework for Sustainable Development' (2015) <https://investmentpolicy.unctad.org/publications/149/unctad-investment-policy-framework-for-sustainable-development>.

43 Ana Novik and Alexandre Crombrugghe, 'Towards an International Framework for Investment Facilitation', OECD Investment Insights (April 2018) <https://www.oecd.org/investment/Towards-an-international-framework-for-investment-facilitation.pdf> ('Towards an International Framework'); Mann and Brauch (n 34).

SDG10 is centred on alleviating poverty and reducing inequality by 2030, which is indispensable for host developing/LDC countries. An investment is sustainable when it is a:

> [C]ommercially viable investment that makes a maximum contribution to the economic, social and environmental development of host countries and takes place in the framework of fair governance mechanisms. This definition goes beyond 'do no harm' and calls for efforts on the part of foreign affiliates to make an active contribution to sustainable development.[44]

The link between an investment and its developmental sustainability is to be measured by its life-cycle contribution to host countries, which does not occur automatically in a laissez-faire regulatory regime. It calls for a proactive policy intervention by involving multi-layered national authorities, regulators, and policymakers of a host country in the determination process of the requirements of sustainable development. The parameters of investment-led sustainable development cannot be rigidly and immutably defined by a top-down preconceived notion, which may be intrusive into the economic sovereignty of host developing/LDC countries. The expected sustainable development of a given investment must be identified and synergised towards achieving SDGs. It should be determined pragmatically through a bottom-up process based on the actual economic realities and social needs of a given host country. On the face of its chronic inability to protect the legitimate trading rights and interests of developing/LDC countries, the ability of the WTO to protect their developmental aspirations would certainly be constrained by powerful capital-exporting countries.

This is not the first time that the term 'development' has been used in a negotiating text at the WTO. Following the failure of the Seattle Ministerial Conference in 1999, new trade talk was planned as a 'development' round addressing the trading plight of developing/LDC members as its centrepiece. Accordingly, the Doha development round adopted the Doha Development Agenda dominated by agricultural trade liberalisation. Developed countries never delivered on their commitments to remove constraints to the agricultural trade of developing/LDC members. In most Ministerial conferences, they presented proposals for further liberalisation to widen their market access in developing/LDC members. The current push for 'investment facilitation for development' is one such proposal, the only difference being that it was initiated by some

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[44] Karl Souvant and Howard Mann, 'Towards an Indicative List of FDI Sustainability Characteristics' (2019) 20 Journal of World Investment and Trade 916, 918; Karl Sauvant, 'Determining Quality FDI: A Commentary on the OECD's FDI Qualities Project' (20 April 2018) Kluwer Arbitration Blog <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3376328>.

developing countries (along with some developed countries), some of which have become capital exporters.[45] They are now seeking to use the mandatory single undertaking of the WTO to give them speedy and uninterrupted access to resource exploitation in developing/LDC members with little or no power to rigorously screen inbound investment in the national interest. In exchange, both investors and their home countries provide no accountability for the 'development' of host developing/LDC members. The term 'development' is added in MFIF merely to secure the support of developing/LDC members in the same manner 'development' was used after the Seattle debacle to resuscitate the stalled WTO trade talks. Thus, the experience leads one to discern the mendacity of MFIF's 'development' aspect. It is not meant to be creating any mandatory corporate developmental obligations but rather operates to consolidate and grow corporate powers, profits, and market reach beyond any public debate or scrutiny.

## E *The WTO: The least experienced in investment matters*

Apart from its extremely narrow experience in TRIMs and Mode 3 services under GATS, the WTO has no other exposure to investment issues. There are more appropriately experienced multilateral bodies engaged in dealing with investment issues for a prolonged period and these bodies are far better equipped and qualified to deal with investment facilitation for development. UNCTAD has recently reformed international investment policies by launching a new generation investment policy, including investment facilitation in Addis Ababa in 2015.[46] The Addis Ababa Action Agenda has been endorsed by the UN in the World Investment Report 2016 to reorient 'FDI towards sustainable development ('…') to leave no one behind and build a world of dignity for all'.[47] The United Nations Commission on International Trade Law (UNCITRAL) is in the process of reforming investor-state dispute settlement (ISDS).[48] The OECD is also working jointly with smaller developing economies to make them an attractive destination for FDI.[49] The G20, as an international political platform, is also engaged

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45 Discussed in Part IV: A below.

46 UNCTAD, 'Investment Framework for Sustainable Development' (Web Page) <https://investmentpolicy.unctad.org/investment-policy-framework>.

47 UNCTAD, *World Investment Report 2016 – Investor Nationality: Policy Challenges* (UN publication, 2016).

48 *UNCITRAL Deliberates Possible Reform of Investor-State Dispute Settlement* UN Doc. UNIS/L/257 (8 December 2017), <http://www.unis.unvienna.org/unis/en/pressrels/2017/unisl257.html>.

49 'Work on Investment Promotion' (n 37); 'Towards an International Framework (n 43).

in investment facilitation and has endorsed the 'Guiding Principles for Global Investment Policymaking'.[50]

Many developing/LDC members have opposed proposed negotiation on MFIF agreement just as they opposed the Singapore issues. There is no palatable reason to raise the issue at the WTO, which is unsuitable to deal with the complexities of investment. Such negotiations would fragment and erode WTO's credibility with developing countries and hold the prospect of collapsing any future trade talks, as previously occurred in the Seattle and Cancun Ministerial Conferences. Hence, this article argues that it is in the best interest of the WTO and its members to leave investment matters to the province of organisations like UNCTAD, that stands out as the most qualified body with a wealth of experience and expertise to promote investment liberalisation and facilitation.

## F *The WTO: A Trojan horse for powerful members to expand market access*

The proposed agreement on MFIF purports to bring investment under the WTO, an organisation established to bring about **'**the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations' (WTO Agreement, Preamble). Notwithstanding the nearly 75 years of institutionalised trade liberalisations since GATT 1947, agricultural trade of the overwhelming majority of WTO members remains protected. The WTO is yet to discipline rampant agricultural trade barriers, which are still pervasive and politically difficult to reduce due to narrow sectoral interests of pressure groups enjoying disproportionate political influence in developed countries.

In the Uruguay Round, the Cairns Group generated formidable negotiating clout to include agricultural trade in the agenda item. As a counter bargaining demand, developed countries pressed for the inclusion of trade in services and TRIPS in the agenda item.[51] While developing/LDC members initially opposed these inclusions, they were too preoccupied with the inclusion of agriculture in the face of enormous opposition and bargaining power of developed members determined to include service trade and TRIPS. Consequently, agriculture

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[50] G20 Trade and Investment Ministerial Meeting: Ministerial Statement (14 May 2020), <https://g20.org/en/media/Documents/G20SS_Statement_G20%20Second%20Trade%20&%20Investment%20Ministerial%20Meeting_EN.pdf>; 'Annex III: G20 Principles for Global Investment Policymaking' <https://www.oecd.org/daf/inv/investment-policy/G20-Guiding-Principles-for-Global-Investment-Policymaking.pdf>.

[51] Jeffry Clark, 'US Proposal for a General Agreement on Trade in Services and its Preemption of Inconsistent State Law', (1992) 15(1) Boston College of International & Comparative Law Review 75.

was included in lieu of agreeing to include service trade and TRIPS. The outcome was a framework agreement in principle for the agriculture exporting countries, while developed countries got two agreements in their favour – GATS and TRIPS.

Of its four modes of services trade liberalisation under GATS, the WTO has liberalised the first three modes involving professional, skilled, and managerial services, where developed countries enjoy comparative and competitive advantage due to their advanced education, training, and technology. Mode 4 on the cross-border movement of natural persons, where developing/LDC members enjoy comparative and competitive advantage due to the availability of ample cheap labour, is not yet liberalised. The TRIPS Agreement provides mandatory protection to intellectual properties backed by national and international enforcement mechanisms. However, the commitment to transfer technology from developed to developing/LDC members under the TRIPS Agreement remains voluntary. The WTO has failed its developing/LDC members in achieving their agricultural trade induced development under its Agricultural Agreement, employment opportunities for their semi-skilled and unskilled labourers under GATS, and transfer of technology for the modernisation of their economies under the TRIPS Agreement.

While powerful members are yet to deliver their assumed commitments, in collaboration with newly emerged capital-exporting countries they are seeking to expand their grip on developing/LDC members' markets by bringing investment facilitation under the WTO. The WTO is strategically preferred to render the framework mandatory for all members under the single undertaking, enforced by the dispute settlement body (DSB) over which powerful members enjoy considerable clout. This appears to be the same old strategy of bringing new issues of vital interest under the WTO by the minority powerful members against the will and interest of the majority developing/LDC members. The WTO has demonstrated its inability to arrest the undue influence of its powerful members and protect the rights and interests of its weaker members. Once again, a future agreement on MFIF seeks to use the WTO as a Trojan horse to camouflage a mandatory pro-investment facilitation framework with a 'development' embellishment to appease its opponents. The developmental role of the framework would most likely be voluntary and its delivery would remain as elusive as ever.

## G *Jurisdictional conflict between the WTO dispute settlement mechanism and investment arbitration system*

If an MFIF agreement is embodied in the WTO, an imminent clash of jurisdiction may arise between the WTO dispute settlement system and investment arbitration tribunals established

under different international investment agreements (IIAs) and bilateral investment treaties (BITs). Although there are claims that MFIF would exclude 'investment protection and dispute settlement issues' in the negotiations,[52] it is highly difficult to avert the confrontation between two adjudicatory bodies. New disciplines on investment facilitation within the WTO could still end up being adjudicated by an ISDS arbitration tribunal. This cross-jurisdiction would likely cause additional conflict between the public international law orientation of the WTO and the private international law application of IIAs/BITs, potentially generating two different outcomes for two factual accounts. This dissimilar outcome is already occurring where the same dispute is adjudicated by the national judiciary of a host country and by an ISDS arbitral tribunal.

Regarding investment measures, the MFIF agreement, as it is expected to ensue, creates a significant overlap with the WTO agreements and IIAs/BITs. GATS, TRIMS and Agreement on Government Procurement (GPA) cover some elements of investment measures in trade in goods and services.[53] GATS establishes disciplines for the liberalisation of trade in services through the establishment of commercial presence abroad (Mode 3), TRIMS prohibits investment measures that distort trade, while IIAs/BITs contain rules and standards exclusively dedicated to the protection of investments. MFIF may also overlap with the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS) and the WTO Agreement on Technical Barriers to Trade (TBT) in situations where the product standards and requirements of a country have an impact on its investment policy and law.[54] Such a slovenly overlap, coupled with the existing structure of the WTO covered agreements and IIAs/BITs, creates a complicated dynamic for the implementation of investment obligations. Moreover, MFIF is progressing towards establishing a mandatory WTO-plus and WTO-extra investment regime within the WTO, which is likely to erode the authority of developing/LDC members to regulate incoming foreign investment in the best interests of their socio-economic needs, policy space, and sustainable development.

In terms of the scope of jurisdiction, implementation, and types of covered measures, MFIF may well be entangled with IIAs and create a clash of jurisdiction with the typical investment

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52 'Easter text', above n 17, scope 1.3 (p 8), section 35 (p 37); *'Investment Facilitation for Development 2019'* (n 9) para 3; *Pitschas*, above n 12.

53 Pitschas, above n 12.

54 WTO (n31) 59, 121.

arbitration tribunals which are established under hundreds of distinct IIAs/BITs.[55] Based on different sets of definitions of the following terms: investors, investment, umbrella clause,[56] fair and equitable treatment (FET) clause, and most favoured nation (MFN) clause, the scope and coverage of a particular IIA/BITs is pre-determined. Amid the murky scope of jurisdiction between IIAs/BITs, MFIF, and other WTO agreements, it is considerably important for WTO members to understand that the adjudicative and enforcement mechanisms under IIAs/BITs may also be invoked to enforce the prospective new WTO disciplines on investment facilitation, and vice-versa.

First, it is a common expectation that disputes arising out of the WTO agreements should be settled by the WTO dispute settlement system. However, due to the blurry and muddled relationship between IIAs/BITs, the MFIF agreement, and other existing WTO agreements, an investor may decide to bring a dispute to an investment arbitration tribunal under its IIA/BIT to challenge a host member's measure pursuant to an umbrella, FET, or MFN clause alleging a violation of the MFIF agreement. For example, based on an 'umbrella clause' in an IIA/BIT, an investor can initiate an ISDS against a host WTO member arguing that a breach of a commitment of the host member under a MFIF agreement also amounts to a breach of an umbrella clause under its IIA/BITs. Second, since most old-generation IIAs/BITs contain unqualified and vague FET clauses, an investor can claim a breach of FET arguing that the host WTO member's MFIF commitments have created a legitimate expectation of the investor to be treated in accordance with the MFIF disciplines. Third, if MFIF is not extended to all WTO members on a MFN basis, an investor from a non-MFN member home country can bring an ISDS claim against a MFIF member alleging a violation of an IIA/BIT's MFN clause.

Finally, if an ISDS tribunal is established under the respective IIA/BIT for breach of WTO-MFIF obligations, it can place the WTO and IIA dispute settlement systems at loggerheads, which will certainly diminish the image and integrity of both systems. Most importantly, perhaps the ISDS tribunal will be applying IIA/BIT to determine its own jurisdiction and reviewing the breach in the context of private international law as opposed to the public

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55 Currently, there are 3,291 active IIA including 2,900 BITs and 391 TIPs, reported in UNCTAD, Investment Policy Hub: International Investment Agreements Navigator <https://investmentpolicy.unctad.org/international-investment-agreements>.

56 'Umbrella clause' is a controversial feature of many BITs. It makes a generic commitment which the tribunals interpret to provide blanket protection of all investments in the host country, see Mary Footer, 'Umbrella clauses and widely-formulated arbitration clauses: Discerning the limits of ICSID jurisdiction', (2017) 16(1) *Law & Practice of International Courts and Tribunals* 88, 92; Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (Oxford University Press, 2012) 166.

international law orientation of the WTO legal text. In such an intricate situation, it is highly likely that the WTO dispute settlement body's jurisdiction will be hijacked by ISDS or the investment arbitration system, and the investment tribunal's assessment could lead to a conclusion that a breach of MFIF discipline is also a breach of an IIA/BIT provision. Thus, it will strengthen the IIA/BIT regime and ISDS system while eroding the jurisdiction of the WTO dispute settlement system.

## IV IMPLICATIONS OF MFIF FOR THE THIRD WORLD

Neoliberalism has become the new paradigm of the global investment market, which has progressively infiltrated many host developing/LDC countries to limit their regulatory space and the jurisdiction of domestic judiciary. This minimalist role of host governments as the protector of social welfare, public goods, the environment, and human rights of their own citizens would likely be further limited only to flourishing investment facilitation and capital advancement. The incorporation of an agreement on MFIF into the WTO would certainly be dominated by neoliberal push, which may produce unintended implications for the developmental goals and economic sovereignty. This may serve as a forewarning for host developing/LDC countries in pursuit of seeking foreign investment induced sustainable development in their economies.

### A *Neoliberalism engulfing WTO negotiations*

Since the 1990s, successive attempts have been made to extend neoliberal principles and policies to foreign investment. The first institutionalised attempt to circumvent the host country's authority was the OECD Multilateral Agreement on Investment (MAI) 1998, which was shelved following widespread public criticism and protest.[57] The next attempt was the inclusion of Chapter 9 on 'Investment and ISDS' in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) signed on 8 March 2018.[58] Its overarching definition of investment encompasses every component of the social infrastructure of signatory states and extends far beyond the protection of private property to include 'speculative financial instruments, government permits, intangible contract rights, intellectual property rights and

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57 Islam M Rafiqul, *International Trade Law of the WTO* (Law Book Co Information Services, 1999) 257-265.

58 *Comprehensive And Progressive Agreement For Trans-Pacific Partnership*, signed 8 March 2018 <https://www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership-text-and-resources/>.

market share'.[59] Its ISDS provisions expose states to investor-initiated claims for breach of the minimum standard of treatment, prompting some states to back pedal on laws dedicated to protecting the environment.

CPTPP prioritises corporate rights over its members' right to regulate their affairs in the public interests and empowers private investors to sue members before extrajudicial tribunals by skirting domestic courts and laws for the protection of environment and public interest. Its 'Minimum Standard of Treatment' assures investors that their investments will be accorded 'fair and equitable treatment and full protection and security',[60] which opens up members to lawsuits from investors for breaching the minimum standard of treatment obligations caused by 'an action that may be inconsistent with an investors' *expectations*'.[61] The CPTPP investment regime propagates capital as sacred, thus warranting maximum legal protection with no reference whatsoever to any quantifiable or indicative assessment of the contribution that an investment may make to the host economy.

MFIF appears to be a continuation of neoliberal expansion. It has reinvented the link between multilateral trade and investment regimes under the WTO at a time when multilateral economic cooperation has reached its rock-bottom level, and the WTO is increasingly sidelined by excessive regionalism and aggressive nationalism.

Over the years, some developing members, notably China, Brazil, Argentina, Mexico, and South Korea, have become sources of outward investment and have been pressing for a WTO-MFIF to further simplify and liberalise foreign investment. These newly emerged capital-exporting developing members opposed such investment negotiations in the Cancun Ministerial in 2003 when they did not have sufficient outward investment. The new and old capital exporting members have formed a 'transnational capitalist class'.[62] Out of the 15 members who originally proposed an agreement on MFIF in March-April 2017, five economies

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59 Australian Department of Foreign Affairs and Trade (DFAT), TPP Text and Associate Documents, Annex 9-D (Canberra, 6 October 2015) section A; Patricia Ranald, 'The Trans-Pacific Partnership Agreement: Reaching Behind the Border, Challenging Democracy,' (2015) 26(2) *Economics and Labour Relations Review* 241.

60 Art 9(6)(1).

61 Centre for International Environmental Law, 'The Trans-Pacific Partnership and The Environment: An Assessment of Commitments and Trade Agreement Enforcement' (2015) 2 Centre for International Environmental Law 9 <https://www.ciel.org/wp-content/uploads/2015/11/TPP-Enforcement-Analysis-Nov2015.pdf> (emphasis added); Public Citizen's Global Trade Watch, 'Case Studies: Investor–State Attacks on Public Interest Policies' (Web Page, 6 March 2015), <https://www.citizen.org/article/case-studies-investor-state-attacks-on-public-interest-policies/>.

62 Justin Schwartz, 'Neoliberalism and the Law: How Historical Materialism Can Illuminate Recent Governmental and Judicial Decision Making', (2013) 22(2) *New Labour Forum* 71, 77; David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005) 154.

(Brazil, China, Hong Kong (SAR), Mexico, the Republic of Korea) have substantially increased their share in the global outward FDI stock; their combined share has risen from 3 per cent in 1990 to 13 per cent in 2018.[63] These members are now looking for easy or unrestricted foreign investment frontiers with no jurisdictional restrictions to maximise the benefits of their surplus capital. They prefer the WTO over UNCTAD due to the WTO's mandatory single undertaking enforced by the DSB in the same way developed members fought tooth and nail to bring intellectual property (IP) rights under the WTO over and above the World Intellectual Property Organization (WIPO) administration of IP rights.

Bringing investment facilitation under the WTO will introduce a uniform rule-based binding regulatory system, where developing/LDC members are marginalised and underrepresented. Should MFIF succeed, it would serve as a precedent for investors and their home countries to press for the inclusion of other aspects of investment, such as regulating national regulatory authorities and treatment of investments, investment protection, compensation for expropriation, and ISDS. Accepting multilateral negotiations and regulations of broad investment issues would impose additional binding obligations on host developing/LDC members and curtail their decision-making ability to allow and regulate investment into their home markets to support strategic domestic priorities and sustainable development, while narrowing their national interest and public policy space. MFIF thus appears to be the same old tactic of advancing neoliberalism to serve the interest of WTO members possessing surplus capital to be invested in capital importing developing/LDC members with weak national regulation.

## B *Sustainable developmental goals*

The sustainable developmental goals of developing/LDC countries require a tailored investment facilitation to cater for their individual uniqueness and special circumstances. The determination of this goal is essentially a domestic matter and investment facilitation measures required to support it need to be adopted and regulated by domestic legislation. The attainment of a developmental goal of an individual developing/LDC country thus calls for a cooperative approach and effort between investors and host countries. This cooperation for investment-induced sustainable development in host developing/LDC countries has steadily been

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[63] Reji K. Joseph, 'Perspectives on topical foreign direct investment issues' (No. 235, Columbia FDI Perspectives 24 September 2018) 2.

recognised in international economic relations and cooperation. It has been endorsed in the Addis Ababa Investment Policy Framework for Sustainable Development 2015, Shanghai Guiding Principles for Investment Policymaking 2016, [64] G20 Hangzhou Statement 2016,[65] and UNCTAD Report 2017[66].

Sustainable development in host developing/LDC countries is not a zero-sum game in that sharing gains with them equates to a loss for capital-exporting countries. Rather, it is an opportunity for WTO multilateralism to be more inclusive. This desired outcome will not occur automatically but instead requires regulatory intervention to articulate and enforce binding obligations to contribute to sustainable development and consequences for the failure to do so. Entry screening for selection and subsequent regulation of the operation of investment for sustainable development in host countries must be an integral part of the proposed MFIF agreement. Such regulative investment facilitation is not protectionism, but rather a pathway to ensure the achievement of both investment-induced sustainable development and efficient facilitation. This would balance the exercise of rights and performance of obligations by both stakeholders (home country and investors) entailing specific accountability. The MFIF text provides no framework for mandatory reciprocal obligations of investors to contribute to the sustainable developmental goal of the host developing/LDC members. It is a proposal for the further simplification and liberalisation of investment approval, without prescribing a domestic screening and regulatory regime or contributory obligations and consequences for failures. As a result, MFIF falling short of these necessary regulatory requirements would create an investment regime that will serve only narrow corporate interest.

## C *Negotiating experience within the WTO*

By relying on the existing neoliberal international investment policy and law and global economic diplomacy, it may be asserted that MFIF will predominantly be focusing on the mandatory investment facilitation and protection obligations of host countries with some cosmetic voluntary developmental role and obligation of investors. The eventual outcome is

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64 UNCTAD facilitates G20 consensus on Guiding Principles for Global Investment Policymaking, 11 July 2016, UNCTAD Investment Policy Hub <https://investmentpolicy.unctad.org/news/hub/508/20160711-unctad-facilitates-g20-consensus-on-guiding-principles-for-global-investment-policymaking#:~:text=The%20G20%20Guiding%20Principles%20for,business%20conduct%2C%20and%20(IX)>.

65 G20 Leaders' Communiqué: Hangzhou Summit, Hangzhou, 5 September 2016, G20 Research Group, http://www.g20.utoronto.ca/2016/160905-communique.html#:~:text=We%20will%20strengthen%20the%20G20,both%20present%20and%20coming%20generations.

66 UNCTAD, World Investment Report 2017: Investment and the Digital Economy, <https://unctad.org/system/files/official-document/wir2017_en.pdf>.

likely to be precisely that which occurred in GATS–liberalising skilled, professional, and managerial services where developed countries enjoy near monopoly, but protecting labour market where developing/LDC members have the competitive advantage. Developed members protect their labour market by tightly controlling migration flows and preventing Mode 4 cross-border movement of workers from developing/LDC members in search of employment in developed countries.

Leaving aside the commitment for 'special and differential treatment' to developing/LDC members in several WTO agreements, the simple matrix of equality and reciprocity demands that if skilled professionals have a right to cross-border work based on their availability in developing/LDC members, so should be the right of unskilled labourers to cross-border work in developed members with available unskilled/semi-skilled jobs. This simple rationale did not prevail in WTO negotiations for GATS, which requires developing/LDC members to open their market without any reciprocal market opening in developed members. While sovereignty and immigration law in developing/LDC members are unlawful barriers to Modes 1-3, such barriers to Mode-4 are not unlawful in developed members. Sovereignty and immigration law in the former are less equal than that in the latter, which defies the principle of sovereign equality of states in international law. The WTO has been presiding over this grossly lopsided negotiating outcome despite its explicit recognition that 'there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development'.[67]

The discriminatory trade in services has serious implications for improving investment capacity and opportunity. The WTO, through GATS, has become an instrument of boosting earnings of developed and a few major developing members, through increased service trade, to increase their surplus capital, foreign investment capacity and opportunities, rate of return, and bargaining power. In contrast, the immobility of labour caused by the Mode-4 restrictions has resulted in lower wages, inferior working conditions, inadequate safety and security, suppression of legitimate rights, and erosion of collective bargaining power. Bewildered by the market power of multinational corporate investors in a deregulatory environment, low-wage

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[67] WTO Agreement Preamble.

workers are exposed to downward pressure on wages and benefits or face unemployment. The deregulatory policies under GATS have disproportionately marginalising effects on predominantly vulnerable sections of the workforce, who have been kept at the lowest levels of the global value chains.[68] The WTO has compounded the service trade problem of many developing/LDC members by restricting their economic alternative of cheap labour exports, despite mounting abject poverty and the worldwide concern for the eradication of poverty.[69] It is in this respect that the WTO restriction on Mode-4 has resulted in the steady erosion of opportunity to enhance service trade induced income and investment capacity-building in its developing/LDC members.

Similarly, developed countries under the TRIPS Agreement receive mandatory protection of their IP rights. However, they only have a voluntary obligation to transfer technology to developing/LDC members, despite the fact that these nations desperately require technology to contribute to their economic development. While all WTO agreements open market access, the TRIPS Agreement restricts market access. Developed members and their corporations have now introduced TRIPS-Plus protection for their IP without any reciprocal commitment to the transfer of technology. The chronic protectionism in agricultural trade in developed members and their agricultural subsidies distorts markets. However, developing/LDC members can neither subsidise food production for domestic consumption to guarantee food security, nor to protect their farmers from illegal dumping, which contributes to the global food crisis and the impoverishment of millions worldwide.[70] The WTO's DSB functions on the principle of the survival of the fittest, in which weak developing/LDC members are largely unrepresented. The Marrakesh Ministerial Decision of 15 April 1994 recognised the need for its reform, which was set to be done within four years after the DSB came into effect on 1 January 1999. Despite this, to date there has been no reform due to political horse-trading in ongoing review negotiations.

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68 Rashmi Banga, 'Measuring Value in Global Value Chains' (UNCTAD Background Paper No. RVC-8, 2013) 3, <http://unctad.org/en/PublicationsLibrary/ecidc2013misc1_bp8.pdf>.

69 Max Roser and Esteban Ortiz-Ospina, 'Global Extreme Poverty' (2019) *University of Oxford* <https://ourworldindata.org/extreme-poverty>; Anthony Atkinson, 'Monitoring Global Poverty, Report of the Commission on Global Poverty (World Bank Group, Washington DC, 2017); Jeffrey Sachs, *The End of Poverty: How We Can Make It Happen in Our Lifetime* (The Penguin Press, 2005) 174-75; David DanBen et al, 'Trade Income Disparity and Poverty' (Research Report No. 5, WTO, Economic Research and Statistics Division research report No. 5, 1999).

70 Rajib Tripura, 'Why Should We Care About Inequality?' *The Daily Star* (Blog Post,14 May 2020), <https://www.thedailystar.net/opinion/news/why-should-we-care-about-inequality-1902268>; Gabriella Gonzalez, 'Institutionalizing Inequality: The WTO Agreement on Agriculture, Food Security, and Developing Countries', (2002) 27 *Columbia Journal of Environmental Law* 433.

The above examples are just a few of many that highlight the track record of WTO negotiating history and outcomes, which have so far favoured powerful members through uninterrupted market access of their manufactured products and services without any reciprocal benefit for developing/LDC members. There is no reason to believe that WTO negotiations for investment facilitation would produce a favourable outcome for the overwhelming majority developing/LDC members. The intrusive nature of the WTO framework on the domestic regulatory space would keep investors, mostly multinational corporations (MNCs), beyond the reach of domestic law and courts. Once embarked on such negotiations, it would be exceedingly difficult for these developing/LDC members to prevent powerful members from subsequently pushing for the framework. Through undemocratic decision-making, the minority powerful members can trigger a debate on an issue that is opposed by the overwhelming majority developing/LDC members. The WTO Secretariat does not always take an impartial stand. It has already renamed its 'Trade in Services Division' to 'Trade in Services and Investment Division' without any mandate and in the face of strong objections by many developing/LDC members.[71] This is indicative of its partisan approach to investment facilitation even before the issue makes it into the WTO.

There is no public interest representation at the WTO. Its Secretariat has a list of affiliated non-government organizations (NGOs) that includes business lobby groups. One third of the l961 NGOs accredited for attendance at the Cancun Ministerial were corporate business groups.[72] Most WTO members, particularly the powerful, represent their major corporate interests. The enormous corporate pressure from the US financial services sector led to the conclusion of GATS.[73] Twelve giant US corporations played a pivotal role in backing and adopting the TRIPS Agreement.[74] The US protection of its pharmaceutical industry during the worldwide AIDS epidemic provoked worldwide criticisms.[75] This over-representation of corporate interests with significant resources and lobbying power often influences the WTO policy options to serve short-term private interests at the expense of long-term public interests. Since

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71 *Council for Trade in Services,* WTO Doc S/C/M/127 (17 June 2016) (Report of Meeting) No. 16-4807, Item No. 9.2.

72 WTO, NGO Attendance at Cancun (Web Page) <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_ngo_e.htm>.

73 Richard Sanders, 'GATS: The End of Democracy?' (15 June 2001) *Australian Financial Review* <http://members.iinet.net.au/~jenks/Sanders.html>.

74 Susan Sell, *Private Power, Public Law: Globalization of Intellectual Property Rights* (Cambridge University Press, 2003); Peter Drahos and John Braithwaite, 'Hegemony Based Knowledge: The Role of Intellectual Property' in Jianfu Chen and Gordon Walker eds, *Balancing Act: Law Policy and Politics in Globalisation and Global Trade* (Sydney: Federation Press, 2004) 206-12.

75 Islam M Rafiqul, *International Trade Law of the WTO* (Oxford University Press, 2006) 414; Jose Vina, 'The Global AIDS Crisis, Intellectual Property Rights, the WTO and Public Health: The Brazilian Perspective', (2002) 17 *Connell Journal of International Law* 312-68.

foreign investors are MNCs, developing/LDC members would be bewildered by the lobbying tactics and resources of MNCs to be deployed to pressure their home countries to negotiate a MFIF to serve and maximise corporate interest.

### D *The WTO is in a crisis of unilateralism and protectionism*

The multilateral trade under the WTO faces growing uncertainties due to continuous outbreaks of trade wars through tit-for-tat arbitrary imposition of tariffs, sanctions, and quotas between the US and China to which the WTO has become a helpless spectator. Powerful members consistently defy the existing WTO rules with impunity. The 'America First' policy, among many protectionist policies of the Trump administration, contradicted and undermined multilateral trade. In December 2019, the US blocked the appointment of new judges to the WTO Appellate Body to replace those who retired, effectively paralysing the WTO's ability to settle disputes. This was in retaliation against the DSB holding some US trade policies and practices inconsistent with its WTO obligations, which the US regarded as overreaching.[76] Unilateralism has been a part of the US campaign of obstruction to multilateral trade liberalisation in favour of go-it-alone, marked by tariff walls, trade barriers, and beggar-thy-neighbour protectionism. The EU has presented a draft proposal for reform and forged an alliance of 16 WTO members to work out an interim plan to save the DSB from the brink of collapse.[77] The trying times for the WTO and its trading regime are also compounded by the premature resignation of its Director-General.[78]

It appears to be a far-fetched proposal to negotiate new rules for investment facilitation when many existing rules are not followed and reformed. With the exception of the usual rhetorical lip service and platitudes, no action has been taken to overhaul the WTO. Even the EU alliance for reform is composed of WTO members with considerable market power, accompanied by a noticeable absence of smaller and weaker developing members. Most efforts by

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[76] Aditya Rathore and Ashutosh Bajpai, 'The WTO Appellate Body Crisis: How We Got Here and What Lies Ahead', *Jurist* (Blog Post, 14 April 2020), <https://www.jurist.org/commentary/2020/04/rathore-bajpai-wto-appellate-body-crisis/>; Keith Johnson, 'How Trump May Finally Kill the WTO', *Foreign Policy* (Blog Post, 9 December 2019), <https://foreignpolicy.com/2019/12/09/trump-may-kill-wto-finally-appellate-body-world-trade-organization/>; 'US blocks appointment of WTO judges', *New Europe* (Blog Post, 10 December 2019), <https://www.neweurope.eu/article/us-blocks-appointment-of-wto-judges/>.

[77] Jim Brunsden, 'Brussels builds alliance to bypass US block on WTO judges', *Financial Times* (Blog Post, 24 January 2020), <https://www.ft.com/content/e644ffea-3e97-11ea-b232-000f4477fbca>.

[78] Ambassador Azevedo resigned with effect from August 2020, one year before the end of his tenure. Elena Pavlovska, 'WTO chief Azevedo resigns amid appeal dispute with US', *New Europe* (Blog Post, 15 May 2020), <https://www.neweurope.eu/article/wto-chief-azevedo-resigns-amid-appeals-dispute-with-us/>; Eleanor Wragg, 'WTO director-general announces surprise resignation amid trying times for trade', *Global Trade Review* (Blog Post, 14 May 2020), <https://www.gtreview.com/news/global/wto-director-general-announces-surprise-resignation-amid-trying-times-for-trade/>.

developing/LDC members on many outstanding WTO commitments are stuck in gridlock due to frosty responses and uncompromising attitudes of powerful members. The 11th Ministerial in Buenos Aires in 2017 was chaotic and dominated by cut-throat trade diplomacy of self-interest, showing that 'this organisation is not working well. There are countries that came here and clearly said in their speeches that they don't want to move their positions at all'.[79] Despite serious demand and the urgent need for reform to build a more efficient and effective regulatory body, no progress has been made. Some members have been vehemently resisting changes, jeopardising the WTOs relevance and even its existence. The pressing agenda for WTO members should relate to the need to retain its core focus on trade, rather than negotiations on investment facilitation.

## V CONCLUSION

The negotiating history of investment from the first Singapore Ministerial Conference in 1996, to the Hong Kong Ministerial Conference in 2005, reveals successive failed attempts at developing multilateral discipline on investment under the WTO. For the proponents, the main reason is to secure uniform mandatory facilitation and protection of their investment in host members under the single undertaking and mandatory DSB of the WTO. The view of the opponents is that such an outcome would place a heavy compliance burden, severely erode their policy space, reduce flexibility to advance public interest, and undermine SDGs under the UN Agenda 2030. They are suspicious of a lopsided framework, motivated by capital-exporting members seeking less restraint and more protection of investment in host members. Although the proposal is presented as a development-driven gesture, investors would be unlikely to be under any mandatory obligation to deliver investment-induced development or suffer consequences for the failure to do so. Achieving SDGs through investment facilitation would involve interaction and intersection between a complex web of domestic laws, regulations, and rules of procedure, applied at multiple levels by national authorities, which would go far beyond the capacity and mandate of the WTO.

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[79] Taos Turner, 'World Trade Organization Makes Scant Progress on Revising Rules', *The Wall Street Journal* (Blog Post, 13 December 2017), <https://www.wsj.com/articles/world-trade-organization-makes-scant-progress-on-revising-rules-1513205379>; also see Abdullah Shibli, 'The urgent need for reforms at WTO', *The Daily Star* (Blog Post, 17 December 2018), <https://www.thedailystar.net/opinion/open-dialogue/news/the-urgent-need-reforms-wto-1674502>; Kavin Gallagher, 'WTO on the brink, needs a rethink', *Aljazeera* (Blog Post, 3 December 2013), <https://www.aljazeera.com/indepth/opinion/2013/12/wto-brink-needs-rethink-201312271325807473.html>.

The real problem faced by host developing/LDC members is their lack of investment screening capacity to determine economically productive, sustainable, and inclusive features of an investment proposal. Massive technology gaps and the digital divide have but added to this limitation. These WTO members can hardly govern their domestic affairs and citizens' welfare and rights, due to the power dislocation caused by multilateral trade liberalisation under the WTO. The promise of trade-induced prosperity remains unfulfilled and is hamstrung by global market access constraints with no WTO intervention. In the more than a quarter of a century that it has been in operation, the WTO has accomplished lopsided trade deals that accentuate gains and prosperity for some, losses and poverty for others, whilst failing to redistribute the gains of multilateral trade liberalisation to offset the pain, poverty, and inequality it has created. Here lies the unfairness of fair trade under the WTO that has generated distrust and a lack of confidence along the Global North-South divide, defying the consensus required for a WTO investment facilitation framework. The WTO has failed abysmally many developing/LDC members, the victims of soaring inequalities and poverty. The opposition to investment facilitation discussions at the WTO is yet another wake-up call for a searching reappraisal of its damaging pro-corporate orientation, to be guided by fresh thinking on a new multilateral vision of shared prosperity, ecological stability, and leadership committed to this vision which the WTO was established to fulfill.[80] Should this call go unheeded again, success in negotiating any new issues in the WTO, including the proposed agreement on MFIF, appears bleak.

Powerful members turn away from the WTO and defy its binding rules and commitments with impunity when they are required to open their markets, yet turn to the WTO out of convenience to make new rules and commitments for more market access to developing/LDC members. The WTO is faltering amid persistent new demands of its powerful members who operate at will by pushing the WTO to the wayside as if there is no multilateral trade liberalisation law in existence. This gerrymandering practice at the WTO has not only undermined consensus on investment, but also generated an existential and relevance crisis–a crisis somewhat of its own making. While bringing investment facilitation under the single undertaking of the WTO would further maximise the economic benefits and clout of members with surplus capital, it is likely

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[80] ICTSD Roundtable, 'WTO: Paths Forward. Towards a Shared Vision on Investment Facilitation' (Geneva, 5 March 2018) <https://www.ictsd.org/themes/global-economic-governance/events/towards-a-shared-vision-on-investment-facilitation> (The ICTSD ceased to exist).

to bring about a corresponding depreciation of economic sovereignty of many small, weak, and poor host members to whom the WTO is increasingly becoming irrelevant. For achieving consensus on any new issues, including the proposed MFIF agreement, the WTO needs a seismic paradigm shift to demonstrate its inclusiveness of and relevance to all membership–developed, developing, and LDC members alike.

# THE RESOLUTION OF COMMERCIAL DISPUTES USING EXPERT DETERMINATION

PHILIP EVANS[1*]


## ABSTRACT

*Expert determination is a dispute resolution process where an independent expert determines issues in dispute between the parties. The process is relatively economical, quick and effective in resolving commercial disputes, particularly disputes which are of a specific character or require some specialised expertise in the understanding of the issues. It is not confined to single issues but may also be used where there are multiple issues in dispute. Expert determination is not governed by legislation such as the Uniform Commercial Arbitration Acts but is a consensual process where the parties enter into a contract with the expert to determine the matters in dispute using his or her expertise and in accordance with procedures agreed by the parties.*

*Despite the benefits of expert determination in resolving commercial disputes, there can be potential problems with the process. These can arise in the choice and appointment of an expert, the level of procedural fairness required, difficulties in the enforcement of an expert's determination and the limited rights in challenging the determination.*

*The practical and legal issues discussed in this paper include the suitability of expert determination, the appointment of an expert, enforcing the expert agreement, the procedures to be followed, appealing the expert's determination, confidentiality and the legal liability of the expert, will assist parties in dispute to make an initial assessment on whether expert determination is the right process for the resolution of any, all or only some of the likely disputes that may arise in connection with their contract and also provides guidance to experts in the conduct of a determination.*


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## I INTRODUCTION

By way of introduction, expert determination is a dispute resolution process with the expert's jurisdiction arising from agreement between the parties in dispute and the expert. The appointment of the expert, his or her role and procedures are contained in the agreement with the disputing parties. It is important to note that the 'decision-maker' is appointed as expert and not an arbitrator and may not be required to apply the rules of procedural fairness to which an arbitrator would be subject. Advantages of the process are that it is highly effective (in terms of cost and expediency) and compared to litigation is confidential.

This paper will discuss all of the practical and legal issues associated with expert determination including the suitability of expert determination in resolving commercial disputes, the appointment of an expert, enforcing the expert agreement, the procedures to be followed, appealing the expert's determination, confidentiality, and the legal liability of the expert.

Expert determination is one of a range of alternative dispute resolution (ADR) processes available to commercial parties in dispute. Before considering each of the relevant expert determination practical and legal issues, it is important to provide some background to ADR generally in order to provide a context to expert determination.

No matter how carefully commercial agreements are drafted to reflect the rights and obligations of the parties to the agreement disputes will often arise, and efficient commercial practice requires the use of processes which are intended to avoid costly, time-consuming and unproductive litigation. Consequently, contemporary commercial agreements will generally contain an 'alternative dispute resolution' (ADR) clause which requires the parties to attempt to resolve the dispute outside the jurisdiction of the courts. Additionally, ADR is not only used in the resolution of commercial disputes but is used to resolve tortious claims, consumer law claims, workplace injury, employment and industrial disputes and family law disputes. Dispute resolution clauses are terms like any other in the agreement and are binding on the parties, and the courts will enforce compliance with these clauses.

## II ADR PROCESSES

Traditionally the two main processes used in the resolution of commercial disputes are commercial arbitration or mediation. In commercial arbitration the parties agree to appoint one or more arbitrators who, by way of a hearing, will consider the submissions and hand down in writing a binding award. The hearings are conducted in private and, subject to an express term

in the arbitration agreement, remain confidential to the parties. Commercial arbitration is conducted in accordance with the relevant state's uniform arbitration legislation.[2]

While the process mirrors litigation to some degree, the process is less complicated through the use of simplified rules of evidence and procedure. The arbitrator is not bound by the rules of evidence and may take into account any matter he or she sees fit.[3] Matters such as who will be called as a witness and what documents must be produced can be handled by way of correspondence or preliminary conferences.

The major disadvantage is that arbitration can become more expensive than court proceedings. Arbitrators can require substantial fees. In addition, parties are required to pay counsel, expert witnesses and costs associated with the hearing venue. With respect to costs, arbitration is a 'win–loss' process and the unsuccessful party will be required to pay the 'costs of the arbitration'.

In comparison, the process of mediation uses an independent mediator to facilitate the discussion and assist parties to resolve the dispute by a mutually acceptable settlement agreement. Mediation is 'interest-based' and not 'rights-based' as in arbitration or litigation. There is no legislation relating to the process, which is usually conducted under rules agreed by the parties.

The advantages of mediation are that it is a flexible process (depending on the agreed rules) that provides parties access to a wide range of outcomes that are not available in arbitration or litigation. For example, in a rights-based process such as arbitration or litigation an arbitrator or judge is constrained by way of a remedy to awarding compensatory damages, which are intended to place the innocent party in the position they would have been in had the other party performed their obligations in accordance with the agreement.

By comparison with arbitration, in mediation the parties, rather than insisting on their legal rights and on the basis of some perceived strength of their case, consider alternatives and options and appetite to come to their own agreement, employing a wide range of settlement options which would not be available in a rights-based process. Mediation also allows each

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2 *Commercial Arbitration Act 2012 (WA).*

3 Nevertheless they are still bound by the rules of natural justice.

party to hear the opposing views and to suggest and consider options in a non-confrontational environment which again assists in the preservation of the business relationship.

However, the success of mediation is dependent upon the skill of the mediator to facilitate discussion between the parties and suggest options. Unlike arbitration, mediators take an active part in the process and are permitted to meet privately (known as a 'caucus') with the parties during the process in order to understand the issues more clearly. This process is also useful in breaking deadlocks during mediation.

A disadvantage is that mediation is only successful if both parties clearly demonstrate a willingness to achieve a negotiated solution. This is problematical when a significant power imbalance exists between the parties or the parties are insisting on pursuing their legal rights under the contract.

In *John v Rees* when outlining succinctly the problems associated with the parties insisting on legal rights arising from a belief in their strong case, Megarry J observed:

> As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.[4]

Mediated issues are often unresolved as during the mediation process either party can withdraw from a proceeding at any time and should the mediation fail, the parties have incurred significant expense and the issues in dispute are still unresolved.

The benefits to the parties in using an ADR clause, such as arbitration, mediation, or expert determination in commercial contracts are well established.[5] In particular, the expert determination procedure is flexible because the process can be made to suit the party's particular dispute and the process and determination is private and confidential. A significant advantage is that the parties are able to select an expert to determine the issue who is a specialist

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4 [1970] Ch 345 at 402.

5 *Your Guide to Dispute Resolution* (Australian Government) 22 January 2014; contains basic information about common Alternative Dispute Resolution (ADR) processes, as well as some tips for using ADR and resolving disputes generally. It is a resource to help understand ADR and is also useful for practitioners, who can use it to inform their clients about ADR processes. Available at: https://www.ag.gov.au/legal-system/publications/your-guide-dispute-resolution.

in the area or areas of dispute and who can understand the issues without the need for opinion evidence. Consequently, it is the most expeditious of all the ADR processes.[6]

In the author's experience, as a registered expert determiner, one of the major benefits of expert determination is the preservation of the business relationship. Resolving the issues quickly can help restore or maintain or even improve the party's relationships. Where proceedings are protracted, this inevitably adversely affects the possibility of a continuing relationship between the parties.

Finally, a court decision will not be the end of the matter. Decisions are often appealed and even if successful the 'winning' party still has to recover the amount determined and their costs incurred in arguing their claim. Often the costs incurred in making and defending the claim will greatly exceed the damages or compensation awarded by the court.[7]

A typical example is the recent Palmer McGowan defamation case where the Federal Court determined that Mr Palmer was to pay the WA premier $20,000, while Mr Palmer (the former United Australia Party chair) was awarded $5,000, after both were found liable for defamation. Justice Lee commented:

> The game has not been worth the candle. These proceedings have not only involved considerable expenditure by Mr Palmer and the taxpayers of Western Australia, but have also consumed considerable resources of the Commonwealth and, importantly, diverted Court time from resolving controversies of real importance to persons who have a pressing need to litigate.[8]

As was noted by Justice Lee,[9] there was a 'glaring' disproportion between the damages awarded and the extent of the legal expenses. Despite both parties being partly successful in the litigation, the state's costs in connection with this matter were $2 million and Mr Palmer had paid $445,000 to WA to cover some of the state's cross-claim action.[10]

When reading the court's decision and the comments by Justice Lee I was reminded of the quotation variously attributed to the French philosopher Voltaire: '*I was never ruined but twice: once when I lost a lawsuit, and once when I won one'.*

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6 For a detailed discussion of the benefits of expert determination see: https://www.nortonrosefulbright.com/en/knowledge/publications/470a3448/use-of-expert-determination-mechanisms.

7 I am reminded of the quote variously attributed to the French philosopher Voltaire that '*I was never ruined but twice: once when I lost a lawsuit, and once when I won one'.*

8 *Palmer v McGowan* (No 5) [2022] FCA 893 at 522,523.

9 *Palmer v McGowan* (No 5) [2022] FCA 893 at 526.

10 https://www.smh.com.au/national/taxpayers-slugged-2-2-million-for-palmer-v-mcgowan-defamation-case-20221222-p5c8cv.html.

## III EXPERT APPRAISAL AND EXPERT DETERMINATION

A process which has significant advantages when compared to arbitration or mediation and which does not suffer from their respective disadvantages is expert appraisal, or determination. This is a form of dispute resolution in which the parties to a contract agree that disputes will be referred to an expert if and when the dispute arises. The process may be an express term of the contract, or the parties may agree to the process in negotiations relating to the dispute.

In a judicial context, the process was concisely stated in The Heart Research Institute Limited & Anor v Psiron Limited:

> As the plaintiffs point out, in practice, Expert Determination is a process where an independent expert decides an issue or issues between the parties. The disputants agree beforehand whether or not they will be bound by the decisions of the Expert. Expert Determination provides an informal, speedy and effective way of resolving disputes, particularly disputes which are of a specific technical character or specialized kind.
>
> Unlike arbitration, Expert Determination is not governed by legislation; the adoption of Expert Determination is a consensual process by which the parties agree to take defined steps in resolving disputes. I accept that Expert Determination clauses have become commonplace, particularly in the construction industry, and frequently incorporate terms by reference to standards such as the rules laid down by the Institute of Engineers Australia or model agreements such as that proposed by Sir Laurence Street in 1992. Although the precise terms of these rules and guidelines may vary, they have in common that they provide a contractual process by which Expert Determination is conducted. [11]

In essence the parties mutually select a person with specific expertise in the matters in dispute to receive written submissions on the issues,[12] and make either a recommendation or binding determination on the issues in accordance with the terms of the agreement between the expert and the parties.

The advantages of expert determination were noted by Chesterman J in *Zeke Services Pty Ltd v Traffic Technologies:*

> The evident advantage of an expert determination of a contractual dispute is that it is expeditious and economical. The second attribute is a consequence of the first: expert determinations are, at least in theory, expeditions because they are informal and the expert applies his own store of

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[11] [2002] NSWSC 646 at paras [16] and [17].

[12] Apart from an initial preliminary conference with the parties the expert does not normally meet with the parties but makes the determination from a consideration of the written submissions.

> knowledge, his expertise, to his observations of facts, which are of a kind with which he is familiar. [13]

The process is, then, clearly quicker and less expensive than other forms of dispute resolution such as arbitration or mediation as it does not require meetings, hire of a hearing venue and the associated costs. The process is flexible as the parties may select whether to allow the expert to decide the procedures to be followed for the determination, or whether rules agreed by the parties or institutional rules apply.[14] The most significant advantage is that the parties select an expert with expertise and experience with respect to the issues in dispute. The agreement and rules will allow the expert to use their own expertise in making the determination, consequently avoiding the need of the parties to engage costly experts.

The incidence of expert determination, together with its advantages in dispute resolution, was noted by Wheeler JA in *Straits Exploration (Australia) Pty Ltd & Anor v Murchison United Nl & An*or:

> There is increasingly, as a matter of commercial practice, a tendency of parties to provide for the determination of some or all disputes by reference to an expert. There are a number of reasons for that course, including informality and speed; suitability of some types of disputes for determination by persons with particular expertise; privacy; and a desire to resolve disputes in a way which may be seen as reasonably consistent with the maintenance of ongoing commercial relationships. The law has long recognised that those are proper considerations to which the Court should give appropriate weight, and that it is desirable therefore that parties who make such a bargain should be kept to it.[15]

The advantages in using expert determination in major infrastructure projects has also been recognised by both the New South Wales and South Australian governments. The GC21 standard form general conditions of contract[16] are used for construction contracts valued at more than $2 million. However, where appropriate to meet special circumstances or requirements, agencies still use the process for complex or high-risk contracts valued over $1 million.

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13 [2005] 2 QdR 563 at [27].

14 For example the Resolution Institute has prepared *Expert Determination Rules*. Available at https://www.resolution.institute/documents/item/1845.

15 [2005] WASCA 241, para 14.

16 GC21 Edition 2 standard form; https://buy.nsw.gov.au/resources/gc21.

The contract form was developed to provide relationship-based contracting with specified requirements for cooperation between the contracting parties transparent and balanced allocation of risk and the mitigation of disputes. The dispute resolution procedures are set out in clause 70 Resolution by senior executives:

> 1. If a party gives notice of an Issue under clause 69, the senior executives named in Contract (Information items 7 and 11) must promptly confer to try to resolve the Issue.
> 2. A party is not entitled to refer an Issue to Expert Determination until 28 days after giving notice of an Issue.
> 3. A party may only refer an Issue to Expert Determination by giving a notice specifying the Issue to the other party (with a copy to that party's senior executive) within the time stated in Contract Information item 51.

In summary, both the courts and major contracting authorities clearly recognise the advantages of expert determination in the resolution of contractual disputes.

## IV EXPERT APPRAISAL AND EXPERT DETERMINATION AND LEGAL AND PROCEDURAL ISSUES

There are a number of procedural and legal issues associated with the use of expert determinations. These include what types of dispute are suitable for expert determination; the expert determination clause; enforcing the expert determination clause; the appointment of the expert; the expert determination procedure; the agreement with the expert; ensuring that the determination does not become an arbitration; the content of the determination report; appealing the determination, and the legal liability of the expert. An understanding of both the procedural and legal issues associated with expert determination is essential both for the expert and the parties in dispute.

### A *What type of disputes should be referred to expert determination?*

Unless exclusive jurisdiction has been conferred by a statute or a specific court or tribunal, there are few restrictions on the type of disputes that can be determined by expert determination. The types of dispute that are referred to expert determination generally involve where a high level of 'technical' expertise is required which might not normally be possessed by a judge or arbitrator who would need to rely on opinion evidence to assist in reaching a decision. The process is appropriate (but not exclusively) for single issues, and involves technical rather than 'legal' questions.

As the determination will be made on the basis of the parties' written submissions, the process is not appropriate where there are issues of credibility. The process is widely used in building and construction disputes where the issues relate to time, cost and quality, or whether plant and equipment has met performance criteria. Other disputes suitable for expert determination have related to disputes regarding share prices, franchising, rent reviews under leases or general valuation issues.

## B *The expert determination clause*

Expert determination clauses (like all ADR clauses) require careful drafting in order to avoid being set aside as 'pathogenic'. [17] The clause should:

(i) specify the field of expertise from which the expert is to be chosen,

(ii) provide for the parties to select the expert, and

(iii) provide for appointment by an appropriate professional institution should the parties fail to agree on the expert.

For example, the expert determination clause suggested by the Resolution Institute:

> Any dispute or difference whatsoever arising out of or in connection with this contract shall be submitted to an expert in accordance with, and subject to, Resolution Institute Expert Determination Rules.
>
> Unless the parties agree upon an Expert, either party may request a nomination from the Chair of Resolution Institute. [18]

A clause which directs the parties to attempt to agree to an ADR process, or does not outline a clear process for attempting to resolve a dispute, will be held to be unenforceable. Courts will not infer the terms of, or direct parties to perform, contractual obligations or terms which are ambiguous.

For example, in *WTE Co-Generation & Anor v RCR Energy & Anor*, WTE commenced court proceedings for breach of contract and to enforce a guarantor's obligations, and for misleading representations made in the formation of the contract.[19] RCR sought a stay of the court proceedings on the basis that there had not been compliance with an ADR clause which, they

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17 Put simply, "unenforceable". The term is attributed to Mr. Frederick Eisemann a former secretary of the International Chamber of Commerce International Court of Arbitration. See 'Avoid pathological Clauses. Be Consistent', http://blog.mylaw.net/avoid-pathological-arbitration-clauses-be-consistent.

18 https://www.resolution.institute/resources/dispute-resolution-clauses.

19 [2013] VSC 314.

submitted, dealt with a dispute resolution mechanism that had to be followed. The ADR clause required the parties to enter into an agreement to agree to another agreement:

> In the event the parties have not resolved the dispute then within a further 7 days a senior executive representing each of the parties must meet to attempt to resolve the dispute or to agree on methods of doing so.[20]

It was held that the process established in the dispute resolution clause was uncertain because either the parties were to meet together to resolve the dispute, or had to agree on methods of doing so. The clause expressly relied upon the parties to agree to another agreement which would provide the process for attempting to resolve the dispute. The clause was clearly an 'agreement to agree' and was unenforceable.[21]

The Court stressed the need for ADR clauses to provide for certainty of process. It found that while the process to negotiate ultimately need not be explicitly detailed, it must be clear in explaining the steps parties need to perform in attempting to resolve their dispute.

## C *Enforcing the expert determination clause*

Where the clause is clear and unambiguous and the court is of the opinion that it was always the original intention of the parties to resolve any disputes in an alternative forum, the parties to the contract will be required to comply with the dispute resolution clause procedures and will be prevented from seeking a stay of the process or commencing litigation proceedings. Courts will give effect to an ADR clause which requires an ADR as a condition precedent to litigation[22] and the courts have consistently held that parties ought to be bound by the terms of their freely negotiated contracts.[23]

Put simply, courts will enforce the provisions of a freely agreed 'bargain' which has clearly contemplated ADR as the agreed dispute resolution procedure. It is a well-established common law principle that uncertainty or vagueness will only invalidate a term of an agreement where a court cannot reasonably determine what the intention of the parties was at the time of entering into the agreement.[24] At the same time, as mentioned above, care needs to be taken in the

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20 [2013] VSC 314.para 12.
21 See also Coal Cliffs Collieries Pty Ltd v Sijehama Pty Ltd (1991) NSWLR 1.
22 See Hooper Bailee Associated Ltd v Natcom Pty Ltd (1992) 28 NSWLR 194.
23 Travel Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326. See also Western Australia v Dimmer (2000) 163 FLR 426.
24 See Hillas v Arcoss Ltd (1932) LT 503, Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd (1968) 118 CLR 429.

drafting of the expert determination clause to ensure the procedures are clear, specific and any conditional requirements are time related. These issues were considered in *Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd.*[25]

The facts were that a dispute arose in connection with the contract and Wambo Coal Pty Ltd (Wambo) made an application for a court order staying litigation proceedings until Downer EDI Mining Pty Ltd (Downer) had complied with the dispute resolution procedure in the contract.[26]

The contract between the parties required Downer to provide maintenance of plant and equipment services to Wambo. Under the terms of the Operation Agreement (the Agreement), payments were to be placed in a separate account and Downer was to draw down from this account in order to recoup the costs of any maintenance services provided. It was further provided in the Agreement that if there was any money left in the account at the end of the agreement it would be divided equally between the parties.[27]

When it became obvious that there would be a surplus in the fund at the end of the contract, Wambo determined to make no further payments as it would be paying into a fund from which it could only receive half at the end of the contract. Downer subsequently pleaded that as a consequence, Wambo Coal was in breach of the agreement.

The basis of Wambo Coal's application for an order staying proceedings was that:

a) Downer had not satisfied a condition precedent to its right to commence proceedings in that it failed to comply with the dispute resolution procedure (DRP).

b) Alternatively the court should require Downer to comply with the provisions and stay proceedings until that occurs.[28]

The application was opposed by Downer on the basis that:

a) The DRP was vague and uncertain and thus unenforceable,

b) There was no point in staying proceedings, whether or not the DRP was enforceable as Wambo in discussions had been intransigent and unmoveable; and

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25 [2012] QSC 290.

26 See, G Moens and P Evans (Ed) (2015) Dispute Resolution in the Resources Sector; An Australian Perspective, Springer Publications.

27 Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd at para [4].

28 Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd at para [2].

c) The procedures in the DRP are unlikely to resolve the dispute and it would be futile and wasteful for compliance to be required.[29]

The dispute resolution clause was contained in clause 46 of the Agreement. Its form and content differed from the typical dispute resolution clause found in Australian Standard General Conditions of Contract,[30] by virtue of its express reference to a condition precedent provision and a default provision requiring expert determination. There was also a 'best endeavours' negotiation clause.[31]

Clause 46.4 was titled *Resolution of Issues by Expert*. It was dependent upon the amount of claim– that is, being less than $1million. What is particularly relevant is the absence in the clause of procedures relating to the appointment of the expert or any rules for the determination.

Martin J noted that there was no relevant difference between an expert determination clause and any other dispute resolution clause. Further, it was noted, there was no basis for treating this type of dispute resolution procedure any differently from an arbitration clause. His Honour, referring to the decision *in Dobbs v National Bank of Australasia Ltd,*[32] commented, in referring to the dispute resolution clause:

> It is a product of the party's agreement and it has never been the policy of the law to discourage the parties from resolving their differences in this way.[33]

There was an issue of uncertainty as the procedures did not allow for the contingency that the required representatives may have been incapable of meeting within the specified time. However, His Honour held that the lack of any mechanism to deal with the impossibility of holding a meeting within time does not render the procedure uncertain and again referred to the principle determined by Wheeler JA in *Straits Exploration*[34]:

> The tendency of recent authority is clearly in favour of construing such contracts, where possible in a way that will enable expert determination clauses to work as the parties appear to have intended, and to be relatively slow to declare such provisions void either for uncertainty or as an attempt to oust the jurisdiction of the courts.[35]

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29 Downer EDI Mining Pty Ltd v Wambo Coal Pty Ltd at para [3].
30 AS124-1992 and AS 4000-1997 (Clause 43).
31 Best endeavour clauses or good faith clauses do not require a party to compromise its legal position. See Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd (2000) 16 BCL 130.
32 (1935) 53 CLR 643 @ 652.
33 See also Straits Exploration (Australia) Pty Ltd and Anor v Murchison United NL & Anor (2005) WASCA 241.
34 At paragraph 21.
35 (2005) WASCA 241 at para [14].

Downer submitted that it would be futile for the meetings required by the dispute resolution procedures to be held because whilst a number of meetings had been held by senior persons, none of the meetings or discussions had resolved the issues in dispute. Wambo submitted it remained ready and willing to participate in the process.

Clearly the intention of clause 46.4 was to expressly allow for the determination of issues in dispute by an expert where the dispute could not be resolved by agreement between the parties as per clause 46.3 of the dispute resolution clause.

His Honour noted that the issue was one of 'participation' rather than 'co-operation' as stated by Giles J in *Hooper Bailie Associated Ltd v Natcom Group Pty Ltd*[36]:

> What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come.[37]

Consequently, the proceedings were stayed pending compliance with the dispute resolution procedures contained in the Agreement. This reinforces the principle that courts are willing to imply terms into the dispute resolution process where there is nevertheless some uncertainty or absence of time related requirements. Further arguments based on the futility of compliance with the ADR clause are unlikely to be acceptable.

These issues were also considered in Fletcher Construction Australia Ltd v MPN Group Pty Ltd.[38] The contract included an expert determination clause which stated, in part, that:

> The third party who has been agreed upon or appointed shall act as an expert and not as an arbitrator and that party's decision shall be final and binding upon the Proprietor and the Engineer.

A dispute occurred and MPN did not want to proceed with the expert determination, arguing that the expert determination clause was void because it was uncertain or attempted to exclude the jurisdiction of the court, which would be contrary to public policy.

The decision holds that expert determination clauses do not seek to exclude the jurisdiction of the court. The clauses are an agreement between the parties that the specified disputes should

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36 (1992) 28 NSWLR 194 @ 206.
37 (1992) 28 NSWLR 194 @ 207.
38 Unreported, Supreme Court of New South Wales, Rolfe J, 14 July 1997.

be determined by an expert and parties should be held to their bargain if they agree to such a clause.

Parties can always seek to have a determination set aside if the matters referred to by the expert were not contemplated by the expert agreement or the procedures agreed for the conduct of the determination were not followed.

These decisions clearly indicate that courts will not allow commercial parties to overturn the freely agreed terms of the bargain and will, where legally possible, imply terms to enforce the dispute resolution procedures despite claims of uncertainty or futility. Where a dispute resolution clause uses terms such as 'may' rather than 'shall', this will still constitute a mandatory referral for determination under the agreed method of dispute resolution. The cases also illustrate the problems and consequent costly delays which may result from the interpretation, application and enforceability of ad hoc dispute resolution clauses which have not been carefully drafted.

## D *Expert determination procedures*

The expert determination clause in the contract will usually state the procedures to be followed by the expert in carrying out the expert determination, together with details of the issues to be determined.

A party may attempt to argue that the absence of detailing the procedure to be followed was likely to invalidate the expert determination clause on the basis of uncertainty. However, it has been held that even if the parties have not agreed the procedures to be followed by the expert, the clause will still be valid as the procedures may be determined by the expert.[39]

Since the object of expert determination is to appoint a person because that person possesses particular knowledge, skills and experience which makes them preferable to a judge or arbitrator, it will be advantageous to give the expert some flexibility as to the manner in which the process is to be conducted. Consequently, typical clauses will expressly provide for the expert to proceed in any manner they think fit subject to any express condition in the expert determination agreement.[40] However, the failure to specify procedures and allowing the expert

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[39] Triarno Pty Ltd v Triden Contractors Ltd. (1992) 10 BCL 305; Fletcher Construction Australia Ltd v MPN Group Pty Ltd (Unreported, Supreme Court of NSW, Rolfe J, 14 July 1997).

[40] See the Property Council of Australia, Project Contract PC-1 (1998).

to conduct the determination as they see fit can be problematic and raises issues such as the need to apply the rules of natural justice,[41] or the requirement to provide reasons for the determination.[42]

Consequently, the usual practice is for the parties to expressly incorporate into the expert determination clause reference to the rules published by a dispute resolution organisation such as the Resolution Institute[43] or the Law Society of NSW.[44] These rules consider all of the necessary requirements for the conduct of an expert determination and include:

- the general duties of the parties to do all things reasonably necessary for the proper, expeditious and cost effective conduct of the process, including compliance by the parties;
- with respect to any direction or ruling by the expert as to procedural or evidentiary matters;
- empowering the expert to make directions and rulings in relation to clarifying issues in dispute, the provision by the parties of submissions and evidentiary material;
- requiring the expert to act fairly and impartially as between the parties giving each party a reasonable opportunity of putting its case and dealing with that of the opposing party and a reasonable opportunity to make submissions on the conduct of the process;
- confidentiality and entering into appropriate confidentiality undertakings;
- the convening of a preliminary conference by the expert to plan and agree a timetable for the provision of submissions, documents and other evidentiary material;

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41 In *Zeke Services Pty Ltd & Anor v Traffic Technologies Ltd & Anor* [2005] QSC 135 it was stated; 'It is at this point that the absence from the agreement of procedural rules to be observed by the expert becomes of importance. Their absence is unremarkable in a case where the expert relies upon his own senses and learning, but where he is obliged to investigate disputed questions of fact and/or law, and come to a conclusion about them, the lack of a methodology for the inquiry is significant. An expert, unless obliged to do so by the contract or the terms of his appointment, does not have to comply with the requirements of procedural fairness or natural justice. The agreement does not contain such a requirement'. Chesterman J at [para 32].

42 In *Kanivah Holdings Pty Ltd v Holdsworth Properties Pty Ltd* (2002) 11 BPR 20 at [201] it was held that in the absence of an express condition the expert does not have to give reasons.

43 See https://www.resolution.institute/documents/item/1845.

44 http://expertdeterminationelectroniclawjournal.com/wp-content/uploads/2017/02/The-Law-Society-of-NSW-Rules-for-Expert-Determination.pdf.

- meetings between the parties, their representatives or experts individually engaged by the parties (including conclaves of the experts individually retained by the parties), whether or not such meetings are attended by the expert appointed to determine the dispute; and
- the timing of the determination and what it is to contain, including a statement of reasons in such form as the expert considers reasonably appropriate, having regard to the amount and the complexity of the dispute.[45]

## E *Ensuring the determination does not become arbitration*

Expert determination agreements and rules may permit the expert to meet with the parties or the experts engaged by the parties. The problem is that, in fact, the process might be deemed to involve the expert in hearing evidence and in determining issues judicially. That is, the process has moved from an expert determination to a de facto arbitration. The distinction is important, and if the parties are equivocal about the precise procedures (or the expert is not aware of the expert determination/arbitration distinction) situations can arise where the process is deemed to be an arbitration placing statutory obligations on the expert as evidenced in the Queensland case of *Capricorn Inks v Lawter International*.[46]

In Capricorn Inks, the parties agreed that Lawter had breached terms of the contract with Capricorn Inks by supplying a defective product and a dispute arose over the amount of damages arising from the breach. It was agreed that a firm of accountants would determine the damages and that the assessment would be final and binding.

Prior to the agreement for determining the issue by expert determination, Capricorn's solicitors had proposed a settlement amount of $100,000. After the expert determination commenced, Capricorn submitted details to the accountant expert stating that damages were $280,000. The accountant then used this as the basis of determining the quantum damages without informing Lawter of the increased amount.

Lawter refused to pay, and Capricorn Inks commenced action on the basis that the parties' agreement was that the assessment would be final and binding. Lawter then counterclaimed,

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45 Expert Determination Clauses; Ashurst Lawyers; Australian Construction Law Newsletter #171 November/December 2016 at page 40.

46 [1989] Qd R 8. See also Age Old Builders Pty Ltd v Swintons Pty Ltd [2003] VSC 307; Badgin Nominees Pty Ltd v Oneida Ltd [1998] VSC 188.

seeking to have the accountant's decision set aside under the then *Commercial Arbitration Act* (Qld) for misconduct.[47] Specifically, they alleged there had been a breach of the rules of natural justice due to the expert not advising them of the new amount claimed by Capricorn Inks and giving them the opportunity to respond.[48]

Despite the name the parties gave to the process, the issue for the court was how the process was carried out. If the court determined that the process was in fact arbitration, the 'expert' would be bound by the provisions in the *Commercial Arbitration Act*. If there had been a breach of the rules of natural justice, then the determination would be set aside.

The matter eventually found its way to the Court of Appeal where it was held that the process was not an arbitration. The court held that while the arbitral function is to hear evidence under oath and to determine the parties' opposing contentions, an expert determination is a determination made by an expert with specialist skills and knowledge without any requirement to hear the parties.

The lesson to be learned from this case is that this issue would not have arisen if the parties had clearly defined at the outset the role of the expert. It is suggested that even if the expert rules allow for meetings between the parties, their representatives and/or experts individually engaged by the parties, this can clearly give rise to a finding that the process was in fact an arbitration and consequently subject to the provisions of the *Commercial Arbitration Act* and especially the provisions dealing with natural justice.

Apart from the convening of a preliminary meeting between the expert and the parties to agree to the procedures for the conduct of the determination and the timetable for the provision of submissions, documents and other evidentiary material in order to avoid the above issues, meetings should not be held. Additional information if requested by the expert can be provided by way of affidavits or other supporting documentary evidence. An essential item for

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47 *Commercial Arbitration Act 1990* (Qld); Section 4(1) ***misconduct*** includes corruption, fraud, partiality, bias and a breach of the rules of natural justice; The same provision is found in the former *Commercial Arbitration Act* 1985 (WA).

48 In *Shirley Sloan Pty Ltd v Merril Holdings Pty Ltd t/as Airen Constructions* [2000] WASC 99 (18 April 2000) an arbitrator's reasoned award was set aside when he took into consideration evidence that had not been adduced in submissions. Steytler J referred to the comments of Ackner LJ in *Interbulk Ltd v Aiden Shipping Co Ltd* [1984] 2 Lloyds Rep 66 at 76: 'If an arbitrator considers that the parties or their experts have missed the real point–a dangerous assumption to make … then it is not only a matter of obvious prudence, but the arbitrator is obliged, in common fairness or, as it is sometimes described, as a matter of natural justice, to put the point to them so that they may have an opportunity of dealing with it'.

discussion at the preliminary meeting relates to the confidentiality of both the determination and submissions made to the expert.

## F *Confidentiality*

Confidentiality and privacy are clearly one of the major advantages of ADR in resolving disputes compared to litigation, which is neither private nor confidential. Indeed, it could be said that confidentiality is a key factor that distinguishes ADR from other forms of dispute resolution. In civil courts, proceedings and documents are generally open to the public and this would be unappealing to parties who desire to keep certain information away from public scrutiny, particularly adverse publicity, allegations arising from disputes or commercially sensitive information.

It was assumed that information disclosed in ADR processes was confidential but in *Esso Australia Resources Ltd v The Honorable Sidney James Plowman (Minster of Energy and Minerals) & 2 Others*,[49] the High Court of Australia decided that a general duty of confidentiality is not implied into an agreement to arbitrate.

By analogy this is now considered to apply to all ADR processes. Consequently, in an expert determination agreement, confidentiality applies only if there is an express term in the determination agreement since there is no common law or statutory requirement for confidentiality in ADR processes. The expert determination agreement should contain express terms stating that any information obtained from any of the parties that is, or that might be relevant to any of the issues in dispute, is to be regarded as entirely confidential.[50]

## G *Appealing or setting aside the expert determination*

One of the advantages of using expert determination is that the determination is final and binding and disposes of the issues. However, an application may be made to a court to have the determination set aside if the process fails to comply with the contract between the parties and the expert or there is some other vitiating factor relevant to the decision.

For example, if the expert has acted outside the scope of the agreement between the parties and the expert, the decision may be challenged on the grounds of jurisdictional error. The expert

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[49] (1995) 128 ALR 391.

[50] For a more comprehensive confidentiality clause, see The Resolution Institute Expert determination Rules (Rule 7) htpps://www,resolution institute/documemts/item/1845.

determination may also be challenged anywhere there is a failure to comply with the contract or the decision is affected by a factor such as fraud or failure to disclose some prior significant association with one of the parties.

In *Shoalhaven City Council v Firedam Civil Engineering Pty Limited, Firedam* contracted with the Shoalhaven City Council to design and construct a waste water system for the Council.[51] The contract stated that expert determination would be used to determine any disputes, and the expert's findings would be final and binding if the aggregate liability of one party to the other was less than $500,000.

A dispute arose regarding extensions of time, delay costs and payment for additional works, and the dispute was referred to an expert for determination in accordance with the contract. The expert determined that an amount of $497,142.55 (less than the aggregate liability) was payable to *Firedam*; however, they sought a declaration from the court that the expert determination was not binding as the reasons given by the expert were inconsistent and not adequately explained.

The matter ultimately found its way to the High Court which held that the expert's determination was sufficiently explained and did not contain any inconsistencies as contended by *Firedam*. The Court stated that the requirement for experts to give reasons reflects the nature of the expert determination process, which is neither arbitral nor judicial, and jurisdiction and the role of the expert arises with the contractual relationship between the expert and the parties.[52]

With respect to the adequacy and form of the expert's reasons, there appears to be little case law on the issue. It is suggested that an analogy can be drawn by considering the adequacy of an arbitrator's reasons. In *Oil Basins Ltd v BHP Billiton Ltd & Ors* it was stated:

> the arbitrator has been chosen for his or her expertise in the trade or calling with which the dispute is concerned in which case a court might well not expect anything more than rudimentary identification of the issues, evidence and reasoning from the evidence to the facts and the facts to the conclusion.[53]

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51 [2011] HCA 38.

52 Adequate reasons are reasons that clearly set out the factual and legal issues for determination, the conclusions on those issues and the thought process that has been applied reaching those conclusions. This however, has to be considered in light of the language that is used by the contract agreement that imposes an obligation to provide reasons.

53 [2007] VSCA 255, 57.

The requirement to give reasons (if not expressly stated in any relevant rules) must be read in accordance with their context. That is, the obligation to give reasons is likely to be determined on the basis of the facts of each case and the contractual terms covering the expert's engagement.

Unless the expert failed to follow the agreed procedures or relevant rules, a mistake in the reasons for the determination given by an expert will not prevent the determination from being binding on the parties. In *Firedam's* case the expert had acted consistently with the contractual requirements and *Firedam* was unsuccessful in having the determination set aside. Consequently, if an expert has conducted the process in accordance with the agreement, the only basis on which the determination may be set aside is fraud or dishonesty.[54]

Even if the expert has made a wrong decision this is not in itself grounds for not enforcing the decision. In *500 Burswood Highway Pty Ltd v Australian Unity Ltd*, it was stated:

> Mistake or error in the process of the determination of the appointed expert will not invalidate a decision. However if the expert asks the wrong question or misconceives the function of the appointment, the task required to be performed will not have been fulfilled. In this event the determination will be set aside.[55]

Next, the paper considers whether the expert's determination can be set aside for breaches of natural justice, and is the same level of natural justice in the determination procedure the same as that in arbitration?

## H *Natural justice*

At the core of all ADR processes is the issue of natural justice. A further consideration is then whether an expert determination can be set side for breaches of the rules of natural justice. The requirements of natural justice generally were stated in *Kioa v West*:

> What is appropriate in terms of natural justice depends on the circumstances of the case, and they will include, inter alia, the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting ... The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the case.[56]

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54 *Legal & General Life of Australia Limited v A Hudson Pty Ltd (1985) 1 NSWLR 314.*
55 [2012] VSC 596 [172].
56 (1985) 159 CLR 550 at 584--585.

At the same time the principles of natural justice were expressed succinctly in *Gas & Fuel Corporation of Victoria v Wood Hall Ltd*:

> There are two rules or principles of natural justice ... The first is that an adjudicator must be disinterested and unbiased. This is expressed in the Latin maxim – nemo judex in causa sua. The second principle is that the parties must be given adequate notice and opportunity to be heard.[57]

An ADR process under an enactment or provisions in an agreement may expressly provide obligations with respect to procedural fairness on the decision-maker.

In commercial arbitration, the *Commercial Arbitration Act 2012* (WA) expressly provides for an impartial arbitrator[58] and the equal hearing of both parties.[59] This allows the courts to ensure the integrity of the process is maintained. These provisions ensure not only that parties are treated equally and given a fair hearing but also that the arbitrator's decision is final and binding.

With respect to expert determinations the expert agreement will usually contain an express term requiring the expert to determine the issues in dispute honestly and impartially. However, in the absence of such a term it will be readily implied by a court.[60]

In summary, the principle arising from judicial decisions is that experts need to ensure that they do not act inconsistently with the agreement under which they are appointed. At the same time, the level of reasoning required of experts will vary in accordance with the particular contractual requirements, as the role of an expert is neither arbitral nor judicial.

## I *The legal liability of the expert*

The Commercial Arbitration Acts provide an arbitrator, carrying out an arbitral or quasi-arbitral function, with protection from liability.[61] For example, the *Commercial Arbitration Act 2012* (WA) states that:

> An arbitrator is not liable for anything done or omitted to be done in good faith in his or her capacity as arbitrator.[62]

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57 [1978] VR 385.
58 Commercial Arbitration Act 2012 Section 12.
59 Commercial Arbitration Act 2012 Section 18.
60 Baber v Kenwood Manufacturing Co Limited [1978] 1 Lloyd'sRep 175 at 181; Legal & General Life of Australia v A Hudson Pty Limited [1985] NSWLR 314 at 335; See also note 35 above.
61 For common law immunity see Sutcliffe v Thackerah [1974] AC 727.
62 Commercial Arbitration Act 2012 (WA); section 39(1).

However, an expert does not have any common law or statutory protection and in the absence of any express protections contained in the expert agreement any claim against the expert would have to be based in contract for failing to act in accordance with the terms of the agreement or in tort for failure to exercise the requisite standard of care required of a person professing particular expertise.[63] Courts will readily imply a term into a contact for services that the services are to be carried out with due care and skill on the basis of the criterion set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*.[64]

In assessing the standard of care owed by a person (in this case an architect) professing professional skill, we can find some guidance from the comments of Windeyer J in *Voli v Inglewood Shire Council*:

> An architect undertaking any work in the way of his profession accepts the ordinary liabilities of any man who follows a skilled calling. He is bound to exercise due care, skill and diligence. He is not required to have an extraordinary degree of skill or the highest professional attainments. But he must bring to the task he undertakes, the competence and skill that is usual among Architects practising their profession. And he must use due care. If he fails in these matters and the person who employed him thereby suffers damage, he is liable to that person.[65] This liability can be said to arise either from a breach of his contract or in Tort.[66]

More recently and of general application to persons with specialist skills is the statement in *Rogers v Whitaker,* where the High Court said:

> In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. But that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade[67]… the Courts have adopted the principle that, while evidence of acceptable … practice is a useful guide for the Courts, it is for the Courts to adjudicate on what is the appropriate standard of care…[68]

If there is a cause of action in either contract or tort it will be dependent on the facts. To avoid the issue of expert's liability it is important that the expert agreement expressly contain a term

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63 Supra Footnote 53.
64 (1977) 180 CLR 266.
65 (1963) 110 CLR 74.
66 (1963) 110 CLR 74 at 84.
67 *(1992) 175 CLR 479.*
68 *(1992) 175 CLR 479 at para [12].*

providing release and indemnity from the parties. For example, as shown in the Resolution Institute Expert Determination Rules:

> The parties agree that the Expert, Resolution Institute and its officers and employees are not liable to any party for or in respect of any act or omission in the discharge or purported discharge of their respective functions under these Rules unless such act or omission is shown to have been fraudulent.[69]

As demonstrated by the discussion and the cases referred to in this section of the paper, it is not only important to take care in drafting the expert determination agreement, but also that both the parties in dispute and the expert need to be mindful of the legal issues in order that the determination is capable of being enforced and not set aside.

## V CONCLUSION

Where the parties are seeking a rights-based resolution of a commercial dispute, expert determination has significant advantages compared to litigation or arbitration. The parties are able to choose an expert with expertise and experience in the area of the dispute. It is not subject to complex procedural rules or legislation and is quicker and less expensive. The jurisdiction of the expert derives from the agreement with the parties. The parties' options are flexible and include allowing the expert to decide their own procedure for the determination, or applying institutional rules as discussed above.

A significant advantage is that the determination of the expert is, with limited exceptions, final and binding and thus disposes of the issues without the possibility of appeal unless the expert has not undertaken the process in accordance with the agreement.

At the same time, care must be taken with the preparation of the expert determination agreement. It must clearly specify the issues which the expert has authority to determine and if the reasons for the determination, if any, are to be in writing. It is also prudent practice to include a provision in the agreement that the expert must disclose any prior associations with the parties to ensure the process is impartial and unbiased.

Lastly, while the procedures or institutional rules may permit the expert to meet with the parties, it is suggested that apart from the preliminary conference with the parties, subsequent

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[69] Rule 17

meetings should not be held to avoid the process being deemed as an arbitration and therefore subject to the provisions of the arbitration acts.

## VI ACKNOWLEDGEMENT

At all times and wherever possible, care has been taken to properly acknowledge the source and authorship of the materials referred to in this paper. Any omission is unintentional.

# TRANSNATIONAL GRANTING OF FINANCIAL CONTRIBUTION UNDER THE BELT AND ROAD INITIATIVE: AN UNLAWFUL SUBSIDY OR GLOBAL PUBLIC GOODS?

BEICHEN DING*

## ABSTRACT

*This article visits the debate on the emerging practice of foreign subsidies, provided by one state for the goods made in another state. At the heart of the debate is China's rise as a global power and the globalization of its enterprises along the Belt and Road Initiative ('BRI'), particularly by supporting companies in its overseas Special Economic Zones ('SEZs'). World Trade Organization ('WTO') covered-agreements, particularly the General Agreement on Tariffs and Trade ('GATT') 1994 90 and the Agreement on Subsidies and Countervailing Measures ('SCM Agreement'), fail to provide a sufficient avenue to regulate cross-border granting of subsidies. The European Union ('EU') so far has composed countervailing regulations in three cases related to transnational financial contribution. This article argues that the decisions by the European Commission ('EC') lacked adequate rationale to clarify how EU legislation, which was inherited through the SCM Agreement, regulates cross-border production subsidies. In opposition to this argument, China views the BRI as non-rivalrous and non-exclusive global public goods supplied by China to the international community in the new age of historical development. Not only is there a divergence in discourse, but also potential methodologies exist to resolve the problem with cross-border granting. The author clarifies the divergences by bridging the gap between subsidies and global public goods and offers some preliminary guidance on how to address the current challenges under international trade law.*

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**KEYWORDS**

extraterritoriality–subsidies–WTO–special economic zone–belt and road initiative

# I INTRODUCTION

Since 2019, the European Commission ('EC') has conducted three anti-subsidy investigations on goods that have allegedly benefited from cross-border financial contributions from Chinese state-owned enterprises. As a result of these investigations the Commission decided to impose a definitive countervailing duty.[1] Among these duties, the EC passed Implementing Regulation 2020/776, which imposes definitive countervailing charges on imports of specific woven and/or stitched glass fiber fabrics coming from China and Egypt, and adopted Implementing Regulation 2020/870 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fiber products coming from Egypt. The EC also introduced Commission Implementing Regulation 2022/433. With this regulation, the EC adopted another countervailing regulation against stainless steel cold-rolled flat products from Indonesia.[2] The two cases which introduced the Commission Implementing Regulations 2020/776 and 2020/870 are inter-related. Both concerned filament glass fiber products which are the main raw material in producing glass fiber fabrics. The two companies involved in the cases are, Hengshi Egypt Fiberglass Fabrics SAE ('Hengshi') and Jushi Egypt for Fiberglass Industry SAE ('Jushi'). The case regarding Commission Implementing Regulation 2020/776 has been brought in front of the General Court (Court) of the European Union (EU) by Hengshi and Jushi.[3] Also in a separate action, Jushi sought the annulment of the Commission Implementing Regulation 2020/870.[4] However, the judgments provided by the Court in March 2023 show that the Court did not support the applicants and dismissed the action. These cases have sparked a heated discussion on the emerging practice of cross-border subsidies since subsidizing overseas enterprises is usually not beneficial to domestic economic development. Cross-border subsidies, in which a government subsidizes a

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1 Commission Implementing Regulation (EU) 2020/776 of 12 June 2020 imposing definitive countervailing duties on imports of certain woven and/or stitched glass fiber fabrics originating in the People's Republic of China and Egypt and amending Commission Implementing Regulation (EU) 2020/492 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fiber fabrics originating in the People's Republic of China and Egypt [2020] OJ 2020 L 189/1. ('Commission implementing regulation 2020/776'); Commission Implementing Regulation (EU) 2020/870 of 24 June 2020 imposing a definitive countervailing duty and definitively collecting the provisional countervailing duty imposed on imports of continuous filament glass fiber products originating in Egypt, and levying the definitive countervailing duty on the registered imports of continuous filament glass fiber products originating in Egypt [2020] OJ 2020 L 201/10 ('Commission implementing regulation 2020/870'). Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia [2022] OJ L 88/24 ('Commission implementing regulation 2022/433').

2 See generally Commission implementing regulation 202/433 (n 1).

3 Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission (The General Court, T-480/20, ECLI:EU:T:2023:90, 1 March 2023).

4 Jushi Egypt for Fiberglass Industry v Commission (The General Court, T-540/20, ECLI:EU:T:2023:91, 1 March 2023).

company outside of its jurisdiction, used to be an uncommon scene. It has been a rising topic of concern nowadays as China globalises its subsidy use along the Belt and Road Initiative ('BRI'), particularly by supporting companies in its overseas Special Economic Zones ('SEZs'). It is necessary to study how such 'cross-border subsidies' should be dealt with in practice. The aforementioned three cases are, as of writing of this article, being dealt with at the EU level. Whether they will be taken further to the World Trade Organization's ('WTO') dispute settlement body remains to be seen.

This paper will first examine how the scenario of cross-border subsidies came into being, with a particular focus on the novel role of overseas SEZs (Section II). The role of SEZs also has significant interplay with the notion of extraterritoriality. It is this feature that gives rise to the intriguing scenario of transnational subsidies. The author examines the disciplines under the Agreement on Subsidies and Countervailing Measures ('SCM Agreement')[5] as well as the EU's Basic Anti-Subsidy Regulation.[6] Section III will analyse the potential remedies under existing disciplines. The author will consider how China views the so-called cross-border subsidies in Section IV. The BRI has long been viewed by China as non-rivalrous and non-exclusive global public goods supplied by China to the international community. Finally, the author clarifies the divergences by bridging the gap between subsidies and global public goods and offers some preliminary guidance on how to address the current challenges under international trade law (Section V).

This article focuses on SEZs since disputed cases happened within an overseas SEZ in Egypt, and the EU's decision greatly relied on the background of the SEZ. Moreover, the establishment of the SEZ will potentially also have an impact on the existing WTO laws. Different views on the SEZ will also affect the potential remedies. Therefore, the study of the interplay between subsidy disciplines under the WTO and the current economic practice of SEZs will be the focus.

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5 Marrakesh Agreement Establishing the World Trade Organization, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1A ('*Agreement on Subsidies and Countervailing Measures*')('*SCM Agreement*').

6 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L 176, 55 ('Basic Anti-Subsidy Regulation').

## II THE SCENARIO: CONCERNS OVER CROSS-BORDER SUBSIDIES

### A *Disputed cases*

In June 2020, the EC determined in Commission Implementing Regulation 2020/776 and Commission Implementing Regulation 2020/870, that enterprises located in the China-Egypt Suez Economic and Trade Cooperation Zone (SETC-Zone) received indirect subsidies from China. According to the disclosed public documents in the anti-subsidy investigation, the EC claimed that the Egyptian manufacturer exporting glass fiber fabrics to the EU was located in a SEZ in Egypt, which was supported by the Chinese government and assisted in the implementation of China's 'going out' strategy.[7] To facilitate the development of the SEZ, Egyptian producers benefit from financial assistance through Chinese government-owned or controlled banks or other Chinese state-owned or state-controlled entities (directly or through Egyptian entities) through the China-Egypt agreement. After the investigation, the EC made a final ruling on 15 June 2020. The EC decided to impose countervailing duties on the glass fiber fabric products produced by the above-mentioned Egyptian manufacturers. In addition, in the anti-subsidy investigation on glass fiber reinforcements, initiated by the EC on 7 June 2019, the grounds of the complaint were similar to the previous case, but the products involved were entirely from Egypt.

The EC, in the final decision, avoided a straightforward reading of the meaning of arts 1.1 and 1.2 of the SCM Agreement in order to defend its conclusion of the illegality of cross-border production subsidies. The EC adopted a novel method of interpretation. On the question of the granter of financial contribution, the EC broadened its interpretation of the SCM Agreement and EU Basic Regulation.[8] According to the Commission, art 31.3(c) of the Vienna Convention on the Law of Treaties (VCLT) specifies that while interpreting a treaty provision 'all relevant provisions of international law applicable to the parties' relations' should be taken into account. In this case, the EC determined that art 11 of the 'Articles on State Responsibility for

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7 Victor Crochet and Vineet Hegde, 'China's "Going Global" Policy: Transnational Production Subsidies Under the WTO SCM Agreement' (2020) 23(4) Journal of International Economic Law 841, 841.

8 Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (codification) [2016] OJ L 176/55 ('EU Basic Regulation').

Internationally Wrongful Acts' ('ASR')[9] was customary international law and should be considered when interpreting the term 'government' under the EU Basic Anti-Subsidy Regulation.[10] The Commission then decided that the term 'government' should encompass not only the Egyptian government, which committed direct governmental activities, but also the Chinese government, whose actions could be attributed to the Egyptian government.[11]

Noticeably, to support its decision, the EC laid great emphasis on the political implications of the BRI and the SETC-Zone, pointing out that both the Chinese and Egyptian governments allocated resources to provide more favorable conditions for specific manufacturers in the SETC-Zone. By working closely together, the SETC-Zone thus serves a common goal and benefits common beneficiaries such as Jushi Egypt and Hengshi Egypt.


Figure 1: Cases on transnational subsidies and their stages

## B *Defining the scope*

The EU has performed actively with regard to the legislation on foreign subsidies. According to the EU, neither the existing EU laws nor international instruments are able to exhaustively address the distortions caused by foreign subsidies on the EU internal market.[12] To address this problem, the EU has launched a white paper targeting the subsidies that non-EU authorities grant to undertakings established, or active in the EU internal market. The White Paper gave rise to the EU Foreign Subsidies Regulation which finally entered into force on 12 January

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9 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries ('ASR').
10 See Commission implementing regulation 2020/776 (n 1) 685-688.
11 See Commission implementing regulation 2020/870 (n 1) 72.
12 European Commission, White Paper on levelling the playing field as regards foreign subsidies (Final Paper, COM(2020) 253, 17 June 2020) 6.

2023.[13] Although used interchangeably, foreign subsidies within the context of the EU Foreign Subsidies Regulation and cross-subsidies are not necessarily within the same scope. Among foreign subsidies, there are those granted to undertakings in the EU and those granted to enterprises outside the EU. For the former, according to the White Paper, the European Commission will have the authority to investigate foreign subsidies granted to an undertaking engaged in any 'economic activity' within the EU Single Market. In particular, this includes activities involving the acquisition of control, a merger with an EU undertaking, or participation in a public procurement procedure. Scholarly writings on this EU regulation already exist.[14] This paper will only address the latter scenario in which a subsidy is granted to enterprises not engaging in any economic activity within the EU, but rather in a foreign country and where the EU imports products from that country.

## C *Background of SEZs*

The alleged subsidisation in Egypt concerns the SETC-Zone. The focus of this article is on overseas SEZs. SEZs are one facet of Chinese engagement. China and the BRI nations have established joint venture economic zones and industrial parks in which Chinese investors offer technology and finance, while local investors provide land and labor. These SEZs, dubbed 'trade and economic cooperation zones' in official announcements, have been established along the BRI to attract foreign direct investments ('FDIs').

Establishing SEZs is a common practice worldwide. Noticeably, over half of all SEZs in the world are located in China.[15] SEZs were initially created as part of China's 'reform and opening up' policy in the early 1980s. Four coastal SEZs (Shenzhen, Zhuhai, Shantou, and Xiamen) near Hong Kong, Macao, and Taiwan, were established to fully use the cities' geographic advantages to absorb foreign investments. With great success, the mode of SEZs have been expanded inland and to the west of China. SEZs have encouraged industrial clustering and played a crucial catalytic role in China's fast economic growth and change for over the last 40 years. Chinese Overseas Economic and Trade Cooperation Zones ('COCZs'), a special type of SEZ, have been created to serve as an effective platform for leveraging China's fast growth

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13 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market [2022] PE/46/2022/REV/1 OJ L 330/1 ('EU Foreign Subsidies Regulation').

14 See, eg, Crochet, Victor, and Marcus Gustafsson. "Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law." (2021) 20(3)*World Trade Review* 343.

15 UNCTAD, World Investment Report 2019 (Report, 12 June 2019) ch IV ('World Investment Report').

experience to help host countries meet their economic and social development goals.[16]

Economic and trade cooperation zones provide an important platform for international collaboration and financial integration.[17] The zones are now important venues for encouraging investment and trade cooperation under the BRI. The BRI refers to the Silk Road Economic Belt and the 21st Century Maritime Silk Road, a significant development strategy launched by the Chinese government.[18] Right now, there are two typical types of COCZs. First is the industry-specific model that is dominated by the companies that established the zone. Second is the comprehensive COCZ model that allows specialised industrial property developers to build and operate COCZs.[19] The China-Egypt SEZ falls within the first type.

SEZs were separated from the rest of the predominantly state-controlled economy and largely freed from import and export restrictions. These attracted FDIs in manufactured export processing, which provided China with access to imported technology and overseas marketing networks, and created new job opportunities and training for China's labor force. The SEZs were expanded to other kinds of zones specialised in high technologies, free-trade zones, and bonded areas to encourage processing trade.[20]

The SETC-Zone at issue is a vital representative of the COCZs along the BRI. The then President of Egypt, Muhammad Hosni El Sayed Mubarak, paid a visit to China’s Tianjin Economic-Technological Development Area in 1994. After the visit, the Chinese enterprise was invited to assist in the creation of a comparable area in Egypt.

The Egyptian government approached the Chinese government in 1994, requesting assistance in establishing an economic zone in the Suez area.[21] In 1997, the Prime Ministers of China and Egypt signed a memorandum of understanding, in which the two countries agreed to work together to develop a free economic zone in the northern Gulf of Suez. This involved exchanging SEZ experiences from China and encouraging relevant Chinese business sectors to

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16 Chinese Academy of International Trade and Economic Cooperation Ministry of Commerce of the People’s Republic of China, Report on Fostering Sustainable Development through Chinese Overseas Economic and Trade Cooperation Zones along the Belt and Road: Analysis and Practical Guidelines from Economic, Environmental and Social Perspectives (Report, 23 April 2019) 1.

17 ‘Overseas Economic and Trade Cooperation Zones on the Belt and Road’ *Belt and Road* (Web Page), <https://beltandroad.hktdc.com/en/sme-corner/industrial-park>.

18 The National Development and Reform Commission, Ministry of Foreign Affairs, and Ministry of Commerce of the People's Republic of China, with State Council authorization, *Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road* (Report, 28 March 2015).

19 See World Investment Report (n 15)2.

20 Report by the Secretariat, *Trade Policy Review – China,* WTO Doc WT/TPR/S/230 (26 April 2010) ch I.

21 Deborah Bräutigam and Xiaoyang Tang, “Going Global in Groups”: Structural Transformation and China’s Special Economic Zones Overseas, (2014) 63 *World Development* 78, 81.

contribute to projects that were being established within the zone.[22]

In the anti-subsidies investigation relating to glass fiber fabrics, the EC rejected the Chinese government's claim that the EC had to first show that the Chinese government had handed out a subsidy within the meaning of the SCM Agreement and denied that it 'created' a subsidy from China for the benefit of the exporting producers of the product concerned.[23] This decision has bypassed the notion of territoriality under art 2(b) of the EU Basic Regulation and art 1.1(a)(1) of the SCM Agreement. For the attribution, the Presidents of Egypt were no doubt aware that the Chinese 'One Belt and One Road' initiative involved heavy state financing through preferential financing and other financial instruments. Therefore, there was a clear act of acknowledgement. In the first place, it is doubtful to what extent ASR should be applied. It is to be noted that after more than 40 years of discussion, the International Law Commission of the United Nations adopted the ASR in 2001, codifying the customary law on state responsibility. First, although customary international law generally applies to the economic relations between the WTO members, the SCM Agreement, being a WTO covered agreement, entails its own rules for the attribution of actions. Hence, there is no room for the ASR to be directly applied to relevant issues. Second, it is doubtful to attribute the conduct of one sovereign country to another country. Third, it is problematic to say that in the said case, the standards of acknowledgment and adoption have been fulfilled. The commentary on ASR clarified that 'recognition and adoption of the conduct in issue as its own' is meant to differentiate situations of recognition and adoption from those of mere support or endorsement.[24] The conduct cannot be attributed under art 11 of ASR if a State just recognises the existence of a factual circumstance or expresses its general approbation in a vague manner. The EC concluded in its final ruling that the Egyptian government's attitude toward China's financial assistance was merely one of 'expectation', 'awareness', and 'endorsement of the significance of those supports', all of which fall far short of the threshold required to invoke art 11. Moreover, the direct financial support, such as concessional loans from Chinese state-owned banks, was an offshore investment with no ties to Egyptian government institutions or banks. The nature of the agreement establishing the SEZ was also misinterpreted. The wording tends to be cooperative rather than endorsing. To conclude, the foundation for the EC's

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22 Memorandum of Understanding Between the Arab Republic of Egypt and the People's Republic of China, April 18th, 1997.
23 Commission implementing regulation 2020/776 (n 1) [712].
24 See ASR (n 9) 53, [6].

conclusion is disputed.

## III DISCIPLINES UNDER SCM AGREEMENT AND EU REGULATION

Subsidies have traditionally been viewed as a tool for nations to promote economic growth in favored domestic industries. Subsidies have taken on worldwide dimensions as a result of the uninterrupted growth of globalisation. Article 1 of the SCM Agreement defines 'subsidy' as 'a financial contribution by a government or any public body within the territory of a Member.' Article 2 of the SCM Agreement stipulates that such subsidies be 'specific' to enterprises or industries 'within the jurisdiction of the granting authority'. This is commonly interpreted to suggest that subsidies only apply inside the territory of the country that is providing the subsidy. However, the phrase, 'within the territory' in art 1 does not relate to the location of the subsidy recipient, and the phrase 'within the jurisdiction of the awarding body' in art 2 does not have to be confined to territorial jurisdiction, but might include personal jurisdiction by nationality.

### A *Restrictive interpretation of the territorial requirement*

Articles 1 and 2 of the SCM Agreement are directly related to the cross-border issue. Article 1.1(a)(1) stipulates that 'for the purpose of this Agreement, a subsidy shall be deemed to exist if … there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government")'.[25] Under this article, the immediate context of the expression 'within the territory of a Member' illustrates that it requires the 'government' or 'public body', rather than the 'financial contribution', to be situated within the territory. The qualifier term directly follows the former terms, without the latter being distinguished with the use of commas.[26] The place of incorporation of the recipient of the subsidy does not preclude the application of art 1.1(a)(1) of the SCM Agreement. Therefore, the territorial requirement set forth in art 1 of the SCM Agreement is satisfied.

From a subjective approach, the signatories did not explicitly claim to exclude foreign subsidies, in the context of discussing development aid. A note by the WTO secretariat on the Expert Group Meeting on Trade Financing observes that the SCM Agreement does not exclude the applicability of the SCM Agreement where the subsidising entity is not within the territory of the member whose goods are allegedly being subsidised. The SCM Agreement is designed

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25 *SCM Agreement* (n 5) art. 1.1(a)(1).
26 Victor Crochet and Vineet Hegde (n 7) 841.

to handle circumstances in which a WTO member subsidises the manufacture or sale of its own goods. However, it is unclear whether the Agreement applies when the subsidising business is located beyond the territory of the member whose goods are allegedly being subsidised.[27] Generally speaking there is no incentive for the government to grant subsidies to foreign enterprises that have nothing to do with their domestic economy. There is debate on whether the subsidies regulated by the SCM Agreement include 'cross-border subsidies'. Moreover, there is no direct WTO jurisprudence on 'cross-border subsidies' so far. One WTO case, *the United States-Tax Treatment for "Foreign Sales Corporations"* ('US-FSC case'),[28] may provide some insight into cross-border subsidies, however, the factual scenario differs from the type of subsidy cases that are the subject matter of this article. In the US-FSC, a Foreign Sales Corporation (FSC) is located in the United States (US). It enjoys tax subsidies from the United States government (that is, the US reduces or exempts the tax that should have been collected from the FSC). On the surface, it seems that it involves 'cross-border subsidies'. However, the export products involved are still produced in the US since the tax laws of the United States generally operate "on a worldwide basis". Moreover, what the EU has claimed in the said case was that there existed a prohibited subsidy conditional on export performance.[29]

The term 'within the jurisdiction of granting authority' in art 2 of the SCM Agreement also gives rise to problems regarding the determination of 'specificity'. 'Prohibited subsidies' themselves are specific and do not need to be examined. However, the principles set out in art 2 of the SCM Agreement must still be followed to determine whether other subsidies meet the requirements of 'specificity'. The traditional understanding of state jurisdiction is, as explained in the Lotus case, that it is 'certainly territorial and cannot be exercised by a State outside its territory'.[30] However, this analysis also has a counterargument. Jurisdiction can be both territorial and national since 'it is the jurisdiction of the authority in charge of the subsidy program, instead of the body performing the financial contribution itself, that needs to be assessed as it is this governmental authority that is behind the granting body'.[31] Moreover, for the object and purpose, the SCM Agreement reflects the contradictory aims of curbing trade-

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27 Expert Group Meeting on Trade Financing-Note by the Secretariat, WTO Doc WT/GC/W/527 (16 March 2004) [21].

28 Appellate Body Report, *United States—Tax Treatment for Foreign Sales Corporations*, WTO Doc WT/DS108/AB/R (24 February 2000) [6]-[9] ( 'US-FSC case').

29 *Ibid*, n.1 [608].

30 *S.S. Lotus* (*France v Turkey*) *(Judgment*) [1927] PCIJ (ser A) No 10, 18.

31 Panel Report, *United States–Continued Dumping and Subsidy Offset Act of 2000*, WTO Doc WT/DS217/R (16 September 2002) [7.113–7.114].

distortive subsidies and enhancing development. As clarified by the panel in it's report on *Brazil — Export Financing Programme for Aircraft*,[32] 'the object and purpose of the SCM Agreement are to impose multilateral disciplines on subsidies which distort international trade'.[33] As long as the nature of the subsidy at hand is trade-distorting, the regulation of it is within the ambit of the SCM Agreement. In the end, the question of whether the SCM Agreement contemplates cross-border production subsidisation should further be confirmed by judicial or administrative decisions.

### B *Remedies against cross-border subsidies under the SCM Agreement*

A possible solution to address cross-border subsidies under the SCM Agreement is by examining the nature of SEZs and revisiting the notion of extraterritoriality. As explained in the previous section, the nature of SEZs is at the core of the cross-border subsidy issue. Demonstrating that the country providing the subsidies has jurisdiction over these enterprises in the SEZs could possibly fulfill the qualifier terms under art 2 of the SCM Agreement. In Commission Implementing Regulation 2020/870, the Commission ruled that by signing arts 1 and 4(1) of the Cooperation Agreement,[34] the Egyptian government agreed that businesses operating in the SEZs would receive 'relevant policy support and facilitation provided by the Chinese government for overseas economic and trade cooperation zones', and that the zone would be developed in accordance with the 'laws of both countries'.[35] The government of Egypt therefore empowered China to give particular help to enterprises solely situated in 'overseas economic and trade cooperation zones' in addition to exercising its own territorial jurisdiction.[36] Currently, there is no case law supporting the expansion of jurisdiction to another country. Therefore, whether the WTO law can borrow the notion of extraterritoriality from public international law remains an important question. Although it is not disputed that the WTO law can be regarded as a special branch of public international law, what remains uncertain is how WTO law relates to other international law.[37] Moreover, what remains to be seen is the extent to which the 'laws of both countries' can be applied within SEZs. The analysis

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32 Panel Report, *Brazil — Export Financing Programme for Aircraft*, WTO Doc WT/DS46/R, (14 April 1999).
33 Ibid [7.26].
34 Agreement between the Ministry of Commerce of the People's Republic of China and the General Authority for the Suez Canal Economic Zone of the Arab Republic of Egypt on the Suez Economic and Trade Cooperation Zone, signed 21 January 2016 (entered into force …) ( 'the Cooperation Agreement').
35 Commission implementing regulation 2020/870 (n 1) [109].
36 Commission implementing regulation 2020/776 (n 1)[724].
37 Joost Pauwelyn, Conflict of Norms in Public International Law: How WTO Law Relates to other Rules of International Law, (Cambridge University Press, 2003) 40.

within the decision by the EC has been left with non-negligible loopholes. Another possible solution for addressing the cross-border issue is by way of a prohibited subsidies discipline. Correlated to the nature of SEZs, if evidence exists to prove that production has gained subsidies contingent upon export performance or the use of domestic goods over imported goods, members could seek remedies for prohibited subsidies.

## C *Compliance with the basic anti-subsidy regulation*

The EU Anti-Subsidy Regulation[38] is based on the SCM Agreement which permits corrective action against subsidies that are viewed as unfair trade practices. This sub-section will analyse disciplines under the Basic Anti-Subsidy Regulation together with two judgments by the EU General Court.[39]

An action for annulment of acts of the institutions of the EU that are contrary to EU law can be brought before the General Court.[40] Therefore, to annul the decisions on imposing countervailing duties, Jushi and Hengshi presented the claim of violation of the Basic Anti-Subsidy Regulation.

In *Jushi Egypt for Fiberglass Industry v Commission*, the applicant Jushi raised five pleas in law in support of its action.[41] To narrow down the analysis of the definition of cross-border subsidies, this sub-section focuses only on the first plea and its second part concerning the alleged infringement of art 2(a) and (b) along with art 3(1)(a) of the Basic Anti-Subsidy Regulation. The same argument was also raised by Jushi and Hengshi in *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission.*[42] The parties presented three main arguments to challenge the Commission's interpretation.

The first argument was that the financial contribution must take place within the territory of the country of origin or export. However, the Court believed that even if a financial contribution did not originate from the government of the country of origin or export, it may nevertheless be attributed to it because that contribution is not ruled out by the definition of a 'subsidy' in art 3(1)(a).[43]

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38 See generally Basic Anti-Subsidy Regulation (n 6).
39 See generally SCM Agreement (n 5); Basic Anti-Subsidy Regulation (n 6).
40 Treaty on the Functioning of the European Union, opened for signature 7 February 1992, [2012] OJ C 326 (entered into force 1 November 1993) 263 ('FEU').
41 Jushi Egypt for Fiberglass Industry v Commission (n 4) [27]-[28].
42 Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission (n 3) [71].
43 Jushi Egypt for Fiberglass Industry v Commission (n 4) [51].

The second argument relies on the difference in wording between the EU regulation and the SCM Agreement. Article 3(1)(a) of the EU Basic Anti-Subsidy Regulation defines a subsidy as follows:

> A subsidy shall be deemed to exist if:
> 1.(a) there is a financial contribution by a government in the country of origin or export, that is to say, where:
>
> (i) a government practice involves a direct transfer of funds (for example, grants, loans, equity infusion), potential direct transfers of funds or liabilities (for example, loan guarantees);

The SCM Agreement describes a subsidy as 'a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government")'.[44] This definition does not refer to a financial contribution granted by 'the government in the country of origin or export' but rather defines a subsidy as a financial contribution by a government or any public body within the territory of a WTO member. However, the ourt in *Jushi Egypt for Fiberglass Industry v Commission* still disagreed that the difference could preclude the possibility that a financial contribution may be attributed to the government of the country of origin or export.

The Court rejected the third argument Jushi claimed, being that the Commission's interpretation of Article 1.1(a)(1) of the SCM Agreement does not comply with WTO case law and public international law.[45] The Court held that since the EC correctly interpreted the Basic Anti-Subsidy Regulation in the light of the SCM Agreement, the question of whether or not it took Article 11 of the ILC Articles into account was irrelevant.

The Court supported all of the EC's interpretation of the EU Basic Anti-Subsidy Regulation. However, what is missing in the judgment is whether the subsidies can be correctly attributed to the government of Egypt. In other words, even if the attribution theory can be directly borrowed from the ASR as customary international law, the threshold of applying the theory to determine whether a foreign government acknowledges as its own the subsidies granted by another government is not yet settled. As previously argued in Section II, the foundation for the EC's conclusion on attribution is doubtful. Although the Court did not provide an analysis

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44 *SCM Agreement* (n 5) art 1.
45 Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission (n 4) [38], [70].

on this, the ruling of the Court, in the two same paragraphs, indicates the Court's inclination to accept the argument of attribution put forward by the EC:

> The government of China and the Government of Egypt … worked closely together to establish the SETC-Zone as a zone with special legal and economic features which enabled the government authorities of China to confer directly all the facilities inherent in China's 'Belt and Road' initiative on the Chinese undertakings established in that zone. [Therefore] … it cannot be accepted that an economic and legal construct such as that of the SETC-Zone, conceived in close collaboration between the Government of China and the Government of Egypt at the highest level is not covered by the Basic Anti-Subsidy Regulation.[46]

By emphasising the close bilateral cooperation with regard to the SETC-Zone, the Court seems to indicate that the characteristics of such cooperation inherently satisfy the requirements of attribution. The problem of attribution has been specifically raised by applicants in the newest case regarding imports of stainless-steel cold-rolled flat products originating in India and Indonesia.[47] This judgment by the EU General Court has not yet been released, and it remains to be seen what is required to fulfill the attribution requirement.

It is problematic to claim that cooperation under the BRI *per se* makes the threshold of attribution lower. The cooperation zone is still within the framework of bilateral economic investment and there is no international law that prohibits one country from providing a facility to another country for economic development and cooperation. The issue of 'cross-border subsidies' is not only involved with the application of law but also begets the question of which law should be applied. This requires us to contemplate the nature of alleged transnational subsidies. If there is no prohibitive rule in the international law of cross-border financial granting, then arguably adopting the EC's point of view as a universal law will mean a bias in favour of a certain legal system with its own policy preference. To this end, the following part of the paper will move to analysing the nature of 'transnational subsidy' under the BRI.

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46 Jushi Egypt for Fiberglass Industry v Commission (n 4) [58]-[59]; Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission (n 3) [91]-[92].

47 Implementing Regulation (EU) 2022/433 (n 1); Action brought on 9 June 2022 — PT Indonesia Ruipu Nickel and Chrome Alloy v Commission (Case T-348/22) [2022]OJ C 294/36, 36.

## IV ANOTHER SIDE OF THE COIN: THE BRI AS AN INTERNATIONAL PUBLIC GOOD

### A *The BRI and global public goods*

Noticeably, from the viewpoint of China, the BRI has long been seen as an international public good by both officials and academia.[48] The difference in discourse not only reveals different attitudes towards the effect caused by the BRI but also can make a difference in the way cross-border subsidy issues are addressed.

A public good is characterised by two features: non-rivalrous in consumption and non-excludability.[49] First, there is no rivalry between potential users of the goods; and second, people cannot practically be excluded from using the goods.[50] Under this definition, there are several sub-categories of public goods. From the perspective of benefit, there is a distinction between domestic public goods and international public goods. The latter includes global public goods and regional public goods. From the perspective of pureness of publicness, public goods should serve as a general term that contains pure or impure public goods. Impure public goods indicate that the two features are not fully met. Compared to an excludable and rivalrous private good, an impure public good can be either a club good or a common-pool resource. International public goods can be further divided into global public goods and regional public goods.[51]

**Table 1: Private or public goods**[52]

| | Excludable | Non-excludable |
|---|---|---|
| Rivalrous | Private goods | Common-pool resources |
| Non-rivalrous | Club goods | Pure public goods |

48 Shi Jingxia, 'The Belt and Road Initiative and International Law: Viewed from the Perspective of the Supply of International Public Goods' (2021) 42(4) *Social Sciences in China* 20, 20-37; 李向阳 [Li Ziangyang], "一带一路"：向世界提供公共产品" ["Belt and Road": Providing public goods to the world"] *CPC News* (Web Page, 19 January 2023) http://theory.people.com.cn/n1/2023/0119/c40531-32609779.html.

49 Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds), *Global Public Goods: International Cooperation in the 21st Century* (Oxford University Press, 1999) 2.

50 Daniel Bodansky, 'What's in a Concept: Global Public Goods, International Law, and Legitimacy' (2012) 23(3) *European Journal of International Law* 651.

51 Todd Sandler, Global Challenges: An approach to environmental, political and economic problems, (Cambridge University Press, 1997),197.

52 Econ Port, 'Classification Table for Types of Goods' (Web Page) <https://www.econport.org/content/handbook/publicgoods/classifpublicgoods.html>.

**Table 2: Global or regional goods**

| | International | regional |
|---|---|---|
| Public goods | Global public goods | Regional public goods |

International public goods are an extension of the public goods theory in the international field. International public goods should have a quasi-universal benefit to more than a certain group of countries or population group.[53] The international public good theory also has an interplay with international law. International law has witnessed a shift from being a law on 'coexistence' between sovereign states, to a law which also regulates the 'cooperation' between states in pursuit of common goals.[54]

The supply of international public goods is an important way for a country or region to participate in global economic governance and enhance its international influence. As the largest developing country, China's special development model will have a profound impact on global governance. As a responsible major country, China should contribute to advancing regional cooperation and increasing the effective supply of international public goods. In terms of the above-mentioned two features of international public goods, cross-border granting within the BRI has the potential to fulfill both of them.

First, the BRI is rather open and inclusive in terms of participation. It includes, but is not limited to, the old Silk Road region.[55] China's aid in establishing joint venture economic zones and transnational production benefits inside these zones is provided without limitations to any country, with the purpose of encouraging local economic growth while also benefiting regional development and global collaboration.[56] Thus, participation is non-rivalrous.[57]

Secondly, the BRI benefits all potential beneficiaries non-exclusively. The BRI is a cooperative endeavor that respects the actual development requirements of member nations and produces mutual benefits via collaboration and the principle of shared interests. It also aligns with the international community's core interests, providing a constructive exploration of a new

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53 Inge Kaul, Isabelle Grunberg and Marc A. Stern (n 48) 3.
54 Joost Pauwelyn (n 36), 17.
55 Shi Jingxia (n 47), 20-37.
56 Simon Shen and Wilson Chan, 'A Comparative Study of the Belt and Road Initiative and the Marshall Plan' (2018) 4(32) *Palgrave Communications* 1.
57 Ibid.

paradigm of international cooperation and global governance, and contributing to global peace.

## B *Challenges of the paradigm*

At present, due to the decline of the US-led global public goods system and the successive emergence of economic crises, the international public goods system has entered a period of instability and lack of functions. The BRI is claimed as a 'single effort' international public good provided by China.[58] The governance of the BRI must be under the rule of law. However, the introduced EU cases have shown that the international global public goods paradigm has faced legal challenges.

This paper holds that at this stage the challenge lies with the network effect of participating in the BRI which has relatively impaired the interests of non-participants. This consideration also concerns whether the public good is local among a well-defined set of countries, or whether it is global. The characteristics of public goods are of great significance for the international legitimacy of the BRI. However, there are a few questions that need to be answered before the BRI can be deemed a public good.

The first question is whether the BRI is a club good or a regional public good. To answer this, we need to identify the differences between a club good and a regional public good. A club good is an impure public good, while regional public good falls under the category of a public good in a narrow sense. Traditionally, there tends to be a clear geographic boundary to distinguish the beneficiaries of a regional public good. However, in terms of the BRI, it is not accurate to restrict it to a certain geographical area. Rather, the BRI is trans-regional. Initially designed to boost the connectivity between East Europe and Asia, the BRI nowadays has expanded to Africa, Oceania, and Latin America. From the location of participants so far, it is difficult to define the BRI as a typical regional public good for certain regions. Therefore, what the BRI needs to solve is not purely a regional public goods problem. At the current stage, taking into account the actual scope of participants, the BRI exists on a blurred line between regional good and club good. On one hand, the beneficiaries are not limited to a clear region. On the other hand, assessed by the participants of BRI, 'membership' in participation is not a means of exclusion, but rather a form of inclusion. It relies on the outsiders to decide whether to participate or not, rather than hosting a meeting behind closed doors. However, the non-

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[58] Shi Jingxia (n 47) 20-37.

competitiveness of the BRI can only be shown from the mutually beneficial economic cooperation relationship along the route. As regional public goods can provide shared advantages for the participating nations, it can produce relatively negative impacts on non-participant parties. As the three EU cases have shown, EU undertakings face challenging competition with undertakings benefiting from the BRI.

This brings us to the second question: Can the theory of international public goods be directly applied to the field of international trade law, where the fundamental principle is based on comparative advantage? International trade law is not only the law of 'cooperation', but also for a large part stipulates the law of 'competition'. The BRI promotes the integration of resources, and thus enhances the comparative advantage of participating states at the macro level. Eventually, this advantage will be transmitted to the micro level and will enhance the competitive advantage of specific undertakings. In light of this, it is necessary to reconsider the criteria that we use to identify global public goods in international trade. The standard for meeting the non-excludability requirement should be made more stringent, taking into account that participation may be affected by non-economic factors such as geopolitics.

## V SPECIFIC SUBSIDY OR GLOBAL PUBLIC GOODS?

Apart from the inherent shortage of impure public goods, the governance of the BRI may also be inconsistent with the SCM Agreement.

### A *Inherent conflict or connected paradigms*

The WTO's rules on subsidies do not apply to all government financial contributions that provide a benefit. Article 2 of the SCM Agreement distinguishes between two forms of specificity: (1) enterprise or industry specificity, which refers to a scenario in which a government subsidises a certain firm or industry, or a set of enterprises or industries; (2) regional specificity: a government subsidises producers in certain parts of its territory. For a subsidy to be subject to the disciplines of the SCM Agreement, it needs to meet one of the above specificity thresholds or be considered a prohibited subsidy.[59]

A subsidy can be countervailed only if such a subsidy is specific. In practice, subsidy specificity review does not perform well under the WTO framework due to the case-by-case approach of

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[59] Peter Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials* (Cambridge University Press, 5th ed, 2021) 1540-1544.

Article 2 of the SCM Agreement in many aspects of specificity determination. On one hand, in order to avoid legal specificity, WTO members' subsidy methods have become increasingly obscured. Members have also implemented large-scale subsidies using a variety of methods, expanding the scope of analysing specificity. On the other hand, the SCM Agreement's specificity provisions are not readily apparent and rely heavily on case analysis and the discretion of the importing member's government. This problem within the WTO has been zoomed in under the context of the BRI.

Most developing and many industrialised economies employ SEZs, which are physically defined regions within which governments stimulate industrial activity through fiscal and regulatory incentives and infrastructure assistance. Article 2.2 of the SCM Agreement is of vital significance to the practice of overseas SEZs. In the Egypt fiber glass cases, for the test of specificity, the EC decided that the Egyptian government was the granting authority in respect of preferential financing. This decision was made since the Egyptian government had acknowledged and adopted the designation by the Chinese government of the SETC-Zone as an overseas investment territory under art 4 of the Cooperation Agreement and it endorsed the fully-fledged implementation thereof. Since these subsidies were limited to companies operating in the Suez Canal area, the EC concluded that they were regional subsidies within the meaning of art 4(3) of the basic Regulation and fell within the jurisdiction of the granting authority.[60]

Since the SETC-Zone is regarded as an overseas SEZ under the BRI, its operative mode is widely applied and promoted to other overseas SEZs. Therefore, the granting of preferential finances within these overseas SEZs gives rise to the potential risk of specific regional subsidies.

In the WTO's report on *US – Countervailing Measures (China)*,[61] the Appellate Body observed that proper identification of 'the jurisdiction of the granting authority will require an analysis of both the 'granting authority' and its 'jurisdiction' in a conjunctive manner.'[62] If the investigating authorities adopted the EC's approach and attributed the financial contribution to the export state and bypassed the test of jurisdiction, the application of overseas SEZs would

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60 Commission implementing regulation 2020/776 (n 1) [703-705].

61 Appellate Body Report, United States — Countervailing Duty Measures on Certain Products from China, WTO Doc WT/DS437/AB/R (18 December 2014).

62 Ibid [4.168].

face potential legal disputes with regard to specific subsidies.

To conclude, the BRI is an initiative put forward by China to benefit the whole world. However, for each microscopic action under the BRI, it seems that the BRI, especially the establishment of the SEZs, can be challenged by the existing WTO rules on specific subsidies.

### B *Bridging the gap*

The global public goods approach stresses international collaboration to address the development concerns of the international community. This is in line with the BRI's goals. The BRI's commitment to maintaining the global free-trade system and an open world economy must be considered when evaluating the legitimacy of cross-border granting of production subsidies. However, the BRI must also be governed by the rule of law at an international level in order to deliver public goods. From a policy perspective, the construction of the BRI should pay attention to harmonising international trade laws. The BRI is not a kind of foreign aid or subsidy. By emphasising adherence to market regulations and giving full play to the market's decisive role in resource allocations, the granting from the enterprises constructing the BRI (under the two aforementioned models of establishing SEZs), the collaborations need to adhere to market principles.

In particular, for the SEZs, there is a conflict between the necessity to uphold fair, market-based trade conditions, and the beneficial purposes to incentivise companies' investment.[63] Therefore, it is necessary to create a legal boundary consistent with WTO law.

## VI Conclusion

The EU cases concerning cross-border subsidies have sparked debate over the legality of unilateral countervailing measures against cross-border production subsidies under the WTO rules. As the BRI evolves and cooperation between China and other BRI participants intensifies, cross-border subsidies will be involved. This emphasises the need for a determination of the validity of the relevant state policy and practice concerning cross-border subsidy. By outlining the factual background to the glass-fiber disputes, this paper holds that the EC's decisions have left loopholes in the application of the EU law, which was inherited from the SCM Agreement. Noticeably, SEZs are at the core of cross-border subsidy disputes.

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[63] Sherzod Shadikhodjaev, 'The WTO Agreement on Subsidies and Countervailing Measures and Unilateralism of Special Economic Zones' (2021) 24(2) *Journal of International Economic Law* 381.

SEZs can potentially provide an avenue for applying extraterritoriality while, at the same time, they may trigger the specific subsidy test under the SCM Agreement. China has a different view of the BRI. Different actors will have different preferences about which norm to choose.[64] The BRI has long been viewed as a non-rivalrous and non-exclusive international public good supplied by China to the international community in the new age of historical development. Not only is there a divergence in discourse, but also there exist potential methodologies to resolve the problem with cross-border granting. The divergence between subsidies and international public goods suggests that at the current stage the BRI is still a regional public good, which will cause negative externality to the non-participants. Therefore, the need to address the current challenges under international trade law and provide policy guidance is of vital significance.

[64] Daniel Bodansky (n 49) 651-668.

# ENGLISH ANTI-SUIT INJUNCTIONS AND THE REACTION OF CHINESE COURTS—FROM THE PERSPECTIVE OF BILL OF LADING CONTRACTS

DAONING ZHANG*


## ABSTRACT

*This paper aims to examine Chinese courts' reaction towards English anti-suit injunctions in the context of bills of lading disputes. The paper finds that friction comes from different rules on incorporation clauses, private international law and the need to protect parties' expectations. The paper offers recommendations as to how Chinese courts should respond to English anti-suit injunctions.*



## KEY WORDS

anti-suit injunctions–incorporation clauses–international arbitration–private international law– Chinese courts–carriage of goods by sea–bills of lading


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## I INTRODUCTION

An anti-suit injunction is a court order that prevents the respondent from initiating litigation in another jurisdiction in violation of an agreement.[1] The influence of English anti-suit injunctions is significant in cases arising out of carriage of goods by sea contracts.[2] One main reason is that businessmen often choose English law as governing law and choose London as the seat of arbitration.[3] English courts will grant anti-suit injunctions when parties breach the arbitration clauses or exclusive jurisdiction clauses.[4] In this paper, the author focuses on Chinese courts' reaction towards English anti-suit injunctions issued against parties in disputes from bill of lading contracts, particularly when bills of lading incorporate clauses from charterparties.

This paper aims to examine how Chinese courts dealt with English anti-suit injunctions and whether their approaches were sound and predictable. The author finds that the main frictions may come from the fact that the two countries have different rules on incorporation clauses in bills of lading and different private international law rules. The author also found that the Chinese test of anti-suit injunctions bears some resemblance to the English test, so one may expect that frictions between two national courts can be avoided, to some degree, in the future. The author recommends that Chinese courts should not skip an analysis of private international law when determining the validity of an arbitration clause and should recognise parties' arbitration clauses in the underlying contracts. As China is a signatory of the *United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention)*,[5] Chinese courts also have an obligation to give effect to parties' arbitration clauses in contracts. The author offers some recommendations to the Chinese courts regarding their strategies for dealing with English anti-suit injunctions.

The paper is organized into five sections. The initial section elucidates the purpose and structure of the paper. The second section delineates the background and furnishes a concise introduction to the anti-suit injunction under English law within the context of bills of lading

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1 For instance, one party, in breach of a London arbitration agreement, starts a court proceeding in another country. Yvonne Baatz, 'Chapter 1 The Conflict of Laws' in Yvonne Baatz (ed) Maritime Law (Informa, 5thed, 2020) 10.

2 Carriage of goods by sea contracts usually refer to bills of lading, while Charterparties are categorised as contracts for the use of vessels. Simon Baughen, Shipping law (Routledge, 7th ed, 2019) 191. See also Carriage of Goods by Sea Act 1992 (UK) art 1, which covers bills of lading, seaway bills and delivery orders.

3 See Carlo Corcione, Third Party Protection in Shipping (Routledge, 2019) 89.

4 For a detailed account of the Arbitration Act 1996 (UK), see Robert Merkin KC and Louis Flannery KC, Merkin and Flannery on the Arbitration Act 1996 (Routledge, 6th ed, 2020).

5 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention').

disputes. In the third section, the author scrutinizes disparate regulations in both countries within the realm of private international law and explores the validity of incorporation clauses that may potentially impact the comprehension of English anti-suit injunctions by Chinese courts. Moving on to the fourth section, the author delves into the strategies adopted by Chinese courts in response to English anti-suit injunctions, offering recommendations to navigate conflicts and bolster cooperation. The concluding section, Section five, encapsulates the findings and insights presented throughout the paper.

## II A BRIEF INTRODUCTION OF ANTI-SUIT INJUNCTIONS IN THE CONTEXT OF ENGLISH SHIPPING LAW

### A *The test of anti-suit injunctions*

The prevalence of London-seated arbitration clauses and English governing law clauses in international carriage of goods contracts gives English courts tremendous power to grant anti-suit injunctions.[6] Global businessmen need to take English anti-suit injunctions seriously in order to comply with court orders and avoid an accusation of contempt of court.[7] It is worth mentioning that anti-suit injunctions are served on respondents, not foreign courts. However, arguably, the judicial sovereignty of a foreign court is still affected indirectly.[8] This section provides a very brief account of rules of English anti-suit injunctions.

English courts have power to grant anti-suit injunctions when it is just and convenient to do so under s 37(1) of the *Senior Courts Act 1981* (UK).[9] It is established that anti-suit injunctions are likely to be supported in two situations.[10] One is where a contracting party breaches a valid exclusive jurisdiction clause or arbitration clause by starting proceedings elsewhere.[11] The English court may also issue anti-suit injunctions to prevent a vexatious and oppressive foreign proceeding (e.g. foreign proceedings are commenced in bad faith),[12] if the English court thinks

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6 LMAA reported that in 2021, there were 2,777 new appointments and an estimated 1,657 references. See Maritime London, LMAA releases 2022 Statistics (Web Page, 11 March 2022) <https://www.maritimelondon.com/news/lmaa-releases-2022-statistics#:~:text=London%20Maritime%20Arbitration%20rides%20out%20the%20pandemic&text=Despite%20the%20disruption%20and%20restrictions,in%20an%20estimated%201%2C657%20references>.

7 People who disobey a court order will be in contempt of court and be subject to a fine or confiscation of assets or imprisonment. The *Civil Procedure (Amendment No. 3) Rules 2020* sch pt 81.

8 One example is *Allianz SpA v West Tankers Inc* (Case C-185/07) [2009] 1 AC 1138. The European Court of Justice ruled that anti-suit injunction affects the mutual trust of member states underpinned by the Brussels I Regulation.

9 *Senior Courts Act 1981* (UK) s 37(1); *AES Ust- Kamenogorsk Hydropower Plant LLP v Ust- Kamenogorsk Hydropower Plant JSC* [2013] UKSC 35.

10 *Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace)* [1995] 1 Lloyd's Rep 87.

11 Hakeem Seriki, *Injunctive Relief and International Arbitration* (Routledge, 2014) [2.15].

12 *Joint Stock Asset Management Company Ingosstrakh Investments v BNP Paribas SA* [2012] EWCA Civ 644.

it is just and convenient to grant an anti-suit injunction to the applicant.[13] The discussion of this class of anti-suit injunctions is out of the scope here, as this paper mainly concerns anti-suit injunctions issued to prevent the commencement of a foreign proceeding in breach of an arbitration agreement in the context of bills of lading disputes.

Before granting an anti-suit injunction, the English court may consider, in granting an interim injunction, whether (1) damages are a more appropriate remedy, and (2) there is a serious issue to be tried.[14] Where an interim injunction could terminate a foreign proceeding, a higher test —a high degree of probability that a valid arbitration agreement exists−will be used.[15]

It is generally agreed that the English court should also have jurisdiction over the defendant/respondent who starts the foreign proceeding.[16] English courts may have jurisdiction over a given defendant in many ways. For example, the English court will have jurisdiction if the defendant/respondent is within the territory of the United Kingdom ('UK'), or if the defendant/respondent is subject to a valid exclusive jurisdiction clause or an arbitration clause whereby parties voluntarily submit to English courts to hear disputes arising from an underlying contract between the parties.[17]

The English court will consider all relevant factors in a case, including certain well-established factors that may affect the court's decision before granting an anti-suit injunction to the applicant. The applicant's contractual entitlement to start court or arbitration proceedings in England and Wales can be affected by the defendant's strong reasons to litigate elsewhere.[18] Factors include delay,[19] comity, submission to a foreign court,[20] and loss of security obtained from a foreign proceeding.[21] As an equitable remedy, the operation of the doctrine of laches

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13 Steamship Mutual Underwriting Association (Bermuda) Ltd v Sulpicio Lines Inc [2008] EWHC 914 (Comm).

14 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396; Clare Ambrose, Karen Maxwell and Michael Collett, *London Maritime Arbitration* (Routledge, 4th ed, 2017) [8.5]; The power to grant interim injunctions. See *Civil Procedure Rules 1998* (UK) r 25(1); *Senior Courts Act 1981* (UK) s 37(1).

15 *Midgulf International Ltd v Groupe Chimiche Tunisien* [2009] EWHC 963 (Comm); *ZHD v SQO* [2021] EWHC 1262 (Comm).

16 *Société Nationale Industrielle Aérospatiale v Lee Kui Jak* [1987] AC 871; *Navig8 Pte Ltd v AL-Riyadh Co for Vegetable Oil Industry (THE "LUCKY LADY")* [2013] EWHC 328 (Comm) [10] (Andrew Smith J). See also Practice Direction 6B 3.1 (6)(a)(c) and (7); *Civil Procedure Rules 1998* (UK) r 6.36. See also Pippa Rogerson, 'Problems of the Applicable Law of the Contract in the English Common Law Jurisdiction Rules: The Good Arguable Case' (2013) 9(3) *Journal of Private International Law* 387, 392.

17 For example, the seat of arbitration is in London or English law is the governing law of the arbitration clause. See Clare Ambrose, Karen Maxwell and Michael Collett, *London Maritime Arbitration* (Routledge, 4th ed, 2017), 127.

18 *Donohue v Armco* [2001] UKHL 64.

19 *Azaz v Denton* [2009] EWHC 1759 (QB).

20 See Trevor C. Hartley, *International commercial litigation – text, cases and materials on private international law* (Cambridge University Press, 2020) 15. The claimant can go to a foreign court to challenge its jurisdiction without dealing with the merits of the case.

21 Welex AG v Rosa Maritime Limited (The Epsilon Rosa) (No.2) [2003] 2 C.L.C. 207. English courts do not impose anti-suit injunctions on a party who starts a ship arrest proceeding elsewhere with a sole purpose of getting security for its claim, even though the party is also subject to a London arbitration clause. Kallang Shipping SA Panama v AXA Assurances Senegal and Comptoir Commercial Mandiaye Ndiaya [2008] EWHC 2761 (Comm).

informs us that delay defeats equities.[22] Indeed, a delay may cause significant costs and inconvenience to the respondent and foreign courts if the foreign proceeding has been too far advanced. Furthermore, the delay is also closely linked to the concept of comity. If a foreign proceeding has proceeded to a late stage, an anti-suit injunction will cause an interruption to the foreign proceeding; understandably, it will lead to a significant waste of time and money. As a result, an undue late application may reduce the success rate of applications for anti-suit injunctions.

As a general law of jurisdiction, a claimant's submission to a court also confers jurisdiction on the court.[23] However, the claimant can go to a foreign court to challenge the foreign court's jurisdiction without dealing with the merits of the case. Furthermore, losing security from a foreign proceeding can be seen as a strong reason to refuse to grant an anti-suit injunction.[24] As a consequence, English courts do not impose anti-suit injunctions on a party who starts a ship arrest proceeding elsewhere with a sole purpose of getting security for its claim, even though the party is also subject to a London arbitration clause.[25] The courts will consider whether there is a valid arbitration agreement between parties. If the answer is affirmative, the courts will consider the strong reasons for not issuing the injunctions. In conclusion, the English courts have developed a predictable formula for the issuance of anti-suit injunctions.

### B *Incorporation clauses and applicable law*

One important question in relation to incorporation of arbitration clauses is whether general words could incorporate an arbitration clause from a charterparty to a bill of lading. The English court takes a strict approach in cases where bills of lading are transferred to a third party, while in other types of cases, incorporation of arbitration clauses by general words may not receive special treatment.[26] In other words, general words of incorporation can effectively incorporate arbitration clauses from one contract to another if both parties of the two contracts are the

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22 Goldsworthy v. Brickell [1987] 1 Ch 378 page 410 Nourse LJ.

23 See Trevor C. Hartley, International commercial litigation – text, cases and materials on private international law (Cambridge University Press, 2020) 15.

24 Welex AG v. Rosa Maritime Limited (The Epsilon Rosa) (No.2) [2003] 2 C.L.C. 207.

25 Kallang Shipping SA Panama v AXA Assurances Senegal and Comptoir Commercial Mandiaye Ndiaya [2008] EWHC 2761 (Comm).

26 Simon Allison and Kanaga Dharmananda, 'Incorporating Arbitration Clauses: The Sacrifice of Consistency at the Altar of Experience' (2014) 30(2) Arbitration International 265, 277.

same.[27] The exceptions are two-contract cases: incorporation arbitration clauses from a charterparty to a bill of lading where parties of these contracts may not be the same.[28]

Where a bill of lading is transferred to a new third party, the holder of a bill of lading may be surprised to discover that he is subject to an English anti-suit injunction, as the bill of lading incorporates a London-seated arbitration clause from a charterparty which is difficult to identify, if not unknown, at the time of becoming such a holder.[29] To protect commercial certainty, common law has developed rules on the effect of incorporation clauses in bills of lading.[30] The general rule is that general words in an incorporation clause can only incorporate terms which are germane to the bill of lading.[31] To incorporate ancillary clauses, including arbitration and jurisdiction clauses which are not closely related to carriage of goods, specific words in bills of lading should be used to articulate parties' intention.[32] The purpose of this rule is to protect the interest of the holders of bills of lading by drawing their attention to the incorporated terms, as the holders may not have a copy of the charterparty or may not have relevant knowledge even though a copy is available.[33] In English law, where the arbitration clause is a usual one in the trade, the need for certainty and clarity is not affected simply because the consignee of the bill of lading does not see the charterparty from which terms are incorporated.[34]

The formality requirements taken by the English courts also increase the difficulty of the third party holder of a bill of lading in identifying an incorporated arbitration clause. English law does not impose restrictive formality rules on charterparties so that exchanges or correspondences between the shipowner and the charters, in the form of emails or recaps, can become voyage charterparties without parties' signatures.[35] This means that tracing the origin of an arbitration clause from a charterparty may not always be straightforward. Also, there is

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27 *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Limited, The Athena* (No 2) [2006] EWHC 2530 (Comm). In this case, the Rules of a mutual insurance company were incorporated into the insurance contract between parties. *Habaş Sinai ve Tibbi Gazlar Isthisal Endustri A.Ş. v Sometal S.A.L.* [2010] EWHC 29 (Comm). In this case, two parties incorporated arbitration clauses to contracts from their previous contracts. These are not the so called two-contract cases. Therefore, general words are sufficient to incorporate arbitration clauses into a contract between the same parties.

28 *Sea Trade Maritime Corporation v Hellenic Mutual War Risks Association (Bermuda) Limited, The Athena* (No 2) [2006] EWHC 2530 (Comm), 12.

29 See Congenbill 94 charterparty bills of lading. This is a standard bill of lading published by BIMCO (Baltic and International Maritime Council) https://www.bimco.org/contracts-and-clauses/bimco-contracts/congenbill-94.

30 *Caresse Navigation Ltd v Office National de L'Electricite and others, The Channel Ranger* [2013] EWHC 3081.

31 *Yuzhny Zavod Metal Profil LLC v Eems Beheerder BV (The Eems Solar)* [2013] 2 Lloyd's Rep 487.

32 *Caresse Navigation Ltd v Office National de L'Electricite and others, The Channel Ranger* [2013] EWHC 3081.

33 Stephen Girvin, Carriage of Goods by Sea (Oxford University Press, 2nd ed, 2011) 186.

34 *Caresse Navigation Ltd v Office National de L'Electricite and others, The Channel Ranger* [2013] EWHC 3081 (Comm) [47].

35 Julian Cooke et al, *Voyage Charters* (Routledge, 4th ed, 2014) [1.3].

no general obligation to tender the incorporated charterparty to the holder of bills of lading.[36] As a result, one cannot assume that the holder of a bill of lading in any case will be privy to the terms of the incorporated arbitration clause. Furthermore, under English law, an incorporation clause in a bill of lading will still be valid without specifying the date or other information of the incorporated charterparty, as long as the charterparty could be ascertained in other ways.[37]

Where there is doubt as to which charterparty is incorporated into a bill of lading in a chain of charterparties, the English courts will generally treat the head charter, of which the carrier is usually a party, as the charterparty from which the terms are incorporated.[38] The blank spaces should be filled in a way to make the bill of lading workable.[39] The head charter should be a voyage charter, not a time charter.[40] In *SLS Everest*, the buyer was issued a bill of lading by the shipowner, while the vessel was subject to a head time charter and a voyage charter.[41] In the bill of lading, incorporated terms from a charterparty and the spaces for the date and the name of the charterparty were left blank.[42] Lord Denning cited *The San Nicholas,*[43] which had similar situations, and held that the blanks should be filled in a way to make the bill of lading workable.[44] The general rule is that the head voyage charter should be the right charterparty as it is inapposite to incorporate terms from a time charter, such as agreement on unpaid hire, to the bill of lading.[45]

It is also possible for a charterparty which has not been concluded to be incorporated into a bill of lading, if the court is satisfied that this is the parties' intention.[46] This approach seems to heavily rely on the English courts' discretion, and introduces too much uncertainty to the commercial world.

The applicable law to determine the validity of an arbitration clause may be identified if parties have made an express choice. If no choice is made, the applicable law of the underlying

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36 *Finska Cellulosaforeningen v Westfield Paper Co Ltd* [1940] 4 All ER 473.
37 Sir Richard Aikens et al., Bills of Lading, (Routledge, 3rd ed, 2020) 227.
38 Ibid 228; in practice, it is not uncommon for the time charterer to be the carrier. Simon Baughen, *Shipping law* (Routledge, 7th ed, 2019) 10.
39 *The 'SLS Everest*, [1981] 2 Lloyd's Rep 389 (CA) p392; *The San Nicholas*, [1976] 1 Lloyd's Rep. 8.
40 A voyage charter is a contract whereby a ship is borrowed by a charterer to complete a specific voyage. Simon Baughen, *Shipping law* (Routledge, 7th ed, 2019) 78; A time charter is a contract to hire a ship for a period of time. Simon Baughen, Shipping law (Routledge, 7th ed, 2019) 191.
41 *The SLS Everest* [1981] 2 Lloyd's Rep 389 (CA).
42 Ibid.
43 *The San Nicholas* [1976] 1 Lloyd's Rep 8.
44 *The SLS Everest* [1981] 2 Lloyd's Rep 389 (CA), 392.
45 Ibid.
46 *The Golden Endurance* [2015] 1 Lloyd's Rep 266; *The Star Quest* [2016] SGHC 100. See also Sir Richard Aikens et al., Bills of Lading, (Routledge, 3rd ed, 2020) 230.

contract, rather than the law of the seat of arbitration, is presumed to be the applicable law to the arbitration agreement.[47] Some jurisdictions, such as Singapore, may take a different approach by giving weight to the seat of arbitration.[48] However, in many carriage of goods standard contracts, governing law clauses and seat of arbitration clauses are determined by parties.[49] If the governing law of a bill of lading is English law, English courts will apply English law to determine whether a London arbitration clause has been incorporated into the bill of lading successfully.[50] Given the liberal approach taken by the English courts and the popularity of London as an arbitration centre, it is likely that foreign parties will be subject to London-seated arbitration.[51]

## III PRIVATE INTERNATIONAL LAW OF CARRIAGE OF GOODS CONTRACTS AND SUBSTANTIVE LAW ON INCORPORATION CLAUSES IN CHINA

This section examines the Chinese law approach to determining the governing law of a carriage of goods contract and the rules on the validity of incorporation clauses. Chinese private international law may confirm that English law is the governing law, while the different rules on incorporation clauses may make Chinese courts hesitate to defer to English law.

### A *Jurisdiction over carriage of goods contracts*

#### 1 *Arbitration agreements*

Chinese courts will defer to arbitral tribunals if parties opt for arbitration as their dispute resolution option.[52] Chinese courts, after receiving a claim form and evidence from a claimant, will decline jurisdiction if they have found a valid arbitration clause. The court at first instance, however, will need to refer the case to higher courts if they are of the opinion that the arbitration clauses are void and the lower court then needs to wait for rulings from higher courts.[53]

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47 *Enka Insaat VE Sanayi AS v OOO Insurance Company Chubb* [2020] UKSC 38.

48 Alastair Henderson, 'Lex Arbitri, procedural law and the seat of arbitration, unravelling the laws of the arbitration process' (2014) 26 *Singapore Academy of Law Journal*, 890.

49 See Gencon 1994 within which English law and London arbitration are the default rules. Gencon refers to general purpose voyage charterparties drafted by the Baltic and International Maritime Council. The latest version is GENCON 2022.

50 Egon Oldendorff v Libera Corp [1995] 2 Lloyd's Rep 64.

51 English courts show an inclination to give effect to commercial parties' intention, notwithstanding where some ambiguity existed in an incorporation clause. Caresse Navigation Ltd v Office National de L'Electricite and others, The Channel Ranger [2013] EWHC 3081 (Comm). The bill of lading incorporated arbitration clause from a charterparty but the charterparty only contained an exclusive jurisdiction clause. The court held that the exclusive jurisdiction clause was incorporated. See Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd [2015] EWCA Civ 401, arguably, the English court treated a non-exclusive jurisdiction clause as an exclusive English jurisdiction clause.

52 Civil Procedure Law of the People's Republic of China (2021 amendment) art 127(2); Arbitration Act of China, art 5.

53 Tianhong Wang, 'Study on the revision of relevant clauses of maritime arbitration judicial review in the Special Maritime Procedure Law of the People's Republic of China'(2021) 32(1) Chinese Journal of Maritime Law 31, 37.

Also, China is a party to the *New York Convention*, so it has an obligation to recognise arbitration agreements unless agreements are void.[54] Recognition of arbitration agreements is also recommended by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Arbitration, which provides that:

> A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.[55]

Therefore, the treatment of arbitration agreement and arbitrators' jurisdiction in China is similar to that required or recommended by *New York Convention* or UNCITRAL Model Law.

Moreover, under Chinese law, Chinese courts recognise the practice of incorporating arbitration clauses from other contracts and the courts have the authority to determine the validity of arbitration agreements.[56] It is worth noting that ad hoc arbitration is not available under the *Arbitration Act* in China, so that it is important for parties to choose an arbitral institution as their arbitral tribunal.[57] Where one party chooses to start litigation in a Chinese maritime court instead, the validity of a maritime arbitration agreement is determined by the Chinese maritime court where the selected arbitral institution is located or where the arbitration agreement is signed or where the respondent is domiciled.[58] However, unless Chinese courts opine that the arbitration clause is void,[59] Chinese courts will refer parties to arbitration.

### 2 *Choice of court agreements*

Under Chinese Civil Procedure Law, parties' choice of court agreement should be recognised by courts as long as the chosen court can be ascertained.[60] In a case where all parties are foreign

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54 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('New York Convention'). This convention is an international treaty which facilitates the recognition and enforcement of arbitral awards made in another signatory state.

55 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 Article 8(1). Arbitration agreement and substantive claim before court in UNCITRAL model law on arbitration. The model law has been provided with the aim of helping countries reform and modernise their own arbitration law; https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration

56 *Interpretation of the Supreme Court of China for Certain Issues on the Application of the Arbitration Law of China* (2008 version) arts 11, 18.

57 The identity of the arbitral institution may be determined with reference to names of the institutions in the underlying contracts or selected arbitral rules. If the institution cannot be determined, there is no chosen arbitral institution. *Interpretation of the Supreme Court of China for certain Issues on the Application of the Arbitration Law of China* (2008 version) arts 3, 4.

58 *Interpretation of the Supreme Court of China for certain Issues on the Application of the Arbitration Law of China* (2008 version) art 12.

59 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art II ('*New York Convention*').

60 *Interpretations of the Supreme People's Court on the Application of the Civil Procedure Law of China* (2022 amendment) art 30.

individuals, organisations or stateless persons which have no connection to the place of dispute in China, Chinese maritime courts will still have jurisdiction over the dispute if the parties choose Chinese maritime courts to solve their issues in their written agreements.[61] While Chinese courts have no effective measures to restrain a party from starting a court proceeding abroad in breach of a choice of court or arbitration clause,[62] as a signatory of the *New York Convention*, Chinese courts may later refuse to recognise a court judgment made in breach of an effective arbitration agreement.

There are two qualifications for the choice of jurisdiction clause. First, that the location of the chosen court should have a real connection to a contractual dispute; and second, the choice should not violate the mandatory requirements on hierarchy of the courts and exclusive jurisdiction of Chinese courts.[63] In other words, there should be a connection between the chosen court and the underlying dispute. On the other hand, if, under the Chinese law, certain disputes must be tried by a special court or by a higher court, such requirements cannot be violated. When it comes to a dispute relating to a bill of lading, no Chinese law sets any requirements in relation to the hierarchy of the court or the special jurisdiction of certain Chinese courts. As a result, only the first condition, a connection between the court and the dispute, needs to be considered. The real connection requirement is used to protect local interests and prevent abusive expansion of foreign jurisdiction or prevent one party gaining advantage over another through fraud, duress and dominate power.[64]As China is a signatory to the Hague Choice of Court Convention,[65] it is likely that this restriction will be relaxed in the future.[66]

The real connection requirement in China is similar to the approach of English courts. English courts will not automatically give effect to parties' choice of court agreement and grant a stay of its own proceedings before considering a broad range of factors in favour of the jurisdiction of either the English court or a foreign court.[67] One may infer that where a Chinese court is the court which is first seized of a case, it would enjoy the jurisdiction to determine whether it has

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61 *Special Maritime Procedure Law of the People's Republic of China 1999*, art 8.

62 Zeng Er-xiu, 'A comparative research on the effectiveness and enforcement of jurisdiction clause in China and UK' (2018) 29(4) *China Journal of Maritime Law*,15, 25; this is so largely owing to the fact that anti-suit injunction regime is not fully developed in China.

63 Civil Procedure Law of the People's Republic of China (2021 amendment) art 35.

64 Hongyun Tian, 'The US-EU Games and China' s Choice: The Ratification of Convention on the Choice of Court Agreement' (2019) 59(2) *Jilin University Journal, Social Sciences Edition*, 84, 90.

65 *Convention on Choice of Court Agreements*, opened for signature 30 June 2005, 44 ILM 1294 (entered into force 1 October 2015).

66 China has not yet ratified the convention.

67 *The Eleftheria* [1969] 1 Lloyd's Rep, 237.

jurisdiction to hear this case or not.[68] One Chinese case also held that jurisdiction clauses relate to procedural matters and the *lexi fori* should be applied to determine their effect and validity.[69] As a general rule, the court will apply its own procedural rules to determine procedural issues in a case. As a result, there is a possibility for Chinese courts to deny the effect of a jurisdiction clause or an arbitration clause in a bill of lading in the hands of an endorsee, since only substantive rights and obligations in the carriage of goods contracts can be transferred.[70] However, this view may not be the mainstream position of Chinese authority as it is contrary to the courts' obligation to recognise arbitration agreements under the *New York Convention* and the party autonomy principle.

A chosen jurisdiction clause is not valid if the selected jurisdiction has nothing to do with the disputes; e.g. the jurisdiction has no real connection to the domiciled place of defendant or the place where the contract was performed.[71] In the absence of agreed express choice of jurisdiction, there are rules for Chinese courts to determine appropriate jurisdiction.[72] The jurisdiction to hear disputes arising from various types of transport contracts, including carriage of goods by rail, by road, by sea, by air contracts and combined transport contracts, is conferred on the court in the jurisdiction of which the goods are shipped, delivered or where the defendant is domiciled.[73] The Special Maritime Procedure Law of the People's Republic of China 1999 provides that the court, within the territory of which the goods are transhipped, can also hear disputes arising from carriage of goods by sea contracts.[74] These rules altogether facilitate litigation in China if the cargo interest is based in China. By the same token, claims arising from charterparties should be heard by the maritime courts within the territory of which the relevant ship is delivered, redelivered, registered or where the defendant is domiciled.[75] One could argue that the delivery place and the place of domicile of the defendant are important connecting factors considered by Chinese courts in determining jurisdiction. Chinese courts may not recognise a choice of court clause if the chosen court has no connection to the dispute.

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68 Lu Yi, 'On the construction of anti-anti-injunction' (2020) 31(2) *Chinese Journal of Maritime Law* 106.

69 *Shandong High People's Court* (2014) Luminxiazhongzi, No. 158 Minshicaidingshu in Zeng Er-xiu, 'A comparative research on the effectiveness and enforcement of jurisdiction clause in China and UK' (2018) 29(4) *China Journal of Maritime Law*, 15, 17.

70 Ibid.

71 Civil Procedure Law of the People's Republic of China (2021 amendment) art 35.

72 Civil Procedure Law of the People's Republic of China (2021 amendment) art 28.

73 Civil Procedure Law of the People's Republic of China (2021 amendment) art 28.

74 Special Maritime Procedure Law of the People's Republic of China 1999, art 6(2).

75 Ibid.

## B *Choice of law for arbitration agreements*

When it comes to choice of law rules of contracts, it is widely accepted that contracting parties are entitled to choose the governing law of their contracts.[76] Chinese law advocates the same principle. Unlike the rules on choice of jurisdiction agreements,[77] the governing law of a contract does not have to have a real connection to the contract.[78]

Under Chinese law, the choice of law question usually arises if a legal relationship contains foreign elements. Such legal relations include but are not limited to the nationality of parties, place of parties' habitual residence or the location of the property, or the legal fact which leads to a change of civil or commercial legal relation; the applicable law should be determined by the court if these elements are outside China.[79] International shipping disputes invariably contain foreign elements, so Chinese courts will need to start with choice of law analyses.

It is generally agreed that an arbitration agreement is a separate agreement independent of the underlying contract.[80] This means that the choice of law of the arbitration agreement and the underlying contract should be determined separately. The court which has jurisdiction to determine the validity of a maritime arbitration agreement is the maritime court within the territory of which the selected arbitral institution is located or where the arbitration agreement is signed or where the respondent is domiciled.[81] The applicable law of the validity of arbitration agreements is as follows in a hierarchical order: 1) the law selected by parties, 2) the law of the jurisdiction where the arbitral institution is located 3) the forum law.[82] Similar rules are provided by recent legislation and judicial interpretation.[83] The current position is that the applicable law of an international arbitration agreement should be the law chosen by the parties, followed by the law of the seat of the arbitration or the location of the chosen arbitral

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76 Rome I Regulation, art 3. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32008R0593.

77 Civil Procedure Law of the People's Republic of China, art 35.

78 Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment).

79 Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment) art 1.

80 The principle of separability. See Arbitration Act 1996 (UK) s 7.

81 Judicial Interpretation of the Supreme Court of China for certain Issues on the Application of the Arbitration Law of China (2008 version) art 12.

82 Ibid art 16.

83 Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment), art 12.

tribunal, followed by the law of the court.[84] Since the fundamental principle of conflict of laws in China is party autonomy,[85] it is not difficult to understand this order of priority.

Recently, the Chinese Supreme Court prescribed rules that, in the absence of parties' choice of applicable law for the validity of an arbitration agreement, if there is a conflict between the law of the jurisdiction of the chosen arbitral institution and the law of the seat of arbitration, the Chinese courts should apply the law which renders the agreement valid.[86] This rule can be seen as an example of the pro-arbitration attitude of China. As a corollary, where the dispute arises from a bill of lading that incorporates an arbitration clause from a charterparty, the validity of an arbitration clause will be determined by the agreed governing law or law of the seat of arbitration. Since both the governing law of the underlying contracts and the seat of arbitration are likely to point to the UK, the result is that English law will apply to determine the effect of an incorporation clause.[87]

### C *Incorporation clauses and bills of lading*

The arbitration clause is sometimes embedded in an incorporation clause in a bill of lading.[88] The bill of lading is more likely to give rise to disputes as the holders of the bill of lading may be surprised to know that they are subject to London arbitration and have no right to start proceedings elsewhere. Chinese maritime law recognises the practice that bills of lading can incorporate clauses from charterparties and give effect to the incorporation clauses. Where a ship is subject to a voyage charterparty and the bills of lading are not in the hands of the charterers themselves, the bills of lading are the contracts between the carrier and the holders, unless the bills of lading make it clear that certain terms in the voyage charterparty are applicable to the bills of lading.[89]

Similar to the position of English law, Chinese maritime law does not allow an incorporation clause to incorporate terms which are not germane to the carriage of goods.[90] For example, as

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84 Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships 2010, art 18; Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment) art 12.

85 Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships 2010, art 3.

86 Rules of the Supreme People's Court on Several Issues concerning hearing Arbitration Cases (Fashi [2017] 22) art 14. The Supreme People's Court has the power to interpret legislation. Though the interpretations do not carry the status of laws passed by the National People's Congress and its Standing Committee in China, they bind lower courts and parties.

87 Egon Oldendorff v Libera Corp [1995] 2 Lloyd's Rep 64.

88 For an analysis of varying types of incorporation clauses, see Sir Bernard Eder et al., Scrutton on charterparties and bills of lading (Sweet & Maxwell UK, 24th ed. 2022) 6-016.

89 Chinese Maritime Law, art 95.

90 Chinese Maritime Law, art 78.

a basic rule, the consignee or holder of bill of lading is not responsible for any costs associated with demurrage, dead freight[91] or any fees relating to loading unless the terms of the bill of lading expressly prescribe.[92] This means that arbitration clauses in a bill of lading can only be given legal effect if they are properly included in the bill of lading.[93]

Chinese law sets a higher threshold than English law for the validity of an incorporation clause which aims to incorporate arbitration clauses into a bill of lading from a charterparty. It has been argued that both the arbitration clause and key characteristics of the relevant charterparty must be specified in an incorporation clause on a bill of lading which incorporates clauses from a charterparty.[94] In another case, the Chinese Supreme Court provided that if the subsequent holders of a bill of lading could not obtain information regarding the applicable law and the arbitration clause in a charterparty, the incorporation clause would not be valid even if the clause mentioned that an arbitration clause including other terms from a charterparty were incorporated therewith.[95] Further, the bill of lading should record parties' intention of arbitration, scope of arbitration and the arbitral institution.[96]

Chinese courts seem to give more weight to the information recorded on the front page (the first page) of bills of lading. Similar treatment under English law exists when it comes to the identity of carriers clauses. For example, in *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)*,[97] the bills of lading prominently provided that the time charterer of the ship, CPS, was the carrier. In contrast, the small print seemed to indicate that the contracts of carriage of goods were made with the owner of the vessel. Lord Hoffmann was of the opinion that 'the reasonable reader would not think that the bill of lading could have been intended to mean one thing to the merchant or banker and something different to the lawyer or judge.'[98] Therefore, it is reasonable to treat the information on the front side of the bills of lading as determinative, as this is how the businessmen understand them.

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91 Dead freight refers to a compensation provided by a charterer to a carrier if the charterer does not provide agreed quantity of cargo.
92 Ibid.
93 Zhenyi Wu and Lin Shao, 'Legal status and effect of arbitration clause of bill of lading' (2007) 6(6) Journal of Dalian Maritime University (Social Sciences Edition), 6.
94 Sheng Gao and Xiangjun Zeng, 'Standards of Incorporation of Arbitration Clause Under Voyage CP by Reference into Bill of Lading' (2018) 20(3) *Journal of Shandong University of Science and Technology*, 61–2.
95 Reply to the case of *Golden Star Co.,Ltd v Korea Marine Transport Co.Ltd* (2011) Minsitazi No. 47.
96 Reply to the case of *Golden Star Co.,Ltd v Korea Marine Transport Co.Ltd* (2011) Minsitazi No. 47.
97 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12.
98 *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12, [76].

In another example, the Ningbo Maritime Court in China claimed jurisdiction and applied Chinese law which had the closest connection to the contract to determine the validity of the incorporation clause. The example is the related Chinese proceedings of the *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* case, between Hin-Pro International Logistics registered in Hong Kong SAR and Compania Sud Americana de Vapores SA, a Chilean shipping company, in the Ningbo Maritime Court in China. The Court applied Chinese law, despite parties' chosen jurisdiction of London, for the reason that London had no connection to the dispute.[99]

To sum up, Chinese law imposes stricter requirements on an incorporation clause than is the position of English law. Not only should the arbitration clause be clearly incorporated into a bill of lading, the key information used to ascertain the incorporated charterparty must be provided as well. Deference to English governing law which gives effect to the incorporated arbitration clause may give rise to a result different from that under Chinese law. To protect local litigants, Chinese courts may hesitate to defer to English law.

## IV CHINESE COURTS' REACTION AND RECOMMENDATIONS

It has been said that anti-suit injunctions, originally created by English courts, do not exist in many civil law jurisdictions.[100] Anti-suit injunctions are new species in the Chinese judicial system. The sources of anti-suit injunctions come from two pieces of legislation. First, art 103 of the Civil Procedure Law of China (2021 amendment)[101] provides general injunctive remedies to litigants. Under art 103, Chinese courts have the power to ask one party to do or not to do something if the courts believe that the party intends to make final court judgment difficult to enforce, or intends to cause damage to other parties.[102] Second, art 51 of the Special Maritime Procedure Law of China 1999 gives maritime courts in China the power to grant injunctive remedies to parties.[103] The remedies are named as 'maritime compulsory measures' which compel defendants to do or not to do certain things with the aim of protecting claimants'

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99 Hin-Pro International Logistics Ltd v Compania Sud Americana de Vapores SA, *Ningbo Maritime Court* (2013) Yonghaifashangchuzi No. 514 Minshipanjueshu. e.g. real connection to the domiciled place of defendant or the place where the contract was signed or performed.

100 Olga Vishnevskaya, 'Antisuit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?' (2015) 32(2) *Kluwer Law International*, 176.

101 *Civil Procedure Law of the People's Republic of China* (2021 amendment) art 103.

102 Ibid.

103 *Special Maritime Procedure Law of the People's Republic of China 1999*, art 51; the substantive maritime law is codified in the *Maritime Law of China 1992.*

legitimate interests.[104] To apply for a maritime injunction, the claimant must make an application to the maritime court where the dispute takes place, along with reasons of application and evidence.[105] The maritime court which receives the application can ask the claimant to provide security.[106] The relationship between the two is that the Special Maritime Procedure Law of China 1999 is a dedicated set of procedural rules for maritime claims, whereas the Civil Procedure Law of China plays a supplementary role.[107]

### A *Chinese courts' reaction – using anti-suit injunctions to counterbalance foreign anti-suit injunctions*

It is rare for anti-suit injunctions to be issued by Chinese courts in shipping cases, as the doctrine of anti-suit injunctions as remedies is not fully developed in the context of shipping law.[108] By contrast, anti-suit injunctions have come into the spotlight in international patent disputes in China over the last few years.[109] Though these are not shipping law cases, it is important to note that the test adopted by Chinese courts is similar to the English test for interim injunctions. Therefore, a further development of the Chinese test can help both countries build mutual trust and understanding.

One recent anti-suit injunction was granted by the Shenzhen Intermediate People's Court in *OPPO v Sharp,*[110] a case between the Japanese company Sharp and the Chinese company OPPO. The anti-suit injunction prevented Sharp from initiating patent infringement proceedings or making anti-suit injunction applications elsewhere until the Shenzhen Intermediate People's Court had delivered its judgment.[111] Also, the injunction required Sharp to withdraw its anti-suit injunction issued by a German court. The consequence of a breach of this Chinese injunction was a fine of 1 million yuan per day. As a result, Sharp withdrew its injunction against OPPO.[112]

In the other important case of *Huawei v Conversant* between the Chinese company Huawei and Conversant, a company registered in Luxembourg, the Supreme People's Court of the People's

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104 *Special Maritime Procedure Law of the People's Republic of China 1999*, art 51.
105 Ibid art 54.
106 Ibid art 55.
107 *Special Maritime Procedure Law of China 1999*, art 6. This provides that both the *Special Maritime Procedure Law of China 1999* and the *Civil Procedure Law of China* regulate maritime claims and the former prevails unless it is silent on certain issues.
108 One case which is frequently cited is the *Huatai Property & Casualty Insurance Co LTD, Shenzhen Brach v Clipper Chartering SA* [2017] E72 XB No.3. This case will be discussed later in this section.
109 Huawei Technologies Co Ltd v Conversant Wireless Licensing SÁRL (2019) Zuigaofazhiminzhong No. 732.
110 OPPO v Sharp (2020) Yue 03 Min Chu No. 689.
111 See the official website of the Supreme People's Court of PRC https://www.court.gov.cn/fabu-xiangqing-297991.html.
112 Ibid.

Republic of China ('the Supreme People's Court') laid down the test of the 'act preservation order' which is an equivalent to an English anti-suit injunction.[113] Such order can be granted on the basis of art 103 of the Civil Procedure Law of China (2021 amendment). The provision of art 103 is very short and does not prescribe how the court should interpret and apply this provision.[114] Therefore, the Supreme People's Court provided valuable guidance on the issuance of anti-suit injunctions pursuant to art 103. To decide whether an act preservation order is appropriate in this case, the Supreme People's Court considered three matters. First, the impact of the enforcement of a foreign judgment to any pending Chinese proceedings on the same issue. Second, the necessity of an act preservation order. Third, the balance of interests between the applicant and the respondent and, fourth, public interest and comity.[115] In this case, Conversant accused Huawei of infringing Conversant's standards-essential patents; both parties were unable to reach an agreement as to how much Huawei should pay for a licence at a fair, reasonable and non-discriminatory royalty rate.[116] Conversant sued Huawei in Germany and received a favourable judgment, including a royalty rate 18.3 times that determined by Nanjing Intermediate Court,[117]which had heard the case three months prior to the start of the German proceeding.[118] The proceedings dealt with almost the same issues. The Chinese court issued an injunction to prevent Conversant from enforcing the German judgment in Germany before the end of the parallel Chinese proceedings.[119]

The Supreme People's Court's approach seems to bear some resemblance to the test developed in the Cyanamid case.[120] The Supreme People's Court of China ruled that the question is, without such an injunction, whether the applicant would suffer losses which were unable to be compensated financially; that is, whether the losses of the applicant outweigh the losses of the respondent. If damages are inadequate and the applicant's losses are more than the respondent's inconvenience caused by an injunction, the court is likely to grant an injunction.[121] The court

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113 Huawei Technologies Co Ltd v Conversant Wireless Licensing SÁRL（2019）Zuigaofazhiminzhong No. 732, 733, 734-1.

114 Art 103 of the Civil Procedure Law writes that taking into account the act of the respondent or other reasons, if the court believes that the respondent may make the court judgment difficult to enforce or may cause losses to parties, the court can order assets preservation or ask the respondent to do or not to do something. This power can be exerted by the court directly or by an application of the claimant.

115 Huawei Technologies Co Ltd v Conversant Wireless Licensing SÁRL（2019）Zuigaofazhiminzhong No. 732, 733, 734-1.

116 Ibid.

117 Ibid.

118 Ibid.

119 Ibid.

120 *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396 at page 406, per Lord Diplock, the test is, among other things, whether the claimant's interest can be adequately compensated by damages; if not, the court will consider the balance of convenience before ordering the injunction, i.e. the need to protect the claimant and the need to protect the defendant.

121 Ibid. In this case, Huawei might be forced to leave the German market and might be deprived of the right for a judgment on the reasonable royalty rate.

will also consider the role of comity which includes an examination of the start dates of parallel proceedings, the jurisdiction of foreign courts, and the impact of the order on foreign trials and judgments.[122] Though the concept of comity is not defined by the Chinese court, it seems to include some element of reciprocity. In this case, the trial started in China earlier than the proceeding in Germany. The Chinese court did not need to give way to the German court; perhaps one can argue that it is the German court that needs to consider whether it is appropriate to try the case in Germany.

In the context of shipping disputes, judges in maritime courts can obviously follow the above test laid down by the Supreme People's Court when issuing anti-suit injunctions. Also, they have power to do so based on art 56 of the Special Maritime Procedure Law.[123] Art 56 of the special maritime law sets three conditions: 1) a specific maritime claim; 2) the respondent breaches any statutes or any terms of contracts; and 3) it is urgent and more harm will be caused without an injunction. It is worth noting that art 56 mentions breach of contracts specifically, therefore it is wide enough to include a breach of an arbitration clause or choice of jurisdiction clause. Condition 2 seems to echo *The Angelic Grace*[124] case so that the Chinese courts are prepared to issue an injunction if there is a clear breach of arbitration clauses or exclusive jurisdiction clauses. Article 56 is likely to be supplemented by the *American Cyanamid*[125] test in *Huawei v Conversant*.

It remains to be seen whether the test will be applied and followed by other Chinese courts in the future, especially in shipping cases. The test itself is a positive step forward. The similarity with the English test of interim injunctions will help China and the UK understand each other's approach better.

### B *Denying foreign anti-suit injunctions through pre-action preservation orders*

Another case is *Huatai v Clipper Chartering*[126] which was heard by Wuhan Maritime Court. The Court issued one anti-anti-suit injunction which required Clipper to withdraw its anti-suit

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122 Ibid.

123 *Special Maritime Procedure Law*, art 2, makes it clear that both the *Civil Procedure Law* and the *Special Maritime Procedure Law* can be applied to dealing with maritime disputes. The *Special Maritime Procedure Law* may be considered first as it is a special set of rules dedicated to maritime disputes.

124 *The Angelic Grace* [1995] 1 Lloyd's Rep 87.

125 *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396.

126 *Huatai Property & Casualty Insurance CO LTD, Shenzhen Brach v Clipper Chartering SA* [2017] E72 XB No.3.

injunction applied in Hong Kong. Clipper argued that there was an arbitration clause in the bill of lading. However, Wuhan Maritime Court established its jurisdiction based on its broad jurisdiction to grant a pre-action preservation order.[127] This is because under the Special Maritime Procedure Law, if the assets of the defendant are located in China, it is possible for a claimant to apply for a pre-action preservation order irrespective of parties' arbitration or exclusive jurisdiction agreements.[128] Chinese maritime courts have stand-alone jurisdiction to issue pre-action preservation orders. After making a pre-action preservation order, unless parties have jurisdiction or arbitration agreements, parties can start a court proceeding in the maritime court that makes the order.[129]

As the defendant did not challenge the jurisdiction of Wuhan Maritime Court within the required timeframe, the Court held that the defendant was deemed to have accepted the jurisdiction of the Court.[130] Therefore, the Court opined that the later issued anti-suit injunction in Hong Kong was an infringement of the claimant's right in the Chinese proceeding.[131] However, it seems this reasoning is questionable. After the enforcement of the preservation order, the claimant can start litigation at the court which grants the order unless parties are subject to arbitration or exclusive jurisdiction clauses.[132] This seems to indicate that the court should have regard to parties' arbitration or jurisdiction agreements.

### C *Reaction of Chinese courts towards English anti-suit injunctions*

The English anti-suit injunctions are powerful tools to prevent Chinese cargo interests or others from starting or continuing a Chinese proceeding.[133] According to the 'competence-competence' principle, every court should be able to decide whether it is appropriate to hear a case or not.[134] Anti-suit injunctions may affect the decision of a foreign court on its own jurisdiction. Some countries have made an effort to push back on the influence of English law.[135] As Dr Kate Lewins observed, the international conventions and national laws can

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127 *Special Maritime Procedure Law of China 1999*, arts 13, 14.
128 Ibid.
129 *Special Maritime Procedure Law of the People's Republic of China 1999*, art 72.
130 *Huatai Property & Casualty Insurance CO LTD, Shenzhen Brach v Clipper Chartering SA* [2017] E72 XB No.3.
131 Ibid.
132 Special Maritime Procedure Law of China 1999, art 19.
133 In addition to cargo interests, an English anti-suit injunction may be used to prevent a Chinese insurer, which had subrogated rights of the cargo interest, from continuing a Chinese proceeding. Starlight Shipping Co. v. Tai Ping Insurance Co. Ltd. [2007] EWHC 1893.
134 Olga Vishnevskaya, 'Antisuit Injunctions from Arbitral Tribunals in International Commercial Arbitration: A Necessary Evil?' 2015 32(2) Kluwer Law International 173, 194.
135 One example is s 11 of the Carriage of Goods by Sea Act 1991 (Cth) in Australia, which allows a party to start a court proceeding in an Australian court, despite there being a choice of court clause in sea carriage documents. Another example is s 46(1) of the Canadian Maritime Liability Act (SC 2001, c. 6) which, similar to the Hamburg Rules, enables a party to start a court proceeding in Canada if

constitute mandatory rules that a local court must follow.[136] The need to comply with the mandatory laws may be a reason for a local court to refuse to stay the local proceeding, despite an exclusive choice of court agreement.[137]

A key question to ask is: should Chinese courts accept the effect of English anti-suit injunctions on Chinese parties in China, or should the Chinese courts seek to counterbalance the injunctions? Without treaties to establish mutual trust between the UK and China, English anti-suit injunctions are likely to be seen as unfriendly moves with an aim of competing for shipping cases. It is worth noting that before Brexit, English anti-suit injunctions were not welcome within the European Union ('EU') as their operation runs counter to the mutual trust between member states under the Brussels I Regulation (recast).[138]

One view is that without the obligations under treaties, it is not a breach of the principle of comity if China does not recognise the effect of a foreign anti-suit injunction.[139] The scope of comity, however, is broader than recognition of duties under international treaties. Comity gives a court an opportunity to balance domestic and foreign policies in a case.[140] Also, comity is a norm largely tailored by local courts, not international law.[141] Therefore, neither the Chinese courts nor English courts have a mandatory obligation to cooperate with each other. However, it is important to remember that anti-suit injunctions are served on the respondent, not on the foreign court. As a result, the real question is: Do Chinese courts have good reasons to hear the case when respondents in China are subject to English anti-suit injunctions?

Also, is it in the interest of Chinese parties if the Chinese proceeding continues? What is almost certain is that if Chinese courts insist on exercising their jurisdiction in a case where the claimant breaches an arbitration or exclusive jurisdiction clause, the English court may refuse

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'(a) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada; (b) the person against whom the claim is made resides or has a place of business, branch or agency in Canada; or (c) the contract was made in Canada', despite the existence of an exclusive jurisdiction agreement or arbitration agreement.

136 Kate Lewins, 'The Trade Practices Act (Cth) 1974 and its impact on maritime law in Australia' (Doctoral Dissertation, Murdoch University, 2008) 11–145.

137 Ibid.

138 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:en:PDF; Comor Allianz SpA v West Tankers Inc (The Front) Case C-185/07, (2009). Clare Ambrose, Karen Maxwell and Michael Collett, London Maritime Arbitration (Routledge, 4th ed, 2017) [8.26].

139 Fengxin Liu, 'Coping with Foreign Anti-suit Injunctions in the Context of International Civil and Judicial Cooperation' (2021) 5 *Journal of Henan Administrative Institute of Politics and Law*, 64, 70; The role of comity is to preserve sovereignty of foreign courts, give effect to parties' expectation and prevent conflicts. Joel R. Paul, 'Comity in International Law' (1991) 32 *Harvard International Law Journal*, 1, 6.

140 Ibid.

141 William S. Dodge, 'International Comity in American Law' (2015) 115 *Columbia Law Review* 2071, 2074.

to recognise Chinese judgments on the basis of public policy.[142] Moreover, English courts may not stay the English proceeding or stop issuing an anti-suit injunction simply because a foreign proceeding, in breach of an exclusive jurisdiction or arbitration clause, is justified under the foreign law.[143] Another opinion is that the Chinese courts can also issue an anti-anti-suit injunction to the applicant of the English anti-suit injunction as a method of counterbalance.[144] However, there should be good reasons for Chinese courts to do so. Next, some shipping cases will be examined, with the focus placed on how Chinese courts react to English anti-suit injunctions.

### 1 *Denying the effect of the incorporation clause*

The first case examined is *Chongqing Red Dragonfly v White Winkle*.[145] Red Dragonfly, the holder of a bill of lading, claimed before the Wuhan Maritime Court that a cargo of soybeans carried by White Winkle's vessel, the Fortune Clover, were damaged at the port of delivery in China.[146] The bill of lading stated that it was '*To be used with Charterparties*' without specifying the number or date of the referred charterparties. Also, on the reverse, it provided that '*All terms and conditions, liberties and exceptions of the charterparty, dated as overleaf, including the law and arbitration clause, are herewith incorporated*.'.[147]

White Winkle challenged the jurisdiction of the Chinese court in that the incorporation clause in the bill of lading successfully incorporated a London arbitration clause from the relevant charterparty. Wuhan Maritime Court held that the incorporation clause did not incorporate the London arbitration clause to the bill of lading due to the following reasons: 1). on the face of the bill of lading in question, no charterparty was mentioned and identifiable. White Winkle argued that under English law, if a charterparty was not specified in a bill of lading, the head charterparty between Priminds Shipping (HK) Co Ltd and Citic Ship Management Ltd should be the one referred in the bill of lading; 2). Wuhan Maritime Court did not support this view as it breached the principle of privity of contract.[148] As a result, the Wuhan Maritime Court held that, without an arbitration clause, it had jurisdiction to hear the case.

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142 Yvonne Baatz, *Maritime Law* (Routledge, 5th ed, 2020) 10.
143 *OT Africa Line Ltd v Magic Sportswear & Ors* [2005] EWCA Civ 710.
144 Lu Yi, 'On the construction of anti-anti-injunction' (2020) 31(2) *Chinese Journal of Maritime Law*, 106, 111.
145 *Chongqing Red Dragonfly Oil Co. Ltd. v White Winkle Shipping S.A.* (2012) Wuhaifashangzi No.01085.
146 Ibid.
147 Ibid.
148 Ibid.

White Winkle appealed to the Hubei High Court. White Winkle's submissions were, among others, that it was possible to ascertain the referred charterparty according to the vessel's name and the date on the bill of lading. Further, English law should determine the legal effect of the incorporated arbitration clause, as the seat of arbitration was in London.[149] The Hubei High Court did not support White Winkle's submissions and held that no charterparty was incorporated into the bill of lading as no date or name of a charterparty was mentioned on the face of the bill of lading, and no arbitration clause was displayed on the face of the bill of lading.[150] Therefore, it was not necessary to consider private international law issues in this case and the Chinese court had jurisdiction in the absence of an arbitration clause in the contract.[151]

The White Winkle case also reveals that differences in substantive law may make Chinese courts sympathize with parties who start litigation in China. The reasoning of the Chinese courts did not start with a choice of law analysis.[152] If the courts determined that English law should be the applicable law to determine the validity of incorporation clause, the result in this case might have come to a different conclusion. For example, if the Chinese court applied either the proper law of the contract or the *lexi abitri* (the law chosen by the parties to govern arbitral procedure), it may find that it is the English law that will regulate the issue of incorporation of arbitration clauses or the issue of validity of the arbitration clause.[153] The Court seemed to treat the requirements of incorporation of an arbitration clause into a bill of lading as mandatory Chinese law, so non-compliance with the Chinese standard renders the incorporation of the arbitration clause invalid.

### 2 *Applying Chinese law directly*

Parallel to *Transfield Shipping Inc. v Chiping Xinfa Huayu Alumina* in the UK,[154] a court proceeding was opened in China. On the part of the Chinese proceeding, the issue of validity of an arbitration agreement was heard by Shandong High Court which received a reply from

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149 *Chongqing Red Dragonfly Ltd. v White Winkle Shipping S.A.* (2015) Yueminsizhongzi No. 00194.
150 Ibid.
151 Ibid.
152 Zhuwei Zhang, 'The characterization and applicable law of incorporation clause–review of article 76 of the Rotterdam rules' (2018) 29(2) *Chinese Journal of Maritime Law*, 65.
153 This argument is supported by the relevant Chinese laws which give priority to the law chosen by parties: Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships 2010, art 18; Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment) art 12.
154 Transfield Shipping Inc. v. Chiping Xinfa Huayu Alumina Co. Ltd [2009] EWHC (Comm) 3642 (Eng.).

the Supreme People's Court.[155] The Supreme People's Court concluded that no contract was concluded between the parties in this case. It is worth noting that the Supreme Court also held that Chinese law was the applicable law to the issue of validity of arbitration clause as it was a procedural issue; *lex fori* should be applied to solve procedural issues.[156] The Chinese court in this case did not explain why the issue of validity is a procedural issue. However, the most recent legal position in China seems to be that the applicable law to determine the validity of an international arbitration agreement should be the law chosen by the parties; if this is unavailable, the applicable law should be the law of the seat of the arbitration or the location of the chosen arbitral tribunal; the fallback option is the law of the court.[157] A direct application of the Chinese law to determine the validity of arbitration clauses skipped the process of an analysis of applicable law. A better approach is to start with a choice of law analysis and determine the proper law on the validity of arbitration agreement. Where parties' express choice is available, this issue will be solved according to parties' intention. However, where parties' choice is not available, it seems the Chinese courts will give more weight to the seat of arbitration. Given that London is an international arbitration centre, the appliable law of the seat of arbitration is likely to be English law. In other words, after a choice of law analysis, Chinese courts may lose the jurisdiction to hear some cases with an international dimension.

### 3 *Reciprocity principle and anti-suit injunctions*

The English Commercial Court does not always grant anti-suit injunctions against Chinese parties which started court proceedings in China.[158] In *Transfield Shipping Inc. v Chiping Xinfa Huayu Alumina Co. Ltd*, the Commercial Court in the UK held that Transfield did not pass the threshold of a high degree of probability to prove the existence of a charterparty between the Panamanian shipowner Transfield and the Chinese f.o.b. (Free on Board) buyer Chiping, owing to the fact that the contract which was purported to exist was in the form of Telex recap which also referred to another charterparty. It was unclear which charterparty was referred to as the basis of the contract in this case.[159] Transfield's delay in seeking English anti-suit injunctions

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155 Chiping Xinfa Huayu Aluminum Oxide Co., Ltd v Transfield Shipping Inc [2009] MSTZ No.32.
156 Ibid.
157 Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships 2010, art 18; Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment), art 12.
158 Transfield Shipping Inc. v Chiping Xinfa Huayu Alumina Co. Ltd [2009] EWHC (Comm) 3642 (Eng.).
159 Ibid.

to stop the Chinese proceedings was also an important factor considered by the Commercial Court.[160]

The Chinese courts sometimes also take a friendly approach towards English anti-suit injunctions. In 'Spar Capella', 'Spar Vega' and 'Spar Draco',[161] the applicant (shipowner) and the respondent (time charterer) had disputes from time charterparties. The shipowner went to the Shanghai Maritime Court to recognise English judgments and orders in favour of the shipowner. The respondent argued that the existence of the English anti-suit injunction system affected mutual trust and reciprocal relationships between the UK and China, as art 5 of the Civil Procedure Law of China provides that:

> if the courts of a foreign country impose restrictions on the civil litigation rights of the citizens, legal persons and other organisations of the People's Republic of China, the people's courts of the People's Republic of China shall follow the principle of reciprocity regarding the civil litigation rights of the citizens, enterprises and organisations of that foreign country.[162]

The Shanghai Maritime Court rejected this submission and opined that the mere existence of the English anti-suit injunction system did not prevent a Chinese court from recognising English judgments and orders on the basis of the reciprocity principle.[163]

There is no statutory definition of reciprocity under Chinese law. It is understood to be one of the requirements to recognise a foreign order or judgement.[164] In the past, conventional wisdom in China believed that if there is no treaty between a foreign country and China or the foreign country has no record of recognising Chinese judgment, it is difficult to expect Chinese courts to recognise the legal order or judgment of that country.[165] Arguably, the reciprocity principle refers to equality, so that where the requirements of recognition are similar, the court of one country may recognise a foreign judgment made by the court of another country.[166]

It is difficult to determine how similar the requirements to issue anti-suit injunctions in England and China are as the test of anti-suit injunction in China is not yet fully developed. However, English law has an inclination to give little weight to the role of comity when determining

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160 Ibid.
161 Spar Shipping AS v Grand China Logistics Holding (GROUP) Co LTD [2018] H72XWR No.1.
162 Ibid.
163 Ibid, [24].
164 Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (2020 Amendment) art 544.
165 Wang Li, 'The Principle of Reciprocity in Recognition of Foreign Judgments' (2022) *Nanda Law Journal* vol(1), 1，3-6.
166 Ibid 11.

whether to issue an anti-suit injunction or not upon a breach of arbitration agreement.[167] If the Chinese court decides to continue a Chinese proceeding in breach of an arbitration agreement, it is unlikely for the judgment to be recognised by the English court. As a result, Chinese courts may need to be cautious as to whether the reciprocity principle is met.

## D *Recommendation*

English courts adopt a predictable 'formula' to determine whether it is justifiable to grant an anti-suit injunction.[168] There is also evidence showing that English courts do not always 'intervene' in Chinese proceedings. For example, in *Essar Shipping Ltd v Bank of China Ltd*, the bill of lading, held by the Bank of China as security, incorporated terms from a voyage charterparty which contained a London arbitration clause.[169] The English Commercial Court recognised the effect of the incorporated clause, while it refused to grant an anti-suit injunction sought by Essar Shipping Ltd due to delay.[170] This shows that without Brussels I Regulation types of treaties between the UK and China, English courts do not have a hostile attitude towards Chinese maritime proceedings. Therefore, Chinese courts should not take a hostile attitude towards English anti-suit injunctions without analysing the justification for them. Hence, Chinese courts should only counteract English anti-suit injunctions when they have good reasons to do so.

If Chinese courts should not be hostile toward English anti-suit injunctions, then what should Chinese courts do if their jurisdiction over a case is indirectly affected by English anti-suit injunctions? If an English anti-suit injunction is granted as the target respondent breaches an arbitration clause in a bill of lading by commencing a Chinese court proceeding, what should Chinese courts do?

The general principle is that courts should not intervene in arbitration unless the law specifies that it can.[171] According to the *New York Convention*, the courts of signatory member states have a duty to refer the parties to arbitration unless the court is of the opinion that the arbitration

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167 Aggeliki Charis Cia Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87, 96.

168 See Pt II. The English courts will take in account the existence of a valid arbitration agreement, delay, loss of security, undertaking and so on.

169 Essar Shipping Ltd v Bank of China Ltd (The Kishore) [2015] EWHC 3266 (Comm).

170 Ibid.

171 See, for example, *Arbitration Act 1996* (UK) pt 1 art 1, which provides that parties are free to solve their disputes, subject only to the public interest exception.

agreement is 'null and void or inoperative or incapable of being performed'.[172] The English *Arbitration Act 1996* (UK) contains similar provisions.[173] The phrase 'null and void' usually refers to situations where arbitration agreements do not exist at all or where the agreements are void due to vitiating elements such as mistakes or fraud.[174] The word 'inoperative' indicates issues such as termination of arbitral agreements or expiry of agreed time limits.[175] Finally, 'incapable of being performed' means interruption by some external forces, such as the death of arbitrators.[176] In many cases, Chinese courts questioned the existence of an arbitration agreement incorporated by an incorporation clause in a bill of lading.

Therefore, if Chinese courts are of the opinion that, under Chinese law, the incorporation clause in a bill of lading fails to incorporate the arbitration clause, Chinese courts can accept jurisdiction.[177] Nonetheless, with regard to a bill of lading containing international elements, Chinese courts should start with an analysis of private international law to determine the applicable law issues. It is likely that the governing law of the underlying contract and the arbitration agreement are subject to English law, as historically, the English law is in favour of carriers and insurers. As analysed above, it may be wrong to apply Chinese law to determine the effect of the incorporation clause and arbitration agreement directly. In most cases, parties do not specify the applicable law of the arbitration agreement except for the governing law of the underlying contract and the seat of arbitration. From the perspective of Chinese private international law, the applicable law to determine the validity of an international arbitration agreement is in the following order: First, the law chosen by the parties of the agreement; second, the law of the seat of the arbitration or the location of the chosen arbitral tribunal; third, the law of the court.[178] Therefore, at the international level, it is unlikely for Chinese law to be applied to determine the validity of arbitration clauses, as the seat of arbitration is more likely to be in London and the proper law of the underlying contract is likely to be English law. In English law, the applicable law of the underlying contract rather than the law of the seat of

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172 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art II ('*New York Convention*').

173 *Arbitration Act 1996* (UK) s 9(4). 'On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.'

174 Robert Merkin KC and Louis Flannery KC, *Merkin and Flannery on the Arbitration Act 1996* (Routledge, 6th ed, 2020) 204.

175 Ibid 209.

176 Ibid 210.

177 See *Chongqing Red Dragonfly Oil Co. Ltd. v White Winkle Shipping S.A.* (2012) Wuhaifashangzi No. 01085.

178 Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships 2010, art 18; Judicial Interpretations of the Supreme People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign Civil Relationships (I) (2020 Amendment), art 12.

arbitration is presumed to be the applicable law to the arbitration agreement; the applicable law of the seat of arbitration cannot be solely relied on to infer either the applicable law of the contract or arbitration agreement.[179] This approach provides parties with certainty and consistency as their obligations and rights will be governed by the same system[180] unless they specify different sets of rules for different agreements. In either case, it is likely that the English law will be applied to determine the validity of the arbitration clause.

In relation to exclusive jurisdiction clauses, it is important to note that under Chinese law, in a choice of jurisdiction agreement, the chosen jurisdiction by parties should have connections to the disputes.[181] If the central gravity of the case is in China, the Chinese court has a good reason to hear the case. Also, Chinese courts can accept jurisdiction if the clause is a non-exclusive jurisdiction clause.[182]

Though it may not be a sound reason for a Chinese court to counteract an English anti-suit injunction simply because the substantive laws of two countries are different, some substantive laws may constitute mandatory law in China. For instance, one party may be forced to accept London arbitration or governing law clauses in their contracts on a take it or leave it basis;[183] one example is an arbitration clause incorporated in a bill of lading that is in the hands of a third party. According to Bryan J in the *Ulusory-11* case:

> As a matter of practical reality it is very common for cargo receivers to become bill of lading holders without being aware of or seeing the terms of any charterparty in the bills, and without being, I should add (from my own experience), very curious about what those terms are.[184]

To protect Chinese parties' interest, Chinese legislators and courts may consider the scope of mandatory laws in the context of maritime law. Chinese courts may refuse to stay the Chinese proceedings or refuse to recognise an arbitral award if the mandatory laws of China are breached. The mandatory laws of a country, including the forum laws and international Conventions the country has ratified, may be strong reasons for the court of that country to decline to stay the proceeding commenced before the court, even though parties grant exclusive

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179 Enka Insaat VE Sanayi AS v OOO Insurance Company Chubb [2020] UKSC 38.
180 Ibid.
181 Zeng Er-xiu, 'A comparative research on the effectiveness and enforcement of jurisdiction clause in China and UK' (2018) 29(4) China Journal of Maritime Law, 17.
182 Ibid.
183 Kate Lewins, 'The Trade Practices Act (Cth) 1974 and its impact on maritime law in Australia' (Doctoral Dissertation, Murdoch University, 2008) 115.
184 Ulusoy Denizilik AS v COFCO Global Harvest (Zhangjiagang) Trading Co Ltd [2020] EWHC 3645 (Comm), [30].

jurisdiction to a foreign court in their contract.[185] The Rotterdam rules[186] and the *Carriage of Goods by Sea Act 1991* (Cth) both contain jurisdiction clauses and parties should be aware of these aspects in order to have their foreign arbitral award recognised.[187]

Another instance for a Chinese court to counter-balance an English anti-suit injunction is at the stage of recognition and enforcement of the English arbitral award. It is trite law that both the rules of the seat of arbitration and the rules of enforcing court supervise arbitration.[188] If the respondent vehemently aims to counteract the anti-suit injunction, they can do so by asking Chinese courts not to recognise and enforce the English arbitral award. Nevertheless, it is less effective for a respondent to counteract an English anti-suit injunction at such a late stage, as they may have committed a contempt of court offence according to the English law.[189] Chinese courts can deny the recognition of the arbitral award, among other reasons, on the basis of public interest.[190] However, the concept of 'public interest' is interpreted narrowly. For instance, in the EU, it is limited to the circumstances where the award is obtained by fraud or corruption or where the underlying contract is an illegal contract.[191] Hence, public interest is unlikely to be used as a defence by the respondent. Also, it is difficult to argue why a London arbitration clause incorporated by an incorporation clause in a bill of lading is contrary to the public interest of China, even though Chinese law may set different requirements on the validity of incorporation clause. Considering China is a signatory to the *New York Convention*, it is difficult to push back against English arbitration at this stage, if not impossible.

One can conclude that where parties of a bill of lading contract start a court proceeding in China in breach of an arbitration clause or exclusive English jurisdiction clause, they may be subject to English anti-suit injunctions. Chinese courts, subject to the *New York Convention* and party autonomy principle, may not take action against the injunction indirectly.[192] However, the differences in substantive rule on the incorporation clauses and the chain of charterparties may

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185 Kate Lewins, 'The Trade Practices Act (Cth) 1974 and its impact on maritime law in Australia' (Doctoral Dissertation, Murdoch University, 2008) 144.

186 United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (not yet in force).

187 *United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, signed 23 September 2009, cls 66–7 (the 'Rotterdam Rules'); *Carriage of Goods by Sea Act 1991* (Cth) s 11.

188 Margaret L Moses, *The Principles and Practice of International Commercial Arbitration* (Cambridge University Press, 3rd ed, 2017) 63–91.

189 The offenders will be subject to a fine or confiscation of assets or imprisonment. *The Civil Procedure (Amendment No. 3) Rules 2020*, sch pt 81.

190 *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) art V(2)(b) ('*New York Convention*'); *Arbitration Act in China* (2017 amendment), art 58.

191 Robert Merkin KC and Louis Flannery KC, *Merkin and Flannery on the Arbitration Act 1996* (Routledge, 6th ed, 2020) 882.

192 For example, the Chinese court should not issue an anti-anti-suit injunction simply because the applicant wants to counterbalance the English anti-suit injunction.

generate uncertainty or even unfairness for foreign parties to bills of lading.[193] These issues require consideration by English courts and Chinese courts when issuing anti-suit injunctions. China may want to push back by considering what rules should be its mandatory rules and the breach of which enables the court to take further action. Also, China should refine its own test of anti-suit injunction to improve transparency and mutual trust. However, mandatory rules on jurisdiction or applicable law are unlikely to hold back English anti-suit injunctions, as the English courts show an adamant attitude to protecting party autonomy.[194]

## V CONCLUSION

The popularity of English law as the governing law of the standard international carriage of goods by sea contracts, such as some BIMCO's,[195] charterparties and bills of lading, in tandem with the status of London as the world maritime arbitration centre, give English courts an unparalleled position to supervise London-seated arbitration and issue anti-suit injunctions worldwide. It is likely that parties will have chosen English law and London-seated arbitration in their bills of lading; therefore English courts will be able to exercise jurisdiction over many shipping cases. However, once bills of lading are transferred to foreign third parties who are not privy to the terms in a charterparty which are incorporated in the bills of lading, the issue may arise as to whether the new holders can start court proceedings elsewhere and whether it is fair for them to be subject to English anti-suit injunctions.

It is advisable for Chinese courts to take a cooperative approach where a party starts a Chinese court proceeding with the purpose of avoiding a valid London-seated arbitration clause. Alternatively, similar to the *Carriage of Goods by Sea Act 1991* (Cth) s 11, the Chinese law may enact mandatory rules to limit parties' freedom to rule out the jurisdiction of the Chinese courts.[196] On the other hand, Chinese judges and legislators should develop the test of anti-suit injunctions, as the predictability and credibility of the Chinese anti-suit injunctions are largely dependent upon their consistent application and interpretation. The similarity between the tests

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193 Ibid [83]; Bryan J in the Ulusoy-11 case opined that where the claimant applied for a final anti-suit injunction, the standard of proof of proving the existence of an arbitration agreement is the balance of probability which is higher than a high degree of probability. This proves that the standard of proof of an anti-suit injunction is not a very high standard.

194 OT Africa Line Ltd v Magic Sportswear & Ors [2005] EWCA Civ 710.

195 Baltic and International Maritime Council is an international shipping organisation.

196 Carriage of Goods by Sea Act 1991 (Cth) s 11.

in China and in the UK helps both countries reduce misunderstanding and enhance cooperation in the future.

# CONVERSATION WITH BOOK

**FLEUR JOHNS**

***#HELP: Digital Humanitarianism and the Remaking of International Order***

# COMMENTS ON #HELP: DIGITAL HUMANITARIANISM AND THE REMAKING OF THE INTERNATIONAL LEGAL ORDER

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It has been a pleasure to read Professor John's most recent book 'HELP#, which meticulously presents to its readers the myriad of ways transformations are taking place in humanitarian practices with the advent of digital humanitarianism. Consequently, these changes are laying bare disjunctions and blind spots when situated within their operative environments or politico-governance frameworks. It also presents innovations and pathologies that are an outcome of this process. One the one hand, there are continuities that reinforce or compound global hierarchies and inequality; and on the other, there are discontinuities that may offer new possibilities, repositories and intimations of the commons despite old stratifications.

One (among several) insight(s) of this book that is particularly important both for readers interested in international (humanitarian) law and public law, governance, and political economy in general, is the extent to which the public and the private is enmeshed within global governance. Although this observation is not the central focus of the book, Professor Johns painstakingly shows the intricacies and layers as well as plethora of actors in digital humanitarian practices and spaces. Throughout it has become clear that humanitarianism has been as commensurate with aims of expanding or maintaining power as with those of ameliorating suffering.

The book is also clear about its focus on contemporary practices rather than engaging extensively with history. As such, it presents a truncated history that largely traces the origins of humanitarianism to 1859 with the creation of the International Committee of the Red Cross (ICRC), and follows its expansion through the interwar period, the Cold War, decolonization and beyond. The author briefly nods to new directions in humanitarian historiography that encompass political movements, colonial encounters, imperial ambitions, economic

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developments, empire etc., and also recognizes the fraught and contentious debate around the very definition of the enterprise that 'generically implies concern with human welfare as a primary or pre-eminent good and action taken out of such concern rather than primarily for pragmatic or strategic reasons' [p 4].

Considering the above, this commentary is intended to be an engagement with some of the themes discussed in the book—essentially thoughts provoked by it as opposed to specifically about it. Almost all of this commentary alludes to history in one way or another.

First, exploring the historical roots of the humanitarian project may provide sobering reflections on today's humanitarianism. The origins of humanitarianism are complex and go beyond European colonial history. This complexity and historical blind spot are important aspects of humanitarianism that #HELP may have engaged with a bit more. Humanitarianism's history is inextricably linked to the colonial project, and even decolonization from the early/mid twentieth century onwards. Ample historical examples run across the Ottoman empire, India, Africa and China, where humanitarian interventions were catalyzed based on local traditions and community organization—which is also true of today—more on this later.[1] Humanitarian causes were also adopted by anticolonial movements. Therefore, what is conventionally understood as 'the West' should not necessarily be the conventional point of departure if we are to locate a global origin story encompassing a broader collection of initiatives, movements and international relations constituting a nuanced conception of humanitarianism. #HELP acknowledges this in passing in its truncated historical account of the origin story, but on account of its emphasis on the conventional originating history of humanitarian interventions, the contents may resonate with—and indeed may be intended to cater to—a Global North readership relative to the South.

Second, #HELP shows that humanitarianism mobilized a range of different actors including nonstate actors, activists, a variety of experts including former military experts, corporations. The diversity of actors in this field warrants further thought, especially on account of shifts in the broader apparatus of colonial and post-colonial governance frameworks. Temporal and

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[1] Çelik, Semih. Between History of Humanitarianism and Humanitarianization of History: A Discussion on Ottoman Help for the Victims of the Great Irish Famine, 1845–1852. Brewis, Georgina. Fill Full the Mouth of Famine': Voluntary Action in Famine Relief in India 1896–19011. *Modern Asian Studies* 44, no. 4 (2010): 887-918; Everill, Bronwen, and Josiah Kaplan, eds. *The history and practice of humanitarian intervention and aid in Africa*. Springer, 2013; Fengjiang, Jiazhi. The Desire to Help: Vernacular Humanitarian Imaginaries in China. *Social Anthropology/Anthropologie sociale* 31, no. 1 (2023): 30-47.

material transitions in development frameworks from imperial/colonial to postcolonial/Global South, and humanitarian actors transformed from being agents of empire to embracing institutional forms of development, culminated in a host of technologically savvy actors in the twenty-first century.

The formal mobilization of humanitarian practice fundamentally relied on imperial knowledge and institutions that were enmeshed with and transformed by new forces of globalization.[2] Charities and non-profits, for e.g., Oxfam, among others, played a significant role in disaster relief in South Asia in the 1960s-70s.[3] The 1970s-80s transition saw interventions by corporate interests acting in humanitarian efforts, a turning point that made humanitarian endeavors thoroughly institutionalized, profitable and market-driven.[4]

The actors changed, though the agency of Global South actors remains ever so fraught and invisible. The account of digital humanitarianism in #HELP and its reliance on technologies of generating information and maps may also be perceived as transfixing the old into the new. The digital aspect of this exercise is a telling story of making the Global South knowable, legible and visible. The contradictions in that process may also claim some degree of vintage. One only has to look to the unintended consequences that accompanied the production of official data in several former colonies in the course of the nineteenth century. British India is a stark example of these developments where the data captured in the population census (onwards of 1872) had fixed identities, creating distortions in official accounts of Indian society.[5] The distance between the colonial state and its subjects was never fully ameliorated. The twentieth century paved the way for an international legal order that superimposed itself upon the framework left behind by the old empire. The Global South, while grappling with modernity and development, would forever play catch up with technologies of rule. Perhaps, this is indirectly alluded to in the book through the analog-digital tension.

Given the distorted nature of Global South representation, can it ever be truly knowable? Informality continues to be a defining feature of Southern demographics, economies and

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2 Pahuja, Sundhya. Decolonising international law: development, economic growth and the politics of universality. Vol. 86. Cambridge University Press, 2011.

3 O'Sullivan, Kevin. Aidland in South Asia: humanitarian crisis and the contours of the global aid industry in the long 1970s. European Review of History: Revue européenne d'histoire 29, no. 3 (2022): 499-519.

4 Carbonnier, Gilles, 'The Humanitarian Market', *Humanitarian Economics: War, Disaster, and the Global Aid Market* (2016; online edn, Oxford Academic, 22 Sept. 2016)

5 Samarendra, Padmanabh. Census in colonial India and the birth of caste. Economic and political weekly (2011): 51-58.

imaginaries. Accordingly, the impact of the digital economy and its full capture of the South continues to be incomplete. Natural disasters in many Global South countries often witness community organizers and volunteers first on the scene even before emergency and/or NGO services invested in one or another form of digital interfaces. The prevalence and agency of these actors may explain, in part, the resilience among some of the most vulnerable populace across the globe affected by natural and climate change-induced disasters. One question that this reader of #HELP was left wondering was who the digital mapping volunteers were. They peered into view every now and then remained largely latent. Addressing that blind spot, however, may be another book altogether, which focuses on the under-represented actors in the underbelly of humanitarian intervention practices. The transformative potential of technology during crises and disasters is likely to achieve little without people and policies that help realize their utility. Accordingly, capacity development, capacity building, training and transfer of knowledge might actually occur or be internalized without identifying who their agents are and whether they are embedded in or emanate from affected communities.

Third, #HELP claims that anyone who enacts any form of legal or political agency or affiliation on the global plane has a stake in the transformation of humanitarianism. The shifts in the field then are not just important for professionals engaged in humanitarian practices but also matters for global investment particularly as it relates to technology. To what extent is this true for the Global South? To discern that question, we need to return to the issue of agency. Shaped by these digital transformations, for whom is the global order of tomorrow, and in what order of priority? While #HELP touches on the effects of digital humanitarianism's transformations in places like Indonesia and Bangladesh, the technology is developed and initiated in the Global North through cooperation and/or collaboration between international organizations and corporate actors. It is not entirely uncommon for these actors to display clientelist behavior that may be induced by competition for funding, prestige and proximity to state power for ensuring cooperation, all of which may potentially compound the incorporation and practice of digital humanitarian practices. In these empirical and technical aspects of the digital humanitarian exercise, the South, like its colonized past and predecessor, continues to be an imperial laboratory from which knowledge and profit are generated, extracted and exported to the Metropole.

What #HELP offers us as a silver lining are the possibilities and innovations that may come to pass, but it leaves the reader short of concretely elaborating on what those possibilities might be. The book also misses a crucial opportunity of speaking to a wider audience beyond a subset

of readers and scholars of international law and digital humanitarianism—though doing so may not at all have been an objective of the author—purely on account of jargon and language. Considering the Global South's uneven access to knowledge repositories, one may hope that such an important contribution to the field as #HELP ought to be made accessible to academics as well as policymakers, particularly those whose decisions and practices help shape the field.

# REVIEW ESSAY ON *#HELP: DIGITAL HUMANITARIANISM AND THE REMAKING OF INTERNATIONAL ORDER*

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Fleur Johns' book *#Help: Digital Humanitarianism and the Remaking of International Order* is a notable and valuable contribution to many academic disciplines, particularly the interdisciplinary law and technology literature. Books and scholarly works that deal with the impact of new and emerging technologies on law and/or society tend to generally fall into two categories: those that are blindly enamoured with the supposed positive influence of the technology and those in a state of moral panic about its negative consequences. This book falls into neither of these because it deftly balances fascination with technology with high-level theoretical analysis and empirically-grounded research. This produces original and critically nuanced exploration of the subject technology and its various contexts and effects.

The main of aim of the book is to investigate 'digital humanitarianism and its ramifications for international law and politics'[1] and its principal research question is 'how are possibilities for politico-legal life on the global plane reconfigured by the influx of digital technology into humanitarian practice and what intimations does this offer of global ordering to come?'.[2] According to the author, digital humanitarianism relates to 'the growing ubiquity of digital technologies … and the resulting augmentation of data-gathering, -storage, - processing, -analysis, and -dissemination capacities' in the humanitarian field.[3] The book aims to study digital humanitarianism through the novel examination of digital interfaces, which technically are 'any standardized means of communication between human users and computers, or among computers and other electronic devices',[4] and their relational effects. The book analyses the

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1 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023) 2.

2 Ibid 21.

3 Ibid 5.

4 Ibid 9.

preconditions, operations and effects of digital interfaces thematically in relation to 'maps, populations, emergencies, [and] states'[5] and these are the subject of separate chapters.

The book is well researched, logically developed and articulately written. It offers an enlightening discussion on what is occurring with the interface of digital technologies and international humanitarian work and efforts and presents excellent theoretical and empirical insights. In the chapter on maps, the author observes how 'the routing of humanitarian mapping work through digital interfaces … tends to create slippages, misreads, and overruns between digital and analog logics combined in that practice. These incongruities are not failures, because digital humanitarian maps do not aspire to represent the world definitively or comprehensively'.[6] As a result, 'these mismatches and overruns also create footholds for possible practices of counter-mapping'.[7] The chapter on populations explains how '[d]igital interfaces… are reconstituting collectives in the international humanitarian field and playing a significant role in such collectives' qualification and effectuation as agents and objects of governance' and the 'sublimation of populations into digital aggregates'.[8] Digitisation therefore fundamentally transforms 'archetypes of humanitarian perception, action, and governance'.[9] In Chapter 4 on emergencies, the author keenly observes that 'digital interfaces either makes them everyone's and no one's problem or renders them actionable by and for a relatively narrow range of people; it turns them from sites of potential unrest into tractable problems of data deficiency'.[10] Moreover, it makes 'humanitarian emergencies incessant – something with which those in the present must endlessly try to cope for the benefit of some idealized future beneficiaries'.[11] In the chapter on states, the author notes how digital interfaces have a significant impact on the constitution and actions of states. For instance, '[t]erritorial control no longer implies a commensurate level of informational control. Government operations are moving into discrete, proprietary digital registers'.[12] More problematically, 'states are subject to a standard of datafication as both a criterion for statehood and a measure of their statehood's ongoing viability. States are expected to work continually toward ever-greater digital data access, accumulation, productivity, and control to demonstrate capability

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5 Ibid.
6 Ibid 32.
7 Ibid 67.
8 Ibid 71.
9 Ibid 73.
10 Ibid 103.
11 Ibid.
12 Ibid 163.

to conduct themselves internationally, with relative independence, in the humanitarian sphere and more broadly'.[13]

The book is a richly-detailed, thorough and in-depth examination of the impact of digitisation on the humanitarian field. There are a few areas though that could have been explained or expanded further. With regard to the law and policy chapter, reference to and interrogation of Lawrence Lessig's four modalities of regulation and his oft-quoted dictum of 'code is law'[14] could have strengthened and deepened the legal analysis as these would have been useful conceptual conduits between digital interfaces and the different type of laws and norms (i.e., 'treaties, multistakeholder arrangements, international guidelines, contracts, ethical codes') examined in the book.[15] For instance, if code is law, how do digital interfaces regulate the actions of persons and in what way do interface developers and providers act as regulators in the digital humanitarian field? Furthermore, the examination and application of legal pluralism and other concepts and principles in the field of socio-legal studies could have also helped better frame the interactions between and among the 'dense array of international, regional, national, and subnational laws, guidelines, and standards – both "hard" and "soft" –… implicated and… borne upon the development and deployment of the digital interfaces'.[16]

The book could have also benefitted from a more robust discussion of postcolonial and Global South theories and frameworks. Many of the digital humanitarian works and projects examined in this book occur in developing countries and former colonies of Western states. The presentation and analysis could have been better contextualised and more reflective of existing socio-cultural contexts if Global South perspectives and paradigms were equally investigated together with the predominantly Western theorists and theories applied in the book.

Finally, the book could have offered more concrete, specific and actionable law and policy recommendations on how to address the impact of digital humanitarianism vis-à-vis international law and order. The book's conclusions, while sound and based on exceptional analysis and research, tend to remain in the theoretical and epistemological realm and are not very practicable. The author seems to recognise this potential limitation: 'To some readers, this might not seem useful. Works of international law are meant to offer reform proposals or

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13 Ibid 164.
14 Lawrence Lessig, *Code version 2.0* (Basic Books 2006) 1 and 123.
15 Johns, *#Help* 202.
16 Ibid 178.

regulatory solutions'.[17] While the book is able to show clearly that digital humanitarianism is complicated (which it is) and it could benefit from the author's proposed new perspective, reorientation or 'directionality' (which it will), one would expect more legal or normative recommendations given the book's emphasis on the importance of the political and the 'politics of use'.[18] The book could be all the more 'useful' for law and policymakers, lawyers, and interested stakeholders such as users and non-governmental organisations, if it did not only describe the problem but also prescribed possible approaches, answers and solutions that go beyond the philosophical.[19]

Regardless of these minor critiques, the book successfully achieves its stated research aims and objectives. It is able to present and examine the full complexity of digital humanitarianism and it provides well-founded theoretical and philosophical analysis that can inform further and future research and thinking on this subject.

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17 Ibid 223.
18 Ibid 205.
19 Ibid (see on the value of usefulness).

# FROM DIGITAL HUMANITARIANISM TO CRYPTO-HUMANITARIANISM

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*He said that he was a utilitarian, and he believed that the ways that people tried to justify rules like 'don't lie' and 'don't steal' within utilitarianism didn't work, and he thought that the only moral rule that mattered was…trying to create the greatest good for the greatest number of people or beings.*

Caroline Ellison, 13 October 2023[1]

## Introduction

In late 2022, the cryptocurrency exchange, FTX, imploded. No longer able to service a sudden increase in customer withdrawals, the corporation had to file for bankruptcy in the United States Bankruptcy Court for the District of Delaware.[2] FTX is reported to owe its customers as much as US$ 8 billion and, at the time of writing, the founder of FTX, Sam Bankman-Fried (SBF) is subject to criminal prosecution for conspiracy and fraud.[3] The collapse of FTX has not only shaken crypto-currency markets over the past year but has also generated considerable anxiety in the 'Effective Altruism' social movement that SBF, and several of his colleagues and collaborators, associate with. Firstly, and most obviously, this is because FTX had committed to funding a number of projects aligned with the objectives of this movement through the FTX Future Fund and the donees may be required to return the donations that have

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1 Victoria Bekiempis, 'Caroline Ellison's Testimony against Sam Bankman-Fried: Five Key Takeaways' (the Guardian, 13 October 2023) <https://www.theguardian.com/business/2023/oct/13/caroline-ellison-testimony-sam-bankman-fried-trial-takeaways> accessed 15 December 2023.

2 David Yaffe-Bellany, 'Embattled Crypto Exchange FTX Files for Bankruptcy' The New York Times (11 November 2022) <https://www.nytimes.com/2022/11/11/business/ftx-bankruptcy.html> accessed 15 December 2023.

3 Leonie Chao-Fong, 'Sam Bankman-Fried Trial: "I May Have Unwittingly Contributed to a Crime", FTX Developer Tells Court – as It Happened' (the Guardian, 4 October 2023) <https://www.theguardian.com/business/live/2023/oct/04/sam-bankman-fried-trial-ftx-live-updates> accessed 15 December 2023.

been paid out.[4] The association with the FTX Future Fund was the source of considerable embarrassment for champions of effective altruism, such as the philosopher William MacAskill, who served on the advisory board of the fund. Secondly, it threw into sharp relief some of the troubling implications of effective altruism, particularly its long-termist variant.[5]

Followers of effective altruism believe that people should not only try to act altruistically but they should do so in the most ambitious, efficient, and rational way possible. This means that instead of working for a charity or helping disburse relief goods in the wake of a natural disaster, individuals should secure the most lucrative jobs possible and make substantial donations (e.g., 10 per cent of income). A donor with a highly-paid job at a hedge fund would have more impact through monetary donations, by enabling humanitarian NGOs to hire multiple personnel and acquire resources, than if the donor personally worked on the ground in a conflict zone. The causes that are supported are similarly unsentimentally assessed: it is preferable to donate to someone who has more 'Quality-Adjusted Life Years' (QALYS) ahead than someone who doesn't, with a donee with a disability or chronic illness automatically deemed to have fewer quality-adjusted life years remaining.[6] In other words, it is better to use limited humanitarian resources to fund a limb prosthetic for an otherwise healthy 20-year old than allocate it to the treatment of a 40-year old non-terminal cancer patient, as the former has more QALYS ahead of them.

There is some irony in this argument about being dispassionate and detached in assessing the worthiness of causes. The idea of elective altruism has its roots in the utilitarian philosophy of Peter Singer, in particular, an influential 1972 essay 'Famine, Affluence, and Morality'. That essay opened with a heart-rending vignette on the 'suffering and death' and 'lack of food, shelter, and medical care' in the newly-liberated Bangladesh,[7] so as to move the reader to agree with his core argument: 'if it is in our power to prevent something bad from happening, without

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4 Sophie McBain, 'Sam Bankman-Fried and the Effective Altruism Delusion' (New Statesman, 3 November 2023) <https://www.newstatesman.com/long-reads/2023/11/sam-bankman-fried-crypto-king-effective-altruism> accessed 15 December 2023.

5 According to Moorhouse, '"Longtermism" is the view that positively influencing the long-term future is a key moral priority of our time. Three ideas come together to suggest this view. First, future people matter. Our lives surely matter just as much as those lived thousands of years ago — so why shouldn't the lives of people living thousands of years from now matter equally? Second, the future could be vast. Absent catastrophe, most people who will ever live have not yet been born. Third, our actions may predictably influence how well this long-term future goes. In sum, it may be our responsibility to ensure future generations get to survive and flourish"' Fin Moorhouse, 'Longtermism: An Introduction; (Effective Altruism, 27 January 2021) <https://www.effectivealtruism.org/articles/longtermism> accessed 31 January 2024.

6 Sophie McBain, 'Sam Bankman-Fried and the Effective Altruism Delusion' (New Statesman, 3 November 2023) <https://www.newstatesman.com/long-reads/2023/11/sam-bankman-fried-crypto-king-effective-altruism> accessed 15 December 2023.

7 Peter Singer, 'Famine, Affluence, and Morality' (1972) 1 Philosophy & Public Affairs 229, 229.

thereby sacrificing anything of comparable moral importance, we ought, morally, to do it'.[8] Yet, 21st-century, longtermist effective altruists like Nick Beckstead make the argument that all things being equal, it is better to save lives in wealthy countries than lives in impoverished countries as the former are more economically productive and innovative. As a consequence, these wealthy individuals—primarily citizens of the Global North—are statistically more likely to positively impact the long-term future of humanity, one which extends thousands of generations into the future when we are (presumably) an interplanetary species.[9]

While not all effective altruists subscribe to this longtermist view, SBF appeared to be committed to longtermism. In setting up the FTX Future Fund, he appointed Beckstead as its CEO. The projects that the Fund donated to ranged from the early detection of pathogens to the 'safe development of artificial intelligence'.[10] The goal was not to support short-term causes, like providing relief to communities devastated by an earthquake, but to save humanity (including future humans) from civilization-ending catastrophes and extinction.[11] In pursuit of this goal, the ends justify the means. Sometimes underhanded means are necessary to achieve a long-term ethical and good outcome. At least, this is what SBF and his team claimed to believe. After FTX filed for bankruptcy, SBF candidly wrote to one journalist that he only spoke about ethics because 'it's what reputations are made of, to some extent…by this dumb game we woke westerners play where we say all the right shiboleths [sic] and so everyone likes us'.

During the ongoing criminal trial of SBF, there have been several attempts to better understand the mind and actions of this young one-time billionaire. One recent essay explored the research of his mother Barbara Fried, a law professor at Stanford, as some of her publications appear to provide insight into SBF's 'faulty moral universe'.[12] In a 2013 essay, Fried sought to abolish the concept of *blame*, challenging the idea that humans have free will but instead claiming that

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8 Ibid, 231.

9 Nicholas Beckstead, 'On the Overwhelming Importance of Shaping the Far Future' (PhD Dissertation, Rutgers University 2013) 11 https://rucore.libraries.rutgers.edu/rutgers-lib/40469/PDF/1/play/.

10 Future Fund, 'Home' (Future Fund, 2023) <https://ftxfuturefund.org/> accessed 15 December 2023; G Lewis-Kraus , 'The Reluctant Prophet of Effective Altruism' [2022] The New Yorker <https://www.newyorker.com/magazine/2022/08/15/the-reluctant-prophet-of-effective-altruism> accessed 15 December 2023.

11 Kaylee Piper, 'Sam Bankman-Fried Tries to Explain Himself' (Vox, 16 November 2022) <https://www.vox.com/future-perfect/23462333/sam-bankman-fried-ftx-cryptocurrency-effective-altruism-crypto-bahamas-philanthropy> accessed 15 December 2023.

12 David Z. Morris, 'The Faulty Moral Universe of Sam Bankman-Fried' (*Coindesk*, 16 December 2022) <https://www.coindesk.com/consensus-magazine/2022/12/16/the-faulty-moral-universe-of-sam-bankman-fried/> accessed 15 December 2023.

humans are like automatons; programmed and conditioned by their circumstances, genetics, and upbringing.[13] If humans cannot depart from the behaviour towards which they are naturally predisposed, then can anyone be blamed for their actions? Denying individual moral responsibility is not only a convenient stance for the defendant of a multi-billion dollar fraud trial but reveals an inclination towards a mechanistic understanding of human nature. This mechanistic understanding is comfortable with envisioning a future for humanity that involves space colonisation and the uploading of human consciousness into virtual simulations that sit on servers orbiting distant stars.[14]

The faulty moral universe of SBF is not an anomaly and in various ways, its imprint can be noticed across the nascent 'crypto-altruism' sector, part of which he helped fund. The manner in which this and other personal ideologies shape individuals and institutions involved in crypto-altruist initiatives is important to understand as they have a direct bearing on the distribution of authority and power in crypto-altruist activities, even if the use of blockchain technology obscures the sources and exercises of this authority. As Fleur Johns presciently asks in a 2021 introductory article for a special issue of the *American Journal of International Law Unbound*, through the use of blockchain technology '[w]hose authority is being "automated away" and whose is being augmented by prevailing blockchain implementations'?[15]

For the purposes of this essay, Fleur Johns' book, (#Help),[16] provides a useful framework for critically engaging with the impact of crypto-humanitarian projects, despite her choice not to focus on blockchain-based digital humanitarian activities in her book.[17] While crypto-altruism is broadly understood to embrace both charitable/philanthropic and humanitarian efforts, for the purpose of this essay, I will focus primarily on crypto-humanitarianism. Thus, in contrast to Novak's definition of humanitarian activity as 'financial and non-financial efforts to promote human wellbeing',[18] I will adopt Johns' explanation that humanitarian activities are necessary interventions by state or non-state actors in a situation where a state fails to maintain security

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13 Barbara H. Fried, 'Beyond Blame' [2013] *Boston Review* <https://www.bostonreview.net/forum/barbara-fried-beyond-blame-moral-responsibility-philosophy-law/> accessed 15 December 2023.

14 Émile P Torres, 'Why Longtermism Is the World's Most Dangerous Secular Credo | Aeon Essays' (Aeon, 19 October 2021) <https://aeon.co/essays/why-longtermism-is-the-worlds-most-dangerous-secular-credo> accessed 15 December 2023.

15 Fleur Johns, 'Centers and Peripheries in a World of Blockchain: An Introduction to the Symposium' (2021) 115 AJIL Unbound 404, 404 <https://doi.org/10.1017/aju.2021.67>.

16 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023).

17 Ibid, 19.

18 Mikayla Novak, 'Crypto altruism: Applying blockchain to charitable and humanitarian activities' [2023] Chinese Public Administration Review 153967542311751, 10 <http://dx.doi.org/10.1177/15396754231175173>.

and protect its sovereign subjects.[19] The following section will present a brief overview of blockchain technology and its application for crypto-humanitarian ends. I will subsequently turn to Johns' book. This essay will not substantively retread the arguments made by Johns but will mirror the structure of Johns' book. After distinguishing crypto-interfaces from digital interfaces, I will compare and contrast three crypto-interfaces—crypto-maps, proof-of-personhood applications, and crypto-humanitarian emergency technologies—with comparable digital interfaces used in digital humanitarian efforts. This will allow me to offer an evaluation and critique of both digital and crypto-interfaces, before homing in on particular concerns raised by crypto-humanitarian projects. I conclude with a set of eight questions for future researchers of crypto-humanitarianism to explore.

## Crypto-humanitarianism

Crypto-humanitarianism responds to the crisis of trust in the humanitarian and charity sectors, where there are concerns about organizations in these sectors managing donations and making a meaningful impact.[20] As the ongoing war in Palestine illustrates, in conflict situations there may be fears that access to foreign humanitarian aid will be disrupted by diplomatic wrangling and a lack of united political will, even when it comes to honouring existing financial and non-financial commitments.[21]

Blockchain technologies are of interest to the humanitarian sector primarily because of some of its core features: decentralization, transparency, tamper resistance, and resilience. Blockchains nowadays have a variety of technical properties, but even the most recent examples bear a resemblance to the Bitcoin blockchain.[22] Broadly speaking, a blockchain is a type of append-only ledger that is maintained by a distributed network of computers ('nodes') in conformity with a protocol that uses cryptographic techniques to enable a shared history to exist between the peer computers and contains conditions and game-theoretic incentives for adding unique 'blocks' of transactions to the ledger. A Proof of Work (PoW) consensus protocol requires block producers to solve a complex and resource-intensive computational

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19 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023) 138.

20 Mikayla Novak, 'Crypto altruism: Applying blockchain to charitable and humanitarian activities' [2023] Chinese Public Administration Review 153967542311751, 2 <http://dx.doi.org/10.1177/15396754231175173>

21 Emanuela-Chiara Gillard, 'Humanitarian Pauses and Ceasefires – What Are the Differences?' (Chatham House, 6 November 2023) <https://www.chathamhouse.org/2023/11/humanitarian-pauses-and-ceasefires-what-are-differences>; Bernhard Reinsberg, 'Blockchain Technology and the Governance of Foreign Aid' (2019) 15 Journal of Institutional Economics 413 <https://doi.org/10.1017/S1744137418000462>.

22 Mari-Cruz Valiente and Florian Tschorsch, 'Blockchain-Based Technologies' (2021) 10 Internet Policy Review <https://policyreview.info/glossary/blockchain-based-technologies>.

puzzle to mine a new block. A Proof of Stake (PoS) consensus protocol, instead, requires block producers to stake a specific amount of digital assets to add a new block. Prominent blockchains, such as Bitcoin and Ethereum, are public and permissionless, which means that anyone can join as a network participant, from being a block producer to an ordinary user, without requiring anyone's prior approval. In contrast, private and permissioned blockchains are developed by one or more organizations with the explicit intention of approving participants. Many, but not all, crypto humanitarian projects use private and permissioned blockchains.[23]

As blockchains are maintained by a network of computers that are operated by a large network of people and organizations, rather than by one individual operator, they are deemed to be decentralized. Consequently, network participants do not need to trust any single operator—and risk having their trust betrayed—but only need to be confident that the technical system and game theoretic incentives function as intended.[24] As a corollary, blockchains are tamper resistant as any effort to retroactively modify the ledger would not only be resource-intensive, but tampering would become almost immediately evident to all the nodes in the network. Blockchains are resilient as copies of the ledger and its transaction history are reproduced across all the nodes in a network, and consequently shutting down one or more nodes is insufficient for altering or taking control of the network. They are also transparent as transactions need to be visible to all network participants for them to be able to verify and validate compliance with the rules of the protocol.[25] Yet, some of these benefits are absent or diminished in the case of private, permissioned blockchains. The transactions on private, permissioned blockchains may be transparent among the organizations that run the nodes maintaining the network (e.g., government agencies and humanitarian aid organizations) but the data may not be visible to the wider public. Relatedly, pseudonymous participation in public, permissionless blockchains is possible whereas the maintainers of a private, permissioned blockchain network become aware of the identities of network participants as part of the approval process. The relative resilience of a private, permissioned network compared to a public, permissionless network can also be called into question as the former

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23 Primavera de Filippi, Wessel Reijers and Morshed Mannan, *Blockchain Governance* (MIT Press, 2024).

24 Primavera de Filippi, Morshed Mannan and Wessel Reijers, 'Blockchain as a confidence machine: The problem of trust & challenges of governance' (2020) 62 Technology in Society 101284 <http://dx.doi.org/10.1016/j.techsoc.2020.101284>.

25 Primavera de Filippi,, Morshed Mannan and Wessel Reijers, 'The Alegality of Blockchain Technology' (2022) 41 Policy and Society 358 <https://doi.org/10.1093/polsoc/puac006>.

can be operated by a few nodes that can coordinate to shut down the entire network. Nevertheless, for reasons explained below, crypto-humanitarian projects may make the design choice to have their blockchain systems be private and permissioned.

Blockchain technologies have evolved since the Bitcoin blockchain was launched. The Ethereum blockchain, for instance, enables software code to be deployed on a blockchain and assigned an address so that when transactions are sent to that address by a user 'signing' the transaction with their private key, it deterministically executes the instructions specified in that code without requiring any further action from a third party.[26] These 'smart contracts' are analogized with vending machines, where the payment of a correct amount of cash will immediately and deterministically dispense a certain product without intervention by the vending machine operator or the organization that installed the vending machine. Smart contracts are leveraged for a wide range of purposes, from issuing tokens for payments, fundraising, and allocating voting rights in an organization to trading digital collectibles.[27] They do not only rely on data that is available online but can be connected to actors that can transmit 'off-chain' data 'on-chain'. Smart contracts can be aggregated for more complex transactions and forms of coordination, from various forms of lending to organizing working arrangements.[28] This 'bundle of smart contracts' have come to be described as decentralized autonomous organizations (DAOs) and is being used to coordinate a variety of human-machine interactions.

These technologies can enhance trust between multiple actors in humanitarian operations by increasing the credibility of commitments and the transparency, immutability, and sharing of vital information.[29] This form of 'swift' trust in a high-pressure environment can prevent breakdowns in communication and facilitate productive collaboration between organizations involved in the disbursement of humanitarian aid. A prominent example is the World Food

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[26] Primavera De Filippi, Chris Wray and Giovanni Sileno, 'Smart contracts' (2021) 10(2) Internet Policy Review <http://dx.doi.org/10.14763/2021.2.1549> accessed 14 December 2023.

[27] Ibid.

[28] Morshed Mannan, 'The Promise and Perils of Corporate Governance-by-Design in Blockchain-Based Collectives: The Case of dOrg', Co-operation and Co-operatives in 21st-Century Europe (Bristol University Press 2023) <<https://doi.org/10.51952/9781529226430.ch005>.

[29] Cécile L'Hermitte and Nirmal-Kumar C Nair, 'A blockchain-enabled framework for sharing logistics resources during emergency operations' (2021) 45(3) Disasters 527 <http://dx.doi.org/10.1111/disa.12436>; Bernhard Reinsberg, 'Fully-automated liberalism? Blockchain technology and international cooperation in an anarchic world' (2021) 13(2) International Theory 287, 288 < https://doi.org/10.1017/S1752971920000305>; Rameshwar Dubey and others, 'Blockchain technology for enhancing swift-trust, collaboration and resilience within a humanitarian supply chain setting' (2020) 58(11) International Journal of Production Research 3381, 3390-3391 <http://dx.doi.org/10.1080/00207543.2020.1722860>.

Programme's Building Blocks project which, since 2017, has disbursed over 325 million USD in aid to over a million refugees across Bangladesh and Jordan.[30] Building Blocks has also been active in coordinating aid that has been distributed in the wake of the explosion in the Beirut port and the ongoing war in Ukraine. The distinguishing feature of the Building Blocks project is that participating humanitarian organizations jointly control and operate a private permissioned blockchain network that allows them to coordinate the disbursement of food, cash, medicine, sanitary goods, and other relief items without duplicating efforts or providing unintended excess assistance.[31]

The use of blockchain technologies enables donors to monitor donations (e.g., to Oxfam with Unblocked Cash), including the achievement of milestones (e.g., with GiveTrack), as well as opening new secure forms of direct (micro-)donations without fees charged or rents extracted by intermediaries (e.g., through Giveth).[32] Donations held in smart contracts can be transferred to humanitarian agencies and donees if certain objective indicators are met, without requiring politically charged decisions. Following the earthquakes that devastated Türkiye and Syria in early 2023, over 5.9 million USD in cryptocurrencies were donated to various relief organizations, a significant contribution in a region where states may try to stymie the flow of aid for political purposes.[33] Relatedly, automating payments for the delivery of relief goods can reduce the logistical bottlenecks that can hamper humanitarian efforts. 'Programmable aid' could arguably 'rapidly distribute digital aid to all the households in a disaster-affected region within hours of the event'.[34] Cost- and time-efficient distribution of assistance is pivotal for humanitarian organizations, with optimistic assessments deeming blockchain technologies to

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30 WFP, 'Building Blocks | WFP Innovation' (WFP Innovation, 14 November 2023) <https://innovation.wfp.org/project/building-blocks> accessed 14 December 2023.

31 Ibid. Some have criticized this approach, arguing that a project that claims to use a 'blockchain' should not be private and permissioned, as it diminishes the participatory and transparency qualities that ensure a blockchain has input and procedural legitimacy. Such blockchains give no or limited voice to beneficiaries of humanitarian aid or the states where such aid is distributed. Georgios Dimitropoulos, 'The use of blockchain by international organizations: effectiveness and legitimacy' (2022) 41(3) *Policy and Society* 328, 336 < https://doi.org/10.1093/polsoc/puab021>; Angela Walch, 'Blockchain Applications to International Affairs: Reasons for Skepticism: Interview with Angela Walch' (2018) 19 Geo J Int'l Aff 27, 29.

32 Mikayla Novak, 'Crypto altruism: Applying blockchain to charitable and humanitarian activities' [2023] Chinese Public Administration Review 153967542311751, 5 <http://dx.doi.org/10.1177/15396754231175173>.

33 Cheikosman E, 'How blockchain-driven humanitarianism can work: for people, not politics' (World Economic Forum, 1 March 2023) <www.weforum.org/agenda/2023/03/blockchain-driven-humanitarianism/> accessed 14 December 2023.

34 World Economic Forum, Blockchain-Based Digital Currency and Tools for Cross-Border Aid Disbursement (5/8 Digital Currency Governance Consortium White Paper Series, World Economic Forum 2021) 7 <www3.weforum.org/docs/WEF_Digital_Currency_for_Cross_Border_Aid_Disbursement_2021.pdf> accessed 15 December 2023.

be a solution to bureaucratic red tape.[35] Increasing the efficient allocation of donations and combatting fraud fosters donor trust and satisfaction.

More ambitiously, there have been discussions of turning humanitarian aid organizations into regulated financial institutions that themselves act as crypto-asset service providers. In this speculative vision, aid organizations would operate their own payment systems and even issue stablecoins, to reduce their dependency on third-party financial institutions and prevent interference in the cross-border flow of aid.[36] The World Economic Forum provides an example of the stablecoin AirUSD (itself backed by the US dollar-backed stablecoin USDC) issued by the crypto-payment platform Airtm being used to make direct donations to medical workers confronting the COVID-19 pandemic in Venezuela, which may otherwise be censored or obstructed by the local government.[37] Another example is the Oxfam Unblocked Cash project in Vanuatu, where e-voucher cards topped up with stablecoins by Oxfam were issued to those affected by natural disasters.[38] These pre-screened individuals could then make payments by tapping their cards on vendors' smartphone devices, without even having to be constantly connected to the internet.[39] Beyond crypto-humanitarianism, there are a growing number of blockchain projects and prototypes that are involved in social and charitable activities. For instance, a broad suite of blockchain applications seeks to encourage environmental sustainability and transparency in climate change efforts (often through market-based solutions, e.g., KlimaDAO).[40] In sum, if all a person needs to be a digital humanitarian is access to the internet,[41] then all that is required to be a crypto-humanitarian is a crypto-wallet.

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35 Hossein Baharmand and others, 'Developing a framework for designing humanitarian blockchain projects' (2021) 131 Computers in Industry 103487 <http://dx.doi.org/10.1016/j.compind.2021.103487>.

36 World Economic Forum, Blockchain-Based Digital Currency and Tools for Cross-Border Aid Disbursement (5/8 Digital Currency Governance Consortium White Paper Series, World Economic Forum 2021) 8 <www3.weforum.org/docs/WEF_Digital_Currency_for_Cross_Border_Aid_Disbursement_2021.pdf> accessed 15 December 2023.

37 Ibid, 11; Team Circle, 'Circle Partners with Venezuela to Send Financial Aid with USDC' (Circle, 20 November 2020) <www.circle.com/blog/circle-partners-with-bolivarian-republic-of-venezuela-and-airtm-to-deliver-aid-to-venezuelans-using-usdc> accessed 14 December 2023.

38 Consensys, 'Blockchain for NGOs: Project Unblocked Cash Case Study' (*Consensys*, 2023) <https://consensys.io/blockchain-use-cases/social-impact/project-unblocked-cash-case-study> accessed 14 December 2023.

39 For more on the use of (e-)vouchers and tokens generally, see Rachel O' Dwyer, Tokens: The Future of Money in the Age of the Platform (Verso 2023).

40 Marco Schletz and others, 'Blockchain and regenerative finance: charting a path toward regeneration' (2023) 6 Frontiers in Blockchain 1, 6 <http://dx.doi.org/10.3389/fbloc.2023.1165133>; Sicilia M-A and others, 'Understanding KlimaDAO Use and Value: Insights from an Empirical Analysis', Electronic Governance with Emerging Technologies (Springer Nature Switzerland 2022) <http://dx.doi.org/10.1007/978-3-031-22950-3_17>.

41 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 5.

## Crypto-interfaces

Having provided a brief overview of crypto-humanitarianism, I now turn to Johns' book. In #HELP, the primary research question that Johns presents is: 'How are possibilities for politico-legal life on the global plane reconfigured by the influx of digital technology into humanitarian practice and what intimations does this offer of global ordering to come?'[42] While there are several ways in which this influx of digital technologies can be approached—such as the study of algorithms and platforms—she chose to focus on interfaces. Several *digital interfaces* are referred to as examples throughout the book, from mapping applications to digital aggregators of populations, but her use of the term *interface* has a specific meaning. The study of interfaces involves studying the relational effects arising from the interaction of hardware (e.g., mobile phones), software, and humans. Instead of (just) being 'things' in themselves, interfaces are 'effects' produced by the socio-technical operations that bring interfaces into being, maintain them, and use them.[43] The study of interfaces in this sense allows for an apprehension of the implications that a broad suite of factors and actors have on digital humanitarian projects. The objective of the book is not to make the use of these technologies more legally or regulatorily 'compliant', but to reveal the high stakes for collective life and politics raised through their use.[44]

The distinction between analogue and digital interfaces is an important element of her evaluation of how the humanitarian field has been transformed by the use of digital technologies. She explains: 'Analogue logic and technology are concerned, that is, with similarity, comparability, contiguity, sequence, and similarity. Analogue differences are differences of degree, not those of opposition or either/or distinction'.[45] In contrast, digital differences are 1s and 0s, either/or, something or nothing; consequently, digital technologies are not suited to representing interim states or spans. The digital thus does not depend on maintaining a connection between the symbolic and the real.

I take my cue from this understanding of interfaces to expand on the distinctiveness of crypto-interfaces. Johns explains that just like the non-blockchain-based digital interfaces discussed in the book, blockchain-based digital interfaces also follow a 'digital logic' because they

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42 Ibid, 21.
43 Ibid, 11.
44 Ibid, 12.
45 Ibid, 34.

depend on cryptographic hashing and the reproducibility of a digital ledger.[46] In short, she argues that by embodying a digital logic, both of these digital interfaces are better at capturing either/or events than analogue interfaces that can capture 'both-and processes and more-or-less similarities'.[47] This connects to the first of three major arguments in her book: that digital humanitarianism reduces certain issues to binaries, that digital humanitarian initiatives are fraught with blind spots, and that these initiatives create novel openings and closures of opportunities. Much of her analysis of digital humanitarianism is also relevant to assessing crypto-humanitarianism.

While it is certainly true that the operation of blockchain technology relies on an either/or logic—e.g., nodes agree to the state of a network or they don't, the execution of a smart contract takes place or it doesn't—both 'on-chain' and 'off-chain' layers encompass complex combinations of digital and analogue logics and technologies. A weather oracle, for instance, can transmit data on-chain from weather service providers that, among other things, use mercury thermometers and other analogue devices.

DAOs, for instance, can also encompass differences in degree because of the importance of off-chain human deliberation in their operations. DAOs have members who are engaged in elaborate systems of deliberation, informal polling, and formal voting that largely take place off-chain, in Discord servers, public chat forums, and Snapshot. These discussions can, depending on the DAO, relate to a broad swathe of operational and strategic decisions, from hiring staff to funding proposals for new projects and initiatives to creating legal entities that can perform off-chain transactions on behalf of the DAO. In addition, members of DAOs sometimes also meet in person at conferences, hackathons, and other events.[48] The decisions according to these votes and discussions are ultimately recorded on-chain, sometimes through the use of a 'multi-signature wallet'. As the name indicates, these wallets require all or a majority of the people with keys to the wallet to provide their signatures before a transaction is recorded on a blockchain. The keyholders of a multi-signature wallet can be a group of selected or elected individuals.[49] As such, a digital logic is clearly in play, as rich deliberations and

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46 Ibid, 35.
47 Ibid, 34.
48 See, e.g., Morshed Mannan, 'The Promise and Perils of Corporate Governance-by-Design in Blockchain-Based Collectives: The Case of dOrg', Co-operation and Co-operatives in 21st-Century Europe (Bristol University Press 2023).
49 Decentraland, 'How the DAO works' (Decentraland Documentation, 2023) <https://docs.decentraland.org/player/general/dao/overview/how-does-the-dao-work/> accessed 14 December 2023.

interactions do need to be, to some extent, reduced to binary code. Either/or transactions are important for network participants to have confidence in the operations of blockchain technologies,[50] but the embeddedness of these technologies in off-chain technical systems (including analogue systems) and human communities means that both-and processes and more/less similarities are also accounted for.

Johns finds that large technology companies and their data extraction processes have contributed to the many blind spots of digital humanitarianism. New actors have become involved in, and sites of, humanitarian projects (e.g., tech companies) and generated dependence on tech infrastructure. Large amounts of data are needed after a humanitarian emergency, for instance, and no one is better positioned than Big Tech platforms and manufacturers to extract, analyse and strike deals about this data.[51] Digital humanitarianism also leads to 'epistemological shifts' in how the needs of the beneficiaries of humanitarian projects are conceptualized and addressed.[52] There is a disorienting change in how we conceive of space due to digital humanitarian projects too: both near and distant at the same time. Furthermore, the use of digital technologies leads to changes in the goals of humanitarian efforts; not about managing populations in situations of inequality but instead more informational objectives: 'Digital humanitarianism is oriented toward the creation and maintenance of feedback loops designed to transmit signals of scarcity, profusion, need, and capacity among a range of human and nonhuman referents'.[53] This may make digital humanitarian efforts blind to certain concerns and realities. In short, Johns shows that digital humanitarianism changes the 'enrollees, epistemology, and ends' of humanitarian action.[54]

In this respect, as I will show with further examples below, crypto-humanitarianism is also prone to data 'extractive humanitarianism',[55] in which persons affected by humanitarian disasters (e.g., refugees) are expected to voluntarily share personal data, and non-personal data about their surroundings, with aid organizations. As Tazzioli explains, such extractive practices are blind to the unpaid labour of vulnerable populations and how such data can contribute to

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50 Primavera De Filippi, Morshed Mannan and Wessel Reijers, 'Blockchain as a confidence machine: The problem of trust & challenges of governance' (2020) 62 Technology in Society 101284 <http://dx.doi.org/10.1016/j.techsoc.2020.101284>.

51 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 107.

52 Ibid, 6.

53 Ibid, 7.

54 Ibid, 7.

55 Martina Tazzioli, 'Extractive Humanitarianism: Participatory Confinement and Unpaid Labor in Refugees Governmentality' (2022) 15(2) Communication, Culture and Critique 176, 182-184 <http://dx.doi.org/10.1093/ccc/tcac018>.

their own surveillance and control. Crypto-humanitarian projects also show the shift in priorities of global humanitarian aid, towards economic efficiency and cost-saving. The WFP's Building Blocks programme, for instance, is geared towards the visibility and sharing of information, with the ultimate goal of efficient use of humanitarian aid by preventing various humanitarian organizations undersupplying or oversupplying aid. This reflects the new ideology of the humanitarian sector that is rooted in an optimistic belief in technological innovations and market solutions to improve the provisioning of aid, an ideology that Scott-Smith refers to as humanitarian neophilia.[56]

As mentioned in the introduction, this purported focus on efficiency and cost-effectiveness is also a hallmark of the effective altruism movement, concerned as they are about maximizing the impact of every dollar, even if it leads to problematic tradeoffs. While the Building Blocks project tries to prevent the undersupply or wastage of aid, it offers little in terms of explaining *why* this gap or surplus might occur or might even be needed.[57] Instead, these humanitarian organizations have to rely on other alternative sources for this local and contextual knowledge. For Jutel, this technology is not designed to serve the needs of aid recipients, as much as it is to use them as 'test subjects' for technological innovations.[58] At a blockchain conference in 2023, Houman Haddad, the head of emerging technologies at the WFP, explained that the design of Building Blocks was influenced by the competition for donations among aid organizations.[59] With overseas development assistance drying up, those donors that do remain invariably have greater influence over the humanitarian sector. These private donors include the small group of entrepreneurs, such as Sam Bankman-Fried, who became obscenely wealth on the back of past cryptocurrency bubbles and were eager to showcase the potential of blockchain technology in various social domains. The influence of these private donors may be direct, by setting conditions on donations, but may also be indirect by shaping what is understood to be efficient or cost-effective uses of aid.

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56 Tom Scott-Smith, 'Humanitarian neophilia: the 'innovation turn' and its implications' (2016) 37(12) Third World Quarterly 2229, 2233 <http://dx.doi.org/10.1080/01436597.2016.1176856>.

57 WFP's 'Building Blocks' Utilizes Blockchain to Make a Difference | Houman Haddad (Directed by London Blockchain Conference, 2023) <https://www.youtube.com/watch?v=EPcEPFlOuzU> accessed 15 December 2023.

58 Olivier Jutel, 'Blockchain Humanitarianism and Crypto-Colonialism' (2022) 3 Patterns 1, 3.

59 Ibid.

## Crypto-maps

In the second chapter, Johns turns to mapping, its history and how it has evolved into real-time mapping for humanitarian purposes in the 21st century. Maps provide a particularly potent example of an interface and the blind spots that these artefacts can have, in both analogue and digital form. She provides several snapshots of various examples of humanitarian mapping. Maps that tried to document the yellow fever epidemic in New York City were able to show environmental conditions, those who died of the disease in the city and those who recovered, but they still suffered from being 'precisely inaccurate',[60] in that the number of data points obscured the biases that may or do exist. Booth's 1886 map illustrating the living and working conditions of over 900,000 Londoners was able to capture the inequality of the city but evidently had racial and moral overtones and somewhat obscured the complex factors behind the poverty of these citizens. Thus, while these maps are intended to enable intervention in poverty alleviation efforts, they had the effect of smoothening over conflict and disagreement.

The flood maps that were created in Bangladesh in 1988 following the disastrous floods that inundated 57-70 per cent of the country, involved novel combinations of analogue and digital data, from statistical graphs to computational models built using hydrodynamic simulation software to real-time satellite data from US and Japanese meteorological satellites.[61] Despite the relatively 'hi-tech' properties of these maps, it was acknowledged that more contextual local data was needed to accompany the digital data that had been collected. Yet, later humanitarian digital mapping efforts, like the FAO's initiative to map food security and vulnerability also had its own blind spots.[62] In addition to satellite data and data from analogue sources, the Geographic Information System (GIS) used by this map also contained data about mobile phone use and internet searches. This approach allowed for the generation of more contextual data but also prompted greater expectations of self-reliance and self-documentation by local communities. Indeed, while earlier mapping projects were undertaken by the state or with funding from the state, the primary data collectors and publishers at present are non-government organizations and private companies.[63]

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60 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 41.
61 Ibid, 48-50.
62 Ibid, 55-57.
63 Ibid, 57.

The Missing Maps Project (MMP) is a key example of such a change. In this project, citizen cartographers collaboratively map under-mapped places through analysis and labelling of satellite imagery. These maps are then made available on the free and open-source OpenStreetMap. The focus of this project is basically on local volunteers (supported by remote volunteers) to be able to map and take action, thereby being self-reliant in the face of future disasters and crises. However, this endeavour can also be considered as the casualization—or gigification—and gamification of humanitarian work, as well as a way of spreading crowd-based surveillance.[64]

Crypto-mapping has existed since at least 2018, with FOAM being an illustrative example.[65] FOAM, for instance, claims to enable the verification of a physical asset being in a particular location at a particular time, with FOAM beacon operators being incentivized to use radio signals to provide this verification service. According to its founders, FOAM is more secure than other spatial verification technologies and also obviates the need for trusting third-party claims about location data.[66] The project also expands the use of crowd-sourcing by giving the crowd a say on what is desirable or not in a given urban space.[67] It is easy to imagine the use of FOAM, or other similar crypto-mapping projects like XYO network, being deployed for humanitarian ends. An aid organization could use it, or even operate a beacon, to verify that a logistics provider had delivered a shipment of relief goods to a disaster zone.

Yet, as Johns and Media Studies professor Shannon Mattern explain, this comes with risks. While supposedly furthering community voice and incentivizing network participants with tokens, this system is vulnerable to plutocracy, manipulation, and bias. It is assumed that communities become more 'free' or 'self-empowered' by contributing 'more' and 'diverse' data, yet the decentralization of data sources does not necessarily translate into the decentralization of power.[68] In the context of blockchain technologies, Angela Walch, among others, has also argued that the decentralization of a technology does not necessarily translate

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64 Ibid, 59-60. Although some may view their work on such mapping exercises more as a form of activism. See, e.g.,Catherine D'Ignazio, *Counting Feminicide: Data Feminism in Action* (MIT Press, 2024).

65 FOAM, 'About' (*FOAM*) <www.foam.space/about> accessed 14 December 2023.

66 Ibid.

67 Shannon Mattern, 'A Map That Tracks Everything' (*The Atlantic*, 30 November 2018) <www.theatlantic.com/technology/archive/2018/11/can-blockchain-maps-replace-gps/576985/> accessed 14 December 2023.

68 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 64.

into the decentralization of power.[69] While appearing to be inclusive, these maps may exclude key demographic groups like women, illiterate persons, and non-English speakers due to the maps' technical properties and use requirements. It is also uncertain whether such crypto-mapping projects would have an interest in decentralizing power, as they are ultimately for-profit entities interested in the appreciation of the token price. In other words, such mapping efforts ultimately serve the purpose of capital accumulation rather than any humanitarian end.[70]

Crypto-maps may obscure the sources of their data and not indicate the conditions under which these data were collected. The flattening of space on map dashboards can lend itself more to a speculative mentality by crowd contributors than concern about local ramifications and responsibilities. Mattern echoes Johns' point about the lack of flexibility in digital logic: 'Overall, there is far more fluidity in matters of physical boundaries and access than blockchain allows. Who knows how spaces such as informal infrastructures, indigenous terrains, and the leftover spaces that shelter the marginalized would fare in a crypto-map?'[71] She also points out that a mapping project with good intentions, for instance identifying blighted areas, can have unintended consequences, like investors purchasing these lands for speculative purposes. This concern can also be extended to post-disaster contexts as well. Johns similarly notes in a later section of her book that there can be further accidental consequences due to amateur efforts, with the mislabelling of a map once leading to an invasion of Costa Rica by Nicaragua in 2010.[72]

This is not to say that collaborative digital mapping efforts are not worthwhile. For example, collaboratively developed digital maps can be used to challenge official, analogue maps, as has been done by the Waoroni in Ecuador when the national government sought to sell oil concessions on their land.[73] However, as Johns rightly points out, it is necessary to be aware of the blindspots and closure of opportunities arising from these projects, as much as the beneficial opportunities.

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69 Angela Walch, 'Blockchain Applications to International Affairs: Reasons for Skepticism: Interview with Angela Walch' (2018) 19 Geo J Int'l Aff 27, 30; BlockchainGov and Project Liberty, Interim Report on Blockchain Governance Practices (Project Liberty, January 2024) < https://www.projectliberty.io/news/decentralized-future-requires-robust-governance-models>.

70 Ryan Burns, 'New Frontiers of Philanthro-capitalism: Digital Technologies and Humanitarianism' (2019) 51(4) Antipode 1101 <http://dx.doi.org/10.1111/anti.12534>.

71 Shannon Mattern, 'A Map That Tracks Everything' (The Atlantic, 30 November 2018) <www.theatlantic.com/technology/archive/2018/11/can-blockchain-maps-replace-gps/576985/> accessed 14 December 2023.

72 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 154.

73 Ibid, 68.

## Proof-of-personhood

In the third chapter, Johns explains how digital interfaces transform people, places and things that count within the 'global sensory economy' due to digital interfaces.[74] These interfaces lead to making decisions that are based on digital aggregates. Her aim is to 'understand how digital interfaces transform archetypes of humanitarian perception, action, and governance'.[75] Pulse Lab Jakarta's digital interface, for instance, gathers and presents location data from 600,000 mobile phones in certain Indonesian islands using pseudonymous data to track human displacement. Yet, digital data aggregated through this and other sources can only represent a 'temporary, synthetic configuration of concern (a Google trend, for instance)'[76] but poorly represents a polity. Digital interfaces do an inadequate job of capturing individual relationships and bonds, as they are more interested in enabling a comprehensive, large collection of data remotely and segmenting this data.[77] This denaturalizes the concept of population from a 'probabilistic rendering of the characteristics' of a bio-social group to 'speculative, senso-political representations of data- about- data- about- data'.[78] The 'truths' that are revealed by this big data 'cannot be controlled by government' alone, requiring interventions by a variety of other actors.[79]

The Worldcoin project provides an illuminating example of this senso-politics.[80] Worldcoin is a cryptocurrency that is offered to individuals in return for scanning their irises with their Orb. According to the founders of this project, these eye scans are required as they are the only secure, reliable, and accurate method for creating a unique digital identity (i.e., a World ID). A distinct digital identity is useful for several purposes, ranging from digital democracy experiments to the equal distribution of a universal basic income to persons who may not have government IDs (e.g., stateless persons).[81] To protect the sensitive biometric data of these persons, the scan data is turned into a hash (i.e., a string of numbers) that is recorded on a blockchain. This hash itself is sufficient to check if a person has previously signed up for a World ID. Worldcoin claims that this proof of personhood can be used for a variety of services

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74 Ibid, 26.
75 Ibid, 73.
76 Ibid, 90.
77 Ibid, 83.
78 Ibid, 93.
79 Ibid, 96.
80 Worldcoin, 'Frequently Asked Questions' (*FAQs*, 2023) <https://worldcoin.org/faqs> accessed 14 December 2023.
81 Edd Gent, 'A Cryptocurrency for the Masses or a Universal Id?: Worldcoin Aims to Scan All the World's Eyeballs' (2023) 60 IEEE Spectrum 42.

where an individual needs to prove their real, unique identity.[82] Once this registration process is complete, the person who has scanned their iris can claim WLD tokens through their World App. Downloading this application automatically gives each user a public-private key pair that they can use to make blockchain transactions. The use of zero-knowledge proofs in the application links a numeric code to each user, which allows Worldcoin to identify whether people have previously claimed tokens without revealing more data about the user. Users can choose to link their phone numbers and cloud backup systems (e.g., Google Drive) with their World App, but if they decide to not do so, they lose access to their account.

At first blush, it may appear that this project solves an important need for a unique and secure (digital) identity. For asylum seekers and refugees, having a unique identity can help them receive aid and confers rights of residence and movement. Over 2.5 million people from over two dozen countries have shared their biometric data for this purpose. Yet, as the leadership team of Worldcoin itself admits, the overriding motive for Worldcoin to provide this service is to eventually distribute their WLD tokens as widely and evenly as possible.[83] Doing this can have immense benefits in terms of adoption of the token and the generation of network effects.[84] Put simply, the philanthropic and humanitarian objectives of the project serve its nascent business model. While promising an identification system that gives users more control over the data they share, compared to both public authorities and social media companies, Worldcoin raises concerns about the extent to which they obtain informed consent, how responsive they are to Orb users' concerns, and the extent to which they actually protect user data. In Kenya, one of the states where Worldcoin has been particularly active, Kenya's Communications Authority recently ordered the suspension of the company's activities due to concerns about the storage of data, monetary payments for data harvesting, and the aggregation of large quantities of sensitive data in the hands of a private company.[85] Subsequently, in October, a parliamentary panel that investigated this project called for Worldcoin to be shut down altogether. Among other things, their investigation found that the company did not have an age-verification process in place, raising the possibility that the company was scanning the

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82 Worldcoin, 'Frequently Asked Questions' (*FAQs*, 2023) <https://worldcoin.org/faqs> accessed 14 December 2023.

83 WLD has yet to be distributed, only a commitment to distribute these tokens have been made.

84 Edd Gent, 'A Cryptocurrency for the Masses or a Universal Id?: Worldcoin Aims to Scan All the World's Eyeballs' (2023) 60 IEEE Spectrum 42, 43.

85 Anita Nkonge, 'Worldcoin Suspended in Kenya as Thousands Queue for Free Money' (BBC News, 2 August 2023) <https://www.bbc.com/news/world-africa-66383325> accessed 15 December 2023.

irises of minors.[86] This illustrates the difficulty of blockchain technologies complying with humanitarian principles, including alleviating human suffering or remaining neutral among conflicting parties, if their technical design is based on commercial imperatives.[87]

This example illustrates Johns' argument that the use of digital interfaces for the management of populations leads to some people being made to count, while others are not.[88] It also shows an impressive appetite for data- about data- about data. While Worldcoin may not be interested in iris scans per se, they are clearly interested in the data that is derived from the hashes of these scans. Data about the number of people who have signed up for a World ID, accounts opened, WLD tokens claimed, and wallet transactions are proudly displayed on the company's homepage.[89] Johns suggests that in aggregating digital data there is less concern about representing what is 'real' than 'making new things stand in for the real'.[90] This is certainly true of the Worldcoin example. By trying to provide a tamper proof, resilient, and privacy preserving form of identification, the reduction of an ID to a snippet of code strips this identification from all contextual information. For a forcibly displaced person, for instance, a World ID might reveal that she is a real and unique individual, but it does not provide data about where she is from or why she is displaced. By cantering the iris scan—or more accurately, the hash derived from that scan—in proving one's personhood, there is a risk of obscuring all the other factors that make us distinct as humans.

However, treating persons like abstract and homogenous datapoints is useful for the goals of organizations that seek to implement universal solutions to complex socio-economic problems. By presenting people as units in a dashboard, it becomes possible to think about them mechanically, dispassionately speculating about the distribution of a global universal basic income or dividends from companies deploying artificial intelligence on an industrial scale, without considering the distinct needs of these units or the merits of these objectives. All problems then appear to be a problem of 'plumbing', with it being possible to continuously unblock any obstacle to the unimpeded global flows of data and money through technical

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86 Duncan Miriri, 'Kenya Panel Urges Shutdown of Worldcoin's Crypto Project within Country' (Reuters, 3 October 2023) <https://www.reuters.com/technology/kenya-panel-urges-shutdown-worldcoins-crypto-project-within-country-2023-10-02/> accessed 15 December 2023.

87 Hossein Baharmanda and others, 'Developing a framework for designing humanitarian blockchain Projects' (2021) 131 Computers in Industry 103487.

88 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 100.

89 Worldcoin, 'Homepage' (Worldcoin, 2023) <https://worldcoin.org/> accessed 15 December 2023.

90 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 101.

measures—including through the collection of more and better data. It is unsurprising that Worldcoin has also received investment from Sam Bankman-Fried's FTX,[91] as projects like these ambitiously claim to solve long-term problems that ostensibly present civilizational risks (e.g., the effects of general artificial intelligence across industries), while diminishing the importance of real human problems in the here and now.

## COVID-19 and other emergencies

In chapter four, Johns shows how the use of digital interfaces has changed the temporality of humanitarian crises: 'Humanitarian emergencies are made to appear cyclical and recurrent by these interfaces—and demanding of continual vigilance'.[92] The digital interfaces that call for action in response to humanitarian emergencies are less concerned about *prevention* than *preparation* for the inevitable. She makes the important point that disasters may be *normal*, but they shouldn't be considered *natural* as their effects are inevitably the result of (poor) human decision-making. Human decisions are ultimately behind *why* affected people are in locations affected by emergencies and disasters, with deliberate policies and human decisions affecting people along class and racial lines.[93] Yet, like effective altruism, digital- and crypto-humanitarianism 'doesn't try to understand how power works, except to better align itself with it', leaving 'everything just as it is'.[94] The manner in which humanitarian agencies respond to emergencies has changed in three important ways as a result of using digital interfaces, in terms of: 'whom is the emergency made salient and actionable; how is the emergency defined; and when, or at what pace and according to what timescale, is the emergency experienced'.[95]

The turn towards digital humanitarianism has conferred Big Tech platforms and (technology) manufacturers important roles and responsibilities in forecasting, preventing, managing, and recovering from disasters. It is their proprietary technologies that are leveraged by humanitarian organizations in their relief operations. This has been coupled with the responsibilization[96] of disaster victims, with individuals expected to become self-reliant in

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91 Benjamin Curry B, 'What Is Worldcoin? How Does It Work? – Forbes Advisor' (Forbes Advisor, 15 August 2023) <https://www.forbes.com/advisor/investing/cryptocurrency/what-is-worldcoin/> accessed 15 December 2023.

92 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 26.

93 Ibid, 105-106.

94 Amia Srinivasan, 'Stop the Robot Apocalypse' (2015) 37 London Review of Books <https://www.lrb.co.uk/the-paper/v37/n18/amia-srinivasan/stop-the-robot-apocalypse>.

95 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 106.

96 John Harris and Vicky White, 'Responsibilization', A Dictionary of Social Work and Social Care (Oxford University Press 2013) <https://www.oxfordreference.com/display/10.1093/acref/9780199543052.001.0001/acref-9780199543052-e-1338> accessed 16 December 2023.

overcoming humanitarian disasters. Everyone is expected to mobilise.[97] This ranges from the refugees who are expected to contribute to the mapping of their own living conditions to (unpaid) volunteer work to forms of small-scale entrepreneurship within refugee camps.[98] Crypto-humanitarianism not only replicates this trend, it extends aid beneficiaries' roles to producing new forms of data labour and acting as (micro-) investors (e.g., Worldcoin).

In terms of how emergencies are defined, attention is increasingly devoted to accumulating more and better data, gathered from a wider range of sources, rather than addressing underlying issues with a wide range of policy responses. Johns uses the example of the Haze Gazer interface that uses a range of digital sources to track fire hotspots in Indonesia to monitor public health risks. Using this application converts problems arising from forest management, urban planning, and climate change adaptation measures into a problem of data, that can be addressed by including more voices or by making sure the data is up-to-date.[99] While this data can show the hot spots from which haze emerges, this doesn't capture the webs of capital accumulation and corruption that are root causes for the haze, circumscribing the policy options for addressing these emergencies (e.g., creating incentives for local institutions to engage in conservation).[100] Similarly, crypto-humanitarian projects like Building Blocks can reveal logistical bottlenecks but doesn't show the root causes of why this humanitarian coordination is needed, such as the Rohingya refugee crisis and the war in Syria. Apparently, we can prognosticate about the future, and think what is best for people thousands of generations from us, but we cannot imagine a different political or economic system that distributes power and resources differently than today.

Through these digital interfaces, humanitarian disasters are treated as essentially being inevitable, foreclosing the possibility of there being alternative futures.[101] As Johns explains, digital interfaces take on the role of waiting and orchestrating the speed of humanitarian aid, while invoking incremental fixes focused on a vague, more secure future.[102] The WFP-Ali Baba developed HungerMap does more to *move* humanitarian workers than actually represent the

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97 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 109.

98 Solomon A Abebe, 'Refugee Entrepreneurship: Systematic and Thematic Analyses and a Research Agenda' (2023) 60 Small Business Economics 315 <https://link.springer.com/10.1007/s11187-022-00636-3>; Martina Tazzioli, 'Extractive Humanitarianism: Participatory Confinement and Unpaid Labor in Refugees Governmentality' (2022) 15(2) Communication, Culture and Critique 176, 182-184 <http://dx.doi.org/10.1093/ccc/tcac018>.

99 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 113.

100 Ibid, 114.

101 Ibid, 120.

102 Ibid, 115-116.

material conditions and political turmoil experienced by those suffering from food insecurity.[103] The VAMPIRE interface co-opts citizens into tracking and reporting market data, so that the impact of droughts and crop failures can be observed. This interface implicitly supports the belief that famines and food insecurity are bound to occur, as climatic and market factors will invariably generate these outcomes.[104]

Crypto-humanitarian projects that respond to emergencies also reflect these dynamics, in an intensified form. It is not states, NGOs, UN agencies, or companies that are at the heart of many crypto-humanitarian efforts, but the individual. It is the 'sovereign individual'[105] that gets to determine *which* humanitarian disaster is worth addressing, and which one can be ignored. It is also the individual that gets to decide *how* these humanitarian disasters are to be overcome and the resources that will be deployed. It is also at the whim of the individual, how quickly an emergency is addressed and how long attention remains on said emergency.

Take, for example, the donation of AirUSD stablecoins to medical workers in Venezuela and Vitalik Buterin's donation of over 50 trillion Shiba Inu tokens (est. value of 1.14 billion USD at the time) to India during the COVID-19 pandemic.[106] The donation of stablecoins to Venezuela can be seen as a well-intentioned contribution to a health system that is under pressure, but the language surrounding the arrangement indicates that these donations are also intended to be a way of discrediting the socialist government of Nicolas Maduro and supporting his challenger, Juan Guaido.[107] Buterin's large donation to India is, on the one hand, significant financial support to hospitals that required oxygen canisters and more intensive care units, but it was also a way for him to offload a meme cryptocurrency that he had unwillingly received. In fact, his large donation had an inflationary effect, sinking the value of Shiba Inu and consequently, the total value of the donation in fiat currency.[108] This donation is intermediated

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103 Ibid, 126.

104 Ibid, 117.

105 James D Davidson and William Rees-Mogg, The Sovereign Individual: Mastering the Transition to the Information Age (1st ed, Touchstone/Simon & Schuster 1999).

106 Manish Singh, 'Ethereum Creator Donates $1 Billion Worth of Meme Coins to India' (TechCrunch, 12 May 2021) <https://techcrunch.com/2021/05/12/vitalik-buterin-donates-1-billion-worth-of-meme-coins-to-india-covid-relief-fund/> accessed 15 December 2023.

107 Team Circle, 'Circle Partners with Venezuela to Send Financial Aid with USDC' (Circle, 20 November 2020) <www.circle.com/blog/circle-partners-with-bolivarian-republic-of-venezuela-and-airtm-to-deliver-aid-to-venezuelans-using-usdc> accessed 14 December 2023.

108 Manish Singh, 'Ethereum Creator Donates $1 Billion Worth of Meme Coins to India' (TechCrunch, 12 May 2021) <https://techcrunch.com/2021/05/12/vitalik-buterin-donates-1-billion-worth-of-meme-coins-to-india-covid-relief-fund/> accessed 15 December 2023; Bloomberg, 'What Happened to $1 Billion Cryptos Donated to India as Covid-19 Aid' (mint, 28 July 2021) <https://www.livemint.com/market/cryptocurrency/what-happened-to-1-billion-cryptos-donated-to-india-as-covid-19-aid-11627459071249.html> accessed 15 December 2023.

by a non-profit crypto-fund established in the free zone of Ajman, United Arab Emirates and led by an Indian crypto-entrepreneur, who ultimately decides the charitable causes to which this donation is allocated.[109] At the time of writing, these allocations are being made in modest tranches.[110] Buterin's donation can, perhaps somewhat cynically, also be read as an attempt to raise the profile of Ethereum, the blockchain Buterin co-founded, in one of the world's largest developing economies.[111] In sum, the turn to the individual in crypto-humanitarianism enables new forms of philanthropic contributions, but also entangles urgent aid in speculative financial markets and allows for the expansion of anarcho-libertarian politics.

Yet, even among libertarians there are geopolitical red lines that are not crossed, indicating implicit political leanings. Ukraine DAO was spun up soon after Russia's invasion of Ukraine, allowing people from around the world to fund humanitarian relief and military operations in the country. The DAO acts as a governance structure and fund for receiving and channelling crypto-donations. Over 7 million USD has been allocated to these organizations through Ukraine DAO, receiving significant support from both Ukrainian and non-Ukrainian nationals. Tens of millions of dollars have been earned by Ukrainian state and non-state actors through the sale of NFTs. While groups in Russia have also created and sold NFT collections to support the war effort, these digital collectibles have been able to raise far less funding.[112]

Following the recent conflict in Israel and Palestine, a crypto-fund, Crypto Aid Israel, was immediately set up to collect donations for Israelis that were displaced by the 7 October 2023 attacks by Hamas, the party that has governed the Gaza Strip since 2007 and a designated terrorist organization in Australia, the United States and the United Kingdom. Cryptocurrencies have also allegedly been used by Palestinians, including Hamas, with the exact amounts and purposes being contested.[113] In the weeks since 7 October 2023, Hamas's alleged use of

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109 Cryptorelief, <https://cryptorelief.in/> accessed 15 December 2023; PwC, 'Due Diligence – IN Crypto Relief Fund' (PwC, 20 November 2023) <https://api.blockchainforimpact.in/pdfs/IN-Covid-PwC-Public-facing-statement-Statement.pdf> accessed 15 December 2023.

110 Saurya Malwa, 'Vitalik Buterin's Shiba Inu Donations to Power New Round of India Covid Relief Funds' (Coindesk, 9 June 2023) <https://www.coindesk.com/markets/2023/06/09/vitalik-buterins-shiba-inu-donations-to-power-new-round-of-india-covid-relief-funds/> accessed 15 December 2023.

111 Olivier Jutel, 'Blockchain Humanitarianism and Crypto-Colonialism' (2022) 3 Patterns 1.

112 Elliptic, "How the Rusia-Ukraine war led to the growth of NFT fundraising' (Elliptic, 17 March 2023) <https://www.elliptic.co/blog/analysis/how-the-russia-ukraine-war-led-to-the-growth-of-nft-fundraising> accessed 15 December 2023.

113 Ephrat Livni and Joe Nocera, 'Is Crypto Financing Terrorism?' (The New York Times, 28 October 2023) <https://www.nytimes.com/2023/10/28/business/dealbook/is-crypto-financing-terrorism.html> accessed 1 February 2024. This debate also reflects the manner in which public blockchains are able to blend transparency and anonymity. Reading blockchain transaction data reveals when a cryptocurrency transaction took place and the amount transacted but does not automatically reveal the real-world identities of the sender and the receiver. There are, however, blockchain analytics tools that are being used to establish these real-world identities, which in turn has prompted the development of tools that preserve financial privacy.

cryptocurrencies to finance some of their activities has been used by anti-crypto politicians in the United States to censure the use of cryptocurrencies for financing terrorism, while crypto-proponents have argued that these claims are exaggerated.[114] One of the arguments made is that Israeli regulators have been able to seize the private keys to many crypto-accounts affiliated with Hamas and close crypto-donation websites, prompting Hamas to shut down their crypto-donation programme.[115] It has also been alleged that the Israeli government works with blockchain analytics companies to identify blockchain addresses that are linked with Hamas so that cryptocurrency exchanges can be requested to block transactions with blacklisted addresses.[116] During the military reprisals by Israel following the 7 October 2023 attacks, Palestinians have also been confronted with power and internet outages. This environment, coupled with a fear of US sanctions, has deterred the use of crypto-donations, even for Palestinians not affiliated with Hamas. Unsurprisingly, a 'Gaza DAO' akin to Ukraine DAO has not been created.

In my view, with conflicts stirring across the globe, from Palestine to Sudan to Guyana, it is perhaps crypto-humanitarian emergency technologies, including those used to facilitate censorship-resistant cross-border payments, that will witness the greatest surge in popular interest. Peer-to-peer mutual aid would be a natural consequence arising from an increase in repression and erosion in public and private services in these territories. Yet, the actual uptake of such crypto-interfaces, and the implications of such adoption, will depend on how the challenges discussed in this essay are addressed.

## Towards crypto-dystopia or crypto-utopia?

In this essay, I have used Fleur Johns' book on digital humanitarianism as a guide to understand the emergence of crypto-humanitarianism, assessing how these two fields are similar and how they are different. In many respects, Johns' thoughtful insights and critiques about digital humanitarianism are also applicable to crypto-humanitarianism. The (gender) digital divide in terms of technology and literacy is present in both fields.[117] Private companies and non-profits

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114 Ksenia Buksha, 'Terrorism & Israel-Gaza War Weaponized to Destroy Crypto' (Cointelegraph Magazine, 13 December 2023) <https://cointelegraph.com/magazine/how-terror-israel-gaza-war-being-weaponized-destroy-crypto/> accessed 15 December 2023.

115 Ibid.

116 Sander Lutz, '"Crypto Aid Israel" Launches to Raise Funds Amid Gaza Conflict' (Decrypt, 9 October 2023) <https://decrypt.co/200737/crypto-aiding-israel-gaza-war-intensifies> accessed 15 December 2023.

117 World Economic Forum, Blockchain-Based Digital Currency and Tools for Cross-Border Aid Disbursement (5/8 Digital Currency Governance Consortium White Paper Series, World Economic Forum 2021) 8 <www3.weforum.org/docs/WEF_Digital_Currency_for_Cross_Border_Aid_Disbursement_2021.pdf> accessed 15 December 2023.

involved in the development of digital or crypto-interfaces have to make delicate design choices, balancing transactional transparency with the need to protect individual privacy.[118] This not only raises risk of an accountability gap, but exposes vulnerable populations to the possibility that the project will become defunct (e.g., as with AidCoin). Crypto-humanitarians share the earlier concern of digital humanitarians that aid beneficiaries should be verifiable as unique individuals, so that aid is appropriately disbursed and illicit activities are not funded.[119] Critics may see both as being a threat to state capacities to provide aid.[120]

Yet, there are ways in which crypto-humanitarianism deepens and intensifies the dynamics of digital humanitarianism. One common thread among crypto-maps, unique digital IDs, and blockchain-based emergency response technologies is how they contribute to the greater responsibilization of individuals, from having to self-maintain digital infrastructures (e.g., FOAM) to securely preserving a (self-sovereign) ID for accessing goods, services, and assets (e.g., Building Blocks, Worldcoin) to deciding how humanitarian emergencies are best overcome. Another common thread is the intentional and unintentional effects that the ideology of longtermist effective altruism has had on these diverse crypto-humanitarian projects. This ranges from shaping concepts of efficiency and cost-effectiveness to relying on technological innovation to influencing priorities and purposes that humanitarian action should pursue. Even where the philanthropic contributions of effective altruists like Sam Bankman-Fried have been unwelcome, the size of their contributions in a resource-strapped humanitarian sector influences the choices and decisions made by actors in that sector.

This comparative assessment of digital and crypto-humanitarianism could be extended to other chapters in the book. In her chapter on states, for example, Johns not only shows how states engage in humanitarian operations, but also how states preserve the core criteria of statehood through the use of digital interfaces. Consider, for instance, maintaining a permanent population and having a defined territory. Maintaining a permanent population nowadays involves real-time tracking of certain data points about people. This conflicts with long-standing analogue notions of how populations are managed and deemed to be permanent.[121] A

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118 Andrej Zwitter and Mathilde Boisse-Despiaux, 'Blockchain for humanitarian action and development aid' (2018) 3 Journal of International Humanitarian Action 1, 3; Peter Howson, 'Crypto-giving and surveillance philanthropy: Exploring the tradeoffs in blockchain innovation for nonprofits' (2021) 31 Nonprofit Management and Leadership 805.

119 Ibid.

120 Olivier Jutel, 'Blockchain Humanitarianism and Crypto-Colonialism' (2022) 3 Patterns 1, 2.

121 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 148.

state's territory is no longer (just) about square kilometres encased within sovereign borders, but digital interfaces (e.g., those that show road networks) help reimagine how territory is understood by the state and is constantly assembled and reassembled. The use of satellite imaging, sensors etc. enables hyper-localized responses to humanitarian crises and can also be ignored by switching on/off .[122] Johns argues, 'for states, the task of patrolling state boundaries is becoming as much about data collection, indexing, distribution, curation, and personalization as it is about explicit marking of boundaries'.[123] Thus, the ability to access and use digital infrastructure becomes as important as protecting territorial boundaries.

States such as Tuvalu, which are experiencing loss of their territory and population, largely due to climate change, have taken this a step further. They use both digital and crypto-interfaces to reimagine statehood without a permanent population or a physical territory.[124] Unique digital IDs take on a new significance, by not just giving access to goods and services, but also connecting citizens of Tuvalu to a wider e-diaspora.[125] Sensors are not just used for the data-intensive policing of territorial boundaries, but also to develop 3D renderings of what that territory once looked like.[126]

What is to be done about the challenges presented by both digital and crypto-humanitarianism? According to Johns, consultation isn't necessarily the answer, as it isn't always clear who should be consulted when data comes from so many people and from so many sources. It is always possible to contest the authenticity of public consultation too.[127] Multi-stakeholder arrangements are often touted as an inclusive solution, but these arrangements are often narrowly focused, excluding beneficiaries of humanitarian assistance.[128] It is also difficult to expand such arrangements due to issues with digital skills, the existence of confidentiality agreements, and restrictions on data sharing. Johns suggests a range of possible alternative responses, from the strategic misuse of interfaces to the repurposing of data for other, better

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122 Ibid, 151.
123 Ibid, 153.
124 Dylan Bushell-Embling, '26 countries recognise Tuvalu's digital sovereignty' (govtech review, 6 December 2023) <https://www.govtechreview.com.au/content/gov-geospatial/news/26-countries-recognise-tuvalu-s-digital-sovereignty-764474170> accessed 1 February 2024.
125 Igor Calzada, 'Blockchain-Driven Digital Nomadism in the Basque e-Diaspora' [2023] Globalizations 1 <https://www.tandfonline.com/doi/full/10.1080/14747731.2023.2271216>.
126 Accenture, 'Climate change gets real in the metaverse' (Accenture, 2023) <https://www.accenture.com/us-en/case-studies/technology/tuvalu> accessed 1 February 2024.
127 Fleur Johns, #Help: Digital Humanitarianism and the Remaking of International Order (Oxford University Press 2023), 94.
128 Ibid, 185.

ends to creative critiques.[129] The vandalization of humanitarian technology after a tsunami to make a point regarding distributive justice provides a vivid example.[130]

The properties of blockchain technologies add an additional wrinkle to these plans. By design, public permissionless blockchains and digital assets like stablecoins are difficult to censor. Unlike digital humanitarian technologies that are controlled by a single operator, or even crypto-humanitarian projects operating a private permissioned blockchain, the operators of a distributed network are not easily coerced through legal sanctions. As a corollary, such networks lack a centralized operator that can be convinced about the merits of a change in design or policy, and can then implement this change singlehandedly. Instead, changes in behaviour necessitates the voluntary agreement and action (e.g., client upgrade) of all nodes. In my view, shaping social norms through public critique, media scrutiny, and legislative activity, can have an important function in spurring this voluntary coordination.[131] The public and media outcry about the energy consumption and environmental footprint of mining blocks using a PoW consensus system bolstered efforts to shift Ethereum to a less energy-intensive PoS consensus system and convinced the vast majority of network participants to accept this 'Ethereum 2.0' in late 2022.[132]

This leads me, finally, to my theoretical and empirical research questions that may encourage further research on crypto-humanitarianism. In addition to the research questions offered by Novak[133] and L'Hermitte and Nair,[134] future researchers could explore:

- How can crypto-humanitarian projects avoid a conflict between their humanitarian purposes and commercial goals?
- How do crypto-humanitarian projects contribute to extractive humanitarian practices?
- What tools could be used to measure the positive and negative impact of crypto-humanitarian projects, particularly those that are not under the purview of an international organization or state?
- How can crypto-humanitarian projects strengthen the capacity of states and humanitarian agencies to address humanitarian crises?

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129 Ibid, 219.
130 Ibid, 224.
131 Primavera de Filippi, Morshed Mannan, and Wessel Reijers, 'Blockchain Technology and the Rule of Code: Regulation via Governance' (2024) 92 *George Washington Law Review* (forthcoming).
132 Primavera de Filippi, Wessel Reijers and Morshed Mannan, *Blockchain Governance* (MIT Press, 2024).
133 Mikayla Novak, 'Crypto altruism: Applying blockchain to charitable and humanitarian activities' [2023] Chinese Public Administration Review 1539675423117 51, 10 <http://dx.doi.org/10.1177/15396754231175173>.
134 Cécile L'Hermitte and Nirmal-Kumar C Nair, 'A blockchain-enabled framework for sharing logistics resources during emergency operations' (2021) 45(3) Disasters 527 <http://dx.doi.org/10.1111/disa.12436>.

Digital humanitarianism is an important new domain of research, to which Johns has made a compelling contribution. My hope is that this essay motivates more scholars to explore the specific implications of crypto-humanitarianism in the years to come.

# ENRICHING THE VERNACULAR: AN AUTHOR'S REPLY

FLEUR JOHNS*

'I guess it's almost like a new religion' muses one of the data scientist interviewees quoted in *#Help: Digital Humanitarianism and the Remaking of International Order*.[1] '[W]e might not understand it', the same interviewee says at another point.[2] '[S]ometimes we get crazy with data' another data scientist observes.[3] These are among the theorists of digital humanitarianism with whom *#Help* engages, namely those doing technical work, and reflecting on what they are doing, while based in mostly South Asian, West Asian, and Southeast Asian settings. Their words bespeak not a world of scientistic reduction, nor an insistence on 'making the Global South knowable, legible and visible', as Cynthia Farid worries in her percipient review.[4] Rather, they describe their work in terms of mystery, struggle, and relationships – always relationships, including law and policy relationships. Yet another data scientist explained:

> [Y]ou try to bring across disparate data and tr[y] to find out ways in which it can be used for completely different purposes than what it may have been intended [for] when created… But it's not just about the data. It's also about the kinds of techniques and the related systems or things that you may need, [including] policies… to enable [us] to use it while also minimizing potential harms.[5]

If 'sometimes we get crazy with data', then writing a book entails a kind of craziness of its own. One tends to lose the ability to read or see clearly what one has written. It is only in dissemination that one has an opportunity to encounter one's writing afresh, although one can never 'book' such encounters in the present.[6] I have learned much from this encounter with the

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1 Fleur Johns, *#Help: Digital Humanitarianism and the Remaking of International Order* (Oxford University Press, 2023) 84 ('*#Help*').

2 Ibid 79.

3 Ibid 222.

4 Cynthia Farid, 'Comments on #Help Digital Humanitarianism and the Remaking of International Order' (2024) 24 *International & Business Law Review*; c.f., Michael Anthony C Dizon, 'Review Essay on #Help Digital Humanitarianism and the Remaking of International Order' (2024) 24 *International & Business Law Review*; Morshed Mannan, 'From Digital Humanitarianism to Crypto-Humanitarianism: A Conversation with #HELP' (2024) 24 *International & Business Law Review*.

5 Johns (n 1) 197–8.

6 Jacques Derrida, *Dissemination*, tr Barbara Johnson (University of Chicago Press, 1981) 63 ('A text is not a text unless it hides from the first comer, from the first glance, the law of its composition and the rules of its game. A text remains, moreover, forever imperceptible. Its law and its rules are not, however, harbored in the inaccessibility of a secret; it is simply that they can never be booked, in the *present*, into anything that could rigorously be called a perception'.) [emphasis in original].

reading and writing of Cynthia Farid, Michael Anthony C. Dizon, and Morshed Mannan, and I am immensely grateful for their generosity and insights, and to the editors of the *International Trade and Business Law Review* for making this exchange possible. In this short response, I take up three points arising from their review essays: first, the relationship of the book to questions of history and hierarchy, or to 'the historical roots of the humanitarian project' (in Farid's words) and to 'Global South perspectives and paradigms' (in Dizon's words); second, Dizon's request for more policy recommendations than the book delivers; and third, the elucidating effect of Mannan's comparative analysis of 'crypto-humanitarianism'.

## Histories unrooted

Readers of *#Help* would benefit from reading the book alongside, and at times against, the rich historiography of humanitarianism, as Farid suggests. The book is not itself an historiographical work. Indeed, it provocatively (and rather mischievously) sets aside intellectual history in its early pages.[7] Nonetheless, its second chapter presents a series of 'snapshots' of humanitarian mapping from the eighteenth to the twenty-first century, respectively foregrounding cities (New York and London), nations (Bangladesh), intergovernmental 'framework[s]' for 'collaborative networking', and finally, community crowdsourcing in 'unmapped or undermapped' communities, such as 'rural areas of Africa'.[8] Beyond this, the historical stories that *#Help* tells are relatively recent, mostly spanning the period from the 1990s to the first few decades of the twenty-first century.[9]

Resituating this book in a broader historiography, Farid offers important reminders that humanitarian interventions have long been 'based on local traditions and community organization', and that humanitarian causes have historically been 'adopted by anticolonial movements' as well as by colonisers. In this regard, Farid worries that *#Help* too readily accepts and restates a 'conventional originating history of humanitarian interventions', identifying these with European colonialisation. These points are well-made and well-taken. Were *#Help*

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7 Johns (n 1) 18–19.
8 Ibid 29–70.
9 See, e.g., ibid 143–144.

a project of racination, or root-tracing, then one could certainly criticise the book for not showing those roots to be as tangled and branching as Farid intimates.

As I have explained in other published reflections on the book, however, *#Help* advances a critique of the idea that problematic dimensions of digital humanitarianism (including how it is implicated in violence, oppression, and inequality), are best understood and tackled at their 'roots', whether those roots be historical or hermeneutic.[10] The same is true of the possibilities that digital humanitarianism presents; I do not believe that these should be identified mainly with historical heterodoxy. It would be a mistake, I believe, to deduce from this or that retelling of humanitarianism's history an expectation that digital humanitarianism will continue along the same trajectory, whether that trajectory is understood as emancipatory or oppressive. Digging up and cleaving to roots all too often entails reaffirmation of historically dominant forms of rulership, including the tendency to trace change to this or that individual thinker or leader, or treat it as an evolutionary process unresponsive to lay or insurgent politics. As I have written elsewhere, the 'distribution of the sensible that results from an orientation towards the authoritative sourcing of today's problems to their roots tends to favour established hierarchies and longstanding practices of 'leave-it-to-us' disregard'.[11]

In line with its concern to resile from racination, *#Help* does not depict digital humanitarianism as decisively seeded in the Global North and applied to the Global South. The book has quite a lot to say, *a propos* of Farid's question, about 'who [are]… digital mapping volunteers' and other workers in the global industry that humanitarianism has become. There is some examination of Missing Map Project volunteers in Bangladesh, for instance, and of lots of discussion of how, where, why, and by whom particular digital humanitarian interfaces have been built.[12] *#Help* does not cast the workers involved as part of an 'invisible' corps in digital humanitarianism's 'imperial laboratory', in Farid's terms. On the contrary, as in the quotes with which this response opened, the book consistently foregrounds the insights and experiences of those engaged in the day-to-day work of digital humanitarianism. And given that the book takes

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10 Fleur Johns, 'Reading and Writing at the Interface' (2023) 11(3) *London Review of International Law* 547.

11 Ibid 554. On the 'distribution of the sensible' produced by digital humanitarianism and other deployments of digital technology in the international legal sphere, drawing on the work of Jacques Rancière, see Fleur Johns, 'Data, Detection, and the Redistribution of the Sensible in International Law' (2017) 111 American Journal of International Law 57.

12 Johns (n 1) 63, 77–79, 117–129, 136–144, 157–160, 180–182, 208–210.

Pulse Lab Jakarta as something of a launch pad for its investigations, *#Help* devotes particular attention to those working in Southeast Asia.[13]

It is still fair to say, as both Farid and Dizon do in different ways, that *#Help* might have spent more time investigating 'Global South perspectives and paradigms' although one might argue over what qualifies as such, and over the perils of such 'taxonomic talk'.[14] The interviewees quoted in the book are among its most prominent theorists, but their words remain unattributed and unplaced by reason of the ethics restrictions under which the research was conducted, and they comprise a literate and educated group, unlike many among those whom they are working to try to assist. Beyond them, the boldface names with whose work the book engages certainly include dead, White, European males (Roland Barthes, Michel Foucault, for instance) alongside theorists not so classified (most extensively, Sara Ahmed).

It would not, however, have been a powerful or effective redistributive move in the global politics of knowledge for *#Help* to simply insert 'Global South theories and frameworks' into its pages, howsoever qualified. What the book shows is that systemic, structural change on the global plane takes place as much through shifts in technical, material practice as through shifts in legal and policy argumentation and expert analysis. It also highlights the powerful, constitutive role played by those who tend to be cast diminutively as 'users' or 'end users' of digital humanitarianism, including intended beneficiaries. That is the point of the story of InaTEWS (an Indonesian tsunami early warning system) on which the last chapter dwells.[15] That story shows how those derided as 'vandals' or, in Simone de Beauvoir's terms,'useless mouths', vested with nothing more than neediness, are producers of a 'rich political vernacular surrounding [the] deployment [of digital interfaces] in the humanitarian field'.[16]

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13 Ibid 19.

14 A key text for engaging in this argument is Gayatri Chakravorty Spivak, 'Marginality in the Teaching Machine' in *Outside in the Teaching Machine* (Taylor & Francis Group, 2008). The reference to 'taxonomic talk' is from that essay, at page 84.

15 Johns (n 1) 213–219.

16 Ibid 218; I have learned much about the role and agency of the 'needy' in global knowledge politics from Mostafa Haider, 'Behind Women's Emancipation and Oppression: Contested Expertise in Global Microcredit Governance' (2023) 0(0) *Australian Feminist Law Journal* 1.

## Payoffs without policymaking

The concern of *#Help* with the shaping of legal and political vernaculars indicates the kinds of payoff for which it aims. These intended payoffs do not include, as Dizon rightly observes, 'concrete, specific and actionable law and policy recommendations'.[17] Rather the book's concern is with expanding the repertoire of legal scholarly thinking surrounding the global distributive effects of digital technology, and the range of actors understood as interlocutors and protagonists in that scholarly work.

Certainly, creative policy and law reform thinking regarding digital humanitarianism are vital. Recent innovations in tax law and policy to counter tax-avoidance or minimisation by the most data-rich (and rich in conventional terms) are indicative of prospects for giving more material effect to beneficiary communities' agency in the context of digital humanitarianism.[18] It is vital that revenue sharing and redistribution accompany, and perhaps even supplant, the predominance of consultation and procedural inclusion in thinking about intended beneficiaries' role.[19]

It is not the case, however, that legal scholarly work can only be made 'actionable' by advancing recommendations for law and policy reform. Some of the most profound, far-reaching changes in legal thought and practice are traceable to writing that has not been advanced in that register. Consider, for example, the impact that Kimberlé Crenshaw's introduction of 'intersectionality' has had, including in debates surrounding digital technology.[20] *#Help* is inspired by the example that Crenshaw and others offer of the transformative potential of work that aims to 'draw out… dissensus' and 'explor[e]… edges and difficulties' in ways that do not translate directly or obviously into a mode of practice or a project of disciplinary renewal.[21]

## The persistent power of analogy

Like the essays of Farid and Dizon, the 'conversation' that Morshed Mannan stages in this volume, between the analysis of digital humanitarianism in *#Help* and his own analysis of

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17 Dizon (n 4).

18 See, e.g., Omri Marian, 'Taxing Data' (2021) 47(2) *Brigham Young University Law Review* 511; Kane Borders et al., 'Digital Service Taxes' [2023] *Post-Print* <https://ideas.repec.org//p/hal/journl/halshs-04174657.html>; Alison Pavlovich, 'Data as a Tax Base' in *International Tax at the Crossroads* (Edward Elgar Publishing, 2023) 287.

19 On the limits of inclusion via consulation, see Johns (n 1) 94.

20 See generally Barbara Giovanna Bello and Letizia Mancini, 'Talking about Intersectionality. Interview with Kimberlé W. Crenshaw' [2016] 2 *Sociologia del Diritto* 11 and see, e.g., Yingqin Zheng and Geoff Walsham, 'Inequality of What? An Intersectional Approach to Digital Inequality under Covid-19' (2021) 31(1) *Information and Organization* 100341.

'crypto-humanitarianism', proves richly illuminating. Mannan's essayistic parallel play demonstrates how much remains to be done in the field of (international) law and technology, and the value of ongoing, collective work on blockchain and cooperative governance: Mannan's own and the work that he is doing together with and alongside other scholars.[22]

There are many points of convergence in this conversation. In taking as a starting point the inextricable entanglement of digital and analogue logics, Mannan and I are in furious agreement.[23] We are likewise on the same page regarding the extraordinary purchase of utilitarianism on the development and evaluation of digital technology, including among scholars, and its problematic and sometimes pernicious ramifications.[24] The story of Sam Bankman-Fried's FTX, on which Mannan focuses initially, has fascinating and troubling implications for law and technology scholarship. In this context and others, I am persuaded by Mannan's argument that the analogical assessment of digital humanitarianism and crypto-humanitarianism could shed significant light.

What Mannan's essay underscores is that it is not possible to grasp the politics of a particular technology, or a particular implementation of technology, by taking at face value developers' expressed political convictions, calling out shortfall in their realisation, or indeed trying to get 'behind' those declared convictions to unearth and address some true (supposedly malevolent) motivation once and for all. The notorious 'bad apple' is a far less significant figure of history than many scholars, courts, and policymakers would have us believe. This is well shown by Mannan's example of the contrast between the well-supported decentralised autonomous organisation (DAO) created to support Ukraine after Russia's invasion, and its hypothetical but non-existent counterpart in support of the Palestinian people, after the attacks on Israel in October 2023 and their extraordinary and devastating aftermath, ongoing at the time of writing.[25] Viewed in the context of cryptocurrency advocates' professed libertarianism and

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21 David Kennedy, 'When Renewal Repeats: Thinking against the Box Millenium Issue: Shaping the Parameters of International Law in the New Millennium' (1999) 32(2) *New York University Journal of International Law and Politics* 335, 475–6. For a critique of Kennedy's orientation towards extra-vernacular projects rather than the perceived needs, views, and actions of practitioners, see Bill Bowring, 'What Is Radical in 'Radical International Law'?' in J Klabbers (ed), *Finnish Yearbook of International Law.* (Hart, 2013) 1.

22 Morshed Mannan and Simon Pek, 'Platform Cooperatives and the Dilemmas of Platform Worker-Member Participation' [2023] *New technology, work and employment* Online first: https://doi.org/10.1111/ntwe.12273; Morshed Mannan, Simon Pek and Trebor Scholz, 'Platform Cooperatives and Poverty Eradication : Building on the Legacy of Johnston Birchall' (2023) 12 *Journal of entrepreneurial and organizational diversity* 33; Primavera De Filippi et al., *Report on Blockchain Technology & Legitimacy* (Technical Report, European University Institute, 2022). The work of Andrea Leiter and Delphine Dogot on global blockchain politics and governance is also worth following.

23 Johns (n 1) 35 (on the peristence and significance of analogue logic in and around digital technology).

24 Ibid 205–211.

25 Mannan (n 4).

crypto-humanitarians' claim to practice rigorous, dispassionate utilitarianism, this manifestation of inequality (or in Mannan's terms 'implicit political leanings') makes no sense. It is only through the triangulation of practice, investment, and socio-technical infrastructure that the politics of what international lawyers are accustomed to calling *structural bias* comes to light in this context.[26] As Mannan seems to accept, the study of interfaces (understood as relational effects and features of socio-technical interaction) encourages this triangulation in ways that conventional studies of doctrine, institutions, platforms, algorithms, and ideas (the latter in the mode of intellectual history) do not.[27]

## Conclusion

That the essays of Farid, Dizon, and Mannan proceed generatively in such different directions attests to the irresolution and early stage of the (international) law and technology field's grappling with humanitarianism, even as the field more broadly is replete with entrenched patterns, clichés, and truisms.[28] Readers are fortunate, as I am, to be presented, through these three review essays, with multiple, distinct routes for engagement in this ongoing work: one might caricature them as historical; policy-oriented; and meta-dissentious. In writing *#Help*, I sought to highlight the tremendously high stakes of the incursion of digital technology and logic into international humanitarian work, but also to convey a sense that there is still much to be done and decided in this domain. Reading Farid, Dizon, and Mannan redoubles my conviction that the perils and possibilities of digital humanitarianism can only be probed through concerted endeavour among unorthodox collectives of inquiry, with those who theorise through humanitarian digital technology's use, misuse, or disuse playing a key role.

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[26] For an influential account, see Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press, 2005) 600–615.

[27] Johns (n 1) 11–19.

[28] See, e.g., Benoît Godin and Dominique Vinck, 'Introduction: Innovation – from the Forbidden to a Cliché' in *Critical Studies of Innovation* (Edward Elgar Publishing, 2017) 1; Lawrence Lessig, *Code: And Other Laws of Cyberspace* (Basic Books, 1999); Melvin Kranzberg, 'Technology and History: 'Kranzberg's Laws'' (1986) 27(3) *Technology and Culture* 544.

# COMMENTARY AND CASE NOTES

# CONFLICT DRIVES HUNGER: HOW THE WAR IN UKRAINE IS IMPACTING THE GLOBAL FOOD CRISIS

PARIS MCNEIL*

## I INTRODUCTION

On 24 February 2022, Russia launched an unprovoked invasion of Ukraine resulting in a war that, to the date of writing, has entered its tenth month. Contrary to much of the rhetoric used by the media, Russia's war in Ukraine did not *cause* the current global food crisis,[1] but rather represented the straw that broke the camel's back, tipping the world into a global food crisis. This crisis was created by a perfect storm of factors including extreme weather events; the rising cost of commodities; weak economic growth post COVID-19; and market shocks on the demand and supply sides including supply chain issues, high energy costs, and transportation difficulties. While the current food crisis bears similarities to the 1972-1974 and 2007-2008 global food crises, this paper argues that the contemporary crisis—accelerated by the Russian invasion in Ukraine—will likely have a greater impact with millions of people in dozens of countries being pushed into food insecurity. Food crises disproportionately affect the world's poorest and most vulnerable people. If this global food crisis is not acted upon quickly, the impact will be devastating, with mass hunger, malnutrition, and famine potentially lasting for many years to come.[2]

This paper examines the current state of global food markets and analyses the factors influencing the current crisis including increasing global demand for grains, transportation and supply chain issues, restrictions on fertiliser supply, and the impact of Russia's war in Ukraine on global food supply. This commentary also explores the vicious cycle of hunger and conflict—conflict drives hunger and hunger can drive conflict—demonstrating the importance of addressing food insecurity. The paper examines the weaponization of food by Russia as well as the increase in food nationalism and export restrictions, exploring how these factors further

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1 Giovana Faria, 'War in Ukraine Causes Global Food Shortage', RadioFreeEurope Radio Liberty (Blog Post, 28 May 2022) <https://www.rferl.org/a/war-ukraine-global-food-shortage/31872861.html>.

2 Dea Bankova, Prasanta Kumar Dutta and Michael Ovaska, 'The War in Ukraine is Fuelling a Global Food Crisis', Reuters Graphics (Web Page, April 2022) <https://graphics.reuters.com/UKRAINE-CRISIS/FOOD/zjvqkgomjvx/>.

exacerbate global food insecurity and drive record food prices. The current crisis is compared with the crises of 1972-1974 and 2007-2008 and this paper advocates for the development of more resilient and self-sufficient food markets around the world to prevent a similar crisis in the future.

## II THE STATE OF FOOD GLOBALLY

This section will provide the background to the current global food crisis by examining the factors which contributed to creating the crisis. It will then explore the factors exacerbating the crisis including the increasing global demand for grains, Ukraine and Russia's contribution to the food market, access and transportation difficulties, and the role of fertiliser in global food chains.

### A *Ukraine and Russia's contribution to the global food market*

Prior to Russia's invasion in late February 2022, the global food system was already under considerable strain. Wheat is the most widely cultivated crop in the world representing 18 per cent of the world's calories and 19 per cent of proteins consumed.[3] Since the 1960s, demand for wheat has soared, in part due to world population growth and the industrialisation of major economies such as China and India.[4] These countries have experienced rapid urbanisation, quickly increasing incomes, and in many cases an increased 'westernisation' of their diets, all of which contribute to an increase in wheat consumption per capita.[5] While approximately 66 per cent of global wheat is produced for human consumption, one fifth of wheat is used as feed for livestock (and this number has been steadily growing from 9 per cent in 1963 to 21 per cent in 2017).[6] As more countries have developed, so too has the global demand for wheat.

The world has come to depend on six so called 'breadbaskets', which are major cereal-producing regions, to meet the growing demand for grains. Ukraine and Russia comprise the breadbasket that supplies Europe, the Middle East and Northern Africa with a variety of food products. Ukraine and Russia export nearly 12 per cent of all globally traded food calories.[7] In

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3 Matthew Reynolds and Hans-Joachim Braun, *Wheat Improvement Food Security in a Changing Climate* (Springer, 2022) 57.
4 Ibid, 57.
5 'MacroVoices #337 Leigh Geohring: The Global Food & Fertilizer Crisis Is Much Bigger than Russia/Ukraine', *Macro Voices* (Fourth Turning Capital Management, 18 August 2022).
6 Reynolds (n 3) 57.
7 Anna Caprile, 'Russia's War on Ukraine: Impact on Food Security and EU Response', *European Parliamentary Research Service* (Fact Sheet, April 2022) <https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/729367/EPRS_ATA(2022)729367_EN.pdf> 1.

2021, Ukraine supplied 9 per cent of global wheat exports, 12 per cent of global corn exports, 17 per cent of global barley exports, 46 per cent of global sunflower oil exports, and 54 per cent of global sunflower meal exports.[8] In that year, Ukrainian wheat exports were valued at $5.1 billion US dollars, with the biggest importers being Egypt, Indonesia, Turkey, Pakistan, and Bangladesh.[9]

The war in Ukraine has resulted in millions of tonnes of food being removed from the global market,[10] creating a spike in already record high prices and forcing the 400 million people around the world who import food from Ukraine to look to other markets to meet their needs.[11] The World Food Program (WFP)[12] has also been severely impacted as 40 per cent of its wheat is sourced from Ukraine.[13] Alarmingly, 36 countries rely on Ukraine and Russia for over 50 per cent of their wheat imports.[14] Relatively well-functioning economies like Egypt (who import more than two-thirds of their wheat from Russia and Ukraine)[15] will likely be able to source wheat from alternative sources and keep their people fed. However, poorer countries (particularly those already struggling economically due to climate events and conflict, such as Yemen, Ethiopia, and Pakistan) will likely be unable to shoulder the increased price of food. This food crisis affects, and will continue to disproportionately affect, the poorest people in the world.

## B *Access and transportation*

One would be mistaken to suggest that in order to solve the global food crisis, the world simply needs to grow more food; the world produces enough food to feed and sustain our global population. The biggest issue driving this global food crisis is not a lack of food, but rather a lack of access to food. The COVID-19 pandemic created a host of supply chain issues and transportation delays that impacted businesses worldwide. The infamous Evergreen container

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8 US Foreign Agricultural Service, 'Ukraine Agricultural Production and Trade', US Department of Agriculture (Fact Sheet, April 2022) <https://fas.usda.gov//sites/default/files/2022-04/Ukraine-Factsheet-April2022.pdf?itid=lk_inline_enhanced-template> 1.

9 Ibid, 2.

10 'How did the Russia-Ukraine War Trigger a Global Food Crisis?' *Aljazeera* (online, 18 June 2022) <https://www.aljazeera.com/economy/2022/6/18/explainer-how-did-russia-ukraine-war-trigger-a-food-crisis> 2.

11 Ibid, 3.

12 The World Food Program is the United Nations' humanitarian food-assistance organisation which supported over 128 million people in more than 120 countries and territories in 2021. 'World Food Programme', *Our Work* (Web Page) <https://www.wfp.org/our-work>

13 Spencer Feingold, 'Ukraine's Food Exports by the Numbers', *World Economic Forum* (Web Page, 25 July 2022) <https://www.weforum.org/agenda/2022/07/ukraine-s-food-exports-by-the-numbers/> 2.

14 Eddy Wax, 'The World Food Crisis is About to Get Worse', *Politico* (online, 15 August 2022) <https://www.politico.eu/article/world-food-crisis-ukraine-russia-war-global-warming-united-nations/> 2.

15 Feingold (n 13) 2.

ship incident in 2021 in which the Suez Canal (one of the world's busiest trade routes) was blocked,[16] demonstrated the world's vulnerability to supply chain and transportation shocks. China's ZERO-COVID policy also placed strain on supply chains, with major trade hubs in Shanghai and Beijing experiencing lockdowns and labour shortages in late 2022 due to negative COVID test requirements.[17] Moreover, seafarers from Russia and Ukraine make up 14.5 per cent of the global shipping workforce.[18] As stated by the Secretary General of the International Chamber of Shipping, Guy Platten, 'seafarers have been at the forefront of keeping trade flowing through the pandemic and we hope that all parties will continue to facilitate free passage of goods and these key workers at this time'.[19] Unfortunately, the majority of seafarers from Russia and Ukraine are unable to work due to conscription laws preventing them from leaving the country, placing increased pressure on an already strained shipping workforce post COVID-19.[20]

All of these factors have culminated in an access to food crisis, with the war in Europe's breadbasket fanning the flames. Between February-June 2022, 20-25 million tonnes of Ukrainian grain destined for Northern Africa, the Middle East and parts of Asia was prevented from leaving via the Black Sea.[21] Ukraine installed mines in the Black Sea to reduce the threat of an amphibious attack, however, this also means that grain could not be easily exported by ship. There was potential for exports to be shipped via supply corridors because the mine locations are known,[22] however, obtaining insurance presents another issue as insurers were unlikely to issue policies for ships travelling through mine-laden waters.[23] The warring nations appeared to be at a stalemate on this issue, with Russia stating that they would 'guarantee the safety of vessels leaving Ukrainian ports'[24] heading for Turkish waters provided Ukraine

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16 Theo Leggett, 'Egypt's Suez Canal Blocked by Huge Container Ship', *BBC News* (online, 24 March 2021) https://www.bbc.com/news/world-middle-east-56505413.

17 Noah Higgins-Dunn, 'How China's Strict COVID Policies Led to Supply Chain Bottlenecks', *CNBC* (online, 19 August 2022) <https://www.cnbc.com/2022/08/19/how-chinas-covid-policies-lead-to-hampered-supply-chains-higher-inflation.html>;Simon Geale, 'How China's Zero-COVID Policy is Affecting Global Supply Chains', *Proxima* (Web Page, 25 August 2022) <https://www.proximagroup.com/how-chinas-zero-covid-policy-is-affecting-global-supply-chains/>.

18 Derek Headey and Shenggen Fan, Reflections on the Global Food Crisis: How Did it Happen? How Has it Hurt? And How can we Prevent the Next One? (Report, 2010) 1.

19 Ibid, 2.

20 Emily Smith, 'War in Ukraine May Lead to Seafarer Shortage and Impact on Supply Chains', *ABC News* (online, 25 June 2022) <https://www.abc.net.au/news/2022-06-25/ukraine-russia-war-impact-on-seafarers-shipping-cargo-trade/101170448#:~:text=Ukraine%20is%20the%20world's%20sixth,cent%20of%20the%20world's%20seafarers> 2.

21 'How did the Russia-Ukraine War Trigger a Global Food Crisis?' *Aljazeera* (online, 18 June 2022) <https://www.aljazeera.com/economy/2022/6/18/explainer-how-did-russia-ukraine-war-trigger-a-food-crisis> 2.

22 Ibid, 7.

23 Ibid.

24 Tom Espiner, 'Ukraine War: WTO Boss Warns of Global Food Crisis', *BBC News* (online, 8 June 2022) <https://www.bbc.com/news/business-61727651> 2.

demined the Black Sea. On the other hand, Ukraine stated it needed 'effective security guarantees' before starting shipments as they feared Russia could abuse the corridor and attack Odessa and other ports from the sea.[25] This tension was further exacerbated when, within hours of Moscow and Kyiv signing the Black Sea Grain Initiative–a United Nations-backed treaty deal allowing exports to leave from Ukrainian ports in July 2022–Russian missiles struck the port of Odessa.[26] Transporting grain by rail was explored, however, Ukraine's rail gauges are different sizes to its western neighbours including Poland.[27] The United States (US) President Joe Biden stated he would build temporary grain silos on Ukraine's border with Poland in order to facilitate additional grain exports by rail.[28] While this may provide some relief, the lengthy detour through western Europe and the additional costs involved will have an inflationary impact on grain prices.

A promising development occurred on 16 August 2022 when 23 000 metric tonnes of Ukrainian grain was transported via the Black Sea by the WFP to the Horn of Africa region where food insecurity, coupled with the worst drought in 40 years, pushed 20 million people into catastrophic hunger and famine.[29] Moreover, between July-October 2022, 38 countries purchased around 9 million tonnes of grain from Ukraine under the Black Sea Grain Initiative.[30] While not all of this grain was destined for countries suffering from acute food insecurity, exporting this grain reduced market volatility and reduced food prices, preventing an estimated 100 million people from falling into poverty.[31] These shipments provided much needed relief to both the recipients and the Ukrainian farmers who needed to make room for the next harvest of crops.

Unfortunately, if Ukraine cannot ship all of the grain that is held in storage, farmers will face additional challenges as the following crop becomes ready to harvest because there will be nowhere to store the crops prior to sale and distribution. The war in Ukraine will also have

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25 Ibid.

26 Asim Anand, 'Beyond the Black Sea: How Russia's War in Ukraine is Exacerbating Food Insecurity', *S&P Global* (Blog Post, 29 July 2022). <https://www.spglobal.com/commodityinsights/en/market-insights/blogs/agriculture/072822-russia-ukraine-food-security> 2.

27 'How did the Russia-Ukraine War Trigger a Global Food Crisis?' *Aljazeera* (online, 18 June 2022) <https://www.aljazeera.com/economy/2022/6/18/explainer-how-did-russia-ukraine-war-trigger-a-food-crisis> 3.

28 Kelly Hooper and Meredith Lee, 'Biden: U.S. to Build Silos on Poland Border to Export Ukrainian Grain', *Politico* (online, 14 June 2022) <https://www.politico.com/news/2022/06/14/biden-u-s-to-build-silos-on-poland-border-to-export-ukrainian-grain-00039455>.

29 Edmond Khoury, 'Ukraine: Six Months of War and Humanitarian Response Amid a Global Food Crisis', *World Food Program* (Web Page, 24 August 2022) <https://www.wfp.org/stories/ukraine-six-months-war-and-humanitarian-response-amid-global-food-crisis>.

30 United Nations, 'Russian Federation's Suspension of Participation in Black Sea Grain Initiative Risks Impacting Global Food Prices, Top Officials Tells Security Council', *United Nations Meeting Coverage and Press Releases* (Web Page, 31 October 2022) <https://press.un.org/en/2022/sc15089.doc.htm>.

31 Ibid.

impacts on grain production for years to come as farmers are unable to plant the same volume of seeds as their fields are laden with ammunition. There is an ongoing threat of Russian attacks by air, and a significant amount of agricultural infrastructure (including storage and refrigeration facilities) have been destroyed by Russian attacks. These factors mean that until the war in Ukraine ends, the global food crisis will continue to be prolonged.

## C *Fertiliser*

Another facet of this global food crisis is the impact of fertiliser. Russia is the largest exporter of fertiliser in the world, accounting for 23 per cent of ammonia, 21 per cent of potash, 14 per cent of urea and 10 per cent of processed phosphate exports. Russian ally Belarus is the fifth largest exporter of fertiliser.[32] The biggest importers of Russian fertiliser are Brazil, China, the US and India.[33] Similar to pre-war food prices, fertiliser prices were already at a record high when Russia invaded Ukraine in February 2022.[34] In the US, fertiliser prices were expected to increase by at least 12 per cent in 2022 after a previous increase by 17 per cent in 2021.[35] The war resulted in disruptions to shipping fertiliser with both Russia and China (the largest and second largest fertiliser exporters in the world respectively) imposing export restrictions on fertiliser to ensure they have sufficient stock for domestic use.[36]

A crisis in the supply of fertiliser is arguably more troubling than a generalised food crisis. Fertiliser has been credited as one of the reasons why the world has been able to keep up with the increasing demand for grains as populations grow and nations industrialize.[37] A crisis in fertiliser has the potential to inhibit food production for many years into the future. The importance of modern fertilisers can be seen in Sri Lanka where the government banned the use of chemical fertilisers on crops, meaning farmers relied on organic fertilisers (comprising predominantly animal dung). As a result, crop yields decreased by at least 30 per cent in 2022,

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32 Bankova, Dutta and Ovaska (n 2) 13.

33 Joana Colussi and Gary Schnitkey, 'War in Ukraine and its Effect on Fertilizer Exports to Brazil and the U.S.', *Farmdoc Daily* (Web Page, 17 March 2022) <https://farmdocdaily.illinois.edu/2022/03/war-in-ukraine-and-its-effect-on-fertilizer-exports-to-brazil-and-the-us.html>.

34 John Baffes and Wee Chian Koh, 'Fertilizer prices expected to remain higher for longer', *Data Blog* (Blog Post, 11 May 2022) <https://blogs.worldbank.org/opendata/fertilizer-prices-expected-remain-higher-longer>.

35 Tom Polansek and Ana Mano, 'As Sanctions Bite Russia, Fertilizer Shortage Imperils World Food Supply', *Reuters* (Web Page, 24 March 2022) <https://www.reuters.com/business/sanctions-bite-russia-fertilizer-shortage-imperils-world-food-supply-2022-03-23/> 3.

36 Bankova, Dutta and Ovaska (n 2) 12.

37 'MacroVoices #337 Leigh Geohring: The Global Food & Fertilizer Crisis Is Much Bigger than Russia/Ukraine', *Macro Voices* (Fourth Turning Capital Management, 18 August 2022); Reynolds (n 3) 54.

and yields for the following harvest will also likely be affected.[38] Brazil is one nation that is especially affected by the fertiliser crisis as Brazil consumes 8 per cent of global fertiliser, importing 85 per cent of all fertilisers they consume, and sourcing nearly 30 per cent of imports from Russia and Belarus.[39]

Finally, as natural gas is a key ingredient in many types of fertilisers, the fertiliser crisis is linked to the climate emergency which is dominating policy positions around the world. There exists a tension between decarbonisation policies which restrict the exploration and production of natural gas, and the requirement for additional natural gas to create enough fertiliser to feed the global population. These contemporary crises should not be considered in isolation; policy-makers should strike a fine balance between conserving the environment and ensuring that the required volumes of commodities like natural gas are produced to ensure that the world grows enough food.

Prior to Russia's invasion of Ukraine, the aforementioned factors, such as supply chain and transportation challenges and record high fertilizer prices, were already increasing food insecurity. Although not the singular cause of the global food crisis, the war in Ukraine represented the inflection point that tipped the world into an enduring global crisis. The combination of drivers including shipping disruptions, climate events, and a fertiliser shortage make this crisis particularly serious. When these factors are combined with irresponsible political decisions such as the apparent strategy of the President of Russia, Vladimir Putin, to weaponize food, as well as the imposition of export restrictions by nearly 20 countries, this food crisis has the potential to become more severe and push more people into malnutrition and chronic hunger than the food crises of 1972-1974 and 2007-2008.

## III CONFLICT DRIVES HUNGER

### A *Why is the current crisis different?*

Global food crises are not new phenomena. The world experienced similar events in 1972-1974 and again in 2007-2008, with many of the factors driving those surges in food prices also being present in the contemporary food crisis. In both of these earlier food crises, the key causes

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38 Uditha Jayasinghe and Devjyot Ghoshal, 'Fertiliser ban decimates Sri Lankan crops as government popularity ebbs', *Reuters* (Web Page, 3 March 2022) <https://www.reuters.com/markets/commodities/fertiliser-ban-decimates-sri-lankan-crops-government-popularity-ebbs-2022-03-03/> 3-4.

39 Colussi and Schnitkey (n 33) 1-2.

included rising oil prices, market shocks on both the supply and demand side, and long-term pressure on international food markets from steadily growing demand.[40] The 1972-1974 food crisis was shaped by a number of additional factors. In the 1960s, the US was the world's residual supplier of grains and implemented a policy to reduce grain production to increase wheat prices. This policy also resulted in reduced grain reserves, making the world more susceptible to the impacts of fluctuations in the price of grain.[41] On the back of reduced production, in 1971 President Nixon liberalised exports to China and the USSR which significantly increased demand for grain; in 1972, the USSR purchased more than 25 per cent of the US crop and more than half of its previous year reserves.[42] Around this time, climate events also impacted Australia, Peru, Argentina, India, the Philippines, and the USSR resulting in a 3 per cent decline in global grain production.[43] While these climate-induced output shocks exacerbated the food crisis, they were likely not a driving factor as similar supply shocks occurred in the 1960s which did not cause a global food crisis.[44] The 2007-2008 food crisis was also driven by a significant demand shock: the rise of the biofuel industry which consumed more than one quarter of all maize produced in the US in 2007.[45] Both crises were of a similar scale and scope, with wheat prices increasing 182 per cent from 1970-1974 and by 108 per cent from 2005-2008.[46] Notably, during both periods, the price of fertiliser also increased by around 300 per cent.[47]

While the globe has faced and overcome food crises before, each of the previous crises of 1972-1974 and 2007-2008 were preceded by more than 10 years of strong global economic growth.[48] The contemporary food crisis comes off the back of two years of generally weak GDP growth, with many countries still recovering from the economic shocks caused by the COVID-19 pandemic. When this is combined with extreme weather events, supply chain issues, increasing commodity costs, and a fertiliser crisis, the outlook becomes far more grave. Many countries that were already economically strained from COVID-19 will be unable to shoulder the increased price of food, commodities, and fertiliser, forcing more people into food insecurity.

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40 Headey and Fan (n 18) 82.
41 Ibid, 84.
42 Ibid, 85.
43 Ibid.
44 Ibid.
45 Ibid, 88.
46 Ibid, 81.
47 Ibid, 11.
48 Ibid, 87.

The current crisis is further exacerbated by various political decisions, such as the imposition of export restrictions, leading to an unprecedented global food crisis which will likely last for longer and impact more lives than either of the two previous crises.

## B *Weaponization of food*

Weaponizing food is not a new tactic during war; stopping food or water is a key part of laying siege to a city in order to force its surrender. In response to Russia's invasion of Ukraine, much of the Western world imposed sanctions on Russia and Belarus to attempt to enforce international law and condemn Russia's conduct.[49] Russia responded by using food as a defensive weapon by restricting its supply and destroying agricultural infrastructure, ultimately impacting countries far removed from the Ukrainian conflict. This weaponization of food, along with global anti-democratic spirit in the form of food nationalism, has remained the central driver of the ongoing global food crisis.

Moscow has stated that Russia has been unable to export grain and fertiliser due to restrictive sanctions imposed by Western nations, however, these sanctions were intentionally imposed on neither food nor fertiliser because of their importance to the global population.[50] Rather, the sanctions target Russia's banking systems and restrict the movement of oligarchs and people of importance.[51] Although food and fertiliser are not sanctioned, sanctions on finance and shipping are making it difficult for buyers to obtain insurance and ultimately, their desired products.[52] However, it must be acknowledged that many countries do not share the views of the West and consequently have not imposed sanctions and are not perturbed from purchasing Russian and Belarusian exports. For example, in October 2022, the Syrian regime of Bashar Al-Assad signed agreements to purchase and import wheat from Russia.[53] Moreover, some commentators hypothesize that the global food crisis could be used in Russia's favour; as cost of living prices increase and pressure mounts on politicians in Western nations to provide relief for their people, some countries may relax their sanctions or encourage Ukraine to broker a

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49 Council of the European Union, 'EU Sanctions Against Russia Explained', European Council Council of the European Union (Web Page, 5 January 2023) <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/>.

50 Ibid; 'How Putin is Weaponising the Global Food Crisis and What the World Can Do', Ukraine: The Latest (The Daily Telegraph, 7 June 2022).

51 Ibid.

52 David Uren, 'Food Supplies Squeezed by Ukraine War and Trade Bans', *Australian Strategic Policy Institute The Strategist* (Blog Post, 16 May 2022) <https://www.aspistrategist.org.au/food-supplies-squeezed-by-ukraine-war-and-trade-bans/> 2.

53 'Syria regime signs new agreements for wheat imports from Russia', *Middle East Monitor* (online, 10 October 2022) <https://www.middleeastmonitor.com/20221010-syria-regime-signs-new-agreements-for-wheat-imports-from-russia/>.

deal in order to ease domestic cost pressures.[54] It remains to be seen whether Western nations will continue to impose sanctions in the face of high inflation rates, cost of living increases, and many of their people facing financial stress.

Russia has also been accused of stealing grain from Ukraine worth an estimated $530 million and selling it to countries in the Middle East and North Africa to finance the war.[55] Satellite imagery and transponder data determined that more than 30 ships made over 50 voyages smuggling grain from occupied Ukraine.[56] Evidence has surfaced that a number of freighters have disappeared from radar in the Black Sea and then reappeared days later; the vessels appear to have intentionally turned off their transponders against the requirements of the International Maritime Organization.[57] Many of these ships claim that Kavkaz in Russia was their port of origin, however, this is likely untrue as that port cannot accommodate the depth requirements of the majority of the freighters.[58] Satellite imagery also showed smaller Russian ships, travelling from Russian occupied Ukraine, docking with larger freighters in the middle of the Black Sea and mixing the grain to obscure its origin.[59] This stolen grain is then transported to the Middle East and North Africa.[60]

The alleged ongoing theft of Ukrainian grain, along with attacks of food and water facilities in Ukraine by Russian forces, may amount to war crimes.[61] David Crane, a prosecutor who has investigated numerous international war crimes stated that the Russians:

> have an absolute obligation to ensure that civilians are cared for and to not deprive them [of] their ability of a livelihood and an ability to feed themselves…It's just pure pillaging and looting, and that is also an actionable offence under international military law.[62]

In September 2022, a United Nations human rights inquiry found that Russia had committed war crimes comprising brutal executions and sexual violence (including against children).[63] It

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54 'How Putin is Weaponising the Global Food Crisis and What the World Can Do', *Ukraine: The Latest* (The Daily Telegraph, 7 June 2022).

55 Michael Biesecker, Sarah El Deeb and Beatrice Dupuy, 'Russia Smuggling Ukrainian Grain to Help Pay for Putin's War', *Associated Press* (online, 3 October 2022) <https://apnews.com/article/russia-ukraine-putin-business-lebanon-syria-87c3b6fea3f4c326003123b21aa78099>.

56 Ibid.

57 As.com, 'Russia's 'Ghost Ship' Tactic', *AS* (online, 19 July 2022) <https://en.as.com/latest_news/russias-ghost-ship-tactic-n/> 2.

58 Biesecker, El Deeb and Dupuy (n 55).

59 Ibid.

60 Ibid.

61 'War Cimes Watch Ukraine', *PBS* (Web Page, 15 September 2022) <https://www.pbs.org/wgbh/frontline/interactive/ap-russia-war-crimes-ukraine/?facets=%7CFood%2FWater+Facility%7C>.

62 Biesecker, El Deeb and Dupuy (n 55).

63 United Nations, 'War Crimes have been Committed in Ukraine Conflict, Top UN Human Rights Inquiry Reveals', *UN News* (Web Page, 23 September 2022) <https://news.un.org/en/story/2022/09/1127691>.

appears this list of war crimes will need to be expanded to include the alleged theft and smuggling of Ukrainian grain.

Furthermore, on 29 October 2022, Russia suspended its participation in the Black Sea Grain Initiative (a treaty signed in July 2022 to allow Ukrainian grain to be exported via the Black Sea) for an unspecified period of time due to alleged attacks on its vessels.[64] Russia's withdrawal caused a further spike in the price of food and fertiliser; a decision that disproportionately affected the world's most vulnerable people.[65] On 17 November 2022, it was announced that the Black Sea Grain Initiative would be extended for an additional four months, providing increased food security in the short term for the nations dependent on Ukrainian grain.[66]

Russia's conduct has not gone unnoticed by the rest of the world. At the 9 176th meeting of the United Nations Security Council (Security Council) on 31 October 2022, United Nations representative of Kenya, Martin Kimani, called for the Security Council to immediately conduct a fact-finding and verification investigation on war-related actions that endanger global food security.[67] At the same meeting, the United Nations representative of Russia, Vassily Nebenzia, announced that 'Russia is … ready to provide grain at affordable prices and provide free of charge 500 000 tons [of grain] to the poorest countries in the upcoming four months'.[68] The representative of the US, Jeffrey Delaurentis, replied that although Russia's donation of 500 000 tonnes of grain was 'a welcome step, [it] should not come at the cost of blocking vastly larger quantities of food exports from Ukraine'.[69]

Russia's decision to employ a tactic to weaponize food in a time of crisis is deplorable. United Nations representative of Albania, Ferit Hoxha, stated that 'no one has the right to weaponize food or play starvation games'.[70] Millions of the world's most vulnerable people will suffer and thousands will die from starvation as a result of Russia's unprovoked invasion, decisions

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64 United Nations, 'Russian Federation's Suspension of Participation in Black Sea Grain Initiative Risks Impacting Global Food Prices, Top Officials Tells Security Council', *United Nations Meeting Coverage and Press Releases* (Web Page, 31 October 2022) <https://press.un.org/en/2022/sc15089.doc.htm>.

65 Ibid.

66 Eddy Wax, 'Ukraine's Black Sea grain export lifeline extended for 4 months', *Politico* (Web Page, 17 November 2022) <https://www.politico.eu/article/ukraine-un-says-black-sea-grain-deal-will-continue/>.

67 United Nations, 'Russian Federation's Suspension of Participation in Black Sea Grain Initiative Risks Impacting Global Food Prices, Top Officials Tells Security Council', *United Nations Meeting Coverage and Press Releases* (Web Page, 31 October 2022) <https://press.un.org/en/2022/sc15089.doc.htm>.

68 Ibid.

69 Ibid.

70 Ibid.

to destroy agricultural infrastructure in Ukraine, and the ongoing theft of Ukrainian grain which is being sold to finance a continued war effort.

## C *Food nationalism*

In response to increasing food and fertiliser prices arising out of Russia's war in Ukraine, nearly 20 countries imposed export restrictions on grain, oilseed products and fertiliser in what has been termed 'food nationalism'.[71] Fearing prices will further rise, and contrary to the advice provided by the G7 Agricultural Ministers, many countries with poor food security imposed export bans to attempt to protect domestic supply levels.[72] This is not a new response; during the 2007-2008 food crisis, export restrictions caused the price of food to surge by 40 per cent.[73] Two thirds of the current restrictions have been imposed on grain exports including wheat, barley and rye;[74] other nations have imposed export restrictions on sugar (India), cooking oil (Egypt), live chicken exports (Malaysia), palm oil exports (Indonesia), and fertiliser (Russia).[75] While export restrictions are generally implemented with the intention of protecting domestic customers, the restrictions result in reduced supply on global markets and increased uncertainty which will ultimately worsen the global food crisis.[76] Export restrictions and food nationalism will result in an increased price of those restricted commodities and a detriment to domestic producers as they are unable to sell their goods on the open market and take advantage of the higher global price. Russian export restrictions were estimated to cause an indirect loss of nearly $2 billion for grain farmers in 2022 as they were selling grain on the domestic market for a price that was one quarter of the world average.[77] The World Bank estimates that Russia's export restrictions alone have contributed to 86 per cent of the price increase in corn and 83 per cent of the price increase in the wheat market.[78] The importance of free trade cannot be understated in a time of crisis; hysteria is responsible for a considerable portion of the surge in

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71 Jonathan Dart, 'News Review: Ukraine Invasion Sparks Food Nationalism', *Czapp* (Web Page, 21 March 2022) <https://www.czapp.com/analyst-insights/news-review-ukraine-invasion-sparks-food-nationalism/> 4. This is an increase from five existing export bans prior to the invasion in February 2022.

72 Ibid.

73 World Food Program, *War in Ukraine Drives Global Food Crisis* (Report, 24 June 2022) 5.

74 Bankova, Dutta and Ovaska (n 2) 9.

75 'How did the Russia-Ukraine War Trigger a Global Food Crisis?' *Aljazeera* (online, 18 June 2022) <https://www.aljazeera.com/economy/2022/6/18/explainer-how-did-russia-ukraine-war-trigger-a-food-crisis> 11.

76 Feed Strategy Staff, 'The Rise of the Food Nationalism Era', *Feed* Strategy (Blog Post, 5 October 2022) < https://www.feedstrategy.com/business-markets/the-rise-of-the-food-nationalism-era/> 4.

77 Ibid, 6

78 Ibid, 4.

prices of food.[79] All nations should implement measures to promote free trade, remove export bans and consider diversifying trade partners to allow global food prices to stabilise.

The contemporary global food crisis is similar in many ways to the crises of 1972-1974 and 2007-2008, with many of the drivers being the same: rising commodity prices, supply and demand shocks and long-term pressure from steadily increasing demand for grains. However, the contemporary food crisis has the potential to persist for longer and impact more people than the previous crises because of generally weak economic conditions making countries less resilient to price increases, Russia's weaponization of food, and export restrictions further inflating grain prices. It is clear that the conflict in Ukraine is propelling much of the world into food insecurity. As this crisis continues, the resultant hunger may also lead to more conflict, further perpetuating this cycle of crisis.

## IV HUNGER DRIVES CONFLICT

While conflict is a key factor that drives food insecurity, hunger is also a key driver of conflict. The current global food crisis has, and likely will continue to have, implications that go beyond hunger, namely civil unrest, protests and riots, and democratic breakdowns. This link is not a new phenomenon; during the Global Financial Crisis, export restrictions created food shortages which led to riots in a number of Middle Eastern countries that set the tone for the Arab Spring in 2010-2011.[80] Consequently, conflicts arising from hunger caused by the current food crisis will further perpetuate the humanitarian crises unfolding around the world, and will likely result in our most vulnerable people becoming more food insecure. Civil unrest has already occurred as a result of the current food crisis, with riots occurring in Sudan after a 43 per cent increase in the price of bread within a month of Russia's invasion,[81] and protests in Iran occurring in May 2022 as government grain subsidies were cut and the price of bread tripled.[82] Protests have occurred in other countries including Argentina, Indonesia, and Greece,[83] and civil unrest in countries that were already struggling such as Sri Lanka, is likely to worsen.[84]

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79 Feed Strategy Staff (n 76).

80 Uren (n 52) 2. The Arab Spring involved anti-government protests, uprisings and armed rebellions across a number of Arab countries, resulting in a number of new governments being instated.

81 Dart (n 71) 2.

82 Uren (n 52) 2.

83 Bankova, Dutta and Ovaska (n 2) 5.

84 Uditha Jayasinghe and Devjyot Ghoshal, 'Fertiliser ban decimates Sri Lankan crops as government popularity ebbs', *Reuters* (Web Page, 3 March 2022) <https://www.reuters.com/markets/commodities/fertiliser-ban-decimates-sri-lankan-crops-government-popularity-ebbs-2022-03-03/>.

For the 36 countries that rely on Russia and Ukraine for more than half of their grain imports, there is a serious risk of conflict arising from this global food crisis. This risk will be further compounded by the WFP's inability to keep up with the demand for aid. The war in Ukraine has contributed to the WFP's monthly costs increasing by US$73.6 million (44 per cent above the 2019 average).[85] Increasing prices and reduced donor funding have resulted in the WFP implementing needs-based prioritization schemes, cutting rations, and suspending assistance to millions in need of increased food security.[86] The WFP is 'forced to take from the hungry to feed the starving'.[87]

As a recipient of the allegedly stolen grain, Lebanon demonstrates the diplomatic difficulties countries face as they become more food insecure. Lebanon, which relies on Russia and Ukraine for more than 25 per cent of an average family's caloric intake, is already facing a financial crisis, and is lacking agricultural storage infrastructure after the explosion in Beirut in 2020.[88] Countries like Lebanon must make difficult decisions to balance the need to feed their people—the consequence of not doing so likely being civil unrest and conflict—with the political ramifications of purchasing discounted (and potentially stolen) commodities from Russia. Relatively well functioning economies that are also heavily reliant on Ukrainian and Russian food exports, like Egypt, appear to have a greater ability to consider the political ramifications of such a decision as they have sufficient funds to shoulder the increased price of imports from other sources. Nations that are struggling economically, however, do not have this luxury.

Hunger and food insecurity often leads to conflict. If not acted upon swiftly, the contemporary food crisis will have ramifications beyond malnutrition, including riots and democratic breakdowns, which will in turn further exacerbate food insecurity and trap nations in a vicious cycle of hunger and conflict. In order to prevent a worsening humanitarian crisis and mass loss of life, this paper recommends that innovative policy solutions be developed to address the food transportation and production issues by placing more importance on developing resilient, self-reliant, and open food markets to curtail future food-related conflicts.

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85 World Food Program, *War in Ukraine Drives Global Food Crisis* (Report, 24 June 2022) 5.
86 Ibid.
87 Ibid.
88 Uren (n 52) 2.

## V AN OPPORTUNITY FOR INCREASED RESILIENCE IN FOOD MARKETS

The current global food crisis demonstrates that the world's food production and supply systems are acutely vulnerable to market shocks and ongoing crises such as climate change and increasing energy prices. The liberalisation of international trade in the 20th century created global food supply chains which led to many poorer nations becoming overly dependent on international markets and neglecting local food security.[89] Creating a more sustainable and resilient food system is one way in which the world can safeguard against another global food crisis. Our food systems must support greater diversity: diversity in where food is produced and reducing our reliance on breadbaskets; increasing diversity of crops and capitalising on neglected indigenous crops; greater diversity of energy sources for agriculture, including renewable sources; and increasing diversity of diets, particularly plant-based diets, to incorporate a wider variety of whole foods.[90] This type of reform may not be the most economical solution, however, short-term costs can be justified when one considers the savings (both financial and in the human toll) that a resilient and diversified food system will have when crisis hits. Some of these outcomes could be achieved through government intervention by diverting some of the allocated agricultural research and development budgets away from traditional crops like wheat, rice, and barley, and into other indigenous crops that could be a productive addition to our diets.[91]

The global food crisis, while having devastating impacts, also represents an opportunity for places like Africa, which are heavily reliant on food imports, to become more resilient and self-reliant. Africa has a number of indigenous grains which are substitutes for wheat, such as teff grown in Ethiopia and cassava in Nigeria.[92] These indigenous crops are highly nutritious, cost-effective, and if cultivated effectively could significantly reduce many African nations' reliance on wheat imports.[93] Data sharing across the African continent also presents an opportunity for resilience by mediating shortages and abundances.[94] At any given time, there is likely an African nation experiencing a bumper harvest, and one experiencing food insecurity arising from a climate event like a drought or flood.[95] Africa as a whole should prioritise

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89 United Nations, The Global Social Crisis Report on the World Social Situation (Report ST/ESA/334, 2011) 73.
90 'How the War in Ukraine is Creating a Global Food Crisis', *The Daily* (The Daily Telegraph, 5 April 2022).
91 Ibid.
92 Ibid.
93 Ibid.
94 Ibid.
95 Ibid.

implementing effective data sharing policies so that supply and demand can have a greater influence on how crops are distributed.[96]

To give examples of some country level initiatives, in March 2022, the Brazilian government implemented a plan to reduce their dependence on fertiliser imports from 85 per cent to 45 per cent by 2050.[97] The program involved increasing the use of organic fertilisers, increasing financial investment in domestic fertiliser production, and promoting more efficient use of different types of fertilisers across the industry, which is forecast to reduce Brazil's fertiliser demand by 20 per cent in the 2022-2023 crop.[98]

While relying solely on organic fertilisers could have unintended consequences (as seen in Sri Lanka), conducting soil tests to identify the nutrients lacking in particular soils would likely promote a more efficient use of fertiliser, assist to reduce the volume of fertiliser required, and consequently, reduce a state's dependence on fertiliser imports.

Finland, on the other hand, frequently sits at the top of the food security index.[99] Even in challenging climate conditions (one third of Finland's land mass being above the Arctic Circle, limited arable land, and dark, icy winters), Finland makes food security a priority. Finland is the world's second largest exporter of oats, with farmers prioritising this cereal instead of wheat or rye as oats are extremely resilient to cold temperatures.[100] Fruit and vegetables require more infrastructure such as heated greenhouses, which comes at a cost, however, this self-reliance has provided Finland with a significant buffer against market shocks.[101] The world should look to Finland as a leader in food self-reliance and aim to implement some of the learnings that have largely protected Finland from the impacts of the current food crisis.

While increasing food sovereignty, particularly in poor nations that are susceptible to chronic food shortages, may not necessarily prevent another global food crisis, it will significantly reduce the severity and duration of a future food crisis. Increased food self-reliance will hopefully allow nations to bounce back faster than if they were reliant on food imports from a small number of international trade partners. The current food crisis also represents an opportunity to learn from the past and make meaningful changes. As the drivers of the 1972-

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96 Ibid.
97 Colussi and Schnitkey (n 33) 3.
98 Ibid.
99 'Global Food Crisis: Leaders Urge Action as Ukraine War Strains Supply Chains', *People and Profit* (France 24, 3 June 2022).
100 Ibid.
101 Ibid.

1974 and 2007-2008 crises and the current crisis are similar, if the world does not address these fundamental issues in food markets by increasing resilience and diversity, the world will almost certainly experience a further similar crisis in years to come.

## VI CONCLUSION

Russia's war in Ukraine continues to exacerbate the growing global food crisis. Commentators estimate that even if the war ended tomorrow, it could take over a year for the food market to recover, with millions of people experiencing acute food insecurity during that time.[102] This crisis has once again exposed the vulnerability of our global food system to market shocks as it was caused by factors which are similar to the catalysts for the 1972-1974 and 2007-2008 crises. The current food crisis is multi-faceted, however, and will likely be more severe than previous food crises because of the combined impact of climate events, weak global GDP growth post COVID-19, supply chain and transportation issues, increasing energy prices, food nationalism, and a shortage of fertiliser. The world must unite to learn from each of these crises and create a more sustainable and resilient food market with increased diversity and a more efficient allocation of resources around the globe. Without a collective, global effort to transform the food system, history will continue to repeat and millions more will starve because of decisions made thousands of kilometres away.

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[102] 'How the War in Ukraine is Creating a Global Food Crisis', *The Daily* (The Daily Telegraph, 5 April 2022).

# WHAT CONSTITUTES APPROPRIATE STAKEHOLDER CONSULTATION IN OFFSHORE PROJECTS?: SANTOS NA BAROSSA PTY LTD V TIPAKALIPPA (2022) 406 ALR 358

RACHEL JUPP*

## I INTRODUCTION

In *Santos NA Barossa Pty Ltd v Tipakalippa* ('*Santos*'),[1] the Full Federal Court of Australia ('Full Court') affirmed a primary judge's decision to set aside the National Offshore Petroleum Safety and Environmental Authority's ('NOPSEMA') approval of a Santos NA Barossa Pty Ltd ('Santos') Environment Plan ('EP') for an offshore gas project.[2] The Full Court found that the Tiwi Island's traditional owners had interests that would be affected by the project, however, they were not consulted in the EP's preparation and NOPSEMA could not have been 'reasonably satisfied' that the legislative consultation requirements had been met.[3] *Santos* is a landmark judgment which provides important judicial guidance in relation to appropriate stakeholder consultation, specifically in relation to First Nations consultation for offshore projects. This decision may have far-reaching effects, and mining companies overseeing resources and energy projects, both offshore and onshore, should carefully consider the Full Court's judgment.

## II BACKGROUND

The proceedings were initially commenced by Dennis Tipakalippa ('Mr Tipakalippa'); an 'elder, senior lawman and traditional owner of the Munupi clan' who are located on the Tiwi Islands.[4] Mr Tipakalippa sought judicial review of NOPSEMA's decision to approve a drilling EP submitted by Santos in relation to an offshore gas project in the Barossa Field in the waters of the Timor Sea, which is located 300 kilometres north of Darwin. Mr Tipakalippa contended

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* Curtin University, LLB Student, 2023.

1 *Santos NA Barossa Pty Ltd v Tipakalippa* (2022) 406 ALR 358 ('*Santos*'), 358–9.

2 NOPSEMA is Australia's independent expert regulator for health and safety, structural integrity and environmental management for offshore petroleum and greenhouse gas storage activities in Commonwealth waters. See NOPSEMA, *About NOPSEMA* (Web Page) https://www.nopsema.gov.au/.

3 *Santos* (n 1).

4 Ibid [5]. The Tiwi Islands form part of the Northern Territory in Australia, and are located 80 kilometres north of Darwin.

that he and other members of the Munupi clan have traditional connections to 'sea country' in the Timor Sea, extending to and past Santos's operational area, which would be impacted by the project.[5] It was argued that the Munupi clan had rights to that sea country due to their longstanding spiritual connections and hunting and gathering activities.[6]

## III REGULATORY LANDSCAPE AND FIRST INSTANCE DECISION

The *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) ('*Regulations*') is the relevant legislative regime and provides that a petroleum holder, including Santos, is required to submit an EP to NOPSEMA under reg 9(1).[7] NOPSEMA must be 'reasonably satisfied' that the EP fulfils certain criteria.[8] This includes demonstrating that the titleholder has conducted the necessary consultations.[9] In particular, reg 11A specifies that a titleholder must consult with 'relevant persons',[10] which includes a 'person or organisation whose *functions, interests or activities* may be affected by the activities to be carried out under the' EP.[11]

At first instance, Mr Tipakalippa successfully argued in the Federal Court of Australia that NOPSEMA could not have been lawfully satisfied that Santos had fulfilled its obligations pursuant to the regulatory regime as he and his clan, who he contended were 'relevant persons', were not consulted as required under the *Regulations*.[12] The Federal Court set aside NOPSEMA's decision, and Santos was prohibited from continuing its drilling activities until it fulfilled its consultation requirements and ascertained a valid NOPESMA approval.[13] Unsurprisingly, Santos appealed this decision.

## IV ISSUES ON APPEAL

The issues before the Full Court primarily concerned the meaning of reg 11A(1)(d) of the *Regulations*, namely, who constituted a 'relevant person'.[14] The Full Court considered the following:

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5 Ibid.
6 Ibid, 358.
7 *Offshore Petroleum and Greenhouse Gas Storage (Environment) Regulations 2009* (Cth) reg 9(1) ('*Regulations*').
8 Ibid, reg 10(1).
9 Ibid, regs 10(1)(a), 10A(g).
10 Ibid, reg 11A(1).
11 Ibid, reg 11A(1)(d).
12 See Tipakalippa v National Offshore Petroleum Safety and Environmental Management Authority (No 2) (2022) 406 35 ALR 41.
13 Ibid.
14 *Santos* (n 1) [15].

- the meaning of 'relevant person';
- the meaning of 'functions, interests or activities';
- whether Mr Tipakalippa and the Munupi clan's connection fell within the scope of these terms; and
- whether NOPSEMA's finding that Santos had satisfied its consultation obligations was lawfully reached.[15]

Santos conceded that if its position vis-à-vis the construction of 'relevant persons' was not upheld, and the Munupi clan were relevant persons, NOPSEMA consequently did not reach the requisite satisfaction lawfully required.[16]

## V DECISION AND REASONING

The Full Court ultimately dismissed Santos's appeal and determined that Bromberg J's first instance decision to set aside NOPSEMA's approval of the drilling EP was not affected by error.[17] In particular, Kenny and Mortimer JJ held that Mr Tipakalippa and his clan did possess cultural and spiritual interests which necessitated consultation under the *Regulations* which had not been satisfied.[18] NOPSEMA's decision, therefore, was invalid and drilling could no longer take place.[19] Lee J wrote a separate judgment, however, His Honour largely agreed with the approach of the other judges.[20]

### A *'Relevant person'*

Santos and NOPSEMA sought a narrow interpretation of the phrase 'relevant person' and 'functions, interests or activities'.[21] Kenny and Mortimer JJ, however, held that 'functions, interests or activities' ought to be 'broadly construed'.[22] Their Honours held a broad construction was warranted, as this would best promote and give effect to the purpose and objects of the *Regulations*.[23] These objects include ensuring that an offshore petroleum project is consistent with the principles of ecologically sustainable development, and its environmental impacts are as minimal as reasonably practicable. [24]

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15 Ibid.
16 Ibid [26].
17 Ibid [22], [110], [111].
18 Ibid, 359.
19 Ibid.
20 Ibid.
21 Ibid [52].
22 Ibid [51] (Kenny and Mortimer JJ).
23 Ibid.
24 Ibid; *Regulations* (n 6) reg 3.

The Full Court found that Santos and NOPSEMA's narrow construction would effectively 'undermine the achievement' of the *Regulation*'s objects.[25] This is for the reason that confining the phrase 'relevant person' would mean that Santos would not be obliged to consult with a person who might 'self-evidently be affected by its proposed offshore activity, nor would it be obliged to take … any measure to address their situation.' [26]

Further, Kenny and Mortimer JJ determined a wide interpretation approach was strengthened by the fact that titleholders have a duty under the *Regulations* to conduct the consultations and subsequently undertake appropriate measures regarding environmental impacts identified.[27] This ensures NOPSEMA are cognisant of the relevant information in order to be adequately satisfied that the titleholder has fulfilled its duties under the *Regulations*.[28]

Moreover, the Full Court turned to the construction of 'interest'. After assessing the text, purpose and context of reg 11A(1)(d) of the *Regulations*, their Honours found that 'interests' should be afforded an interpretation that adopts the accepted understanding in public administrative law.[29] Thus, the principal issue of whether Mr Tipakalippa and the Munupi clan had the necessary interests that imposed consultation duties upon Santos was to be resolved through 'a matter of fact and degree'.[30]

## B *Sea country interests*

The Full Court unanimously determined that Santos was required to consult with Mr Tipakalippa and his clan, as the Munupi clan possessed interests that could be affected by Santos's proposed drilling activities.[31] This finding indicates that a traditional owner's connection to sea country will be an interest under the *Regulations*. The material before Santos and NOPSEMA included 'ample acknowledgement of the traditional connections of Tiwi Islanders' to the sea and marine resources that could be affected.[32] Therefore, Kenny and Mortimer JJ held that this acknowledgement clearly demonstrated the Munupi clan possessed an 'immediate and direct' interest as a result of their traditional connection to the sea country.[33]

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25 Ibid [52].
26 Ibid.
27 Ibid [49], [50] (Kenny and Mortimer JJ), [157] (Lee J).
28 Ibid.
29 Ibid [65] (Kenny and Mortimer JJ).
30 Ibid [67]. See also *Re McHattan and Collector of Customs* (1977) 18 ALR 154, 157 (Brennan J).
31 Ibid.
32 Ibid [38].
33 Ibid [68].

Thus, Santos was obliged to consult with the Munupi clan under the *Regulations*. This finding is significant given that it was accepted that Mr Tipakalippa and his clan did not hold any form of recognised proprietary or statutory rights over the relevant waters pursuant to the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT),[34] nor a determination under the *Native Title Act 1993* (Cth) ('*NTA*').[35]

Santos contended that the meaning of 'interests' under the *Regulations* should be limited to legal interests.[36] Santos further argued that this could be juxtaposed with a non-proprietary spiritual or cultural connection of a traditional owner over traditional land or waters.[37] Santos and NOPSEMA claimed that a cultural or traditional connection will be inferior to recognisable, proprietary rights.[38] This argument was dismissed by the Full Court, whereby Kenny and Mortimer JJ found that the traditional owners' interests and cultural connection to the sea and marine resources that may be affected were akin to those 'well known' to modern Australian law and legislative regimes, including various statutes protecting the non-legal interests of First Nations peoples.[39] Lee J concurred and determined that 'interest' must be adequately broad and agreed that 'cultural or spiritual interests' undoubtedly fell within the ambit of this broad definition.[40]

Moreover, submissions were made by Santos and NOPSEMA that any interpretation of 'interest' ought to be limited to ensure procedural fairness.[41] Santos distinguished circumstances whereby an individual or group's interests are directly and immediately impacted, from circumstances whereby the public at large are indiscriminately impacted.[42] In the latter case, which Santos contended applied to the case at hand, there will be no interest 'capable of identification' in a reasonable and practical manner.[43] The Full Court dismissed this argument, as it could not be concluded that Mr Tipakalippa and the Munupi clan's interests were 'analogous to those of the public at large'.[44]

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34 Aboriginal Land Rights (Northern Territory) Act 1976 (NT).
35 Native Title Act 1993 (Cth) ('NTA').
36 Santos (n 1) [148] (Lee J).
37 Ibid.
38 Ibid [148]–[50].
39 Ibid [68].
40 Ibid [158].
41 Ibid [82].
42 Ibid [83].
43 Ibid [83]. See also Castle v Director General State Emergency Service [2008] NSWCA 231, [6] (Basten JA).
44 Ibid [84].

### C *Rejection of 'unworkability' contention and consultation obligations*

The Full Court also rejected Santos and NOPSEMA's argument that a broad construction of reg 11A would be 'unworkable'.[45] It was submitted that to allow a wide definition could result in the possibility that every member of an indeterminate, large class of individuals who share common interests, such as the Munupi clan, may require individual consultation.[46] It was acknowledged by the Full Court that it must be possible for the consultation requirement pursuant to reg 11A to be practicably and reasonably discharged by the duty holder.[47] Kenny and Mortimer JJ found, however, that there was no complexity in acknowledging that the traditional owners, who maintained a traditional connection to their sea country and its marine resources, were indeed 'reasonably ascertainable'.[48]

The Full Court turned to the *NTA* to establish that traditional interests being shared communally will not exempt Santos from its consultation obligation being fulfilled in a reasonable manner.[49] The examples of processes that exist under the *NTA* demonstrate that it is possible for the consultation obligation to be fulfilled in a practicable way, meaning the provision is indeed workable.[50] Kenny and Mortimer JJ recognised the 'myriad of ways of contacting groups of First Nations peoples', including contacting regional or local First Nations organisations.[51]

The Full Court provided a number of assertions in relation to the form of consultation required pursuant to reg 11A.[52] These included adopting a similar approach to the *NTA* and requiring a titleholder to prove to NOPSEMA that they have provided the group members with a 'reasonable opportunity' to participate in decision-making, and this opportunity was appropriate and modified to the particular nature of the relevant persons' interests.[53] Further, the Full Court highlighted superficial or tokenistic conduct will not fulfil a consultation obligation.[54] Additionally, if a First Nations groups' interests are held communally, consultation should reflect the characteristics of the interests impacted by the proposed activity.[55] Lastly, an

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45 Ibid [86]–[94], [109].
46 Ibid [86]–[88].
47 Ibid [89].
48 Ibid [90].
49 Ibid [95]–[109].
50 Ibid.
51 Ibid [92].
52 Ibid [104].
53 Ibid.
54 Ibid; McGlade (formerly Wanjurri-Nungala) v South West Aboriginal Land & Sea Aboriginal Corporation (No 2) (2019) 374 ALR 329.
55 Ibid.

email may be inadequate for consultation, however, an appropriately notified and conducted meeting may satisfy consultation requirements.[56]

Moreover, reg 11A requires consultation to be genuine and the affected persons must be provided with 'sufficient information' to make an educated assessment of possible ramifications of the activity, and a 'reasonable period' in which they can engage in consultation and respond with their concerns.[57] The Full Court noted these requirements are implemented in order to allow Santos to thereafter relay these concerns to NOPSEMA.[58] The Full Court determined that Santos, by merely sending emails containing an array of information and details in relation to the proposed activity to the traditional owners, will unlikely satisfy consultation requirements under the *Regulations*.[59]

## D *Was NOPSEMA's decision lawfully reached?*

Ultimately, the Full Court found there was 'ample acknowledgment' of the Tiwi Islanders'—which included the Munupi clan and other First Nations groups—traditional connections to the sea and marine resources in Santos's drilling EP.[60] Further, it was recognised that these interests could be impacted by Santos's drilling activities, and Santos highlighted the potential environmental risks to marine resources that are central to the traditional owners' culture and customs.[61] This information confirms that Santos was familiar with the Tiwi Islanders and their traditional interests.[62] Consequently, Santos had evidently implemented an interpretation of reg 11A(1)(d) whereby the Munupi clan fell outside the ambit of Santos's duty to consult.[63]

Therefore, NOPSEMA could not have been 'reasonably satisfied', nor could they have formed a view, based on a correct understanding of law, that Santos's drilling EP satisfied the requisite standards, as Santos's understanding of the traditional owners' interests and activities and its failure to thereafter consult with Mr Tipakalippa and the Munupi clan were evident.[64] NOPSEMA had thus reached its decision on a misinterpretation of 'relevant person' and the

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56 Ibid.
57 Ibid [56].
58 Ibid [57].
59 Ibid [94].
60 Ibid [38].
61 Ibid [42].
62 Ibid.
63 Ibid [79].
64 Ibid [110]–[2].

necessary requirements for consultation that must be satisfied to accept an EP.[65] Consequently, NOPSEMA erred in its construction of reg 11(1)(d), and Santos's drilling EP was set aside.[66]

## VI SIGNIFICANCE AND KEY TAKEAWAYS

The Full Court's decision to set aside NOPEMA's approval arose against a context in which Australia's inability to safeguard Aboriginal cultural heritage and failure to consult with First Nations Australians has been heavily scrutinised, including in light of the Juukan Gorge incident[67] and subsequent Commonwealth Government response.[68]

Although *Santos* concerned a single, offshore gas project, the decision will likely have far-reaching effects for other large offshore projects and possibly onshore projects which affect traditional owners' interests. Moreover, on the basis of *Santos*, NOPSEMA may now also implement a meaningful consultation approach in relation to offshore electricity infrastructure as it will to assessments of offshore gas EPs. Following the decision, NOPSEMA stated that it would be augmenting its internal capabilities to address the ramifications of *Santos*.[69] The requirement for genuine and informed consultation will continue for projects pursuant to the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).[70] However, it is clear that any legislative consultation requirements must be assessed carefully against the *Santos* decision, specifically in the current context where there is an increasing expectation by stakeholders that project proponents will consult in an appropriate manner with First Nations groups in order to satisfy the United Nations Declaration on the Rights of Indigenous peoples requirement to achieve 'free, prior and informed consent' of First Nations peoples.[71]

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65 Ibid [79].

66 Ibid.

67 See Emma Ruben, 'Prevention of Juukan Gorge repeat requires stronger heritage laws, Federal report reveals', *National Indigenous Times* (online, 21 July 2022) <https://nit.com.au/21-07-2022/3487/prevention-of-juukan-gorge-repeat-requires-stronger-heritage-laws-federal-report-reveals>.

68 Australian Government, *Australian Government response to the Joint Standing Committee on Northern Australia's A Way Forward: Final report into the destruction of Indigenous heritage sites at Juukan Gorge and Never Again: Inquiry into the destruction of 46,000 year old caves at the Juukan Gorge in the Pilbara region of Western Australia* (Interim Report, Department of Climate Change, Energy, the Environment and Water, November 2022) <www.dcceew.gov.au/sites/default/files/documents/australian-response-to-destructionof-juukan-gorge.pdf>.

69 See Corrs Chambers Westgarth, *Ensuring effective stakeholder consultation following Santos v Tipakalippa* (Web Page, 21 December 2022) <https://www.corrs.com.au/insights/ensuring-effective-stakeholder-consultation-following-santos-v-tipakalippa>

70 *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

71 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295 UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

Further, on 15 December 2022, NOPSEMA published an updated 'Consultation in the course of preparing an Environment Plan guideline' in response to *Santos*.[72] The Guideline, which largely refers to the *Santos* decision and emphasises the importance of engaging in consultation with First Nations peoples, confirms that:

- consultation is a 'two-way dialogue' and there is no 'one size fits all approach';
- consultation must reflect the *Regulations*' objects;
- titleholders must engage early with relevant persons, and adapt the consultation approach to reflect the characteristics of these interests;
- EPs must outline how the titleholder identified the relevant persons and the consultation process; and
- titleholders must demonstrate to NOPSEMA that they have provided First Nations groups with a reasonable opportunity and reasonable notice for consultation.[73]

*Santos* represents a landmark judgment in Australian law and signals a notable shift in the way project proponents are expected to consult with First Nations peoples and their communities when developing EPs.[74] Until *Santos*, mining companies were not consulting with First Nations peoples or groups in compliance with the Full Court's articulation of the *Regulations*. Thus, *Santos* affirms First Nations peoples' and communities' right to be consulted in relation to EPs under the *Regulations* that could affect their sea country, and provides overdue clarity for the offshore oil and gas sector in Australia. More broadly, the Full Court's decision confirms the vital role that First Nations peoples have in safeguarding their sea country from environmental risks and harm.

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72 NOPSEMA, 'Consultation in the course of preparing an environment plan' (Guideline, 15 December 2022) <https://www.nopsema.gov.au/sites/default/files/documents/Consultation%20in%20the%20course%20of%20preparing%20an%20Environment%20Plan%20guideline.pdf>.

73 Ibid, 7–12.

74 See Environmental Defenders Office, *"This is our Country and we must be consulted": Tiwi Islanders again claim victory over Santos, as Barossa appeal dismissed by Federal Court* (Web Page, 2 December 2022) <https://www.edo.org.au/2022/12/02/historic-win-for-tiwi-traditional-owner-over-santos-barossa-gas-project-upheld-in-federal-court/>.

# AUSTRALIA'S PRO-ARBITRATION STANCE CONFIRMED IN KINGDOM OF SPAIN V INFRASTRUCTURE SERVICES LUXEMBERG S.À.R.L

RACHEL JUPP*

## I INTRODUCTION

On 12 April 2023, *Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l.* [2023] HCA 11 ('*Kingdom of Spain*') was handed down by the High Court of Australia ('High Court').[1] This highly anticipated High Court decision largely confirmed the Full Federal Court of Australia's judgment, and recognised and enforced an award that was issued pursuant to the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (1965) ('*ICSID Convention*') against the Kingdom of Spain.[2] The High Court found that Spain ultimately waived its foreign state immunity from proceedings heard in Australian courts through entering the *ICSID Convention*.[3] *Kingdom of Spain* was importantly the first High Court judgment regarding waiver pursuant to the *Foreign States Immunities Act 1985* (Cth) ('*Immunities Act*') in relation to the recognition of an ICSID award.[4] Further, it provides overdue clarity regarding Australia's previously unclear position towards the terms 'recognition', 'enforcement' and 'waiver' pursuant to the *ICSID Convention*. The High Court decision came as a relief to foreign investors, who may now rest assured that Australia is an appealing venue for the recognition and enforcement of international arbitral awards that are rendered under the *ICSID Convention*.

## II BACKGROUND

The background against which *Kingdom of Spain* arose involved the Spanish Government withdrawing from its renewable energy subsidies, particularly over the last decade, in light of

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1 Kingdom of Spain v Infrastructure Services Luxembourg S.à.r.l. [2023] HCA 11 ('Kingdom of Spain').

2 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ('ICSID Convention').

3 Kingdom of Spain (n 1).

4 Foreign States Immunities Act 1985 (Cth) ('Immunities Act').

a turbulent economic environment and a change in the Spanish government.[5] This has triggered a surplus of litigation by foreign investors, who allege Spain has contravened the multilateral Energy Charter Treaty (1994) ('*ECT*').[6] The *ECT* permits foreign investors to make claims against contravening host nation-states and includes an arbitration agreement that outlines settlements of investment disputes pursuant to the *ICSID Convention*.[7] Due to developments in European Union ('EU') law, complexities have arisen when seeking the enforcement of an award from intra-EU disputes under the Treaty.[8] Thus, foreign investors are now turning to jurisdictions such as Australia as a venue to enforce ICSID arbitral awards.[9]

In *Kingdom of Spain*, foreign investor Infrastructure Services Luxembourg S.à.r.l ('Infrastructure Services') commenced an arbitration against the Spanish Government in accordance with the *ICSID Convention*, alleging Spain, as host state, had contravened the *ECT*.[10] In June 2018, an arbitral tribunal awarded Infrastructure Services an award of €101 million, as well as interest and part of the legal costs, for Spain's violation of the *ECT* due to its unwinding of a renewable energy subsidy scheme (the 'ICSID Award').[11] Unsurprisingly, Infrastructure Services then sought to have the ICSID Award enforced against Spain in multiple jurisdictions, such as the Federal Court of Australia ('Federal Court').[12]

## III THE FEDERAL COURT DECISIONS

In 2019, Infrastructure Services approached the Federal Court, seeking orders to effectively recognise and enforce the ICSID Award.[13] Spain rejected this argument, contending it was immune from the Federal Court's jurisdiction by virtue of the *Foreign States Immunities Act 1985* (Cth) ('*Immunities Act*').[14] Section 9 outlines that a foreign state will be immune from the jurisdiction of Australian courts,[15] and s 10 provides that this immunity will not apply

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5 See King & Wood Mallesons, *INVESTOR-STATE ARBITRATION: KINGDOM OF SPAIN V INFRASTRUCTURE SERVICES LUXEMBOURG S.À.R.L. [2023] HCA 11* (Web Page, 27 April 2023) <https://www.kwm.com/global/en/insights/latest-thinking/investor-state-arbitration.html>.

6 *Energy Charter Treaty*, signed 17 December 1994, 2080 UNTS 100 (entered into force 16 April 1998).

7 Ibid.

8 See *Slovak Republic v Achmea BV* [2018] 4 WLR 87 ('*Achmea*').

9 See Australian Disputes Centre, *Recognise and enforce an ICSID award in Australia, but execution may be a different matter! Kingdom of Spain v Infrastructure Services Luxemburg S.à.r.l [2023] HCA 11* (Web Page) <https://disputescentre.com.au/kingdom-of-spain-v-infrastructure-services-luxemburg-s-a-r-l-2023-hca-11/>.

10 *Kingdom of Spain* (n 1) [1].

11 Ibid [2].

12 Ibid.

13 *Eiser Infrastructure Ltd v Kingdom of Spain* (2020) 142 ACSR 616 ('*Eiser Infrastructure Ltd*').

14 Immunities Act (n 4); Kingdom of Spain (n 1) [37].

15 Immunities Act (n 4) s 9.

whereby the foreign state has submitted to the Australian jurisdiction,[16] including by 'agreement'.[17] Relevantly, an 'agreement' will encompass a treaty, which incorporates the *ICSID Convention*.[18] The *ICSID Convention* has domestic force in Australia through the *International Arbitration Act 1974* (Cth),[19] and its central purpose is to support the movement of private capital to sovereign nations through mitigating sovereign risk.[20]

At first instance, Stewart J of the Federal Court determined that Spain's agreement to the *ICSID Convention* constituted 'a waiver of its immunity from recognition and enforcement, but not from execution' of the ICSID Award.[21] In particular, and relevant for the High Court proceedings, this included s 6 of the *ICSID Convention* which comprises articles concerning 'Recognition and Enforcement of the Award',[22] namely arts 53, 54 and 55:

- art 53 outlines that an ICSID award is binding on the parties;[23]
- art 54 stipulates that a Contracting State shall recognise the award as binding, the award's enforcement within the Contracting State as if 'it were a final judgment of a court in that State';[24] and
- art 55 upholds state immunity from the execution of the award.[25]

Consequently, at first instance, Stewart J found in favour of Infrastructure Services, and ordered that Spain pay Infrastructure Services €101 million.[26]

In the appeal to the Full Court of the Federal Court of Australia ('Full Court'), Allsop CJ, Perram and Moshinsky JJ found that any immunity from a recognition proceeding was waived as a result of Spain's entry into the *ICSID Convention* and agreement to arts 54 and 55.[27] However, the Full Court held that immunity from enforcement had not been waived.[28] Thus, Allsop J's decision had gone too far by 'requiring Spain to do something'.[29] Consequently, the Full Court made orders recognising the ICSID Award as binding upon Spain, and entering

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16 Ibid s 10.
17 Ibid s 3(1).
18 Ibid; *Kingdom of Spain* (n 1) [56].
19 International Arbitration Act 1974 (Cth) s 32.
20 International Centre for Settlement of Arbitration Disputes, 2021 Annual Report (Annual Report, 2021) 3.
21 Eiser Infrastructure Ltd (n 13) 648–9 (Stewart J).
22 ICSID Convention (n 2) s 6.
23 Ibid art 53.
24 Ibid art 54.
25 Ibid art 55.
26 Eiser Infrastructure Ltd (n 13).
27 Kingdom of Spain v Infrastructure Services Luxembourg Sarl (2021) 284 FCR 319, 322–4, 327–8, 345.
28 Ibid.
29 Ibid 336, 322, 324, 345.

judgment against Spain for €101 million.[30] However, it provided that nothing in its order 'shall be construed as derogating from the effect of any law relating to immunity of [Spain] from execution'.[31]

## IV ISSUES FOR THE HIGH COURT

Spain subsequently raised the following two issues on appeal to the High Court:

1. whether Spain's agreement to arts 53–55 of the *ICSID Convention* constituted any waiver of foreign State immunity; and
2. if so, whether Spain's amenability to the jurisdiction of Australian courts is, firstly, restricted to 'bare recognition' of the award, or to 'recognition' and 'enforcement' of the award, and secondly, whether the Full Court's orders constituted enforcement.[32]

## V HIGH COURT OUTCOME AND REASONING

The High Court unanimously found that Spain's agreement to the *ICSID Convention* constituted a waiver of its immunity.[33] Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ delivered a joint judgment in this case.

### A *Waiver of foreign state immunity*

First, Spain contended that s 10 of the *Immunities Act* will only allow Australian courts to recognise a waiver of foreign state immunity from jurisdiction within a treaty whereby the treaty's words include an 'express', rather than implied, waiver.[34] Spain argued that this was reflective of the international law principle that a waiver of foreign state immunity by treaty is required to be express.[35] As it is a long-standing statutory interpretation principle that provisions of national legislation should be assessed, as far as reasonably practicable, to accord with the international law position,[36] Spain reasoned that the requirement for waiver to be express should be interpreted consistently with international law.[37]

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30 Ibid 450–1.
31 Ibid.
32 Kingdom of Spain (n 1) [7].
33 Ibid [8].
34 Ibid [17].
35 Ibid.
36 Ibid [16]. See also Al-Kateb v Godwin (2004) 219 CLR 562, 589 [63]. See also Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association (1908) 6 CLR 309, 363; Polites v Commonwealth (1945) 70 CLR 60, 68–9, 77, 80–1; Minister for Immigration & Ethnic Affairs v Teoh (1995) 183 CLR 273, 287 ; Kartinyeri v Commonwealth (1998) 195 CLR 337, 384 [97].
37 Ibid.

Thus, the High Court assessed the international law principles against which s 10(2) of the *Immunities Act* is to be considered. The High Court acknowledged various international authorities confirming Spain's approach, including Lord Goff's judgment in *R v Bow Street Magistrate*, in which his Honour stated that 'consent by a state party to the exercise of jurisdiction against it must … be express'.[38] However, the High Court ultimately rejected Spain's argument as this international law principle on state immunity is marked by 'ambiguity' and is by no means absolute.[39] The High Court determined that when properly understood, 'express' can encompass implications which include unexpressed content which can be ascertained by inference.[40]

The High Court held that 'international authorities that insist upon express waiver of immunity in a treaty should not be understood as denying the *ordinary and natural role* of implications in elucidating the meaning of the express words of the treaty'.[41] Therefore, a waiver of foreign state immunity by treaty may be explicitly provided in its terms or may be implied from the express terms contained in the treaty.[42] Nonetheless, the High Court determined that any implication must have a 'high level of clarity' in light of the treaty's objects and purpose,[43] and the implication is required to be drawn with 'great care'.[44] The High Court noted that this approach accords with the position in the United States, whereby immunity will not apply if the foreign state has 'waived its immunity explicitly or by implication', however, waiver is nonetheless 'rarely accomplished by implication'.[45]

The High Court ultimately rejected Spain's submissions, and found that the implication of waiver arising under s 10(2) is unmistakable.[46]

### B *Interpretation of 'recognition', 'enforcement', and 'execution'*

The High Court noted that the terms 'recognition', 'enforcement' and 'execution' have been continually used in an imprecise and overlapping manner.[47] The High Court considered multiple international cases and treaties, however, it ultimately turned to the legislative drafting

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38 Kingdom of Spain (n 1) [22]; R v Bow Street Magistrate; Ex parte Pinochet [No 3] [2000] 1 AC 147, 216 (Lord Goff).
39 Kingdom of Spain (n 1) [23], [18].
40 Ibid [27]–[9].
41 Ibid [24].
42 Ibid.
43 Ibid [28].
44 Ibid [26].
45 Ibid [29]. See also *In re Tamimi* (1999) 176 F 3d 274, 278.
46 Ibid.
47 Ibid [42].

background of the *ICSID Convention* and adopted the descriptions of these terms in the proposed *Restatement of the Law: The US Law of International and Investor-State Arbitration*.[48] The High Court held that:

- 'recognition' relates to a court's determination that an international arbitral award is to be treated as binding;
- 'enforcement' refers to the legal process whereby an international arbitral award is 'reduced to a judgment of a court that enjoys the same status as any judgment of that court';[49] and
- 'execution' can be characterised as the method in which a judgment that recognises and enforces an award is ultimately given effect, which commonly includes writs of execution made against the property of an award debtor.[50]

The High Court contemplated the alleged inconsistencies among the English, French and Spanish versions of the *ICSID Convention*.[51] In particular, Spain argued that both the French and Spanish texts discuss 'enforcement' and 'execution' as exécution and ejecución simultaneously.[52] However, the High Court maintained that the above terms are distinct in meaning and are not interchangeable, and importantly discerned 'execution' as being the *means* in which an award will be enforced; a distinction which had been previously stifled with vagueness.[53] Thus, arts 53–55 clearly outline a division between the respective terms, and art 55 thereby protects foreign state immunity solely in relation to the execution of an ICSID award.[54]

Ultimately, the High Court found that Spain's suggested interpretation of the *ICSID Convention* would effectively broaden the reach of foreign state immunity in a way that was inconsistent with the purpose of the *ICSID Convention*, such as mitigating sovereign risk.[55]

### C *Did the agreement of the ICSID Convention result in a waiver?*

Spain argued that a foreign state could not waive its foreign state immunity through agreeing to art 54(1) of the *ICSID Convention*, as art 54(1) does not provide for 'express' waiver.[56] The

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48 Ibid [45]. See American Law Institute, *Restatement of the Law: The US Law of International Commercial and Investor-State Arbitration*, Proposed Final Draft (2019) §1.1.
49 Ibid.
50 Ibid.
51 Ibid [59]–[66].
52 Ibid [59].
53 Ibid [45].
54 Ibid.
55 See King & Wood Mallesons (n 5).
56 *Kingdom of Spain* (n 1) [68].

High Court dismissed this submission, as an 'agreement' arose by virtue of arts 53–55.[57] Specifically, arts 53 and 54 provide that such awards are 'binding' and art 55 protects immunity solely from 'execution'.[58] Thus, the High Court determined that Spain's interpretation would misrepresent the words of the *ICSID Convention* and necessitate distinct conduct that would constitute waiver in order for an award to be recognised and/or enforced against a foreign state.[59]

Moreover, the High Court dismissed the alternative argument that art 54 encompassed waiver of immunity vis-à-vis only recognition, rather than enforcement of an ICSID award.[60] Therefore, the High Court held that by agreeing to the *ICSID Convention*, namely, arts 53–55, Spain waived its immunity from the jurisdiction of the courts of Australia to recognise and also enforce a binding *ICSID* award against Spain.[61]

### D *Alternative argument*

The High Court also briefly assessed the 'not fully developed' position of Spain in relation to the decision of *Republic of Moldova v Komstroy LLC* ('*Komstroy*').[62] In *Komstroy*, the Court of Justice of the European Union applied the previous case of *Slovak Republic v Achmea BV* ('*Achmea*'),[63] and proposed that an agreement to arbitrate within the *ECT* is not relevant to 'intra-EU' disputes, whereby a dispute arises between an EU state and another EU state investor.[64] The High Court dismissed Spain's argument that *Komstroy* applied, as the agreement to submit to Australian courts' jurisdiction surfaced by virtue of Spain's entry to the *ICSID Convention*, not the *ECT*.[65]

## VI NEXT STEPS

*Kingdom of Spain* did not attempt to execute vis-à-vis Spanish assets, meaning Spain's assertion that it has foreign state immunity from execution remains unchanged. Therefore, it will be interesting to observe whether Infrastructure Services will successfully obtain execution against Spain.

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57 Ibid [8].
58 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.
62 *Republic of Moldova v Komstroy LLC* [2021] 4 WLR 132.
63 See *Achmea* (n 8).
64 Ibid.
65 *Kingdom of Spain* (n 1) [78]–[9].

## VII SIGNIFICANCE AND KEY TAKEAWAYS

There are various takeaways arising from the High Court's decision. Firstly, it is clear that foreign investors who strive to have an ICSID arbitral award enforced in Australia will embrace the High Court's decision, as *Kingdom of Spain* provides greater certainty that arbitral awards acquired against foreign states in an ICSID arbitration case will be enforceable in the Australian jurisdiction.[66] Further, the case confirms that investor-state dispute resolution is an efficient means to uphold the rights of an investor as against unauthorised state interference.[67] The case establishes that ICSID awards are required to be recognised and enforced in Australia as if they were the final judgments of an Australian court. Therefore, an ICSID award may have higher enforceability than awards falling beyond the scope of the *ICSID Convention*.

Moreover, the case demonstrates that Australia is an advantageous jurisdiction in which international investors can seek the enforcement of arbitral awards against a foreign state, including in circumstances in which the award does not involve Australia. This is evidenced in *Kingdom of Spain*, whereby the justification for bringing the enforcement proceedings in Australia was merely the fact that Spain possesses assets within Australia.[68] It similarly confirms that Australian courts consistently deliver judgments that uphold and respect the importance of international arbitration. Therefore, it is possible that investors that are prohibited from *ECT* enforcement and similar investor-state awards within the EU will turn to Australia as a suitable jurisdiction for enforcement.[69]

This is an optimistic development in investor-state dispute resolution, which has been enduring a number of challenges in recent years. This includes *Philip Morris v Australia*, which triggered deliberation in relation to the potential ramifications investment-treaty arbitration may pose to a state's ability to regulate in the public interest by demonstrating the tensions present between investor's rights and sovereign regulatory authority,[70] as well as cases such as *Achmea* which

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66 See King & Wood Mallesons (n 5).
67 Ibid.
68 Kingdom of Spain (n 1).
69 Clyde & Co, Green light for enforcement of investor-state arbitration award in Australia (Web Page, 21 April 2023) <https://www.clydeco.com/en/insights/2023/04/green-light-for-enforcement-of-investor-state-arbi>.
70 Philip Morris Asia Limited (Hong Kong) v. The Commonwealth of Australia, PCA Case No. 2012-12 (proceeding is still pending).

seemingly restricted the ability to claim under intra-EU investment treaties.[71] Further, multiple states have indicated their desire to eventually abandon the *ECT*.[72]

*Kingdom of Spain* offers guidance in relation to the application and utility of the *ICSID Convention* within Australia, and it affirms the generally pro-arbitration inclination of the courts in Australia.[73] However, the decision is also of significance as it demonstrates that foreign state immunity from execution will continue to apply. Therefore, investors must be cognisant that their ability to execute their investment award is possibly affected by a distinct immunity against execution conferred by the *Immunities Act* to foreign states. More broadly, *Kingdom of Spain* contributes to the growing jurisprudence in relation to investment-treaty arbitrations, which is a progressively popular mechanism in the dispute resolution setting.

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71 Achmea (n 8).

72 See Ashurst, European states seek to exit the Energy Charter Treaty what does this mean for energy investors (Web Page, 4 November 2022) <https://www.ashurst.com/en/insights/european-states-seek-to-exit-the-energy-charter-treaty-what-does-this-mean-for-energy-investors/>.

73 See Australian Disputes Centre (n 9).

# UNFAIR PREFERENCES REDEFINED: THE IMPACT OF *BRYANT V BADENOCH INTEGRATED LOGGING PTY LTD* (2023) 406 ALR 731

KIRA ELLIOTT*

## I INTRODUCTION AND BACKGROUND

*Bryant v Badenoch Integrated Logging Pty Ltd* ('*Bryant*')[1] is a recent and significant High Court decision that determined that the 'peak indebtedness rule' ('PIR') is not a part of the unfair preference provisions pursuant to s 588FA(3) of the *Corporations Act 2001* (Cth) ('the Act').[2] According to s 588FA of the Act, an unfair preference is a transaction between a company and creditor where the creditor ultimately received more from the company for an unsecured debt than they would have received in the event of the company's winding up.[3] Previously, the PIR was upheld through industry practice and a number of lower court decisions that have validated its application.[4] The PIR has previously operated so as to provide an avenue whereby liquidators can choose the date of the first transaction between the creditor and the liquidated company, subject to the relevant relationship, as a means of maximising an unfair preference claim. Consequently, the liquidator can increase the chances of recovering money and assets from a creditor, by designating the moment where the company was at the peak of its debt to be the start date of the 'single transaction'.[5] Following the High Court decision in *Bryant,* this once settled area of Australian law has been substantially interrupted through the abolishment of the PIR. As a result, a company's liquidator is no longer provided the discretion to determine the 'single transaction' for the purposes of assessing whether there has been an unfair preference pursuant to the relevant provisions. This decision brings with it a substantial shift in the quantification of future unfair preference claims and, as a result, will impact the

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1 (2023) 406 ALR 731 ('Bryant').

2 Corporations Act 2001 (Cth) ('the Act') s 588FA(3). Under this section, every transaction forming an integral component of an ongoing business relationship between a company and creditor must be regarded collectively as a single transaction.

3 Ibid, s 588FA.

4 Taline Chater and Marc Bosnic, 'Certainty: the Peak Indebtedness Rule is no Longer' (01 March 2023, Blog Post) Minter Ellison <https://www.minterellison.com/articles/certainty-the-peak-indebtedness-rule-is-no-longer>.

5 Toby Boys, 'High Court Rejects "Peak Indebtedness Rule" in Unfair Preferences Case' (22 February 2023, Blog Post) < https://www.holdingredlich.com/high-court-rejects-peak-indebtedness-rule-in-unfair-preferences-case>.

commercial viability associated with commencing an unfair preference claim, particularly when such claims involve a 'running account'.

## II FACTS

Gunns Limited ('Gunns') operated a timber felling business from Tasmania, Australia which managed sawmills and plantations across multiple states in Australia.[6] Badenoch Integrated Logging Pty Ltd ('Badenoch'), carries on business as a harvester and haulage contractor.[7] In 2003, an agreement was entered into between Badenoch and Gunns, where Badenoch agreed to supply the group with a specified quantity of timber, in exchange for payment in which an invoice was issued to Gunns at the end of each calendar month and payment was subsequently due on the last business day of the month thereafter.[8] As of 2010 and onwards, Gunns developed a habit of being regularly overdue in making payment and Badenoch was continuously following up and seeking information as to when an invoice would be paid.[9] Badenoch subsequently became aware that the late and irregular payments were 'due to a lack of cashflow, payments were being made at least partly out of asset sales and it was not the only contractor not receiving payment on time'.[10] As the problems with payment continued to ensue, Gunns ultimately appointed the plaintiffs as joint and several liquidators of Gunns and its wholly owned subsidiary, Auspine.[11] Upon their appointment, the liquidators applied to the Court to have 11 payments made from 26 March to 25 September 2021 by Gunns to Badenoch declared void based on to s 588F(1) of the Act.[12] The liquidators subsequently argued that:

1. All payments executed within the timeframe spanning from 30 March 2012 and 24 September 2021 are deemed void under s 588FE of the Act due to their classification as insolvent transactions.[13]
2. If there was a 'continuing business relationship' between Gunns and Badenoch pursuant to s 588FA(3)(a) of the Act:[14]

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6 *Bryant, Gunns Ltd (in liq) (Recs and Mgrs Apptd) (CAN 009 478 148), Re* (2020) 144 ACSR 423 ('*Bryant Federal Court'*) [11]-[12] (Davies J).
7 Ibid [14].
8 Ibid [19].
9 Ibid.
10 Ibid [20].
11 Ibid [1].
12 Ibid [11].
13 *Bryant Federal Court* (n 5) [1] (Davies J).
14 The Act (n 2) s 588FA(3)(a).

i. It concluded when Gunns briefly ceased to provide supply to Badenoch in July 2012, or otherwise, upon the contract's termination on 2 August 2021; and[15]

ii. They were permitted to select the starting date within the relation back period to establish an unfair preference through the PIR.[16] The liquidators submitted that 31 May 2012, being Gunns' peak indebtedness to Badenoch, ought to be the beginning of the 'single transaction'.[17]

Badenoch, however, argued that Gunns and it had a continuing business relationship for the 'entirety of the relation back period and each of the payments in issue was an integral part of that continuing business relationship'.[18] Furthermore, by way of s 588FA(3) of the Act, Badenoch contended that these payments should be regarded as a single transaction for the purposes of determining whether it received an unfair preference.[19] This is the basis for which the case was initially heard by Davies J in the Federal Court of Australia.

## III PROCEDURAL HISTORY

### A *Federal Court of Australia*

At first instance, Davies J determined that the PIR was applicable to the payments, pursuant to s 588FA(3) of the Act, so as to allow the liquidators to choose the date of the first transaction.[20] In their submission, Badenoch contended that '[the High Court] should not follow the authorities that have applied the [PIR]…arguing that the cases where the PIR has been applied in the context of s 588FA have been wrongly decided'.[21] Supporting this argument, Badenoch referred to the New Zealand case of *Timberworld Ltd v Levin*[22] which essentially abolished application of the PIR in New Zealand law.[23] Ultimately, his Honour was 'not persuaded that the [PIR] no longer applies under Australian law with the enactment of s 588FA…albeit that s 292(4B) of the NZ Act is in materially the same terms as s 588FA(3)'.[24] However, the primary judge held that only two of the Gunns' payments could be regarded as 'integral' for the purposes

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15 *Bryant Federal Court* (n 5) [95].
16 Ibid [100].
17 Ibid.
18 Ibid [95].
19 Ibid.
20 Ibid [105].
21 Ibid [103].
22 [2015] 3 NZLR 365.
23 *Bryant Federal Court* (n 5) [104].
24 Ibid [105].

of continuing the business relationship between Gunns and Badenoch.[25] His Honour considered that the other payments 'were made in circumstances where both parties were "looking backwards rather than forwards; looking to the partial payment of the old debt rather than the provision of continuing services"'.[26]

### B *Federal Court of Australia Full Court*

Davies J's decision was subsequently appealed to the Full Court of the Federal Court, where it was unanimously held that the PIR lacked any foundation in the text of s 588FA of the Act.[27] Their Honours noted that the plain language used in both the statute and the legislative material upheld the creditor's assertion that the PIR was not meant to be applicable within the framework of s 588FA(3).[28] Further, the Full Court held that the PIR contradicts the rationale in *Airservices Australia v Ferrier*,[29] particularly with respect to the 'running account principle' and the corresponding 'doctrine of ultimate effect' embodied in s 588FA(3) of the Act.[30] As the name implies, the doctrine of ultimate effect requires consideration of the 'ultimate effect' of the transaction while ascertaining whether said transaction qualifies as a preference.[31] In contrast to the primary judge's findings, the Full Court further concluded that two additional payments were made as an integral part of a continuing business relationship.[32] The decision of the Full Federal Court was subsequently appealed to the High Court of Australia.

## IV HIGH COURT DECISION

The High Court unanimously dismissed Gunns' appeal and upheld the decision made by the Full Federal Court.[33] Their Honours, Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ addressed the following key issues.

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25 Ibid [99].
26 Ibid.
27 *Badenoch Integrated Logging Pty Ltd v Bryant, Gunns Ltd (in liq) (Recs and Mgrs Apptd)* (2021) 284 FCR 590 ('*Badenoch Full Federal Court*').
28 Ibid [112] (Middleton, Charlesworth and Jackson JJ).
29 (1996) 185 CLR 483.
30 *Badenoch Full Federal Court* (n 27) [47]-[56]. The 'running account principle', as provided by s 588FA(3) of the Act, provides that all transactions forming an integral component of an ongoing business relationship between a company and creditor must be regarded collectively as a single transaction. This section similarly embodies the 'doctrine of ultimate effect', recognising that payments intended to secure trade credit for goods of equal or higher value do not disadvantage the general body of creditors.
31 Ibid [47].
32 Ibid [72].
33 *Bryant* (n 1).

## A *Peak indebtedness rule*

The High Court, in its dismissal of the appeal, held that the PIR is incompatible with the 'running account' principle, and the plain language within s 588FA(3) of the Act. In particular, Jagot J noted that 'it cannot be assumed or inferred that, in incorporating the "running account principle"… the legislature also intended to incorporate the "peak indebtedness rule"'.[34] Through a consideration of the language within the Act and the accompanying Explanatory Memorandum, Jagot J ultimately concluded that the PIR is not to be read into s 588(FA)(3).[35] It was noted that previous cases which had reached the alternative, erroneous conclusion, did so while incorrectly assuming that the 'running account principle' includes the PIR.[36] Jagot J further clarified by noting that 'it is not the case that the PIR is irreconcilable with the "running account principle" and the associated need to consider the ultimate effect of the transactions forming part of the relevant continuing business relationship.'[37] Therefore, liquidators are no longer entitled to select the highest point of indebtedness as the starting point to increase the probability of establishing an unfair preference and its amount.

## B *Continuing business relationship*

As for the question as to whether a 'transaction is, for commercial purposes, an integral part of continuing business relationship', Jagot J identified that it necessitates an 'objective factual inquiry'.[38] In doing so, consideration should be made to the 'whole of the evidence of the actual business relationship between the parties'.[39] The High Court noted that it is necessary that the actual business relationship be evaluated in 'its commercial context'[40] and 'in a business sense'.[41] That being said, the objective is to determine the 'business character' of a transaction said to have been made as part of an ongoing business relationship, and subsequently assess whether said transaction forms an integral part of the relevant relationship, for commercial purposes.[42] Furthermore, the Court clarified that the first transaction that forms an integral part of a continuing business relationship, for the purposes of s 588FA(3) of the Act, is either the 'first transaction after the beginning of the prescribed period or after the date of insolvency…or

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34 Ibid [45] (Jagot J).
35 Ibid [76].
36 Ibid.
37 Ibid [77].
38 Ibid [14].
39 Ibid.
40 Ibid [90].
41 Ibid [89].
42 Ibid [14].

the first transaction after the beginning of the continuing business relationship, whichever is the later'.[43]

### C *Payment determinations*

In light of the above, the High Court was finally required to consider whether the payments made by Gunns to Badenoch were an integral part of their 'continuing business relationship' within the context of s 588FA(3) of the Act. Following an objective factual inquiry, the High Court ultimately affirmed the reasoning adopted by the Full Court as to the characterisation given to the numerous payments made from Gunns to Badenoch. Thus, the High Court determined that, as the net indebtedness of Gunns to Badenoch had increased, there could be no unfair preference relating to the single transaction deemed by s 588FA(3) of the Act. Furthermore, the High Court affirmed the Full Court's findings with respect to the nature of the payments. Therefore, the first 4 out of 11 transactions were deemed an integral part of the continuing business relationship between the parties, while the subsequent 7 transactions were not included as the relationship had already ceased by this point. The appeal was therefore dismissed.[44]

## V SIGNIFICANCE

The judgment delivered by the High Court in *Bryant,* affirming the abolishment of the PIR as a matter of Australian law, will undeniably influence the amount liquidators are able to recover through unfair preference claims pursuant to s 588FA(3) of the Act.[45] With the elimination of this rule, liquidators are no longer able to arbitrarily select a date within the relevant relation back period as a tactic to maximise their claims against a creditor.[46] The High Court's rejection of the PIR marks a significant departure from prior case law's understanding of the unfair preferences provisions under the Act. Previously, by expanding the assets available to meet the demands of creditors, the existence of the PIR often rendered preference claims a financially viable option to pursue. Upon this High Court decision, it is clear that liquidators must now satisfy a heightened threshold to demonstrate the termination of a 'continuing business

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43 Ibid [13].
44 Ibid [103].
45 The Act (n 2) s 588FA(3).
46 Laura Johns, 'Unfair Preference Claims Shot? Impact of Australian High Court's Rejection of Peak Indebtedness Rule in Gunns Case' (March 2023, Blog Post) *Norton Rose Fulbright* <https://www.nortonrosefulbright.com/en/knowledge/publications/17c4ff1e/unfair-preference-claims-shot#:~:text=Key%20takeaways-,Summary,(Cth)%20(Act)>.

relationship', substantially restricting their ability to pursue an unfair preference claim within this context. While it is likely that this outcome will come as a disappointment to liquidators, it will benefit creditors as it enables them to defend against unfair preference claims by demonstrating that the payments received within the relation-back period were an integral part of their continuing business relationship. Ultimately, the decision in *Bryant* benefits both liquidators and creditors alike, by providing clarification to the assessment of unfair preference claims by affirming the doctrine of ultimate effect as the correct test. In doing so, this decision has resolved a long-standing issue of uncertainty with respect to the application of the unfair preference provisions provided by s 588FA(3) of the Act.[47]

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[47] Vas Marinos, 'High Court Abolishes Peak Indebtedness Rule in Bryant & Ors v Badenoch Logging Pty Ltd [2023] HCA 2' (21 June 2023, Blog Post) *Norman Waterhouse* < https://www.normans.com.au/news/high-court-abolishes-the-peak-indebtedness-rule-in-bryant-ors-v-badenoch-logging-pty-ltd-2023-hca-2>.

# *KOZAROV V VICTORIA* (2022) 273 CLR 115: EMPLOYER'S DUTY TO TAKE ADEQUATE PREVENTATIVE MEASURES SAFEGUARDING EMPLOYEE WELLBEING

KIRA ELLIOTT* AND ALISA FARRUGGIO§

## I INTRODUCTION

*Kozarov v State of Victoria* ('*Kozarov*')[1] is a significant judgment of the High Court of Australia that considered an employer's duty of care to employees with regard to mental health. In particular, this decision confirmed that employers are in fact obligated to take necessary measures to prevent psychiatric injury to their employees, particularly when the nature of the work poses an inherent and obvious risk to mental well-being.[2] Formerly, the leading case in this field was *Koehler v Cerebos (Australia) Ltd* ('*Koehler*').[3] The main judgment in *Koehler* was provided by McHugh, Gummow, Hayne and Heydon JJ, with Callinan J providing a separate but supporting judgment. The decision highlighted that an employer, 'engaging an employee to perform stated duties is entitled to assume, in the absence of evident signs warning of the possibility of psychiatric injury, that the employee considers that he or she is able to do the job'.[4] However, *Kozarov* suggested that there is no need for the presence of 'evident signs' as specified in *Koehler* where the regular exigencies associated with the particular employment role present an obvious danger to the psychiatric health of the employee.[5] The appellant's role, as a solicitor for the Office of Public Prosecutions who was routinely exposed to graphic and disturbing material in the Specialist Sexual Offences Unit ('SSOU'), is considered such a role where mental injury is a reasonably foreseeable consequence.[6] Given the increased emphasis on mental health in Australian employees,[7] the High Court judgment in *Kozarov* serves as a message to employers that they must diligently acknowledge and address risks to their

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1 (2022) 399 ALR 573 ('Kozarov').
2 Ibid [6] (Kiefel CJ and Keane J.).
3 (2005) 214 ALR 355 ('Koehler').
4 Ibid [36] (McHugh, Gummow, Hayne and Heydon JJ).
5 Kozarov (n 1) [6].
6 Ibid [107] (Edelman J).
7 Productivity Commission, Mental Health (Report No 95, 30 June 2020) vol 2, 301.

employees' psychiatric well-being. This decision could set an example globally as it will ideally push employers to be more proactive in taking care to ensure their duty has been discharged, not only with respect to their employees physical safety but also their mental wellbeing.

## II FACTS

Zagi Kozarov initiated legal action in the Supreme Court of Victoria against her employer, the State of Victoria, seeking compensation for the psychiatric harm she suffered during the course of her employment. The appellant was an employee at the Victorian Office of Public Prosecutions in the Sexual Offences Unit between June 2009 and April 2012.[8] Ms Kozarov worked on 'cases of abhorrent nature involving child rape and offences of gross depravity', with considerations of 'witness statements and video and audio recorded evidence which contained graphic and disturbing content'.[9] As a result of her 'cumulative exposure to vicarious trauma in SSOU casework, Ms Kozarov subsequently developed psychological symptoms and was diagnosed with chronic post-traumatic stress disorder ('PTSD') and a major depressive disorder ('MDD').[10] Whilst Ms Kozarov applied to be moved out of the Sexual Offences unit, these attempts were unsuccessful, and ultimately the appellant's employment was terminated.[11] Ms Kozarov subsequently brought an action against the State of Victoria, arguing that the psychological injuries suffered were caused by the 'ongoing, repeated exposure to a high volume of sexual offences cases' during her course of employment.[12] Ms Kozarov made claims against the State of Victoria in negligence, breach of contract, and breach of statutory duty, on the basis that there was an 'unsafe system of work at the SSOU and that there was a 'failure by her employer to take reasonable steps to protect her from harm'.[13] Ms Kozarov's case was primarily based upon the assertion that 'there were numerous signs, some more obvious than others, that [she] was at risk of harm'.[14] The trial judge and the Court of Appeal identified 13 'evident signs' that Ms Kozarov relied upon to argue that the State of Victoria was provided sufficient notice of the risk of psychiatric injury in connection with her course of employment ('notice finding').[15]

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8 *Kozarov* (n 1) 587 [63] (Gordan and Steward JJ).
9 Ibid [74].
10 Ibid [63].
11 Ibid [48] (Gageler and Gleeson JJ).
12 *Kozarov v State of Victoria* [2020] VSC 78 [4] (Dixon J) ('*Kozarov Supreme Court*').
13 Ibid [5].
14 *Kozarov* (n 1) [64] (Gordon and Steward JJ).
15 Ibid [68].

## III PROCEDURAL HISTORY

### A *Supreme Court of Victoria*

At first instance before the Supreme Court of Victoria, the trial judge found in favour of Ms Kozarov in establishing that the State of Victoria had breached its duty of care by neglecting to take reasonable steps to prevent psychiatric injury.[16] Rather, a reasonable employer 'ought to have implemented specific measures or a specific system of work in response to the risk [of psychiatric injury'].[17] The specific measures expected within this context are based on the SSOU's 'Vicarious Trauma Policy', which includes 'personal and professional strategies for staff to use in dealing with vicarious trauma'.[18] The list of measures and practises intended to protect SSOU staff from vicarious trauma were not properly implemented so as to be effective in protecting Ms Kozarov from suffering mental injury.[19] Dixon J held that this policy necessitated a system to be put in place that would have prompted a welfare inquiry for Ms Kozarov,[20] along with an offer of rotation or 'time out' from the SSOU role to reduce exposure to trauma.[21] The trial judge found that 'viewed prospectively' 'the [State of Victoria] knew or ought to have known … that the plaintiff was at risk of workplace-related psychiatric harm'.[22] Thus, 'a reasonable person in [this position] would have adverted to the evident signs regarding [Ms Kozarov] and observed that she was failing to cope with her allocated work'.[23] Further, Dixon J submitted that the state's failure to implement the necessary measures materially contributed to the furtherance and exacerbation of Ms Kozarov's PTSD and subsequent diagnosis of MDD, so as to satisfy the element of causation.[24] This was held on the basis that Ms Kozarov showed signs of cooperation that indicated she would have accepted an offer of rotation if appropriately informed of the rationale to do so.[25] Thus, the trial judge awarded a total sum of $435,000 in damages to Ms Kozarov as a means of compensating the loss and damage she suffers as a result of her psychiatric injury caused by the State of Victoria's breach of its duty of care.[26]

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16 Kozarov Supreme Court (n 12) [567].
17 Ibid [624].
18 Ibid [97].
19 Ibid [7].
20 Ibid [660].
21 Ibid [691].
22 Ibid [622].
23 Ibid [623].
24 Ibid [739].
25 Ibid [733].
26 Ibid [777].

## B *Victorian Court of Appeal*

The Victorian Court of Appeal subsequently reversed the decision made by Dixon J in the Supreme Court upon an application on behalf of the State of Victoria.[27] The state sought leave to appeal based on two grounds: '(1) the judge erred by holding that a sentinel event had occurred and evident signs from the plaintiff were apparent so as to require from the defendant by way of a reasonable response', and '(2) the judge erred in holding on the balance of probabilities that the injury and loss suffered by the plaintiff would have been avoided had the defendant done those things the Court held reasonably required'.[28]

### 1 *First ground of appeal (notice finding)*

With respect of the first ground, the State of Victoria contended that they were not on notice of any relevant risks to Ms Kozarov's mental state based on the 13 'evident signs' considered in the Supreme Court decision.[29] Further, the state submitted that the trial judge's previous decision was erroneous as it failed to consider the 'evidence of events as they unfolded in the light of what was known from time to time', and in doing so involved 'impermissible litigious hindsight'.[30] The Victorian Court of Appeal, however, dismissed the first ground of appeal and upheld the trial judge's approach whilst considering the 'evident signs' .[31] While noting that these signs, if viewed in isolation, 'might not individually constitute relevant notice to the defendant that the plaintiff was at risk of suffering psychiatric injury', the Court of Appeal upheld the trial judge's approach by considering the matters in combination.[32]

### 2 *Second ground of appeal (rotation finding)*

The Court of Appeal, however, ultimately ruled in favour of the State of Victoria on the basis of its second group of appeal which subsequently overturned the Supreme Court decision.[33] In particular, the lack of evidence provided by the Supreme Court as to the finding that Ms Kozarov would have agreed to an offer of rotation out of the SSOU led the Court of Appeal to conclude that the element of causation had been satisfied based on 'inferences'.[34] Particularly, the Court of Appeal noted Ms Kozarov's statement that she was 'passionate about continuing

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27 State of Victoria v Kozarov (2020) 301 IR 446 ('Kozarov Court of Appeal').
28 Ibid [5] (Beach JA, Kaye JA and Macaulay AJA).
29 Ibid [75].
30 Ibid [70].
31 Ibid [76].
32 Ibid.
33 Ibid [111].
34 Ibid [104].

[her] work' in the SSOU,[35] as well as the fact that she had sought a promotion and had signed a contract for a 'Full Time, Ongoing' position in the SSOU.[36] Accordingly, their Honours were not satisfied based on this evidence that Ms Kozarov would have accepted a rotation out of the SSOU had the State of Victoria presented this offer.

## IV HIGH COURT DECISION

Ms Kozarov filed an appeal to the High Court against the Court of Appeal's decision. The High Court unanimously decided in favour of Ms Kozarov on the notice finding made in the first instance decision and proceeded to overturn the determination made by the Court of Appeal with respect to the rotation finding. By way of four separate judgments, the High Court ultimately set aside the orders made by the Court of Appeal.[37]

### A *Kiefel CJ and Keane J*

With respect to the notice finding, their Honours embraced an alternative approach from the primary judgment presented by Gageler and Gleeson JJ. Nevertheless, they concurred with the subsequent orders issued. Both Kiefel CJ and Keane J did not agree with the degree of substance the Court of Appeal placed on the 13 'evident signs' to establish sufficient notice.[38] Their Honours held that the measures stipulated within the SSOU's vicarious trauma policy indicated that the State of Victoria had a 'lively appreciation of the serious risk to Ms Kozarov's mental health posed by her work'.[39] Thus, their Honours concluded that 'no further warning signs were necessary to oblige the respondent to take reasonable steps to safeguard Ms Kozarov's mental health'.[40] In reaching this conclusion, references were drawn from the aforementioned case of *Koehler* wherein it was said:

> [The employee's] agreement to undertake the work runs contrary to the contention that the employer ought reasonably to have appreciated that the performance of those tasks posed a risk to the [employee's] psychiatric health. [41]

In this respect, their Honours clarified that *Koehler's* primary focus was determining whether the employer could have reasonably foreseen a risk to the employee's mental wellbeing given

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35 Ibid [108].
36 Ibid [109].
37 *Kozarov* (n 1) [113].
38 Ibid [12] (Kiefel CJ and Keane J).
39 Ibid [7].
40 Ibid.
41 Ibid [4].

the nature of the work and the associated requirements.[42] Their Honours further emphasised that where the specific circumstances of employment pose an inherent risk to an employee's mental health, the employer is obliged to take proactive measures to ensure the safe execution of the relevant work.[43]

## B *Gageler and Gleeson JJ*

While considering the notice finding, their Honours took into account the evident signs, particularly Ms Kozarov's 'genuine emotional distress',[44] which was recognised as a 'significant indicator of possible work-related psychiatric injury'.[45] Additionally, their Honours noted that Ms Kozarov took on 'an unnecessary evidentiary burden' of proving foreseeability by way of establishing 'evident signs' as necessitated by *Koehler*.[46] With respect to the rotation finding and accompanying issue of causation, their Honours acknowledged Ms Kozarov's attempts to be rotated due to the detrimental effect of her work obligations on her mental wellbeing.[47] Although they admitted there was an element of 'ambiguity in the trial judge's reasons' as to whether rotation alone could be considered the 'only option that would have avoided exacerbation of [the] PTSD', their Honours ultimately held that the Court of Appeal was erroneous in its decision to overturn the rotation finding.[48]

## C *Gordon and Steward JJ*

While Gordon and Steward JJ did not provide any further commentary based on the *Koehler* decision, they supported the notice finding due to the 'inherently difficult nature of the work carried out by Ms Kozarov', which 'ought to have put [the State of Victoria] on notice that Ms Kozarov was at risk of psychiatric injury in the continued performance of her work'.[49] Further, their Honours' position with respect to the rotation finding was fairly consistent with that of Gageler and Gleeson JJ. They were in agreement in that more intensive training for management and staff and an offer for rotation would have very likely been accepted by Ms Kozarov.[50] Their Honours considered the issue of causation as the 'primary question' which

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42 Ibid [2].
43 Ibid [6].
44 Ibid [51] (Gageler and Gleeson JJ).
45 Ibid [54].
46 Ibid [29].
47 Ibid [59].
48 Ibid [56].
49 Ibid [80] (Gordon and Steward JJ).
50 Ibid [95]-[97].

required consideration.[51] Ultimately their Honours concluded that the State of Victoria breached its duty 'in a way which could be said to have *caused* the exacerbation and prolongation of Ms Kozarov's PTSD and subsequent development of MDD'[52] when they 'failed to intervene by making a welfare inquiry ... and offering her occupational screening.'[53]

### D *Edelman J*

Finally, while agreeing with the reasoning provided by the remainder of the High Court, Edelman J delivered a separate judgment.[54] Justice Edelman supported the notice finding, as his Honour submitted that as a 'reasonable person in the position of [the State of Victoria] would have been aware of the risks'.[55] Furthermore, his Honour saw that the 'foreseeable risk ... was so great', and the 'likely extent of that foreseeable injury was so serious', that the State of Victoria would have had to offer Ms Kozarov an offer of rotation so as to exhibit a reasonable response within this context.[56] Justice Edelman further noted that, had the reasonable steps of welfare enquiries and occupational screening been complied with, these measures would have revealed symptoms of Ms Kozarov's psychiatric state. Thus, his Honour submitted this would have encouraged Ms Kozarov to agree to a rotation and therefore prevent the furtherance of the psychiatric injury she suffered.[57]

## V SIGNIFICANCE

The High Court decision in *Kozarov* highlights the crucial role of employers in acknowledging and diligently addressing potential risks of injury associated with the relevant role, including where said risk is psychological. This becomes of utmost importance particularly where the relevant employment role involves tasks that present an inherent risk of psychological harm. While not every workplace will share the same unique characteristics present within this case, this does not exempt employers from their duty to identify and take reasonable steps in relation to risks to employees' mental wellbeing. In light of this, employers would be wise to conduct risk assessments, particularly with respect to mental health, and subsequently implement appropriate control measures.

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51 Ibid [65].
52 Ibid [592].
53 Ibid.
54 Ibid [99]-[113] (Elderman J).
55 Ibid [110].
56 Ibid [111].
57 Ibid [112].

# *AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION V KOBELT* (2019) 267 CLR 1: HOBSON'S CHOICE - DIFFICULTIES IN ASSESSING STATUTORY UNCONSCIONABILITY

ALISA FARRUGGIO*

## I INTRODUCTION

Unconscionable conduct refers to 'behaviour that is so harsh that it goes against good conscience'.[1] Unconscionable conduct focuses on the conduct of the stronger party and whether they have attempted to retain a benefit from a dealing with a person who is under a special disability or disadvantage.[2] Under numerous pieces of legislation concerning consumer protection, it is illegal for businesses to behave unconscionably either towards consumers or other businesses. Despite this, the term unconscionable conduct is not expressly defined within this legislation, and the definition is instead derived through a case-by-case basis and the courts' interpretation of the term over time. The case of *Australian Securities and Investments Commission v Kobelt* centred on this issue and the meaning of unconscionable conduct under statute.[3]

## II RELEVANT LAW

Unconscionable conduct is prohibited under statute, with equity intervening to provide remedies to those who are victim to such conduct. In equity, the seminal case on unconscionable conduct was Commercial Bank of Australia Ltd v Amadio[4] which found that where there is an imbalance in bargaining power between parties, such as where the weaker party lacks knowledge or education, then a transaction could be set aside for being unconscionable.

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1 'Unfair business practices', *Australian Competition & Consumer Commission* (Web Page) <https://www.accc.gov.au/business/selling-products-and-services/unfair-business-practices#:~:text=Unconscionable%20conduct%20is%20behaviour%20so,towards%20consumers%20or%20other%20businesses>.

2 Micarone v Perpetual Trustees (1999) 75 SASR 1, 108.

3 (2019) 267 CLR 1 ('*Kobelt*').

4 (1983) 151 CLR 447 ('Amadio').

There are several statutes which prohibit unconscionable conduct, with these Acts having different applications.[5] The *Australian Securities and Investments Commission Act 2001* (Cth) ('*ASIC Act*')[6] is one of the Acts which aims to regulate conduct of businesses by placing obligations on these entities when dealing with consumers. The *ASIC Act* is specific to unconscionable conduct in connection with financial services. Sections 12CB and 12CC of the *ASIC Act* are the relevant provisions. Section 12CB(1) states:

> (1) A person must not, in trade or commerce, in connection with:
>
> (a) The supply or possible supply of financial services to a person; or
>
> (b) The acquisition or possible acquisition of financial services from a person;
>
> (c) Engage in conduct that is, in all circumstances, unconscionable.[7]

Section 12CC of the *ASIC Act* lists out certain matters which the court may have regard to when determining whether the supplier of financial services has contravened s 12CB in their conduct with consumers.[8] Examples of these matters include the bargaining positions of the parties,[9] whether the weaker party understood the documents relating to the supply of financial services,[10] and whether any unfair tactics have been used by the supplier.[11]

## III MATERIAL FACTS

The respondent, Lindsay Kobelt (Kobelt) owned a store in Mintabie, South Australia. Kobelt's store sold a variety of things such as groceries, used cars and fuel. Kobelt's customers were largely made up by Indigenous Australians (Aṉangu people). At his store, Kobelt used a book-up system allowing customers to buy goods and services and delay paying for the item until later. Through this book-up system the customers would give Kobelt access to their bank accounts by providing their debit cards to Kobelt. The customers' wages and any Centrelink entitlements were paid to this bank account.[12] The customers additionally had to disclose the personal identification number (PIN) of this debit card to Kobelt. Using this debit card, Kobelt could deduct funds from the customer's bank account to repay their debt owed. Kobelt would also take funds from the account 'in return for the supply of goods over the interval between

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[5] Competition and Consumer Law Act 2010 (Cth); National Consumer Credit Protection Act 2009 (Cth).
[6] Australian Securities and Investments Commission Act 2001 (Cth) ('ASIC Act').
[7] Ibid s 12CB(1).
[8] Ibid s 12CC(1).
[9] Ibid s 12CC(1)(a).
[10] Ibid s 12CC(1)(c).
[11] Ibid s 12CC(1)(d).
[12] *Kobelt* (n 3) [1].

the customer's "pay days"'.[13] The Renouf report, commissioned by the Australian Securities and Investments Commission (ASIC) in 2002,[14] provides that where there are no alternative financial services in place, often the only way for Indigenous consumers to obtain credit is through a book-up system.[15]

Although the book-up system was a common arrangement between store owners and Indigenous communities in rural and remote areas of Australia, the issue in this case was whether this conduct by Kobelt was unconscionable. There were several reasons why this issue was in dispute. Kobelt failed to record the exact amount owed by his customers. In addition to this, Kobelt would sometimes withdraw all the money from the customers' accounts leaving them with no money to buy groceries. When this occurred, Kobelt would allow the customers to purchase groceries with part of the amount that he had pulled out from that month. This meant that the customers could only buy groceries from Kobelt's store.

## IV PROCEDURAL HISTORY

### A *Federal Court*

At first instance, ASIC brought proceedings against Kobelt in the Federal Court alleging that the book-up system used in Kobelt's store contravened s 12CB(1) of the *ASIC Act* which prohibits unconscionable conduct when supplying financial services. The judgment by White J found that Kobelt's conduct was unconscionable and in breach of the *ASIC Act*. Evidence assessed by White J showed that Kobelt would generally clear all or nearly all the funds within the customers' accounts as soon as they were credited. From the amount withdrawn, half of it would go toward reducing the debt owed and the other half was held on to by Kobelt as 'book-down' for the customer to use solely at his store.[16] Whether this 'book-down' amount was provided to the customer was dependent on Kobelt's discretion. His Honour believed that the fact that Kobelt required customers to hand over their debit cards and disclose their confidential PINs was significant in finding unconscionable conduct. His Honour additionally stated that there was no reason, in the evidence, why all the funds had to be withdrawn and the fact that Kobelt entitled himself to all the customer's periodic income was unconscionable. White J acknowledged that the book-up system provided some benefits

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13 Ibid [1] (Kiefel CJ and Bell J).
14 Australian Securities & Investments Commission, *Book up: Some consumer problems*, Report No. 12 (2002) 5.
15 *Kobelt* (n 3) [3].
16 *ASIC v Kobelt* [2016] FCA 1327 [55].

to Indigenous customers but generally took advantage of their poverty and lack of financial literacy by exploiting these customers.

### B *Full Federal Court*

On appeal, this case then proceeded to the Full Federal Court where the Federal Court's decision was overturned. Although the Full Court acknowledged that Kobelt's customers were particularly vulnerable, their Honours believed it was significant that the customers understood the book-up system and had voluntarily agreed to the terms of such an arrangement.[17] Their Honours further stated that as Kobelt had not been dishonest or hid any information from the customers, there was no undue influence, and his conduct was not unconscionable.[18]

## V THE HIGH COURT DECISION

ASIC was then granted special leave to appeal to the High Court.[19] The issue to be considered was how unconscionability was to be interpreted under s 12CB(1) of the *ASIC Act* in comparison to unconscionable conduct in equity. Although their Honours held a mutual understanding that unconscionable conduct in equity required the 'unconscientious taking advantage of a special disadvantage',[20] their Honours differed in their interpretation of unconscionable conduct under the *ASIC Act*. The High Court delivered a 4:3 judgment by bare majority. The majority, made up of Kiefel CJ, Bell, Gageler and Keane JJ found that the actions by Kobelt did not amount to unconscionable conduct. The three dissenting judges in this case consisted of Nettle, Gordon and Edelman JJ.

### A *Interpreting standard of unconscionable conduct pursuant to the ASIC Act*

#### 1 *Retain ordinary meaning*

Kiefel CJ and Bell J stated that as the term 'unconscionable' is not defined within the *ASIC Act*, it should be understood as bearing its ordinary meaning.[21] Their Honours believed that s 12CB(1) applied to conduct when supplying financial services that 'objectively answers the description of being against conscience'.[22] Gageler and Keane JJ believed that the range of

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17 *Kobelt v ASIC* (2018) 352 ALR 689 [260]-[269] (Besanko and Gilmour JJ).
18 Ibid.
19 *Kobelt* (n 3) [13].
20 Ibid [118].
21 Ibid [14].
22 Ibid [14] (Kiefel CJ and Bell J).

conduct which could be deemed unconscionable was broader under the statute,[23] and there were more considerations other than just whether a stronger party had exploited a special disadvantage possessed by the weaker party. However, their Honours still agreed with Kiefel CJ and Bell J in that the standard of unconscionability under statute substantially remained the same as the unwritten law.[24]

### 2 *Broader standards for unconscionability*

Nettle, Gordon and Edelman JJ held a varying opinion on how unconscionability was to be interpreted under the statute. Their Honours believed that the conduct encompassed by s 12CB of the *ASIC Act* was broader than the unwritten law as well as the standard it imposed. Edelman J went on to state:

> [A]lthough Parliament's proscriptions against unconscionable conduct initially built upon the equitable foundations of that concept, over the last two decades Parliament has repeatedly amended the statutory proscription against unconscionable conduct… to require courts to take a less restrictive approach.[25]

This less restrictive approach meant that under statute, unconscionability could consider factors such as special disadvantage or any exploiting of that special disadvantage, but this was no longer a mandatory consideration pursuant to s 12CB as there was no 'moral standard' as to what constitutes unconscionability.[26]

## *B Whether Kobelt's book-up system amounted to unconscionable conduct*

Gageler J stated that the 'identification of the correct perspective bears materially on the resolution of this appeal',[27] which highlights the importance of the differing opinions of their Honours in considering the standard for unconscionability under the statute. These differences appeared to influence their Honours' determination on the central issue of whether Kobelt's book-up system amounted to unconscionable conduct.

### 1 *Majority judgment*

The 4:3 majority of the High Court consisting of Kiefel CJ and Bell, Gageler, and Keane JJ held that Kobelt's conduct was not unconscionable pursuant to s 12CB of the *ASIC Act*. The

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23 Ibid [84].
24 Ibid [82]–[90] (Gageler J) and [121]–[123] (Keane J).
25 Ibid [295] (Edelman J).
26 Ibid [295].
27 Ibid [86] (Gageler J).

majority upheld the Full Court's finding that the Indigenous customers possessed a basic understanding of the book-up system. Their Honours also considered the fact that the use of book-up systems was common as shown by 'the evidence of the cultural norms and practices of the Aṉangu customers'.[28] Therefore the Aṉangu customers believed that this credit system was appropriate not because of their lack of financial literacy but because this was a common aspect of their culture. The book-up system was often the most appropriate method of obtaining credit for Aṉangu customers as many customers had low incomes and lacked assets to secure a loan.[29] Therefore this system provided customers with an advantage as they did not need to share resources with family members. In addition to this, the majority found that no part of Kobelt's conduct was exploitative of the Aṉangu customers' lack of financial literacy or education. In relation to this Kiefel CJ and Bell J stated that the 'absence of unconscientious advantage obtained by Kobelt from the supply of credit ... under his book-up system'[30] further supported the conclusion that there was no unconscionable conduct.

The majority did not believe that the Aṉangu customers were under any 'special disadvantage' as Gageler J found they 'evidently considered that continued participation in the book-up system suited the interests of them and their families having regard to their own preferences and distinctive cultural practices'.[31] On this basis, they were not being taken advantage of as they engaged in this agreement and were capable of judging what was in their best interests. The majority additionally found that there was no bad faith by Kobelt as he was 'generally willing to negotiate the amount to be withdrawn from an individual customer's account and to return a customer's card temporarily should the customer wish to travel'.[32] Keane J agreed with this view and stated that although the book-up system may have placed the customers in a more vulnerable position, Kobelt did not actually take advantage of this vulnerability or act with an intent to exploit.[33] His Honour went on to state that this book-up system could have 'inflicted serious damage' on Kobelt's business with customers having the power to collectively punish Kobelt if they had wished to do so.[34]

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28 Ibid [77], [79].
29 Ibid [65].
30 Ibid [19] (Kiefel CJ and Bell J).
31 Ibid [110] (Gageler J).
32 Ibid [100] (Gageler J).
33 Ibid [116].
34 Ibid [129].

### 2 *Dissenting judgment*

There were three dissenting judges, their Honours Nettle, Gordon, and Edelman. Nettle and Gordon JJ focused primarily on the power imbalance between Kobelt and the customers, finding that Kobelt's conduct was exploitative as the customers lacked choice, had a limited understanding of the arrangement, and Kobelt had failed to be transparent about the terms and conditions of the arrangement. Their Honours believed that Kobelt had taken advantage of the customers as he failed to keep proper records of the amount owed and would often clear out all the money in the customer's bank accounts. They also opined that it was exploitative as it restricted customers to shopping solely at Kobelt's store. Their Honours stated that the customers were under a special disadvantage due to their financial circumstances and lack of education as well as the fact that they lived in remote communities. Edelman J further stated that as the interest rates far exceeded what a commercial lender would have charged,[35] and as the book-up system was discriminatorily applied solely for Indigenous customers, it was unconscionable pursuant to s 12CB(1). Edelman J referred to the voluntary entering into the agreement by customers as 'Hobson's choice' as there was no practical alternative available for customers due to their vulnerable circumstances.[36] Therefore, the customer's choice to enter the arrangement was not truly voluntary.

## VI IMPLICATIONS

This High Court decision has created significant uncertainty in relation to how unconscionable conduct under statute will apply, as five separate judgments were given and the judgments in relation to the standard for unconscionable conduct were also ambiguous with no clear conclusion reached on the matter. The resulting narrow majority finding that the book-up system was not unconscionable demonstrates how divided their Honours were in reaching a decision. The majority believed that unconscionability required an exploitation or advantage taken of the weaker party which is a relatively high bar to satisfy for relief. As the dissenting judgment believed that it was the clear intent of Parliament to broaden the standard of unconscionability under statute, it is possible that this broader application may be adopted in future cases. Both the majority and minority judgments have their persuasive aspects: Although there are arguments finding that the book-up system exploited these Indigenous customers, if

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35 Ibid [200].
36 Ibid [266].

such systems were not in place people within these communities would also be severely disadvantaged as they have no other appropriate means of obtaining credit.

This decision reaffirms that statutory unconscionability must be decided on a case-by-case basis depending on the individual circumstances. Following this case, it will become harder for unconscionable conduct to be established if the consumer voluntarily engages in an agreement, even where, as Edelman J stated, it was 'Hobson's choice'. The divergence in the majority and dissenting judgments appears to stem from the values held by their Honours which have influenced what they deem to be a voluntary transaction. It will likely prove difficult to determine how this decision should apply in future cases.