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# international trade law & regulation

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# International Trade Law & Regulation

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# Post-Brexit Scenarios for UK Competition Policy and Public Enforcement: The EEA Model v Complete Independence

Anne MacGregor

Adam Kidane\*

\* Anti-competitive practices; Comparative law; Competition policy; EU law; European Economic Area; European Union; Merger control; State aid; Third countries; United Kingdom; Withdrawal

On 23 June 2016, the British people voted by majority to leave the European Union (EU) in an “advisory” referendum. The referendum result was a seismic shock, unexpected by financial markets and not predicted by final pre-referendum polls. With a new British Prime Minister now at the helm, the process of coming to terms with the referendum result and planning for the significant practical challenge of achieving Brexit is now underway in both the UK and Brussels.

For the time being, the UK is still a member of the EU, with all the rights and responsibilities that membership entails. As noted by the remaining 27 heads of state and government in the statement following their informal meeting of 29 June 2016, “until the UK leaves the EU, EU law continues to apply to and within the UK”. Formal exit negotiations between the UK and the EU (to be conducted by the European Commission (Commission) on the basis of a mandate from the European Council) will only commence once the UK has delivered its so-called “article 50 notice”.<sup>1</sup> Present indications are that this will not occur until early 2017, possibly much later.<sup>2</sup> Once the art.50 notice is delivered to Brussels, exit will occur two years later, unless all the EU Member States agree to extend the exit agreement negotiation period.<sup>3</sup>

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<sup>1</sup> Article 50(2) TEU provides that “a Member State which decides to withdraw shall notify the European Council of its intention”. Article 50(1) allows any Member State to withdraw from the Union “in accordance with its own constitutional requirements”. The UK constitutional requirements for delivering the art.50 notice are presently unclear. The UK Government takes the view that the Government may decide of its own accord when to deliver the notice, but several court challenges have been brought asserting that an Act of Parliament is required to trigger the withdrawal procedure, on the basis of the sovereignty of Parliament. See *Santos v Chancellor for the Duchy of Lancaster* CO/3281/2016, High Court of Justice, QBD (Admin) (19 July 2016). For a discussion of this issue see N. Barber, T. Hickman and J. King, “Pulling the Article 50 ‘Trigger’: Parliament’s Indispensable Role” (27 June 2016), U.K. Const. L. Blog, <https://ukconstitutionallaw.org/2016/06/27/nick-barber-tom-hickman-and-jeff-king-pulling-the-article-50-trigger-parliaments-indispensable-role/> [Accessed 1 September 2016].

<sup>2</sup> Statement by UK Prime Minister Theresa May, joint press conference in Berlin with German Chancellor Angela Merkel (20 July 2016). The 27 remaining members of the EU have implicitly acknowledged that it is for Britain to decide the timing of the delivery of the art.50 notice: see Statement, informal meeting of the 27 (Brussels, 29 July 2016).

<sup>3</sup> TEU art.50(3) states that “the Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in para.2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period”.

A significant motivation for Leave voters in the UK referendum was the perception that too much national power had been devolved to the EU over the course of the 40-odd years in which the UK has been an EU member. The EU has the competences conferred on it by the EU’s treaties, which form its constitutional foundation. Competences not conferred upon the EU in those treaties remain with the EU Member States.

In the area of competition law and policy, art.3 of the Treaty on the Functioning of the EU (TFEU) states that the Union shall have “exclusive competence in the establishing of the competition rules necessary for the functioning of the internal market”. But EU Member States retain their competence to regulate competition at the national level. So national competence and EU competence are autonomous and parallel. The European Commission’s Directorate-General for Competition (DG Competition) acts as a supra-national antitrust agency for the bloc, while all the EU Member States have their own national competition authorities (NCAs). In the UK, that national agency is the Competition and Markets Authority (CMA).

So, as the UK starts to think about extracting itself from the EU, at least as concerns competition enforcement, it already has a national agency and national legislation in place and there is no immediate legal vacuum to fill before Brexit can occur. Nevertheless, owing to the unique and highly developed system of autonomous and parallel competition competence between the EU and its Member States, the UK’s national competition regime is intertwined with that of the EU, so to speak, in a number of ways. This is because, over the years, DG Competition and the NCAs have developed various mechanisms in order to be able to work together effectively and efficiently. Some of this is reflected in EU and UK legislation. Other aspects are to be found in guidance notices or soft law.

The extent to which the EU’s supranational competition regime will have to be disentangled from the UK’s regime will ultimately depend upon the arrangement that the UK negotiates with the EU for its post-Brexit relationship. Much has been written as to the possibility of the UK adopting the so-called “Norway model”, i.e. becoming a signatory to the EEA Agreement as an EFTA rather than

EU Member State,<sup>4</sup> once the UK leaves the EU.<sup>5</sup> This is the closest form of relationship the UK could have with the EU short of being an EU member, and there have certainly been a number of political statements on both sides of the English Channel since the referendum to the effect that a close relationship between the UK and the EU post-Brexit is desirable.<sup>6</sup>

However, EEA membership for the UK exactly and fully replicating the arrangement presently enjoyed by Norway, Liechtenstein and Iceland could be a politically unpalatable solution for a number of Brexit proponents, since EEA membership includes single market access and entails signing up to the free movement of persons requirement.<sup>7</sup> This was arguably the most reviled aspect of EU membership for UK referendum voters in the Leave camp. Statements by the new Prime Minister, Theresa May, would indicate that the UK will be aiming to put in place limitations on the numbers of EU migrants who can come to the UK to work.<sup>8</sup> Any such limitations will probably mean that EEA membership in its purest form is not possible, but it is not out of the question that a unique tailored relationship with the EU might be negotiable, with special concessions concerning the free movement of workers.<sup>9</sup> Everything is a question of negotiation, and it is worth remembering that even now as an EU Member State, the UK's membership is not "standard". It has an opt-in in the area of Justice and Home Affairs legislation,<sup>10</sup> dispensation from the "ever closer union" requirement, and is not a member of the euro zone. Further, it only participates in some aspects of Schengen.<sup>11</sup>

Specifically in the area of competition enforcement seen discretely, it is possible that the EEA model might prove feasible, even if full free movement of persons is not an element of the UK's new relationship with the EU. Although the EEA Agreement has been in force for over 20 years, the way in which it functions and applies to competition matters is not widely understood. The purpose of this article is to look at this in some depth, and in doing so examine two opposing potential scenarios for UK competition policy post-Brexit: the first in which competition matters between the UK and the EU are

regulated in the way which presently occurs under the EEA Agreement between the 27 EU Member States and Iceland, Liechtenstein and Norway; and the second in which the UK competition regime is completely, surgically separated from that of the EU. There may of course be a variety of other possible options in between these two scenarios, but they will not be explored in this article.

### Post-Brexit competition arrangement along the lines of the current EEA Agreement competition regime

Articles 6 and 7 of the EEA Agreement provide that the *acquis communautaire* is part of the EEA Agreement. It follows that EU legislation implementing competition rules that are contained in the Treaty on the Functioning of the EU (currently set out in Annex XIV of the EEA Agreement) will apply in the EEA. The competition provisions of the EEA Agreement are to be interpreted in a manner that is consistent with judgments of the EU courts prior to the date of the signature of the EEA Agreement. The EFTA Court has gone further and held that subsequent judgments of the EU courts are relevant. In particular, it held that

"the reasoning which led the EC Court of Justice to its interpretations of expressions in Community law is relevant when those expressions are identical in substance to those which this Court has to interpret".<sup>12</sup>

It is important to note that certain products are excluded from the scope of the EEA Agreement and are therefore not subject to the competition provisions of the Agreement. In particular, art.8 of the EEA Agreement only applies to those products falling within Chs 25 to 97 of the Harmonised Description and Coding System (HS Nomenclature), with the exception of the products listed in Protocol 2 to the Agreement. It follows that neither the Commission nor the EFTA Surveillance Authority will be competent to apply competition rules in cases where products that fall outside the scope of the

<sup>4</sup> The UK is presently a signatory to the EEA Agreement in its capacity as a Member State of the EU.

<sup>5</sup> See for example Swati Dhingra and Thomas Sampson, "Life after Brexit: What are the UK's options outside the European Union?", LSE Centre for Economic Performance (12 February 2016), p.4; Wolfgang Münchau, "Brexit: The Norway option is the best available for the UK", Financial Times, 28 June 2016; Jean-Claude Piris, "If the UK Votes to Leave: The Seven Alternatives to EU Membership", Centre for European Reform (12 January 2016), p.2.

<sup>6</sup> "In the future, we hope to have the UK as a close partner of the EU and look forward to the UK stating its intentions in this respect": Statement by the remaining 27 heads of state and government (Brussels, 29 June 2016), para.4.

<sup>7</sup> The remaining 27 heads of state and government stated, following their informal Brussels meeting on 29 June 2016, that "access to the Single Market requires acceptance of all four freedoms": para.4.

<sup>8</sup> See for example Rowena Mason and Alex Duval Smith, "Theresa May takes Brexit's immigration message to eastern Europe", *The Guardian*, 28 July 2016, in which the Prime Minister is quoted as saying that UK voters had sent a "very clear message that they do not want free movement to continue as it has in the past". In an earlier interview with *The Telegraph* published on 3 July 2016, Mrs May said that as PM she would reform the free movement of people, but stopped short of saying she would abolish it altogether. In launching her campaign for leadership of the Conservative Party on 30 June 2016, she stated that "there is clearly no mandate for a deal that involves accepting the free movement of people as it has worked hitherto".

<sup>9</sup> While visiting eastern European countries in late July 2016, the Prime Minister stressed that she was keen for the UK to have its own distinct relationship with the EU, rather than an "off the shelf" model previously negotiated with other nations such as Norway or Switzerland.

<sup>10</sup> The UK's participation in EU legislation on Justice and Home Affairs is principally governed by Protocol 21 to the Lisbon Treaty. That allows the UK to choose, within three months of a proposal being presented to the Council, whether it wishes to participate in the adoption and application of any such proposed measure. If the UK notifies the President of the Council of its intention to participate within that three-month period, there is no possibility of opting out later. If the measure is adopted, the UK is bound, the European Court of Justice has jurisdiction over the matter and the Commission has the power to enforce in respect of any failure to properly implement the measure. If the UK does not opt in by the three-month point, it is still entitled to a seat at the negotiating table, but has no vote.

<sup>11</sup> See Protocol 19 to the Lisbon Treaty on the Schengen opt-out. The UK participates in the police and judicial co-operation elements of the Schengen *acquis*, but not in the border control elements.

<sup>12</sup> *Scottish Salmon Growers Association Ltd v EFTA Surveillance Authority* (E-2/94) [1994-95] EFTA Court Report 59; [1995] 1 C.M.L.R. 851 at [11]. At [13], the EFTA Court rejected the EFTA Surveillance Authority's argument that judgments of the Court of First Instance were not of direct relevance.

EEA Agreement are concerned. In such cases, jurisdiction will revert to the national competition authority of the EFTA State.<sup>13</sup>

### *Antitrust*

The competition provisions of the EEA Agreement mirror the rules contained in arts 101, 102 and 106 of the TFEU. In particular, arts 53 and 54 of the EEA Agreement contain prohibitions on anti-competitive agreements and the abuse of a position of dominance, respectively. Both provisions are applicable if trade between one or more EU Member States and one or more EFTA states that are signatories of the EEA Agreement (i.e. Iceland, Liechtenstein and Norway) is affected. Annex XIV extends the application of EU block exemption regulations which provide safe harbours for certain categories of agreements from the prohibition in art.101 TFEU.<sup>14</sup> Therefore, from a substantive standpoint, there would be no material changes to UK competition policy if the UK became a party to the EEA Agreement as an EFTA state.

The responsibility for the enforcement of the competition provisions in the EEA Agreement is shared between the Commission and the EFTA Surveillance Authority. The rules on the division of responsibility between the two authorities that are contained in art.56 of the EEA Agreement do not foresee concurrent jurisdiction, and are designed so that there is a “one-stop shop”. In cases involving restrictive agreements that are caught by both art.101 TFEU and art.53 of the EEA Agreement, the Commission will have jurisdiction to take a decision for the entirety of the EEA territory.<sup>15</sup> Where an agreement only affects trade between the EU and one or more EFTA states and there is no appreciable effect on trade between Member States, jurisdiction will be determined by reference to the percentage of the combined EEA-wide turnover that was generated by the undertakings concerned.<sup>16</sup> If the undertakings concerned achieve 33 per cent or more of their turnover in EFTA territory, the EFTA Surveillance Authority will have jurisdiction; the Commission will have jurisdiction in cases where the undertakings concerned achieve 67 per cent or more of their turnover in the EU.<sup>17</sup> In cases where only trade between EFTA states is affected, the EFTA

Surveillance Authority will have jurisdiction. These rules for the allocation of jurisdiction are replicated in cases involving the abuse of a dominant position.<sup>18</sup>

There are extensive co-operation and co-ordination provisions underpinning arts 53 and 54 that are set out in Protocol 23 to the EEA Agreement. These provisions are intended to promote the consistent application and enforcement of EU competition law principles. Protocol 23 puts in place obligations of mutual administrative assistance and consultation in enforcement activities as well as information sharing arrangements. This includes an obligation for the competent authority to consult the other surveillance authority prior to the issue of a statement of objections and the publication of a decision. Moreover, both authorities as well as the states that fall under their supervision are entitled to be present at Advisory Committee meetings of the competent authority. Protocol 23 essentially ensures that the EFTA Surveillance Authority enjoys the same rights as a national competition authority of an EU Member State.

It follows from the above that there would be no significant changes to the UK antitrust enforcement regime, in the event the UK were to join the EEA as an EFTA state.

### *Merger control*

There would also be no material changes in the field of merger control if the UK were to become a member of the EEA post-Brexit. Where a transaction qualifies for review under the EU Merger Regulation, the Commission will be the sole competent authority in the EEA, with the exception of cases that relate to products that fall outside the scope of the EEA Agreement.<sup>19</sup> It follows that the Commission will exercise exclusive jurisdiction not only with respect to EU Member States, but also in relation to the territories of the EFTA states. Conversely, where the turnover thresholds are only exceeded in the territories of the EFTA states, as opposed to the whole of the EEA, the transaction will be reviewable by the EFTA Surveillance Authority.<sup>20</sup>

Protocol 24 to the EEA Agreement contains detailed rules on the referral of cases to or from EFTA states that are similar to those in the EU Merger Regulation. At the pre-notification stage, parties to a transaction are able to

<sup>13</sup> See for example Case COMP/M.7015 *Bain Capital/Altor/EWOS*. Two products that were subject to the transaction, namely tapioca starch (HS code 11.08.14) and fish feed (HS code 23.09.90) were not covered by the EEA Agreement. Consequently, the transaction, insofar as it related to those two products, was subject to merger control review in Norway. The Commission's decision only covered the EU with respect to tapioca starch and fish feed.

<sup>14</sup> Annex XIV of the EEA Agreement extends the application of the following block exemption regulations to Iceland, Liechtenstein and Norway: (1) Regulation 330/2010 on the application of art.101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices (Vertical Agreements Block Exemption Regulation) [2010] OJ L102/1; (2) Regulation 316/2014 on the application of art.101(3) of the TFEU to categories of technology transfer agreements [2014] OJ L93/17; (3) Regulation 1218/2010 on the application of art.101(3) of the TFEU to certain categories of specialisation agreements (Specialisation Block Exemption Regulation) [2010] OJ L335/43; (4) Regulation 1217/2010 on the application of art.101(3) of the TFEU to certain categories of research and development agreements (Research and Development Block Exemption Regulation) [2010] OJ L335/36; (5) Regulation 169/2009 applying rules of competition to transport by rail, road and inland waterway (Rail, Road and Inland Waterway Block Exemption Regulation) [2009] OJ L61/1; and (6) Regulation 906/2009 on the application of art.81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia) (Liner Shipping Block Exemption Regulation) [2009] OJ L256/31, as amended by Regulation 697/2014 [2014] OJ L184/3.

<sup>15</sup> EEA Agreement art.56(1)(c).

<sup>16</sup> EEA Agreement art.56(1)(b).

<sup>17</sup> The definition of turnover in art.3 of Protocol 22 to the EEA Agreement mirrors art.5 of Regulation 139/2004 on the control of concentrations between undertakings (EU Merger Regulation) [2004] OJ L24/24.

<sup>18</sup> EEA Agreement art.56(2).

<sup>19</sup> EEA Agreement art.57(2)(a) and Annex XIV.

<sup>20</sup> EEA Agreement art.57(2)(b) and Annex XIV.

request a referral from the EFTA states to the Commission where it is reviewable under the national competition laws of at least three EU Member States and at least one EFTA state.<sup>21</sup> In the event of a veto by one or more EFTA states, the national competition authority of the competent EFTA state(s) will retain jurisdiction. However, a veto by an EFTA state will have no impact on the request for referral from the EU Member States to the Commission. In addition, the parties to a transaction may request a referral from the Commission to a competent EFTA state. The threshold for referral to an EFTA state is identical to the one contained in the EU Merger Regulation. The parties need to demonstrate by way of a reasoned submission that the

“concentration may significantly affect competition in a market within an EFTA State, which presents all the characteristics of a distinct market and should therefore be examined, in whole or in part, by that EFTA State”.<sup>22</sup>

The EEA Agreement also enables the Commission to refer a transaction to an EFTA state post-notification.<sup>23</sup> The grounds for referral are twofold. First, a transaction may be referred to an EFTA state where it affects competition in a market within that EFTA state that presents the characteristics of a distinct market. Secondly, the Commission may refer a transaction to an EFTA state where the transaction affects competition in a market within that EFTA state, which presents all the characteristics of a distinct market *and* which does not constitute a substantial part of the territory covered by the EEA. Post-notification referrals to the Commission are also possible where a transaction may affect trade between one or more EU Member States and one or more EFTA states, and it threatens to significantly affect competition in one or more EFTA states.<sup>24</sup> However, while an EFTA state may join a referral request, it is unable to initiate a request itself.<sup>25</sup> It follows that the powers of EFTA states are in this regard more limited than those of EU Member States.

Given the above, UK membership of the EEA post-Brexit would not lead to significant changes to the merger control regime. In terms of jurisdiction, some transactions may no longer originally qualify for review under art.1(2) and 1(3) of the EU Merger Regulation since UK turnover would no longer count towards the EU-wide turnover thresholds. However, some of these would still find their way back to Brussels under the pre-notification upward referral provision in art.4(5) of the EU Merger Regulation in any event. So a significant proportion of transactions would still continue to benefit from a “one-stop shop” since they would be reviewable either by the Commission or the EFTA Surveillance Authority.

## State aid

If the UK were to opt for EEA membership as an EFTA state, or an EEA-like arrangement concerning competition enforcement, it would be subject to a parallel state aid regime that is in line with EU rules in art.107 TFEU. Article 61 of the EEA Agreement mirrors the wording of art.107 TFEU, and the EFTA Surveillance Authority would assume the role of the Commission in monitoring state aid granted by the UK.

## Post-Brexit competition arrangement in which the UK’s competition regime is completely separate from that of the EU and EEA

This section examines the potential impact on UK competition policy and public enforcement in the event that the UK leaves the EU and does not remain in the EEA as an EFTA state or put in place EEA-like arrangements concerning competition enforcement.

## Antitrust

From a substantive standpoint, there are unlikely to be any fundamental changes to the principles that form the basis of UK national antitrust rules since this would require a drastic shift in domestic competition law policy. In particular, the key theories of harm underlying the Ch.I and Ch.II prohibitions in the UK Competition Act 1998 (CA 1998) are universally accepted by antitrust regulators and policy-makers across the globe. Moreover, it is unlikely that the UK Parliament would have the appetite to embark on wide-ranging reforms to the domestic competition regime at a time when there will be a great deal of unavoidable legislative work to do as part of the exit process.

However, it must be said that the CA 1998 is currently modelled on EU competition law. Indeed, the wording of the prohibitions against anti-competitive agreements in s.2 CA 1998 (Ch.I) and the abuse of a dominant position in s.18 CA 1998 (Ch.II) are almost identical to the corresponding prohibitions in arts 101 and 102 TFEU. Although the likelihood of significant changes to the CA 1998 is low immediately following the UK’s exit from the EU, it is entirely conceivable that, post-exit, there may be gradual divergence in the manner in which the principles underlying the EU and UK antitrust regimes are interpreted and applied as time goes by.

Section 60 CA 1998 currently requires that any questions arising under the Act are to be dealt with in a manner that is consistent with corresponding questions arising under EU law. This includes ensuring that there is no inconsistency between judgments of the UK courts, on the one hand, and the principles laid down in the TFEU

<sup>21</sup> EEA Agreement art.6(5) of Protocol 24.

<sup>22</sup> EEA Agreement art.6(4) of Protocol 24.

<sup>23</sup> EEA Agreement art.6(1) of Protocol 24.

<sup>24</sup> EEA Agreement art.6(1) of Protocol 24.

<sup>25</sup> EEA Agreement art.6(1) of Protocol 24.

and judgments of the EU courts, on the other hand.<sup>26</sup> The CA 1998 also currently requires UK courts to take into account any relevant decisions or statements of the Commission.<sup>27</sup> In the event that the UK exits the EU and does not become a party to the EEA Agreement as an EFTA state or put in place EEA-like arrangements in the competition sphere, the repeal of s.60 would be required.

Sovereignty and “taking back control” were key themes in the campaign to leave the EU prior to the 23 June 2016 UK referendum, and if these are followed through in every subject area of the exit negotiations, it may be that it would not be feasible to retain provisions which would require deference to EU competition law and policy. The Vote Leave camp clearly stated its desire to end the influence of the “rogue European Court of Justice”.<sup>28</sup> Regulation 1/2003<sup>29</sup> would also no longer apply. Consequently, the UK would no longer be competent to apply arts 101 and 102 to conduct which might have an effect on trade between Member States.<sup>30</sup>

Additionally, under s.10 CA 1998, agreements that are covered by EU individual and block exemptions are currently exempt from the Ch.I prohibition. Also, where an agreement does not benefit from an EU block exemption since it does not produce an effect on trade between EU Member States, it will benefit from a parallel exemption.<sup>31</sup> Again, it seems unlikely that s.10 CA 1998 would survive in its current form in the event that the UK opts for a non-EEA solution in the competition sphere, since that would imply an application of EU law in the UK. Notwithstanding the possible repeal or amendment of s.10 CA 1998, the likelihood of a radical departure from existing policy seems low, and one would expect the UK Government to formulate and put in place a similar set of exemptions, or perhaps even go as far as simply transposing the various block exemptions into UK competition law.

That said, looking back to before the 2004 modernisation of the EU antitrust regime, it is not entirely inconceivable that some subtle differences in the treatment of agreements might then emerge. For instance, the UK’s treatment of vertical agreements pre-2004 differed from the current Vertical Agreements Block Exemption Regulation.<sup>32</sup> In particular, vertical agreements other than those with a resale price maintenance component were excluded from the Ch.I prohibition. This was largely attributable to the fact that, from a domestic standpoint,

the Office of Fair Trading did not share the Commission’s concern that the single market might become compartmentalised.

Although a UK exit from the EU absent an EEA-like solution for competition enforcement would be unlikely to trigger any significant changes to the substance of UK antitrust rules, the procedural aspects of the existing regime would need to be overhauled. The Commission’s Modernisation Package and in particular Regulation 1/2003 have led to some degree of procedural convergence and co-ordination in the enforcement of antitrust rules across the EU. This has been supplemented by the Commission’s Network Notice, which created the European Competition Network (ECN).<sup>33</sup> Since the entry into force of Regulation 1/2003, the ECN has played an integral role in the shaping and development of a common antitrust enforcement culture and has helped to achieve some alignment in the enforcement procedures of Member States.

The disapplication of Regulation 1/2003 and the Cooperation Notice in the UK would remove the formal and informal mechanisms for the allocation of jurisdiction between the Commission and the NCAs of EU Member States. In practice, subject to limited exceptions, parallel antitrust enforcement actions in the EU are rare.<sup>34</sup> However, following the UK’s exit from the EU, the initiation of proceedings by the Commission would no longer relieve the CMA of its jurisdiction.<sup>35</sup> In addition, the CMA would no longer be able to reject a complaint or suspend proceedings on account of an NCA commencing an investigation under arts 101 or 102.<sup>36</sup> Conversely, neither the Commission nor another NCA would reject a complaint that had already been dealt with by the CMA.<sup>37</sup> A further consequence would be that UK courts would be no longer consider staying proceedings in order to avoid issuing judgments which might run counter to a decision that is contemplated in proceedings initiated by the Commission.<sup>38</sup> Moreover, UK courts would no longer stay proceedings pending the outcome of an appeal to the EU courts.

This would mean that businesses could find themselves the subject of two substantially similar investigations or proceedings on both sides of the English Channel. This would inevitably increase costs, and involve a greater burden on company resources as well as increased uncertainty for businesses that have to manage two

<sup>26</sup> CA 1998 s.60(2).

<sup>27</sup> CA 1998 s.60(4).

<sup>28</sup> See [http://www.voteleavetakecontrol.org/a\\_framework\\_for\\_taking\\_back\\_control\\_and\\_establishing\\_a\\_new\\_uk\\_eu\\_deal\\_after\\_23\\_june.html](http://www.voteleavetakecontrol.org/a_framework_for_taking_back_control_and_establishing_a_new_uk_eu_deal_after_23_june.html) [Accessed 22 September 2016].

<sup>29</sup> Regulation 1/2003 on the implementation of the rules on competition laid down in arts 81 and 82 of the Treaty (Regulation 1/2003) [2003] OJ L1/1.

<sup>30</sup> Regulation 1/2003 arts 3 and 5.

<sup>31</sup> CA 1998 s.60(2). See also Regulation 1/2003 art.3(2).

<sup>32</sup> Regulation 330/2010 on the application of art.101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (Vertical Agreements Block Exemption Regulation) [2010] OJ L102/1.

<sup>33</sup> Commission Notice on cooperation within the Network of Competition Authorities (Cooperation Notice) [2004] OJ C101.

<sup>34</sup> For instance, manufacturers of consumer detergents were subject to separate investigations by the French *Autorité de la concurrence* and the Commission. The Austrian *Bundeswettbewerbsbehörde* and the Commission also conducted separate investigations into anti-competitive arrangements that were entered into by manufacturers of lifts and elevators. In addition, Visa was subject to two separate investigations by the CMA and the Commission for its interchange fees.

<sup>35</sup> Regulation 1/2003 art.11(6).

<sup>36</sup> Regulation 1/2003 art.13(1).

<sup>37</sup> Regulation 1/2003 art.13(1).

<sup>38</sup> Regulation 1/2003 art.16(1).

separate processes. There would also be a risk of double jeopardy. The principle of *ne bis in idem* is a cornerstone of EU law. However, in the event of a UK exit, it is not clear how the CMA or the UK courts would interpret the facts of a case that is the subject of a separate enforcement action by the Commission or an NCA in order to determine which conduct specifically relates to the UK. The well-developed case law of the EU courts in this area would cease to apply in the event of an exit without EEA membership.<sup>39</sup> Accordingly, it is possible that a business could find itself subject to two fines for the same conduct.

A UK departure from the ECN would also deprive the CMA of an important enforcement intelligence and evidence gathering tool. Article 11(2) Regulation 1/2003 provides that the Commission will transmit to the NCAs the most important documents it has collected with a view to applying arts 101 and 102 TFEU. Similarly, art.11(3) Regulation 1/2003 requires all NCAs to notify the Commission in writing before, or without delay after, taking the first formal investigative measure in an art.101 or 102 case. This information may also be made available to other NCAs. Moreover, art.12(1) of Regulation 1/2003 provides that NCAs have the power to provide one another with, and use in evidence, any matter of fact or law, including confidential information. It follows that the exchange of information may take place between the NCAs and the Commission, and between the NCAs themselves.

That said, there are procedural safeguards and restrictions on the ability of the Commission and NCAs to use information obtained pursuant to art.11 Regulation 1/2003 as evidence. First, information submitted to the ECN may not be used by the Commission or NCAs as the basis for starting an investigation of their own accord, subject to limited exceptions.<sup>40</sup> Secondly, art.12(2) states that the information that is exchanged shall only be used for the purposes of applying arts 101 and 102 TFEU. This does not preclude NCAs from relying on the information in the same case in order to apply national competition rules in parallel with EU competition rules, provided those national rules do not lead to a different outcome. Thirdly, art.12(3) provides that the information that is exchanged may only be used as evidence to impose sanctions on individuals where (i) the law of the transmitting NCA foresees sanctions of a similar kind for infringements of arts 101 or 102; (ii) the information has been collected by the transmitting NCA in a manner that is consistent with the rights of defence of natural persons under the

national rules of the recipient NCA; and (iii) the recipient NCA shall not use the information to impose custodial sanctions.

It is possible that the UK might enter into a memorandum of understanding (MOU) or co-operation agreement with the EU on competition matters in the event of a full exit without EEA membership or EEA-style competition arrangements. A key question is whether any such a future agreement between the UK and the EU (or indeed any other jurisdiction) would allow for the exchange of confidential information including leniency materials. If it did, it would be unprecedented. None of the competition MOUs and co-operation agreements that are currently in place between the EU and third countries permits the exchange of confidential information. Antitrust authorities outside the EU wishing to obtain information that has been submitted to the Commission need to secure a confidentiality waiver from the business that is the target of an investigation before the information can be shared between authorities. In the event that a new MOU or co-operation agreement were to permit the exchange of confidential information, similar protections to those that are currently in place under EU law would need to be included to avoid discouraging co-operation in future CA 1998 cases. However, there is no guarantee that such safeguards would be included in any future arrangements that are entered into by the UK. Additionally, the degree of co-operation envisaged in MOUs and agreements varies considerably. For instance, the agreements entered into by the EU with Canada, Japan, South Korea, Switzerland and the US contain extensive co-operation and enforcement co-ordination provisions. By contrast, the agreements entered into by the EU with Brazil, India, China and Russia envisage much looser forms of co-operation.

Additional UK civil service resources would need to be dedicated to enforcement activities following a Brexit without EEA membership or EEA-like competition arrangements. The CMA has already faced criticism from a number of quarters for not taking enough enforcement action, and practitioners have often bemoaned a dearth of legal guidance or certainty on certain common business practices as a result of a lack of precedents and underdeveloped decisional practice. This criticism was echoed in a recent report from the UK National Audit Office, which highlighted that the CMA faces significant challenges in increasing the low number of enforcement decisions to date.<sup>41</sup> It noted that the UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015

<sup>39</sup> See for example *Limburgse Vinyl Maatschappij v Commission* (C-254/99 P) [2002] E.C.R. I-8375; *Aalborg Portland v Commission* (C-204/00 P) [2004] E.C.R. I-123, [2005] 4 C.M.L.R. 4; *Showa Denko v Commission* (C-289/04 P) [2006] E.C.R. I-5859, [2006] 5 C.M.L.R. 14; and *Toshiba Corp v Úřad pro ochranu hospodářské soutěže* (C-17/10) EU:C:2012:72, [2012] 4 C.M.L.R. 22.

<sup>40</sup> Cooperation Notice, para.39. Paragraph 40 of the Cooperation Notice provides that information submitted by a leniency applicant may not be transmitted to another member of the ECN, unless their consent has been obtained. This extends to information that has been obtained following a dawn raid or any other fact-finding measure (e.g. information requests) that was made possible by the leniency application. Paragraph 41 of the Cooperation Notice provides that no consent is required where (i) the receiving authority has already received a leniency application in relation to the same conduct from the same applicant and it is not open to the applicant to withdraw the information which has already been submitted; and (ii) the authority has provided a written commitment that neither the information transmitted to it nor any other information it may obtain following the transmission will be used by it or by any other authority to which the information is subsequently transmitted to impose sanctions on the leniency applicant as well as employees and any other natural persons that are covered by the application.

<sup>41</sup> NAO, "The UK competition regime", Report by the Comptroller and Auditor General, National Audit Office, HC 737 Session 2015–16 (5 February 2016), <https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf> [Accessed 1 September 2016].

prices), compared with almost £1.4 billion of fines imposed by their German counterparts.<sup>42</sup> Michael Grenfell, the recently appointed executive director of enforcement at the CMA, has already signalled the CMA's ambition to increase its enforcement activities.<sup>43</sup> In the absence of additional resources, it is difficult to see how such an increase would be possible without placing considerable strain on an already stretched CMA.

As a final point, although the focus of this article is on public enforcement, it is worth briefly mentioning that the UK's exit from the EU could jeopardise the UK's position as the forum of choice for private enforcement actions. The attractiveness of the English courts stems from the existence of generous disclosure rules relative to other EU Member States (i.e. discovery), their willingness to readily accept jurisdiction on the basis of an "anchor defendant", as well as procedural efficiency. Commission decisions will no longer be binding if there is an exit from the EU without EEA membership, and the degree to which they can act as persuasive authorities will be unclear. In view of the improvements to the private enforcement regimes of EU Member States that are envisaged in the Damages Directive<sup>44</sup> and the fact that Commission decisions would continue to be binding before the courts of the EU's remaining 27 Member States, the UK is likely to become less attractive as a damages jurisdiction. Future claimants may switch to alternative EU jurisdictions such as Germany or the Netherlands, which are already considered to be claimant friendly.

## Merger control

From a jurisdictional standpoint, the Commission currently has the exclusive competence to review all transactions that meet the turnover thresholds in art.1 of the EU Merger Regulation.<sup>45</sup> However, following the UK's exit from the EU, in the absence of an EEA-like arrangement for competition matters, turnover generated in the UK will no longer count towards the calculation of EU-wide turnover. Without EEA membership or EEA-type competition arrangements, this would result in some transactions being deprived of the benefit of a

"one-stop shop". Some transactions would trigger filings in both the UK and the EU, or the UK and one or more EU Member States. Either scenario will inevitably result in higher transaction costs, and businesses will be exposed to an increased risk of delays and regulatory uncertainty. It is also possible that some transactions may escape merger control scrutiny in the UK owing to the voluntary nature of its filing regime.

In contrast to EU antitrust law, there are no binding rules that are designed to align the substantive aspects of merger control reviews across the EU, albeit there are a series of voluntary soft law measures.<sup>46</sup> In particular, there is no equivalent of s.60 CA 1998 (see above) in the UK Enterprise Act 2002 (EA 2002) that compels the CMA or the UK courts to apply the jurisprudence of the EU courts or take into account the decisional practice of the Commission. In practice, notwithstanding the fact that the UK and the Commission already apply slightly different substantive tests in their respective merger control reviews, a UK exit from the EU without EEA membership in theory should not give rise to a significant increase in the number of cases in which the CMA and the Commission reach different conclusions.<sup>47</sup> Indeed, the Commission and the CMA are both moving away from a structuralist analysis of mergers towards an approach that is more effects-based and focused on the qualitative aspects of competition (in particular the closeness of competition).<sup>48</sup>

However, a closer examination of the CMA's approach to the substantive review of mergers reveals that it employs economic tools in its competitive assessment to a greater extent than the Commission and most NCAs. This is reflected in the CMA's practice as well as its detailed Merger Assessment Guidelines on the economic assessment of mergers.<sup>49</sup> Indeed, it is not uncommon for CMA economists to be involved in merger cases at the outset, including in relatively straightforward cases that are cleared in Phase I. For instance, the CMA's assessment of unilateral effects, which is based on the hypothetical monopolist test, will typically involve detailed economic analyses including the use of econometric merger screening tools.<sup>50</sup> This is part of a growing trend of moving towards "narrower competition

<sup>42</sup> According to statistics compiled by the ECN, of the larger EU Member States, the UK and Poland adopted the fewest number of enforcement decisions. Between 1 May 2004 and 31 December 2015, the UK adopted 81 decisions, which is significantly lower than the number of decisions adopted by France (246), Germany (200), Italy (135), the Netherlands (105) and Spain (137). Statistics available at <http://ec.europa.eu/competition/ecn/statistics.html> [Accessed 1 September 2016].

<sup>43</sup> Speech delivered by CMA's Executive Director for Enforcement, Michael Grenfell, "How the CMA tackles cartels and anti-competitive practices" (November 2015), <https://www.gov.uk/government/speeches/michael-grenfell-on-the-cmas-approach-to-competition-enforcement> [Accessed 1 September 2016].

<sup>44</sup> Directive 2014/104 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU (Damages Directive) [2014] OJ L349/1.

<sup>45</sup> EU Merger Regulation art.21(3).

<sup>46</sup> ECA, "Procedures Guide of the European Competition Authorities (ECA)" (2001), [http://ec.europa.eu/competition/ecn/eca\\_information\\_exchange\\_procedures\\_en.pdf](http://ec.europa.eu/competition/ecn/eca_information_exchange_procedures_en.pdf); ECA, "Principles on the application, by National Competition Authorities within the ECA, of Articles 4 (5) and 22 of the EC Merger Regulation" (2005), [http://ec.europa.eu/competition/ecn/eca\\_referral\\_principles\\_en.pdf](http://ec.europa.eu/competition/ecn/eca_referral_principles_en.pdf); EU Merger Working Group, "Best Practices on Cooperation between EU National Competition Authorities in Merger Review" (2011), [http://ec.europa.eu/competition/ecn/nca\\_best\\_practices\\_merger\\_review\\_en.pdf](http://ec.europa.eu/competition/ecn/nca_best_practices_merger_review_en.pdf) [All accessed 1 September 2016].

<sup>47</sup> The UK applies the "substantial lessening of competition" test (SLC), whereas the EU applies the "significant impediment to effective competition" (SIEC) test.

<sup>48</sup> See for example speech delivered by Alex Chisholm, former CMA Chief Executive, "Public interest and competition-based merger control", Fordham Competition Law Institute Annual Conference (11 September 2014), <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control>; and speech delivered by Carlos Esteva Mosso, "The Contribution of Merger Control to the Definition of Harm to Competition", GCLC Conference 2016, Brussels (1 February 2016), [http://ec.europa.eu/competition/speeches/text/sp2016\\_03\\_en.pdf](http://ec.europa.eu/competition/speeches/text/sp2016_03_en.pdf) [Both accessed 1 September 2016].

<sup>49</sup> Merger Assessment Guidelines, OFT1254/CC2 (Revised) (September 2010) (Merger Assessment Guidelines). Adopted by the CMA as set out in Annex D of "Mergers: Guidance on the CMA's jurisdiction and procedure" (CMA2) (January 2014) (Jurisdictional and Procedural Guidance).

<sup>50</sup> Merger Assessment Guidelines (September 2010), paras 5.2.10 to 5.2.20. A set of substitute products (a "candidate market") will satisfy the hypothetical monopolist test if a hypothetical firm that was the only present and future seller of the products in the candidate market would find it profitable to raise prices. In applying the hypothetical monopolist test, the CMA will normally use a SSNIP of 5%.

criteria” and “a more technical and nuanced assessment” that has led to a corresponding decrease in the emphasis on market definition.<sup>51</sup>

The CMA’s economic analysis toolkit includes the use of diversion ratios as one of the principal measures of the closeness of competition.<sup>52</sup> In some cases, the CMA may even encourage the parties to conduct a customer survey in Phase I in order to gain a better assess the closeness of competition. The CMA will also request extensive data on variable margins as well the price sensitivity of customers in order to compute metrics such as upwards pricing pressure (UPP), gross upward pricing pressure index (GUPPI) and illustrative price rise (IPR).<sup>53</sup> The end result is a data-intensive and sometimes lengthy review that will often involve extensive pre-notification discussions.<sup>54</sup> The Commission’s use of merger screening tools is comparatively limited and reserved for more complex cases.<sup>55</sup> In this regard, as a matter of practice, the Commission has stated its preference for using quantitative economic analysis tools only where sufficient accurate data exist and it has sufficient time to analyse them.<sup>56</sup> The Commission is also aware of the need to reduce the burden and cost on the notifying parties while at the same time ensuring and enhancing the effectiveness of its substantive review.<sup>57</sup> Post-Brexit, this trend of greater reliance by the CMA on empirical economic analysis tools could lead to wider divergence in the approach to the substantive assessment of mergers. Such a shift would push the UK closer to the US approach to merger control review, which advocates the greater use of quantitative economic analysis tools.<sup>58</sup>

Moreover, the possibility that the EU may in the future adopt mandatory rules designed to achieve greater substantive convergence in the area of merger control cannot be excluded. Indeed, the Commission is intent on

making improvements to the system of merger control review across the EU including the development of a “true ‘European Merger Area’, in which a single set of rules applies to mergers examined by the Commission and NCAs”.<sup>59</sup> Post-Brexit, UK merger control law principles may set off on a different developmental trajectory that will not necessarily be aligned with the corresponding regimes in the EU and its Member States. The UK’s exit from the EU, even if it becomes an EEA member or puts in place EEA-like competition arrangements, will inevitably remove its ability to shape reformed EU merger control rules and the development of a European Merger Area.

There may also be an increase in the number of conflicting decisions (however small). This would add a layer of complexity to cross-border transactions where a filing is triggered in the UK and the EU (or Member State(s)). Of course, it is possible that the UK may enter into a co-operation agreement with the EU similar to the one that is currently in place between the EU and the US, which may then minimise the risk of divergent outcomes in merger reviews. However, this cannot be guaranteed and the degree of co-operation envisaged by any future agreement may be limited.

The risk of conflicting merger decisions stemming from a lack of substantive convergence has already been illustrated in recent cases involving the CMA and NCAs. For instance, in April 2012, the CMA prohibited Akzo Nobel’s proposed acquisition of Metlac,<sup>60</sup> whereas the German Bundeskartellamt cleared the transaction unconditionally.<sup>61</sup> The divergence can be explained by the different substantive tests that were applied by the two authorities. The UK applied the SLC test, whereas, at the time, the Bundeskartellamt applied a dominance test.<sup>62</sup> Most recently, in November 2012, the acquisition

<sup>51</sup> See fn.3. Indeed, the CMA’s Merger Assessment Guidelines clearly emphasise that “the boundaries of the market do not determine the outcome of the Authorities’ analysis of the competitive effects of the merger in any mechanistic way ... the Authorities may take into account constraints outside the relevant market, segmentation within the relevant market, or other ways in which some constraints are more important than others” (para.5.2.2).

<sup>52</sup> Merger Assessment Guidelines (September 2010), para.5.2.15(a). The diversion ratio between Product A and Product B represents the proportion of sales that would divert to Product B (as opposed to Products C, D, E, etc.) as customers’ second choice in the event of a price increase for Product A. Evidence which may be used to assess the closeness of competition includes internal documents, bidding data, relative price levels in the candidate market (and the correlation of those prices to each other), historical price and sales volumes, and information on the product/service characteristics of the merging parties (as well as competing suppliers).

<sup>53</sup> Merger Assessment Guidelines (September 2010), paras 5.2.1(b) and 5.2.1(c).

<sup>54</sup> The average pre-notification period in the first 10 months following the creation of the CMA was 25 working days. See talk delivered at the Law Society by Sheldon Mills, Executive Director Mergers, CMA, “UK Merger Control — a retrospective on the last 10 months at the CMA” (10 February 2015), <https://events.lawsociety.org.uk/uploads/files/19ceb373-1c4b-48d3-b06a-6b9791fc7f95.pdf> [Accessed 1 September 2016]. The CMA will also regularly make use of its powers under s.109 EA 2002 to request additional data following the formal submission of a merger notice. In the event that the parties are unable to comply with the request within the prescribed deadline, the clock may be stopped. According to CMA statistics, more than half of the s.109 requests issued in the first 10 months following the creation of the CMA resulted in the suspension of the statutory timetable.

<sup>55</sup> See for example Case COMP/M.5644 *Kraft Foods/Cadbury*; Case COMP/M.5658 *Unilever/Sara Lee Body Care*; Case COMP/M.6497 *Hutchison 3G Austria/Orange Austria*; and Case COMP/M.6570 *UPS/TNT Express*.

<sup>56</sup> DG Competition Staff Working Paper, “Best practices for the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 and in merger cases” (October 2011), [http://ec.europa.eu/competition/antitrust/legislation/best\\_practices\\_submission\\_en.pdf](http://ec.europa.eu/competition/antitrust/legislation/best_practices_submission_en.pdf) [Accessed 1 September 2016]. For instance, the Commission’s review of the proposed merger between Deutsche Börse and NYSE Euronext took the view that it was inappropriate to conduct any empirical economic analysis in particular for market definition purposes since there was a lack of suitable data (Case COMP/M.6166 *Deutsche Börse/NYSE Euronext* at [251]). Similarly, the Commission did not undertake any extensive empirical economic analyses in its review of the joint venture between Telefónica, Vodafone and Everything Everywhere on account of the limited data that was available owing to “the nascent state of the markets under consideration” (Case COMP/M.6314, *Telefónica, Vodafone and Everything Everywhere* at [20]).

<sup>57</sup> Case COMP/M.6314, *Telefónica, Vodafone and Everything Everywhere* at [52].

<sup>58</sup> Department of Justice and Federal Trade Commission, 2010 Horizontal Merger Guidelines (19 August 2010), pp.20–24, <https://www.justice.gov/atr/horizontal-merger-guidelines-08192010> [Accessed 1 September 2016].

<sup>59</sup> Commission, “White Paper: Towards more effective EU merger control” (9 July 2014), paras 20–22, [http://ec.europa.eu/competition/consultations/2014\\_merger\\_control/mergers\\_white\\_paper\\_en.pdf](http://ec.europa.eu/competition/consultations/2014_merger_control/mergers_white_paper_en.pdf). See also speech delivered by Joaquín Almunia at the European Competition Day, “Change and challenges, Weaving Europe’s single competition enforcement area” (Rome, 10 October 2014), [http://europa.eu/rapid/press-release\\_SPEECH-14-678\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-14-678_en.htm) [Both accessed 1 September 2016].

<sup>60</sup> Competition Commission, “A report on the anticipated acquisition by Akzo Nobel N.V. of Metlac Holding S.r.l.” (21 December 2012), [https://assets.publishing.service.gov.uk/media/5329e008e5274a226b0002ef/main\\_report.pdf](https://assets.publishing.service.gov.uk/media/5329e008e5274a226b0002ef/main_report.pdf) [Accessed 1 September 2016]. The Competition Appeal Tribunal subsequently upheld the Competition Commission’s prohibition decision (*Akzo Nobel NV v Competition Commission* [2013] CAT 13).

<sup>61</sup> Bundeskartellamt (BKartA) No B 3/187-11, *Akzo Nobel NV/Metlac Holding Srl* (24 April 2012).

<sup>62</sup> German merger control rules were subsequently reformed and the dominance test was replaced by the SIEC test, bringing Germany into line with the EU.

of SeaFrance assets by Eurotunnel was cleared by the French Autorité de la concurrence following a summary procedure,<sup>63</sup> but was blocked by the CMA.<sup>64</sup> In that case, despite identical substantive tests there were fundamental differences in the factual and economic assessments that ultimately compelled different outcomes. In particular, the CMA considered that DFDS/LD, a competing ferry operator on the Dover-Calais route, was likely to exit the market in the short term, which would have enabled Eurotunnel to successfully raise prices. In contrast, the competitive assessment by of the Autorité de la concurrence did not take into account the possible exit of DFDS/LD, since none of the evidence it gathered suggested this was a possibility. To some extent, these two different outcomes are attributable to the CMA undertaking a detailed in-depth investigation, which meant that there was more time to conduct a rigorous review. The Autorité de la concurrence on the other hand cleared the transaction in a summary procedure.<sup>65</sup> Nonetheless, the case demonstrates the possibility that diverging conclusions are possible even in situations where two authorities apply the same principles and are largely presented with the same facts.

Although the UK has traditionally been one of the EU's more liberal and open economies, an exit from the EU absent EEA membership or EEA-like competition arrangements would provide greater scope for domestic protectionism. In cases that are deemed to give rise to a public interest concern, the UK would no longer be constrained by art.21 of the EU Merger Regulation from prohibiting or imposing remedies on transactions that are notified to Brussels.

Article 21 of the EU Merger Regulation currently provides for limited circumstances in which a Member State can intervene in order to protect its legitimate interests, namely public security, media plurality and prudential rules. Any other public interest must be communicated to the Commission and assessed for compatibility with EU law, before a Member State is able to use it. Without the prior approval of the Commission, a Member State is unable to invoke other concerns such as industrial policy, a desire to limit foreign ownership or even the loss of jobs and UK R & D capacity as was the case in the abandoned takeover of AstraZeneca by Pfizer to stop a transaction.<sup>66</sup> Any intervention that is deemed illegitimate by the Commission is open to challenge and may be declared unlawful by the EU courts.

Under the EA 2002, the grounds for public interest interventions are currently more or less aligned with the EU Merger Regulation.<sup>67</sup> However, there would be greater scope for flexibility once exit occurs since the UK Government would be able to amend the list of public interest considerations to add further categories, without the threat of a challenge from the Commission.

Indeed, the new British Prime Minister has already said publicly since the referendum that the interests of workers, local communities and the “whole country” could be better taken into account in the deal-approval process for UK target companies, citing the failed AstraZeneca takeover attempt. Speaking in Birmingham on 11 July 2016, Theresa May said that “something radical” was needed to protect strategically important industries:

“A proper industrial strategy wouldn't automatically stop the sale of British firms to foreign ones, but it should be capable of stepping in to defend a sector that is as important as pharmaceuticals is to Britain.”<sup>68</sup>

A strategy of this nature is unlikely to be compatible with EEA membership. Further, although a non-EEA solution in the area of competition enforcement post-Brexit would allow broader public interest considerations in UK domestic competition legislation, in practice the UK would not want to incite retaliatory measures by other countries which might want to prevent acquisitions of their companies by British acquirers.<sup>69</sup>

Another way to handle such issues post-Brexit would be for the UK to introduce a foreign investment review regime, similar to the CFIUS review in the US, the Foreign Investment Review Board (FIRB) process in Australia, or the Investment Canada Act in Canada. This would allow acquisitions of British companies by foreign corporations to be reviewed more broadly on “non-competition” public interest grounds. As Sir Philip Lowe has recently pointed out, the main problem with such public interest tests are that they can mean less predictability, clarity and transparency in the regulatory process because they provide greater scope for the exercise of political influence. On the other hand, they can provide great opportunities—both for parties to a transaction which may have otherwise been blocked on competition grounds, and for third parties trying to intervene to have transactions blocked.<sup>70</sup>

<sup>63</sup> Autorité de la concurrence No.12-DCC-154, Groupe Eurotunnel/SeaFrance (7 November 2012).

<sup>64</sup> Competition Commission, “A report on the completed acquisition by Groupe Eurotunnel S.A. of certain assets of former SeaFrance S.A.” (6 June 2013), [https://assets.publishing.service.gov.uk/media/5329dfe8ed915d0e5d00035d/final\\_report\\_excised.pdf](https://assets.publishing.service.gov.uk/media/5329dfe8ed915d0e5d00035d/final_report_excised.pdf) [Accessed 1 September 2016].

<sup>65</sup> This included a review of Eurotunnel internal documents, which suggested that its decision to acquire the SeaFrance assets was primarily driven by a desire to prevent DFDS/LD from acquiring the ferries and driving down prices. The Autorité de la concurrence did not see any of the Eurotunnel internal documents.

<sup>66</sup> See Alec Burnside, “EU legal review takes precedence in Pfizer/AstraZeneca case”, Letters to the Editor, *Financial Times*, 16 May 2014.

<sup>67</sup> EA 2002 s.58 allows the Secretary of State to intervene in cases that give rise to issues of national security; media quality, plurality and standards; and financial stability.

<sup>68</sup> PaRR, “UK PM's merger review agenda may point to Brexit settlement outside the EEA — lawyers” (13 July 2016).

<sup>69</sup> “A ‘repoliticisation’ by adding more exceptions to competitive-based merger controls, or introducing criteria in foreign investment control that have previously been abandoned in merger control by successive governments, could undermine business confidence and the credibility of any merger regime.” Alex Chisholm, former CMA Chief Executive, “Public interest and competition-based merger control”, Fordham Competition Law Institute Annual Conference (11 September 2014) <https://www.gov.uk/government/speeches/alex-chisholm-speaks-about-public-interest-and-competition-based-merger-control> [Accessed 1 September 2016].

<sup>70</sup> Sir Philip Lowe, “Brexit Bowl: Competing Public Interests? Politics and Competition Enforcement”, FTI Consulting (20 July 2016).

Finally, an increase in the volume of merger cases that are reviewable under the EA 2002 would inevitably place a strain on the CMA's resources, although this may be partially offset by the fact that the UK operates a voluntary merger control regime.

### *State aid*

The UK will no longer be subject to state aid rules if it leaves the EU and does not join the EEA or put in place an EEA-like competition regime. Any future UK state aid regime will ultimately be dependent on the terms of the relationship between the UK and the EU. For instance, if the UK were to enter into arrangements that are broadly similar to the ones that currently govern Switzerland's relationship with the EU, the UK would be subject to state aid rules that are similar to those that are contained in art.107 TFEU. In particular, art.23(1)(iii) of the EU-Switzerland Free Trade Agreement provides that any state aid which could distort competition by promoting certain undertakings or certain branches of production is incompatible with the agreement.<sup>71</sup> At a minimum, the UK will still be subject to World Trade Organization rules that govern state subsidies, and in particular the Agreement on Subsidies and Countervailing Measures (ASCM).<sup>72</sup> So the UK Government's ability to grant subsidies will probably still be subject to some regulatory

constraints, although WTO subsidy provisions are less sophisticated and far less effectively enforced than the EU state aid regime.

### **Conclusion**

Significant work is already underway in the UK to establish what its negotiating position will be in all policy areas going into the EU exit negotiations. As the months go by, we are likely to start to see a more focused debate in the competition sphere, and details will begin to emerge as to the direction the UK Government would like to take. In this article, we have set out the two ends of the possible spectrum of outcomes in the field of competition enforcement. There are doubtless a number of other potential solutions somewhere in between. Regardless of what the UK wants going in to the negotiations, it will have to reach a consensus with the remaining 27 EU Member States, and for a solution involving the EEA, Norway, Liechtenstein and Iceland as well.

Even if a full surgical separation of the EU and UK competition regimes is the final outcome, there will be no legal vacuum: the UK currently has a well-oiled national regime based on sound domestic competition legislation, which will continue to function well. But the regulatory burden on business would certainly be greater than in a post-Brexit scenario in which an EEA-type competition regime is put in place.

<sup>71</sup> EC-Switzerland Free Trade Agreement [1972] OJ L300/189, [http://trade.ec.europa.eu/doclib/docs/2007/january/tradoc\\_133045.pdf](http://trade.ec.europa.eu/doclib/docs/2007/january/tradoc_133045.pdf) [Accessed 1 September 2016].

<sup>72</sup> See [https://www.wto.org/english/docs\\_e/legal\\_e/24-scm.pdf](https://www.wto.org/english/docs_e/legal_e/24-scm.pdf) [Accessed 1 September 2016].

# Identifying International Commercial Arbitration

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☞ Commercial arbitration; International arbitration; International trade; Jurisprudence; Reasonableness

## Introduction

This article aims to provide a narrative of international commercial arbitration (ICA). The aim here is not to present a comprehensive legal, economic, sociological, political and business theory of ICA. Of primary importance is whether ICA actually does presume some privilege, and whether it is less accessible and exercises some mode of social control.<sup>1</sup> This is all the more crucial as ICA is arguably both within and outside international—or transnational—law.<sup>2</sup>

While ICA to a certain extent represents the language of international law, it simultaneously has the capacity to be situated outside it.<sup>3</sup> For instance, the International Chamber of Commerce (ICC)—the foremost non-governmental organisation dealing with business issues, business disputes and arbitration in commercial matters—is a diplomatic actor that enjoys a close relationship with both the United Nations<sup>4</sup> and the International Labour Organization.<sup>5</sup> Granted, the main objective of the ICC, which acts among corporations and chambers of commerce, is the self-regulation of business and the enhancement of global trade. Nevertheless, the ICC has Category A consultative status with the United Nations Economic and Social Council. Indeed, “the ICC has been involved in world affairs since its creation in 1919”.<sup>6</sup> For instance, the ICC helped resolve the problem of post-war reparations after the First World War<sup>7</sup> and

was found to be “competent” in determining war reparations.<sup>8</sup> Indeed, in complex negotiating environments, there have always been attempts to fit business into world politics. The ICC embodies such an attempt.

The study of ICA is all the more necessary as, on the one hand, ICA seems too decentralised, scattered, clandestine and elitist. On the other hand, there is the question of the “legal” character of ICA. Arguably, ICA is a non-legal practice.<sup>9</sup> Yet, we have been witnessing the progressive “judicialisation” of ICA. In other words, ICA resembles litigation.<sup>10</sup> This means that both the theory and the practice of ICA are in need of explanation and also in need of narrative agency, otherwise the legal community and the public would lack the power to interpret what it is and how it can evolve in the future. In this respect, how to define ICA? What is its status? Status as a concept is linked to the notion of legitimacy,<sup>11</sup> and “legitimacy comes from being useful; it is more than doing good privately, it is a way of being publicly recognized”.<sup>12</sup> In this respect, how is ICA recognised or to be recognised by the general public, or by the international community?

Although ICA appears to be a private affair among and between disputing parties and arbitrators, it has become an indispensable element of international trade in particular and of the international system in general. ICA shapes both. It has an impact upon the international community—in other words, it has a public dimension. At present, the flow of international trade cannot be conceived of without ICA. By looking at ICA and its actors, we can reach certain conclusions regarding the modern culture of international trade law and international (transnational) dispute settlement in particular and regarding international law in general.

Indeed, ICA has become so prevalent and conspicuous that analysing it could lead to an analysis of the entire international system as such. In this regard, the argument of this article is that ICA is a reasonable dialogue. Therefore, this article first examines the “dialogue” aspect of ICA and the actors and the issues of that dialogue. The following section discusses arbitrators, which is then followed by a discussion of the concept of private

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<sup>1</sup> M.M. Bakhtin, *The Dialogic Imagination: Four Essays by M.M. Bakhtin* (Austin, TX, and London: University of Texas Press, 1981), p.427, <http://www.public.iastate.edu/~carlos/607/readings/bakhtin.pdf> [Accessed 1 September 2016].

<sup>2</sup> International law is, in general terms, the law between states, international organisations and individuals. Transnational law involves domestic actors. That is, transnational law is the law among regulators, agencies and various authorities of different nations.

<sup>3</sup> Bakhtin, *The Dialogic Imagination* (1981), p.358: “Thanks to the ability of a language to represent another language while still retaining the capacity to sound simultaneously both outside it and within it, to talk about it and at the same time to talk in and with it . . .”

<sup>4</sup> Dominic Kelly, “The Business of Diplomacy: The International Chamber of Commerce meets the United Nations”, Centre for the Study of Globalisation and Regionalisation (CSGR) Working Paper No.74/01 (May 2001), p.3.

<sup>5</sup> Kelly, “The Business of Diplomacy”, CSGR Working Paper No.74/01 (May 2001), p.4.

<sup>6</sup> Kelly, “The Business of Diplomacy”, CSGR Working Paper No.74/01 (May 2001), p.3.

<sup>7</sup> Kelly, “The Business of Diplomacy”, CSGR Working Paper No.74/01 (May 2001), p.11. G. Ernest Hubbard, “The New Diplomacy: An English Outlook” (1927) 11 *Chinese Social and Political Science Review* 179: “Comprehensive as the Versailles Treaty was, it left a tremendous legacy of work to be accomplished by the diplomats after its signature. The reparations question had been settled only in broad principle . . .”

<sup>8</sup> Kelly, “The Business of Diplomacy”, CSGR Working Paper No.74/01 (May 2001), p.11.

<sup>9</sup> Vijay K. Bhatia, Giuliana Garzone and Chiara Degano (eds), *Arbitration Awards: Generic Features and Textual Realisations* (Newcastle upon Tyne: Cambridge Scholars Publishing, 2012), p.3.

<sup>10</sup> Bhatia et al. (eds), *Arbitration Awards* (2012), p.3.

<sup>11</sup> Richard Sennett, *The Culture of the New Capitalism* (New Haven, CT, and London: Yale University Press, 2006), p.190.

<sup>12</sup> Sennett, *The Culture of the New Capitalism* (2006), p.190.

diplomacy, before going on to look at the relation of law to ICA. The subsequent section analyses the cultural aspect of ICA. The last section before the conclusion exposes the significance of the concept of reasonableness for ICA. The article concludes by situating the concepts of dialogue, arbitrators, private diplomacy, law, culture and reasonableness within a single framework.

## Dialogue

ICA may be deemed a *dialogue* between parties to a dispute and the relevant arbitrators.<sup>13</sup> Thus, there is a “dialogic” dimension to ICA.<sup>14</sup> That is to say, ICA is dynamic and consists of re-descriptions of international commerce through dialogue. Although there is no binding precedent rule in ICA, the past is modified by the present as much as the present is influenced by the past.<sup>15</sup> Indeed, dialogism is about remaining unresolved.<sup>16</sup> Put more concretely, dialogism allows for multiple voices, including those that are incommensurable.<sup>17</sup>

Dialogue is the distinguishing trait of ICA. Indeed, ICA has instituted customs for this dialogue:

“Notwithstanding sometimes radical differences in counsel style, there does prevail a general sense of professional decorum among protagonists in the arbitral hearing room.”<sup>18</sup>

There is a dynamic and strong conversation among disputants and arbitrators. ICA actors are fully conscious of their “dialogic” role, which can exemplified by a comparison of the attitudes of arbitrators with that of judges sitting on the bench of permanent international courts. For instance,

“it is usual for the International Court of Justice (ICJ) to hear oral arguments in relative silence; questioning from the bench is relatively rare, and then usually only from the President”.<sup>19</sup>

“Arbitration is structuring and shaping a dialogue.”<sup>20</sup> For instance, while parties can prepare their own terms of reference at the beginning of the arbitral process to determine the basic parameters of arbitration, the

arbitrator may also present terms of reference to the parties for their approval. That is, parties and arbitrators all shape and influence the conduct of proceedings from the start, in effect from the first procedural order.

This “dialogism” is all the more apparent within the history of ICA. At the turn of the 20th century, the line between arbitration and conciliation was a rather fine one<sup>21</sup>; it was unclear as to whether it was arbitrators or parties that were making the final decision. Arbitrators and parties were deemed to coexist in a specified dialogue with a view to a resolution of the dispute. In most cases, the arbitrators were notable business leaders<sup>22</sup> and were deemed facilitators—there was no strict requirement for them to apply a particular procedural or substantive law. Indeed, “many decisions were made *ex aequo et bono*, not on the basis of a particular law”.<sup>23</sup>

There is a self-standing dialogue in ICA in that attachment to national jurisdictions is tenuous. “An arbitrator, unlike a national judge, has no forum.”<sup>24</sup> Indeed, “arbitrators are not bound by the conflict of laws of a forum to choose the law applicable to the substance of the dispute”.<sup>25</sup> “By design arbitration is set in a jurisdiction where neither party’s counsel is licensed.”<sup>26</sup> Hence, neither the laws to be applied nor the actors of ICA are necessarily to be rooted in a particular national law. Still, ICA arbitration may refer to the pertinent national law. ICA does not exclude the application of national law and national law concepts to international commercial contracts.<sup>27</sup> This does not preclude the self-standing quality of arbitral dialogue.

This dialogue on an international platform has to do with the intent of commercial actors as embodied in “contractual relationship”. That is to say, international economic transactions are embodied in international contractual relationships and arbitration constitutes the guarantee for these contractual relationships. The contractual relationship is to be interpreted and enforced in the light of the spirit of international commerce,<sup>28</sup> not through the parameters of national commercial codes. ICA assists in this “international” interpretation and enforcement.

<sup>13</sup> Pierre A. Karrer, *Introduction to International Arbitration Practice* (Alphen aan den Rijn: Kluwer Law International, 2014), p.xi.

<sup>14</sup> Bakhtin, *The Dialogic Imagination* (1981).

<sup>15</sup> Bakhtin, *The Dialogic Imagination* (1981).

<sup>16</sup> Richard Sennett, “The Architecture of Cooperation” (video), Harvard Graduate School of Design (28 February 2010).

<sup>17</sup> Patrick O’Callaghan, “Monologism and Dialogism in Private Law” (2010) 7 *The Journal Jurisprudence* 405, 407.

<sup>18</sup> George A. Bermann, “Dramatic Sideshows at the Hearing” in Domitille Baizeau and Bern Ehle (eds), *Stories from the Hearing Room: Experience From Arbitral Practice (Essays in Honour of Michael E. Schneider)* (Alphen aan den Rijn: Wolters Kluwer, 2015), Ch.3, p.20.

<sup>19</sup> Michael Hwang, “War Stories and the Morals to be Learnt,” in *Stories from the Hearing Room* (2015), Ch.10, p.81; Gary Born, “A New Generation of International Adjudication” (2012) 61 *Duke Law Journal* 775.

<sup>20</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.87.

<sup>21</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.236.

<sup>22</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.236.

<sup>23</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.236.

<sup>24</sup> *Insurer (US) v Manufacturer (Italy)*, Interim Award, ICC Case No.11333 (2002), in Albert Jan van den Berg (ed.), *Yearbook Commercial Arbitration: Volume XXXI* (Alphen aan den Rijn: Kluwer Law International, 2006), p.120, para.6.

<sup>25</sup> *Insurer (US) v Manufacturer (Italy)*, Interim Award, ICC Case No.11333 (2002), in *Yearbook Commercial Arbitration* (2006), p.120, para.6.

<sup>26</sup> J. William Rowley, “Guerrilla Tactics and Developing Issues” in Stephan Wilske and Günther J. Horvath (eds), *Guerrilla Tactics in International Arbitration*, International Arbitration Law Library, Vol.28 (Alphen aan den Rijn: Kluwer Law International, 2013), Ch.1, p.22, para.1.04.

<sup>27</sup> e.g. *State-owned Corporation X v Corporation Y*, Final Award, ICC Case No.11307 (2003), paras.27, 28, 29, 30 (here the ICC court refers to the South African national case law for the analysis of the issue of bribery. South African law is the law governing the substantive matters in dispute).

<sup>28</sup> Parties Not Indicated, Order, ICC Case No.11904 (6 February 2002), International Court of Arbitration of the International Chamber of Commerce, para.17.

Thus, contract does not finalise a negotiation. Put more clearly, a contractual relationship cannot be reduced to a mere contract.<sup>29</sup> Contract here is to be seen as the core document that merely provides the principles that will govern the long-term relationship between the parties. There is a continuum of contractual relationships whereby contract is to be seen as a flexible instrument to be interpreted within a relationship of trust between the parties. ICA stands as the culmination of this relationship.

International commerce requires clarity and stability of international commercial contracts,<sup>30</sup> and this is feasible as long as contracts are enforced. Indeed, contracts are made to be enforced.<sup>31</sup> As such, international arbitration is significant for the interpretation and enforcement of contracts to such an extent that even though arbitration clauses may exist only in one contract (the main contract), the arbitration clause could be extended to related contracts which amend, complete or complement the main contract.<sup>32</sup> As such, ICA provides such a forum in which the normal intent of commercial actors may be interpreted to bring all disputes arising out of or relating to the same contractual relationship to be resolved in the same international forum,<sup>33</sup> regardless of the number and diversity of contracts in that relationship. That is, “arbitral dialogue” is based upon a “contractual relationship”, and not only upon a specific contract. In this respect, the actors and the issues of this dialogue should be further clarified.

## The actors and the issues of dialogue

Dialogue within and on this contractual relationship takes place among arbitrators. Importantly, a good arbitral tribunal is not necessarily unanimous.<sup>34</sup> “The goal should be a ‘correct’ award, not a unanimous award which may be the result of a bargaining process.”<sup>35</sup> Indeed, the dissenting arbitrator can issue a full and separate dissenting opinion. For instance, under the rules of the ICC, both the draft award of the arbitral tribunal and the dissenting opinion of the arbitrator go before the plenary

session of the ICC Court for approval before they are formally signed and issued to the parties.<sup>36</sup> The ability to issue a dissenting opinion and the lack of need for unanimity demonstrate the significance of dialogue in ICA. Dissenting opinions do not affect the outcome of the case, yet they do, to an extent, fulfil the function of a “practical doctrine”.<sup>37</sup> That is, separate opinions may be considered as authoritative opinions—not binding precedents—in ICA.<sup>38</sup> And these authoritative opinions may influence later arbitral awards.

This is a plausible interpretation in that, after the proliferation of international courts and tribunals, the “doctrine” as a source of law is deemed relegated to a less important rung. This is exemplified in particular by the secondary status given to the doctrine in art.38 of the Statute of the International Court of Justice (ICJ).<sup>39</sup> The strong emergence of international adjudication in the 20th and the 21st centuries undermined the power of the doctrine. References by international courts and tribunals to individual publicists are rare.<sup>40</sup> Still, the doctrine could be conceptualised as including the dissenting opinions of judges and of arbitrators.<sup>41</sup> Actually, this is all the more understandable as a great majority of those judges and arbitrators have an academic background.<sup>42</sup> This doctrine may not be a direct source of ICA, yet, arguably, it has an authority.<sup>43</sup>

Dialogue takes place among different laws, too. The arbitral dialogue could be defined as comparative law in action.<sup>44</sup> For instance, in ICC Case No.9771 (2001),<sup>45</sup> although Russian law was found to be the applicable law to the dispute at hand, general principles of contract law common to various legal systems were also referred to. It is a dialogue that necessarily takes place owing to the insufficiencies of international commercial contracts and individual national laws in allocating commercial risks between the parties.

Dialogue also takes place between arbitration and other dispute settlement methods. Arbitration is the ultimate dispute settlement method. Other methods (e.g. negotiation, mediation, conciliation) would probably not

<sup>29</sup> This smacks of the Chinese understanding of dispute resolution, where the non-adversarial method is favoured. See Fan Kun, “Globalization of International Arbitration: Rethinking About Tradition-Modernity and East-West Binaries”, University of Pennsylvania East Asia Law Review, (2016), p.25, SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2671627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671627) [Accessed 1 September 2016].

<sup>30</sup> Parties Not Indicated, Order, ICC Case No.11904 (6 February 2002), International Court of Arbitration of the International Chamber of Commerce, para.17.

<sup>31</sup> Parties Not Indicated, Order, ICC Case No.11904 (6 February 2002), International Court of Arbitration of the International Chamber of Commerce, para.17.

<sup>32</sup> Award of Arbitration Institute of the Finland Chamber of Commerce (FAI) Case No.16/2014, FAI Case No.16/2014 (6 October 2014), *Kluwer Arbitration*, <http://www.kluwerarbitration.com/CommonUI/organization.aspx?jurisdiction=Finland&organization=Arbitration+Institute+of+the+Finland+Chamber+of+Commerce&text-type=Awards> [Accessed 1 September 2016].

<sup>33</sup> Award of Arbitration Institute of the Finland Chamber of Commerce (FAI) Case No.16/2014, FAI Case No.16/2014 (6 October 2014), *Kluwer Arbitration*, <http://www.kluwerarbitration.com/CommonUI/organization.aspx?jurisdiction=Finland&organization=Arbitration+Institute+of+the+Finland+Chamber+of+Commerce&text-type=Awards> [Accessed 1 September 2016].

<sup>34</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.214.

<sup>35</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.214.

<sup>36</sup> Karrer, *Introduction to International Arbitration Practice* (2014), pp.221, 222.

<sup>37</sup> André Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207.

<sup>38</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207.

<sup>39</sup> Statute of the International Court of Justice art.38: “The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: d) ... judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

<sup>40</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 224, 226.

<sup>41</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 229.

<sup>42</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 227; André Oraison, “Réflexions sur ‘la doctrine des publicistes les plus qualifiés des différentes nations’” (1991) 2 *Revue Belge de Droit International* 507, 543.

<sup>43</sup> Oraison, “Réflexions sur ‘la doctrine des publicistes les plus qualifiés des différentes nations’” (1991) 2 *Revue Belge de Droit International* 507, 515.

<sup>44</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.18.

<sup>45</sup> *Commodities Trading Company (Italy) v Shipping Company D (Cyprus)*, *Shipping Company A (Cyprus)*, Final Award, International Court of Arbitration of the International Chamber of Commerce, *Kluwer Arbitration*, p.49.

work if there were not the threat of arbitration at the end of the process.<sup>46</sup> These other methods comprise dialogue, too. But arbitral dialogue should be seen as the culmination of other dialogues that take place in other dispute settlement methods.<sup>47</sup> Hence, ICA generally consists of relatively well-structured steps of negotiation and mediation.

Indeed, international arbitral institutions, such as the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the American Arbitration Association (AAA), compete on the quality of their arbitrators and staff to institute this dialogue in the optimum manner.<sup>48</sup> Some legal scholarship argues that arbitration is a legal process merely with a less formal evidentiary and hearing structure.<sup>49</sup> Arbitration is a flexible framework, with utmost discretion conferred on the parties and on the arbitral tribunal in procedural and substantive matters. Still, the arbitral structure is more solid and restrictive than negotiation, mediation and conciliation. Most importantly, arbitral dialogue leads to a binding decision. Hence, a distinction is to be made between negotiation, mediation and conciliation on the one hand and arbitration on the other.<sup>50</sup>

All in all, arbitration is a constant dialogue of sorts consisting of and utilising different national laws, arbitrators, parties and other dispute settlement methods:

“It is incumbent upon counsel and arbitrators to show that national laws converge on points at issue, thereby establishing a transnational rule that is capable of being applied.”<sup>51</sup>

This constructive dialogue is apparent from the fact that a settlement may take place at any time during the arbitration—settlement is not limited merely to the pre-arbitration phase.<sup>52</sup>

Another specificity of this dialogue is the necessity of producing a decision of high quality in the end. The presentation of the decision (arbitral award) and the art of persuasion are of utmost importance.<sup>53</sup> Indeed, “appointing a partisan arbitrator is not a promising

strategy”.<sup>54</sup> A partisan arbitrator impairs the righteousness of the appointing party.<sup>55</sup> A real dialogue takes place only between non-partisan arbitrators. A judgment of high quality results from the dialogue of and between non-partisan arbitrators.

This dialogue is inherent in the fact that no “surprises” should take place in ICA. That is, parties should not be surprised by the procedure, law applied or award as issued by the arbitral tribunal. In line with due process, they should be granted the opportunity to present their case.<sup>56</sup> There is to be a due process of notification to the parties as regards the grounds on which the arbitral award is made.<sup>57</sup> Thus, while parties should be able to conduct presentations and defend themselves as regards those grounds, they should also be able to understand, interpret and appreciate the award.

Negotiation and dialogue are most inherent in the fact that ICA “seeks the most reliable account of the controverted events”.<sup>58</sup> What counts is epistemological truth, advocacy, argument and persuasiveness.<sup>59</sup> In this process of dialogue, the aim is to promote accuracy.<sup>60</sup> This search for accuracy is also linked to the reputation of the arbitrator.<sup>61</sup> There is a sort of constant cross-check among arbitrators, in that peer pressure acts as a limitation of sorts on the discretion of every other arbitrator.<sup>62</sup> Every arbitrator is aware of the possible repercussions of their decision on their reputation and their prospects of being hired for subsequent cases. Thus, although there is no formal binding rule of precedent, the search for reputation and the concern to protect one’s status as a “neutral arbitrator” lead arbitrators to pay the utmost attention to the acceptability and validity of their awards. This means that subsequent arbitral awards are in line with the previous awards and also are compatible with the expectations of the parties to the dispute to the maximum extent possible.

The predominant “dialogue” trait of ICA is evident in the fact that “the law applicable to the merits of the dispute should be treated as a question of fact, not of law”.<sup>63</sup> National laws are treated as data applicable to

<sup>46</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.4.

<sup>47</sup> Fan Kun, “Globalization of International Arbitration” (2016), p.35, SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2671627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671627) [Accessed 1 September 2016]: “However, it is important to note that a preference for arbitration as the default dispute resolution mechanism does not necessarily mean that arbitration will be used to ultimately resolve the disputes. In fact, the survey shows that Japanese companies typically resolve approximately 83% of all their international commercial disputes by negotiated settlement. Furthermore, a significant number of Japanese companies (37.5%) have filed for arbitration in order to further settlement negotiations.”

<sup>48</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.13.

<sup>49</sup> Paul Eric Mason, “The Arbitrator as Mediator, and Mediator as Arbitrator” (2011) 28(6) *J. Int. Arb.* 541.

<sup>50</sup> Mason, “The Arbitrator as Mediator, and Mediator as Arbitrator” (2011) 28(6) *J. Int. Arb.* 541.

<sup>51</sup> Emmanuel Gaillard, “Thirty Years of *Lex Mercatoria*: Towards the Selective Application of Transnational Rules” (1995) 10 *ICSID Review — Foreign Investment Law Journal* 208, 226.

<sup>52</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.51.

<sup>53</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.66.

<sup>54</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.68.

<sup>55</sup> Paul Darling QC, “Who do you Want? Who do you Get? Appointing the Right Arbitrator” (Keating Chambers, London, 2009), p.3: “The choice of a party nominated arbitrator is a particularly sensitive matter. While it is true that such an arbitrator will be aware of the nomination and might be expected to be receptive to the nominating party’s case, or at least to understand it, rather than otherwise, it is dangerous to have an arbitrator whose impartiality is open to question; suggestions of bias may cast doubt on the validity of the award, or ground a challenge. Inexperienced parties may wrongly believe that the arbitrator they nominate is there solely to advance their cause, a serious misunderstanding.” See <http://www.keatingchambers.co.uk/multimedia/docs/Who%20do%20you%20want%20Who%20do%20you%20get%20PD-4%2012%2009-mg.pdf> [Accessed 1 September 2016].

<sup>56</sup> Jeff Waincymer, “International Arbitration and the Duty to Know” (2011) 28(3) *J. Int. Arb.* 201, 213.

<sup>57</sup> Waincymer, “International Arbitration and the Duty to Know” (2011) 28(3) *J. Int. Arb.* 201, 215.

<sup>58</sup> Nicolas C. Ulmer, “Language, Truth, Arbitral Accuracy” (2011) 28(4) *J. Int. Arb.* 295.

<sup>59</sup> Ulmer, “Language, Truth, Arbitral Accuracy” (2011) 28(4) *J. Int. Arb.* 295.

<sup>60</sup> Ulmer, “Language, Truth, Arbitral Accuracy” (2011) 28(4) *J. Int. Arb.* 295, 311.

<sup>61</sup> Sophie Harnay, “Réputation de l’arbitre et décision arbitrale: Quelques éléments d’analyse économique” (2012) 4 *Revue de l’Arbitrage* 757, 764.

<sup>62</sup> Harnay, “Réputation de l’arbitre et décision arbitrale” (2012) 4 *Revue de l’Arbitrage* 757, 766.

<sup>63</sup> Jose Pereyo, “A Bridge Too Far” (2012) 9(36) *Revista Brasileira de Arbitragem* 90, 101.

concrete problems. No systematic concern for developing national laws exists. Moreover, an arbitrator cannot invoke and evaluate a legal argument that has not already been invoked by the parties to the dispute. Every fact is to be invoked by the disputants in the arbitral dialogue. Applicable substantive law to the dispute is to be treated as a fact, but not as a system of a law to be freely developed and interpreted by arbitrators.<sup>64</sup>

An arbitral tribunal cannot speak in the name of a purported substantive law, which is not specifically designated and detailed by the parties. If the law applicable to the merits is treated as a fact, it is to be clearly pleaded by the parties,<sup>65</sup> a reflection of the autonomy of the parties in ICA. Indeed, “arbitration laden jurisdictions sanction arbitral tribunals for applying legal arguments *ex officio*”.<sup>66</sup> They set aside such arbitral awards on grounds of being *ultra petita*.<sup>67</sup> This is all the more natural as “arbitrators cannot be expected to be knowledgeable of foreign law”.<sup>68</sup>

Moreover, another “dialogue” takes place between arbitrators and national judges:

“Judges and arbitrators are either cooperating, with an ever better understanding of their respective function, or else lost in mutually assured destruction.”<sup>69</sup>

Hence “the expression ‘private justice’ is in a sense reductionist and misleading”.<sup>70</sup> ICA is not isolated from national public authorities. That is, arbitration and national judiciary are complementary.<sup>71</sup> Indeed,

“government cannot outsource responsibilities, yet it does not have to underestimate the marginal benefit of a controlled partnership with the private sector”.<sup>72</sup>

Governments conceive of ICA as a “private” support for international dispute settlement. Viewed in this light, for example, the ICC is a sort of epistemic business community and pursues a “diplomacy of technics”, the technics being those of international trade. ICA thus supplements diplomacy.

For instance, there are numerous close links between diplomacy and the private sector in US foreign policy.<sup>73</sup> “For most of America’s history, foreign policy has reflected an obsession with open markets for American business.”<sup>74</sup> To be sure,

“the motives of America were never entirely commercial; Americans have associated commerce with open markets, open markets with political freedom, political freedom with democracy, and democracy with peace”.<sup>75</sup>

Diplomacy and trade are therefore intertwined.

Granted, there is, at the same time, the phenomenon of the separation of the economic power from national political power:

“Transnational power seems to have escaped the boundaries of the nation state, the power of capital seems to have become even more diffuse, and the problem of locating and challenging the centre of capitalist power has apparently become even harder.”<sup>76</sup>

Yet this does not mean that nation-state has been eliminated from the scene of international trade. As confirmed by the practice of ICA, national courts are active and at some points essential in the smooth functioning of ICA—for example, in composing the arbitral tribunal, in taking interim measures, and in recognising and enforcing arbitral awards.

Therefore “the state remains a vital point of concentration of capitalist power”.<sup>77</sup> Indeed, “there are many different ways in which the state has been a crucial mechanism for the maximal accumulation of capital”.<sup>78</sup> International dispute settlement is one of those ways. In this respect, ICA sits at the intersection of state power and private power and functions as a dialogue between state power and private power while also being a (platform for) dialogue between “global capital” and national governments.

The universal dimension of dialogue within ICA is conspicuous. ICA’s peculiarity stems from the conciliation of interests of the international business community (global capital) and states. Actually, for a stable and endless accumulation of capital, cadres are

<sup>64</sup> Pierre Tercier, “La Légitimité de L’Arbitrage” (2011) 3 *Revue de L’Arbitrage* 664, 665.

<sup>65</sup> Pereyo, “A Bridge Too Far” (2012) 9(36) *Revista Brasileira de Arbitragem* 90, 118.

<sup>66</sup> Pereyo, “A Bridge Too Far” (2012) 9(36) *Revista Brasileira de Arbitragem* 90, 109.

<sup>67</sup> Pereyo, “A Bridge Too Far” (2012) 9(36) *Revista Brasileira de Arbitragem* 90, 118.

<sup>68</sup> Pereyo, “A Bridge Too Far” (2012) 9(36) *Revista Brasileira de Arbitragem* 90, 104.

<sup>69</sup> Jan Paulsson, “Why Good Arbitration Cannot Compensate for Bad Courts” (2013) 30(4) *J. Int. Arb.* 345, 352.

<sup>70</sup> Paulsson, “Why Good Arbitration Cannot Compensate for Bad Courts” (2013) 30(4) *J. Int. Arb.* 345, 352.

<sup>71</sup> Paulsson, “Why Good Arbitration Cannot Compensate for Bad Courts” (2013) 30(4) *J. Int. Arb.* 345, 345.

<sup>72</sup> Lucrezia Raggio, “The Private Sector and United States Diplomacy Nexus” (4 August 2014), <http://www.cronacheinternazionali.com/the-private-sector-and-united-states-diplomacy-nexus-6709> [Accessed 1 September 2016].

<sup>73</sup> Raggio, “The Private Sector and United States Diplomacy Nexus” (4 August 2014), <http://www.cronacheinternazionali.com/the-private-sector-and-united-states-diplomacy-nexus-6709> [Accessed 1 September 2016].

<sup>74</sup> Jeffrey E. Garten, “Business and Foreign Policy”, *Foreign Affairs*, 1 May 1997, p.2.

<sup>75</sup> Garten, “Business and Foreign Policy”, *Foreign Affairs*, 1 May 1997, p.2.

<sup>76</sup> Ellen Meiksins Wood, *Empire of Capital* (London, New York: Verso, 2005), p.14.

<sup>77</sup> Wood, *Empire of Capital* (2005), p.14.

<sup>78</sup> Immanuel Wallerstein, *Historical Capitalism* (London, New York: Verso, 2011), p.56.

needed<sup>79</sup>: “Cadres have to be created, socialized, reproduced.”<sup>80</sup> Moreover, the primary ideology that serves to create, socialize and reproduce them has been “the ideology of universalism”.<sup>81</sup> Arbitrators are global capitalism’s cadres in the smooth functioning of international trade: “The international arbitrator has to protect a certain basic contractual morality and the superior interests of international trade.”<sup>82</sup> According to Wallerstein:

“Universalism maximizes the close integration of production processes and the operation of the interstate system, thereby facilitating the accumulation of capital.”<sup>83</sup>

Universalism requires the rationalisation of both the production processes and dispute settlement. An intermediate stratum<sup>84</sup>—consisting of administrators and technicians, such as arbitrators—helps universalism. The question then is not whether “arbitrators” participate in the international legal process but where, how, when and with what resources they are participating.<sup>85</sup>

## Arbitrators

The “modern age” was founded upon the bedrock of capitalism and a science-centred “professionalism”, which in turn was fostered, structured and restrained by a nascent nationalism.<sup>86</sup> In other words, the universal aspirations of capitalism and “professionalism” were challenged by nationalist aspirations. Indeed, “modern” international law, as an endeavour within the realms of social science, has three pillars—capitalism, nationalism and “professionalism”. All nations, it can be presumed, are partial, with their own specific national concepts, terminologies and agendas, and they all attempt to shape and perhaps bend treaties, customs and general principles to suit their own interests. In this context, international lawyers, as “professionals”, on a daily basis deal with the strengths and deficiencies of global (and regional and local) capitalism, and with the disputes that arise over international treaties, customs and general principles of law between constituent nations in the global marketplace.

In this regard, a distinction can be made within professional academia between “publicists of reflection” and “publicists in action”.<sup>87</sup> In other words, a distinction of sorts can be made between the “academic doctrine”, as represented by individual scholars, and the “active

doctrine” emanating from those working in the courts, commissions and international organisations.<sup>88</sup> “Publicists in action” are those judges who sit on international tribunals and in particular those who write separate or dissenting opinions; those who write legal opinions on behalf of states or international organisations; and those who participate and vote in jurists’ commissions and associations. In fact, they can be said to represent a passage of sorts from a naturalistic view of “publicists of reflection” to a positivist view in international law.

The “publicness” of international law was seen as entailing and implying the anonymity of legal doctrine; this dissolution of the significance of individual legal scholars within legal doctrine was seen as a way of creating the appearance—or indeed, veneer—of complete neutrality and impartiality.<sup>89</sup> In the process, the accumulation of positive international law (foremost in the shape of international conventions) and the proliferation of international courts have reduced the (formerly) preponderant role of naturalistic individual publicists.<sup>90</sup>

In this respect, international arbitrators may be cited. International arbitration—a system of private adjudication—is a field in which disputes are left to the disposal of international “professionals”, namely, arbitrators:

“In arbitration, the parties appear before *ad hoc* tribunals created to resolve a single dispute or a class of related disputes, staffed by arbitrators selected by the disputing parties.”<sup>91</sup>

Arbitrators may adjudicate disputes between states (state-to-state arbitration),<sup>92</sup> between investor companies and states (investor-state arbitration),<sup>93</sup> or between companies (international commercial arbitration).<sup>94</sup>

At the outset, in the late 19th and early 20th centuries, international arbitration was conceived as an informal settlement-oriented system, thereby entailing confidentiality and secrecy. However, this was primarily due to the fact that the interests of the disputing parties, be they states and/or companies, necessitated expert and professional concentration. Instead of viewing disputes through the lens of community interests, the specific contexts and parameters of the disputes had to be taken

<sup>79</sup> Wallerstein, *Historical Capitalism* (2011), p.80.

<sup>80</sup> Wallerstein, *Historical Capitalism* (2011), p.80.

<sup>81</sup> Wallerstein, *Historical Capitalism* (2011), p.80.

<sup>82</sup> Pierre Lalive, “Transnational (or Truly International) Public Policy and International Arbitration” (2014) 11(41) *Revista Brasileira de Arbitragem* 173, 210.

<sup>83</sup> Wallerstein, *Historical Capitalism* (2011), p.83.

<sup>84</sup> Wallerstein, *Historical Capitalism* (2011), p.83.

<sup>85</sup> Jordan J. Paust, “Nonstate Actor Participation in International Law and the Pretense of Exclusion” (2011) 51(4) *Virginia Journal of International Law* 977, 1001.

<sup>86</sup> Yuri Slezkine, *The Jewish Century* (Princeton University Press, Princeton, New Jersey: 2004), p.207.

<sup>87</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 207.

<sup>88</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 209.

<sup>89</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 224.

<sup>90</sup> Oraison, “L’Influence des Forces Doctrinales Académiques sur les Prononcés de la C.P.J.I. et de la C.I.J.” (1999) 1 *Revue Belge de Droit International* 207, 212, 213, 214.

<sup>91</sup> Charles H. Brower II, “Arbitration” in *Max Planck Encyclopedia of Public International Law* (2007), p.2, para.4.

<sup>92</sup> Brower, “Arbitration” in *Max Planck Encyclopedia of Public International Law* (2007), p.2, para.4.

<sup>93</sup> Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law*, 2nd edn (Oxford University Press USA, 2012).

<sup>94</sup> Richard H. Kreindler and Rita Heinemann, “International Commercial Arbitration” in *Max Planck Encyclopedia of Public International Law* (2009).

into account. International arbitration has thus evolved to avoid rigidity and public scrutiny, in contrast to judicial settlement.

The wish not to be publicised, or to be publicised as little as possible during the proceedings, is the preference of international businesses, alongside the efficient and swift resolution of disputes. Flexibility within the bounds of and on the part of the arbitrators is the ultimate principle of arbitration. Both the proceedings of international arbitration and the international arbitration community itself are of a closed nature.<sup>95</sup> Indeed, the exacting demands of the international business community are the precursors and reason behind this insularity.

Confidentiality, the neutrality of the forum and the specialist capabilities of the tribunal are important factors in the increasing role of international arbitration.<sup>96</sup> In the process, the emergence of international arbitrators—either commercial lawyers or public international law professors—who share a common vocabulary is noteworthy. Significant regulatory power in the field of the promotion and protection of foreign investment has been transferred to these expert decision-makers.<sup>97</sup>

“Arbitration was meant to depoliticize international law by removing disputes from national courts and gunboat diplomacy”,<sup>98</sup> a de-politicisation that was attempted (and achieved) mainly through publicists (legal scholars). International arbitrators were generally chosen from the ranks of well-published or reputedly “wise” men with noteworthy experience and proven reputations and track records in international law, credentials that would undoubtedly have impressed the parties privy to any dispute. These international arbitrators were also expected to possess “common sense” and to be able to claim a certain distance from international politics and the international business world. These wise men were trusted to such an extent that “sometimes an eminent professor felt that he did not have to explain things”.<sup>99</sup> All the parties involved respected the wise men’s decisions.

Indeed,

“the grand notable arbitrators are still influential, and their services are called on when disputes are outside the routine, requiring more political sensitivity, authority and clout that comes with their status”.<sup>100</sup>

Yet the criticism is that international arbitrators are, to a great extent, influenced by extra-legal factors beyond the realms of neutral law-bound processes. The nature of the litigants, dominant ideology/-ies, the judicial background and/or the competitive formation of arbitral tribunals<sup>101</sup> are all extra-legal factors.<sup>102</sup> That is, legal texts and procedures are not as determinative as expected in the functioning of international arbitrators.<sup>103</sup> The competitive formation of arbitral tribunals, in particular, which involves increasing chances of reappointment by the parties of future disputes, may have an impact on the purported neutrality of arbitration.

In this context, international arbitrators constitute “an extraordinary network of personal ties”.<sup>104</sup> It has been argued that “international commercial arbitration was a relatively marginal—even if elite—activity until the 1980s”.<sup>105</sup> At that time:

“Disputes were resolved through a mix of social capital (respectability) and legal capital (a career in the legal world, especially in the form of publications, speeches, conferences, as well as previous experience in arbitration) more like today’s mediation than litigation-like processes.”<sup>106</sup>

At present, there is a competitive market of renowned arbitrators and pre-eminent lawyers whose presence and whose efforts increase the chances of winning a case.<sup>107</sup> The academic opinions of international lawyers and previous arbitral tribunal awards together constitute an important sector of international law, in which an “epistemic community” of arbitrators has emerged and which functions in terms of reputation rather than a centralised system. Undoubtedly, the “preoccupation with choosing a ‘big name’ arbitrator and counsel team” remains.<sup>108</sup>

Nevertheless, the large autonomy that has recently been afforded to the “grand” international lawyers is coming into question. Furthermore, international commercial and

<sup>95</sup> Yves Dezalay and Bryant Garth, “Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes” (1995) 29(1) *Law & Society Review* 27, 30.

<sup>96</sup> Sundaresh Menon, “International Arbitration: The Coming of a New Age for Asia (and Elsewhere)”, ICCA Congress, Opening Plenary Session (2012), p.4, para.8, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

<sup>97</sup> Jason Webb Yackee, “Controlling the International Investment Law Agency” (2012) 53(2) *Harvard International Law Journal* 392.

<sup>98</sup> Catherine A. Rogers, “The Politics of International Investment Arbitrators” (2014) 12(1) *Santa Clara Journal of International Law* 223, 226 n.3.

<sup>99</sup> Dezalay and Garth, “Merchants of Law as Moral Entrepreneurs” (1995) 29(1) *Law & Society Review* 27, 37.

<sup>100</sup> Dezalay and Garth, “Merchants of Law as Moral Entrepreneurs” (1995) 29(1) *Law & Society Review* 27, 60.

<sup>101</sup> Robert D. Cooter, “The Objectives of Private and Public Judges” (1983) 41 *Public Choice* 107.

<sup>102</sup> Rogers, “The Politics of International Investment Arbitrators” (2014) 12(1) *Santa Clara Journal of International Law* 223, 226 fn.3.

<sup>103</sup> Rogers, “The Politics of International Investment Arbitrators” (2014) 12(1) *Santa Clara Journal of International Law* 223, 226.

<sup>104</sup> Dezalay and Garth, “Merchants of Law as Moral Entrepreneurs” (1995) 29(1) *Law & Society Review* 27, 47.

<sup>105</sup> Bryant Garth, “Law, Lawyers, and Empire: From the Foreign Policy Establishment to Technical Legal Hegemony”, Papers Presented in the Center for the Study of Law and Society Lunch Speaker Series, Center for the Study of Law and Society Jurisprudence and Social Policy Program (2006), p.45.

<sup>106</sup> Garth, “Law, Lawyers, and Empire” (2006), p.46.

<sup>107</sup> Menon, “International Arbitration” (2012), p.10, para.25, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

<sup>108</sup> Menon, “International Arbitration” (2012), p.14, para.35, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

investment arbitration has been evolving into a formalised and litigious apparatus.<sup>109</sup> Arguably, this has to do with the growth of global trade, the multiplication of bilateral and multilateral investment treaties and the need for an efficient system of international dispute resolution that can cope with the increasing number of disputes.<sup>110</sup> That is, the formalisation and rationalisation of international arbitration is a result of the success of the arbitration itself.

Moreover, expert dominance in international arbitration may not be fitting as arbitration also involves key public issues. This issue is all the more crucial as many investor-state disputes are not merely private commercial conflicts, but often reflect and impact crucial issues of public policy.<sup>111</sup> Indeed,

“international investment disputes often involve fundamental disagreements over the content of relevant legal rules – as vague and unsettled as they are – and also over the proper balancing of ethical, social, cultural, or other values”.<sup>112</sup>

Most importantly, the lack of a system of precedent in international commercial arbitration increases arbitrators’ room for manoeuvre in deciding cases. Likewise, art.53(1) of the International Centre for Settlement of Investment Disputes (ICSID) Convention excludes binding precedent.<sup>113</sup> Admittedly, previous opinions are often referred to in subsequent arbitral decisions, and an implicit rule of precedent of sorts may arguably have established itself. Be that as it may, although the “arbitral task” of these wise men has been progressively “routinised” and rationalised for the sake of predictability and efficiency,<sup>114</sup> international arbitrators have considerable autonomy in granting their rulings.

Arbitrators hand down final and binding decisions on disputes, with minimal intervention on the part of courts,<sup>115</sup> inasmuch as “there is no central organizing structure and unifying appellate control”.<sup>116</sup> Furthermore, “most countries provide for absolute or at least qualified immunity for arbitrators”.<sup>117</sup> There are no formal initial entry requirements to be a member of the club of arbitrators; arbitrators are legal professionals who do not have tenure. They can therefore be said to epitomise the power of individual legal experts and “professionals” in

international law, which they help complete via their crucial role in international dispute settlement involving states and companies.

Arbitrators are also selected not only in consideration of past achievements but also on the basis of their (potential) ability to engage in a dialogue with other arbitrators, with various national laws and with other dispute settlement methods. Actually, “in place of craftsmanship, modern culture advances an idea of meritocracy which celebrates potential ability rather than past achievement”.<sup>118</sup> This dialogue and its primary actors—arbitrators—are crucial in that commercial contracts are open to various interpretations.

When an international commercial contract is interpreted, it is to be translated into action. ICA may be deemed a mode or manner of translation of international commercial contracts. Translators—namely arbitrators—are evaluated on their potential to address international trade challenges and their attendant legal questions and are thereby expected to cope with the challenges of a dynamic international trading environment and the interpretation of commercial contracts.

Actually, it is the wish of global capital to settle its problems as quickly as possible. There is the notion, of sorts, of unleashed capital and the pressure of short-term returns; investors feel empowered thanks to this rapidity.<sup>119</sup> Impatient capital has to re-engineer and reinvent itself continually or risk stumbling in the markets.<sup>120</sup> Executives of corporations are driven by this impatient capital,<sup>121</sup> and it is therefore their wish that problems should be settled by reliable and expert hands as quickly and agreeably as possible. At the same time, they demand an informal face-to-face network where they can present arguments and counter-arguments. This informality connotes ambiguity, rather than strict, definite and rigid procedural and substantive rules that have been pre-determined.

ICA provides such a platform. There exists a high tolerance for ambiguity. ICA is a flexible framework where “human relations skills” dealing with ambiguity are essential. People with such skills engender trust. “Trust comes in two shapes, formal and informal.”<sup>122</sup> “Formal trust means one party entering into a contract, believing the other party will honour its terms.”<sup>123</sup>

<sup>109</sup> Yves Dezalay and Bryant G. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: University of Chicago Press, 1998).

<sup>110</sup> Menon, “International Arbitration” (2012), p.3, para.6, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

<sup>111</sup> Topics of investor-state arbitration could concern public health regulation, environmental protection, public services such as water and sanitation, consumer protection and sovereign debt. See Yackee, “Controlling the International Investment Law Agency” (2012) 53(2) *Harvard International Law Journal* 392, 393, 394, 396.

<sup>112</sup> Yackee, “Controlling the International Investment Law Agency” (2012) 53(2) *Harvard International Law Journal* 392, 412, citing Eugene Staley, *War and the Private Investor: A Study in the Relations of International Politics and International Private Investment* (New York: Doubleday, Doran and Co Inc, 1935), p.449.

<sup>113</sup> ICSID Convention art.53, <https://icsid.worldbank.org/ICSID/StaticFiles/basicdoc/partA-chap04.htm#s06> [Accessed 1 September 2016].

<sup>114</sup> Dezalay and Garth, “Merchants of Law as Moral Entrepreneurs” (1995) 29(1) *Law & Society Review* 27, 39.

<sup>115</sup> Menon, “International Arbitration” (2012), p.14, para.36, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

<sup>116</sup> Menon, “International Arbitration” (2012), p.13, para.34, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

<sup>117</sup> Menon, “International Arbitration” (2012), p.17, para.44, [http://www.arbitration-icca.org/media/0/13398435632250/ags\\_opening\\_speech\\_icca\\_congress\\_2012.pdf](http://www.arbitration-icca.org/media/0/13398435632250/ags_opening_speech_icca_congress_2012.pdf) [Accessed 1 September 2016].

<sup>118</sup> Sennett, *The Culture of the New Capitalism* (2006), p.4.

<sup>119</sup> Sennett, *The Culture of the New Capitalism* (2006), p.40.

<sup>120</sup> Sennett, *The Culture of the New Capitalism* (2006), p.42.

<sup>121</sup> Sennett, *The Culture of the New Capitalism* (2006), p.43.

<sup>122</sup> Sennett, *The Culture of the New Capitalism* (2006), p.66.

<sup>123</sup> Sennett, *The Culture of the New Capitalism* (2006), p.66.

“Informal trust is matter of knowing on whom you can rely.”<sup>124</sup> This is especially true during times of crisis or dispute. Thus, ICA “translates” this formal trust based upon commercial contract into informal trust.

In fact, arbitrators possess a certain institutional knowledge of ICA: “This kind of institutional knowledge complements informal trust.”<sup>125</sup> “By definition, institutions are persistent patterns of behavior that are created in response to the needs of a particular historical moment.”<sup>126</sup> The ICA network<sup>127</sup> of arbitrators may be deemed as an institution. Actually, “the networks constitute a safety net which diminishes the need for long-term strategic planning”.<sup>128</sup> That is, international commercial operators need not diligently strategise in forming commercial contracts when they count on the support of the ICA network in the event of crisis in the implementation of the contract.

Granted, there exists the legal interest of the states in having the disputes settled by their ordinary courts owing to their concern for the protection of state sovereignty. Indeed, acceptance of ICA by a state—the commitment on the part of the state involving a renunciation, on its side, of a part of its sovereignty—“should be expressed officially by the competent state authority”.<sup>129</sup> Most importantly, the choice between ICA and national courts—as always between all competing legal interests—is a matter for policy, and is not a matter for an inherent hierarchy among them. In this respect, the international community seems to have made its choice in favour of ICA. ICA is a consequence of the policy advanced by the international community.

This policy of favouring ICA has been dominant, but this does not mean that ICA has not changed at all. On the contrary, ICA is a dynamic process. Importantly, it has progressively become a more “judicialised” process, rather than relying solely on the discretion and judgment of the wise arbitrator.<sup>130</sup> That is, “the modern arbitral process has lost its early simplicity; it has become more complex, more legalistic, more institutionalized, more expensive”.<sup>131</sup> In this respect, the foremost question to be asked about ICA is whether it may constitute a system of law—that is, is it more than a dialogue? Is it possible to talk about an “international legal arbitral order”?<sup>132</sup> Or can it be said to be merely a form of private diplomacy?

## Private diplomacy

The fact that *lex mercatoria*—transnational commercial rules and principles outside national laws—is apt to be applied may be evidence in favour of the existence of an autonomous arbitral order.<sup>133</sup> But is this enough to qualify ICA as a legal order? Should ICA, rather, be defined as a sort of diplomacy—a privatised diplomacy? This distinction is important in that diplomats do not favour considerations of principle and precedent, but rather are concerned with freedom of action.<sup>134</sup> Diplomats are inclined to pursue what they wish to achieve in the short run, whereas the legal perspective is one of principle and precedent.<sup>135</sup> The legal system seeks to build up a pattern,<sup>136</sup> whereas diplomacy does not necessarily aim to build a consistent pattern.

Still, the role of precedent is not to be exaggerated: “Precedent has decisive force, it never pretends to be the ultimate word.”<sup>137</sup> That is, there are “ways and means of distinguishing or departing from precedent”.<sup>138</sup> Precedent is a way of incrementalism in law—it helps establish a body of law through increments. Nevertheless, there may be other ways to incrementalism. Arbitrators may still be in dialogue with each other within a large body of ICA without the rule of precedent. Every arbitrator and every arbitral tribunal may contribute their increments to ICA without a formal rule of precedent. In this sense, arbitrators are private diplomats who are not under the pressure of the “rule of precedent”, but who rather bring their increments to international dispute settlements via a more flexible means.

Private diplomats are independent advisers and professionals who are, generally, prominent individuals with considerable experience at the nexus of the state and corporations. Private diplomacy complements state diplomacy, and it serves both the state and private companies. It is a method of “the allocation of influence among competing interest groups, industries and social classes”.<sup>139</sup>

In a general sense, the emergence of private diplomacy may sound contradictory, in that

<sup>124</sup> Sennett, *The Culture of the New Capitalism* (2006), p.66.

<sup>125</sup> Sennett, *The Culture of the New Capitalism* (2006), p.69.

<sup>126</sup> Francis Fukuyama, *Political Order and Political Decay* (London: Profile Books, 2014), p.7.

<sup>127</sup> Fan Kun, “Globalization of International Arbitration” (2016), p.48, SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2671627](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671627) [Accessed 1 September 2016].

<sup>128</sup> Sennett, *The Culture of the New Capitalism* (2006), p.80.

<sup>129</sup> *Papillon Group Corp (Panama) v (1) Arab Republic of Syria; (2) Arab Advertising Organization (AAO, GOLAN) (Arab Republic of Syria); (3) General Establishment of External Commerce (Arab Republic of Syria)*, Final Award, ICC Case No.12923/E.C. (11 October 2007), p.111, in Jalal El-Ahdab (ed.) (2013) 5(3) *International Journal of Arab Arbitration*, <http://www.kluwerarbitration.com> [Accessed 1 September 2016].

<sup>130</sup> Nigel Blackaby and Constantine Partasides, “Preface” in *Redfern and Hunter on International Arbitration*, 5th edn, edited by Alan Redfern, J. Martin Hunter et al. (Oxford: Oxford University Press, 2009), p.vi.

<sup>131</sup> Nigel Blackaby et al., “An Overview of International Arbitration” in *Redfern and Hunter on International Arbitration* (2009), p.30.

<sup>132</sup> Jean-Michel Jacquet, “Souveraineté et autonomie: réflexions sur les représentations de l’arbitrage international” (2007) 4 *Journal du Droit International* 1170.

<sup>133</sup> Jacquet, “Souveraineté et autonomie” (2007) 4 *Journal du Droit International* 1170, 1170–1171.

<sup>134</sup> Stephen M. Schwebel, “Reflections on a Career in International Law” (interview), *Conversations with History*, Institute of International Studies (22 January 1990), p.4.

<sup>135</sup> Schwebel, “Reflections on a Career in International Law” (22 January 1990), p.4.

<sup>136</sup> Schwebel, “Reflections on a Career in International Law” (22 January 1990), p.4.

<sup>137</sup> O’Callaghan, “Monologism and Dialogism in Private Law” (2010) 7 *The Journal Jurisprudence* 405, 418.

<sup>138</sup> O’Callaghan, “Monologism and Dialogism in Private Law” (2010) 7 *The Journal Jurisprudence* 405, 418.

<sup>139</sup> Richard Sherman and Johan Eliasson, “Privatizing Commercial Diplomacy: Institutional Innovation at the Domestic-International Frontier”, p.2, <http://economics.uwo.ca/centres/epri/colloquium/papers/sherman.pdf> [Accessed 1 September 2016].

“the League of Nations (and later the United Nations) was established in order to handle problems in a manner more open and more reasoned than that of the old methods of private diplomacy alone”.<sup>140</sup>

Yet, “it is just as impossible to conduct diplomatic business in the full light of day as it would be in the case of commercial business”.<sup>141</sup> “To make their work effective, diplomats, like business executives, must be given latitude and discretion.”<sup>142</sup> In this light, the privacy of ICA—the lack of binding precedent, the privacy of the proceeding, the secrecy of hearings and the non-publication of arbitral awards—is understandable.

In a narrower sense, private diplomacy is about petitioning the government for the initiation of trade disputes,<sup>143</sup> consulting with government(s) on trade-negotiation agenda(s) and/or attending World Trade Organization talks with government officials. Private parties may even have access to the standard—state-to-state—diplomatic channels.<sup>144</sup> The issues involved may be related to quotas, subsidies, discriminatory taxation and intellectual property protection.<sup>145</sup> In this respect, ICA, as a method of conflict handling, could also be seen as a method of private commercial diplomacy—as a contribution to classic diplomacy. It may even be argued that, rather than relegating the influence of the industrial and commercial circles to a purely “informal” domain, ICA creates a more visible and formalised form of influence.<sup>146</sup> ICA—as a diplomatic method—may be regarded as part of the existing global trade regime. Thus, the normative questions around ICA could be repelled through this diplomatic characterisation of ICA.

“Corporations engaged in corporate diplomacy actively add new roles to the traditional role of the corporations.”<sup>147</sup> At the same time, they bring a new dimension to the notion of diplomacy. Corporate diplomacy is about relations between firms having different nationalities and between firms and governments.<sup>148</sup> It aims to affect rule-making, to prevent conflict and to settle disputes.<sup>149</sup> Corporate diplomacy is also about managing the non-market environment.<sup>150</sup> Thus, the “diplomatic”

dimension of ICA engenders questions regarding its “legal” quality. Hence, the next section looks at the relation of law to ICA.

## Law

The challenge of ICA is how it can and will maintain its independent and regulating force. Otherwise it is difficult to legitimise any form of coercion or limitation on freedom.<sup>151</sup> The effort to qualify ICA as a sort of law is linked to the necessity of legitimising ICA as a form of coercion. However, and arguably, if the legal system does not provide for rule of law through principle and precedent, one cannot justify limitation of freedom and the concurrent coercion,<sup>152</sup> in which case, can ICA, at least, be controlled by law if it is strictly not a law as such for the sake of coercion and limitation on disputing parties?<sup>153</sup> Or does ICA constitute merely an “informal law”—an ambiguous law—in the field of international commerce?

Law has a public nature. That is, “the pre-understanding that ‘law’, as far as we trust it, deals with the totality of concerns related to what is of ‘public interest’”.<sup>154</sup> The “public” nature of law connotes an asymmetric and an unequal aspect of the aforementioned relationship. That is, the requirement to protect the public interest leads to an unequal relationship because this protection takes place through a preponderant power—that is, public power. Inequality and the asymmetry of power—the principles of public law—are scattered and diffuse. In this context, every law is thus more or less “public law”, and this is also true of the international order as such. ICA, in turn, cannot avoid the “publicness” of the international order.

“Minimum and optimum public orders are the chief policy goals of the international legal process.”<sup>155</sup> Yet, there may exist an “elusive and unseizable nature of the public nature of law because of its field-related pursuit of special goods”.<sup>156</sup> Put in clearer terms, one can question the “publicness” of ICA because of its special good as pursued by private actors—that is, the private settlement

<sup>140</sup> Hubbard, “The New Diplomacy” (1927) 11 *Chinese Social and Political Science Review* 179, 184.

<sup>141</sup> Hubbard, “The New Diplomacy” (1927) 11 *Chinese Social and Political Science Review* 179, 194.

<sup>142</sup> Hubbard, “The New Diplomacy” (1927) 11 *Chinese Social and Political Science Review* 179, 194.

<sup>143</sup> Sherman and Eliasson, “Privatizing Commercial Diplomacy”, pp.3, 4, <http://economics.uwo.ca/centres/epri/colloquium/papers/sherman.pdf> [Accessed 1 September 2016].

<sup>144</sup> Sherman and Eliasson, “Privatizing Commercial Diplomacy”, pp.3, 4, <http://economics.uwo.ca/centres/epri/colloquium/papers/sherman.pdf> [Accessed 1 September 2016].

<sup>145</sup> Sherman and Eliasson, “Privatizing Commercial Diplomacy”, pp.3, 4, <http://economics.uwo.ca/centres/epri/colloquium/papers/sherman.pdf> [Accessed 1 September 2016].

<sup>146</sup> Sherman and Eliasson, “Privatizing Commercial Diplomacy”, pp.3, 4, <http://economics.uwo.ca/centres/epri/colloquium/papers/sherman.pdf> [Accessed 1 September 2016].

<sup>147</sup> Enric Ordeix-Rigo and Joao Duarte, “From Public Diplomacy to Corporate Diplomacy: Increasing Corporation’s Legitimacy and Influence” (2009) 53(4) *American Behavioural Scientist* 549, 562.

<sup>148</sup> Alberto Asquer, “What is Corporate Diplomacy? And, Why Does It Matter?” (2012) 4(3) *Journal of Multidisciplinary Research* 53, 56, 59.

<sup>149</sup> Asquer, “What is Corporate Diplomacy?” (2012) 4(3) *Journal of Multidisciplinary Research* 53, 56, 58.

<sup>150</sup> Ulrich Steger, *Corporate Diplomacy: The Strategy for a Volatile, Fragmented Business Environment* (Chichester: Wiley, 2003), pp.6, 17.

<sup>151</sup> Joost Pauwelyn, “The Rise and Challenges of ‘Informal’ International Law-Making”, FICHL Publication Series No.11 (2011), p.125.

<sup>152</sup> Pauwelyn, “The Rise and Challenges of ‘Informal’ International Law-Making”, FICHL Publication Series No.11 (2011), p.137.

<sup>153</sup> Pauwelyn, “The Rise and Challenges of ‘Informal’ International Law-Making”, FICHL Publication Series No.11 (2011), p.138.

<sup>154</sup> Gianluigi Palombella, “Global Legislation and Its Discontents” in Rain Liivoja and Jarna Petman (eds), *International Law-Making: Essays in Honour of Jan Klabbers* (Abingdon: Routledge, 2014), Ch.4, p.70.

<sup>155</sup> Steven Ratner, “Ethics and International Law: Integrating the Global Justice Project(s)” (2013) 5(1) *International Theory* 1, 6; S. Wiessner and A.R. Willard, “Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity” in S. Ratner and A. Slaughter (eds), *The Methods of International Law* (Washington, D.C.: American Society of International Law, 2004), p.47 at p.61.

<sup>156</sup> Palombella, “Global Legislation and Its Discontents” in *International Law-Making* (2014), p.72.

of international commercial disputes by private arbitrators. Nevertheless, it could be countered that private engagement does not necessarily interfere with the public nature of law. Actually, “governments have always relied on non-state actors to help execute public purposes”.<sup>157</sup> “Public-private collaborations have a long history.”<sup>158</sup> Thus, rather than looking at and emphasising the private dimension of the subject and the actors in ICA, one can look at the source of ICA to decide whether it constitutes law.

The source of the law could be defined as the reason for recognising something as law.<sup>159</sup> What is the source of ICA? Is it merely a commercial contract? Is it the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC), as ratified by a vast majority of the international community of states? In other words, “under what conditions do states back private arbitral tribunals for transborder commerce with public authority by ratifying the NYC?”<sup>160</sup>

The contract is so important in ICA that what is looked for in ICA is predictability in the execution of the singular contract rather than a consistent arbitral jurisprudence.<sup>161</sup> With this in mind,

“the law is not a control factor in arbitration; rather it is a facilitator if and when necessary and if invoked by one of the parties”.<sup>162</sup>

Indeed, more than the applicable law, contract interpretation with a view to finding the real intention<sup>163</sup> of the parties to the contract is important.<sup>164</sup> In other words, applicable law, to the extent it is applied, is interpreted in the light of the intention of the parties to the contract.<sup>165</sup> Indeed, international commercial contracts are most of the time written as exhaustively as possible in order to cover all relevant issues.<sup>166</sup> Every contract is

a self-standing document. There is no need to refer to a purported precedent. It suffices to look at the contract alone.

Moreover, one should not exaggerate the role of precedent for the establishment of law: “Not all law is formal, found in precedent and statute.”<sup>167</sup> The lack of binding precedent may merely mean that arbitrators do not feel responsible for the development of ICA as such but will be inclined to leave to governments, national courts<sup>168</sup> and the international business community any attempts at reform.<sup>169</sup> Thus, a sort of an analogy can be made with continental judges, who do not obey binding precedent rule. Still, in practice, arguably, both continental judges and international commercial arbitrators could be deemed to be less inclined to depart from precedent.<sup>170</sup>

Indeed, it is interesting to note that ICA tribunals may explicitly refer to a certain “international arbitration jurisprudence”, as seen in ICC Case No.12193.<sup>171</sup> In this case, the arbitral tribunal held that a certain “international arbitral jurisprudence” exists for determining the applicable law to the contract in the event that parties to the dispute have not determined the law to be applied. As regards the distribution contract which was at issue in this case, this “arbitral jurisprudence” was found to point to the place of the enforcement of the contract—that is, the place with which the contract has the closest relationship.<sup>172</sup> That is to say, the law of the place of the distributor’s business was determined to be the applicable law.

ICA has become a huge business. It is no longer the enclosed territory of a tiny club of elite scholars and lawyers. Arguably, this has led to a certain decline in the standards thereof.<sup>173</sup> Unwritten rules among a small elite—which are effective in a small group—cannot be the same as those in a larger group. The characterisation of ICA, at present, is all the more important as now the influence of peer pressure and simple honour have waned,

<sup>157</sup> Francis Fukuyama, *Political Order and Political Decay* (2014), p.520.

<sup>158</sup> Fukuyama, *Political Order and Political Decay* (2014), p.520: “In Europe, social services from population registration to poor relief were traditionally delivered by churches; those functions were absorbed into the state only in the twentieth century. English and Dutch colonialism was carried out by semiprivate organizations like their East India Companies, which worked in parallel with the government. Stein Ringen (*Nation of Devils: Democratic Leadership and the Problem of Obedience*, New Haven, Yale University Press, 2013, p.24–29) points out that the military governments ruling South Korea after 1961 nonetheless relied heavily on a variety of private organizations to carry out their policies, not just giant corporations like Samsung and Hyundai, but a welter of private voluntary associations as well.”

<sup>159</sup> Antonino Rotolo, “Sources of Law in the Civil War” in Roger A. Shiner (ed.), *Legal Institutions and the Sources of Law*, Vol.3 (Berlin: Springer, 2005), p.148.

<sup>160</sup> Thomas Hale, “The rule of law in the global economy: Explaining intergovernmental backing for private commercial tribunals” (2015) 21(3) *European Journal of International Relations* 483, 488.

<sup>161</sup> Laurent Levy and Fabrice Robert-Tissot, “L’interprétation Arbitrale” (2013) 4 *Revue de l’Arbitrage* 861.

<sup>162</sup> Julian D.M. Lew, “Achieving the Dream: Autonomous Arbitration?” in Loukas A. Mistelis and Julian D.M. Lew (eds), *Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration*, Vol.16 (Kluwer Law International, 2007), Ch.20, p.463.

<sup>163</sup> International Chamber of Commerce, International Court of Arbitration, Case No.10422 (2001), 2003, 1142, no.5.4. Kluwer Law International, 2009, pp.609–622. The case can also be found at <http://www.trans-lex.org/210422> [Accessed 1 September 2016]; Levy and Robert-Tissot, “L’interprétation Arbitrale” (2013) 4 *Revue de l’Arbitrage* 861, 873.

<sup>164</sup> Levy and Robert-Tissot, “L’interprétation Arbitrale” (2013) 4 *Revue de l’Arbitrage* 861.

<sup>165</sup> Levy and Robert-Tissot, “L’interprétation Arbitrale” (2013) 4 *Revue de l’Arbitrage* 861, 868.

<sup>166</sup> Levy and Robert-Tissot, “L’interprétation Arbitrale” (2013) 4 *Revue de l’Arbitrage* 861, 869.

<sup>167</sup> Kenneth S. Carlston, “Theory of the Arbitration Process” (1952) 17(4) *Law and Contemporary Problems* 631, 650.

<sup>168</sup> *Sun Life Assurance v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660; [2006] 1 All E.R. (Comm) 675 at [87], per Lord Justice Jacob: “(a) An arbitration is an essentially private matter between the parties to it ... (b) Because the determination of arbitrators is itself a private matter it is in its nature not intended to be available to third parties for any purpose. A third party’s rights against one of the parties to an earlier arbitration cannot depend on the happenstance of the availability of the details of that arbitration in a later arbitration involving that third party. In this connection I note that the position may be different if the earlier decision is that of a court. In particular a decision of a court as to the construction of a contract is a matter of law — with the consequence that the further principle of judicial precedent on such a question may come into play.”

<sup>169</sup> Rotolo, “Sources of Law in the Civil War” in *Legal Institutions and the Sources of Law* (2005), p.149 (here the interpretation of the notion of binding precedent—stare decisis—is made with regard to Anglo-American and continental judges).

<sup>170</sup> Rotolo, “Sources of Law in the Civil War” in *Legal Institutions and the Sources of Law* (2005), p.149.

<sup>171</sup> *Lebanese Distributor v German Manufacturer*, Final Award, ICC Case No.12193 (June 2004) in (2009) 1(2) *International Journal of Arab Arbitration* 453, para.26.

<sup>172</sup> *Lebanese Distributor v German Manufacturer*, Final Award, ICC Case No.12193, June 2004, in (2009) 1(2) *International Journal of Arab Arbitration* 453, para.27.

<sup>173</sup> David A.R. Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138.

suggesting that some other means must be found of protecting the ICA.<sup>174</sup> In this respect, viewing ICA as an idiosyncratic and informal branch of “law” could help.

There exists within the purported “law” of ICA the culture and the ideology of expertocracy. A certain expert dominance—in the guise of the arbitrator—is at issue. All the while, the expert is not required to fulfil specific national qualifications. The arbitrator does not have to be a lawyer. They need not have the nationality of the place of the arbitration. Indeed, many states strive to make it clear in their legislation that no nationality condition exists to appear in arbitrations in their territories.<sup>175</sup> Basically, the expert is deemed to have common sense—with or without legal education and with or without the nationality of the place of arbitration.<sup>176</sup>

Arbitrators embody the ultimate culmination of the expert ideology in international trade. Experts negotiate with each other in ICA. This negotiation does necessarily mean that the arbitral tribunal, for instance, should explain its own findings when they depart from the findings of the expert appointed by the tribunal.<sup>177</sup> Actually, this is in line with the purported judicial impartiality of international judges sitting on the permanent international courts and tribunals. There exists a certain faith in individual judgment and good faith, together with the trust in the due professional socialisation of judges.<sup>178</sup> There is a presumed trust in the judges. That is the case even more so with arbitrators; arbitrators are considered to be the ultimate experts. Trust—trust in the capacity and the autonomy of the arbitrators—is the intangible factor that allows the system to function.<sup>179</sup>

This ideology of the expert is pervasive to such an extent that sometimes it may be difficult to distinguish between an expert decision and an arbitration. This is seen in particular in construction and infrastructure arbitrations.<sup>180</sup> The purported arbitral clause may not be sufficiently clear to decide whether the parties, by having entered into a contract, have provided for an engineer’s (expert’s) decision or for arbitration for the settlement of their disputes. Thus, the wording of the arbitral clause in the contract is of utmost importance in order to distinguish between an expert decision and arbitration.

Actually, “arbitration is the aftermath of a contract”.<sup>181</sup> That is, “arbitration is an allowable extension of the sphere of contract”.<sup>182</sup> And ambiguity is acute when there is no explicit reference to arbitration in the contract. As a rule of thumb, if only three operative words exist in the arbitral clause—that the award will be “final”, “binding” and “conclusive”—then ICA may definitely be deemed to exist, rather than an expert decision.<sup>183</sup> Arbitration, therefore, is based on an expert who makes a final, binding and conclusive award.

Arguably, expertocracy is legitimate as long as it is “reflective” of the international community. That is, experts—arbitrators—need not democratically “represent” the international community as such. Indeed, arguably,

“the legitimacy of the international courts in general does ‘not’ stem from them being ‘representative’ of society, it stems from them being ‘reflective’ of society”.<sup>184</sup>

On this view, ICA could be considered as a “reflective” network for dialogue and negotiation among disputing parties. ICA is a modern network. Indeed, “modern networks have prospered, paradoxically, in ways that are profoundly inegalitarian”.<sup>185</sup> The real question then is: what kind of global society is being “reflected” and “not represented” by ICA?<sup>186</sup>

In this regard, arguably, ICA “reflects” a determined move from pure expertocracy towards arbitrocracy<sup>187</sup>—a qualified expertocracy. Arguably, international political and economic elites, in order to insulate trade policy-making and the implementation thereof from the vicissitudes of national and “representative” democratic politics, favour ICA. They help form a quasi-international arbitrocracy. The problem is not with national laws as such, but those national “representatives”—national judges, national legislatures and national executives—who make and apply national laws to disputes. The stakeholders of ICA do not opt for national judges but wish rather for their dispute(s) to be handled by international quasi-judges (i.e. arbitrators) who have different nationalities and legal backgrounds, but who possess a high level of expertise. Hence, ICA “reflects”

<sup>174</sup> Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138.

<sup>175</sup> Vanina Sucharitul, “Seoul: Trends in the Asia-Pacific Region”, *Global Arbitration Review*, 28 November 2014, p.4.

<sup>176</sup> Carlston, “Theory of the Arbitration Process” (1952) 17(4) *Law and Contemporary Problems* 631, 650: “The problem of communicating facts to an arbitrator can become enormously simplified, if he be skilled and expert in the field of the controversy.”

<sup>177</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.143.

<sup>178</sup> Frederic Megret, “International Judges and Experts’ Impartiality and the Problem of Past Declarations” (2011) 10 *Law and Practice of International Courts and Tribunals* 31, 66.

<sup>179</sup> Fukuyama, *Political Order and Political Decay* (2014), p.522.

<sup>180</sup> Shishir K. Dholakia, “Arbitration Agreement in Construction Contracts” (2012) 1(1) *Indian Journal of Arbitration Law* 9.

<sup>181</sup> Carlston, “Theory of the Arbitration Process” (1952) 17(4) *Law and Contemporary Problems* 631, 635.

<sup>182</sup> Carlston, “Theory of the Arbitration Process” (1952) 17(4) *Law and Contemporary Problems* 631, 635.

<sup>183</sup> Dholakia, “Arbitration Agreement in Construction Contracts” (2012) 1(1) *Indian Journal of Arbitration Law* 9, 12.

<sup>184</sup> Mikael Rask Madsen, “Understanding International Courts and Law as Practices: Contributions from Post-Bourdieuian Reflexive Sociology of Law”, LSE Law Collections, p.4, <http://www.lse.ac.uk/collections/law/sociological/Understanding%20International%20Courts%20and%20Law%20as%20Practices%20-%20Madsen%20paper.pdf> [Accessed 1 September 2016].

<sup>185</sup> Niall Ferguson, “Networks and Hierarchies” (6 October 2014), pp.1, 8, 9, <http://www.niallferguson.com/journalism/miscellany/networks-and-hierarchies> [Accessed 1 September 2016].

<sup>186</sup> Madsen, “Understanding International Courts and Law as Practices”, p.17, <http://www.lse.ac.uk/collections/law/sociological/Understanding%20International%20Courts%20and%20Law%20as%20Practices%20-%20Madsen%20paper.pdf> [Accessed 1 September 2016].

<sup>187</sup> For juristocracy, see, in general, Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge, MA: Harvard University Press, 2007).

and perpetuates that motivation. This raises the question whether ICA “reflects” a definable “culture”, distinct from national legal cultures.

## Culture

The “expertocracy-arbitocracy” perspective leads us to ask whether there is a specific “culture” of ICA. If the answer is affirmative, does this culture really influence the way in which national laws are interpreted by international arbitrators? For some commentators, the answers to both questions are in the affirmative,<sup>188</sup> if the basic assumption is that “there is no clear difference between creating and applying law, each law-applying act being also creative of law”.<sup>189</sup> This creative dimension of the application of law to the dispute leads to the emergence of a certain culture—whether international arbitrators do it deliberately or not.

If there exists a legal and social culture of ICA, this has to do with the specifics of the domain it regulates. In other words, first, ICA is a dispute settlement method among equals—no party is stronger than the other.<sup>190</sup> The private and equal relationship between parties is preponderant in the culture of ICA. This restricts considerably the intervention of the state for the sake of the protection of a party and reduces the public law dimension of ICA. Equality among disputing parties may lead to the toleration of isolation of the arbitral case from public international law or from a (purported) general international arbitral law.

ICA is concerned with private relationships among equals. Only under exceptional circumstances can national public policies intrude into this private domain. That is, for issues of morality, limitations by a certain transnational public policy are in place. Both state courts (in enforcing and setting aside arbitral awards) and international arbitral tribunals consider important ethical issues when arriving at decisions. These ethical matters could be about arms traffic, drug traffic, terrorism, bribery, protection of cultural goods and cultural heritage, protection of human rights or measures against racism.<sup>191</sup>

Every arbitration is a private affair between equals based on a specific transaction—that is, a contract. A contract between equals becomes the subject of ICA

owing to the malfunctioning of the contract or breaches thereof. Actually, the most important documentary evidence in ICA is the contract,<sup>192</sup> and no effect of binding precedent of this specific transaction exists.<sup>193</sup> Every contract and its dispute settlement are self-standing, which implies that every arbitration is a private matter. Arguably, in such private matters, the effective guarantee for security and consistency can come from the legal and social “culture” of international arbitrators, and the culture of ICA comprises transnational public policy. Arbitrators are to consider transnational public policy in order to secure the recognition and enforcement of their awards.<sup>194</sup>

Such a culture may be the sole reason for choosing ICA as a dispute settlement method. As no uniform substantive law of ICA exists, the “cultural” procedure employed in ICA emerges as the real reason for opting for this dispute settlement method. This culture compensates for the lack of a uniform substantive law in the arbitrators’ toolkit. In this sense, the procedure’s quality is important in that the procedure may “stymie the substantive ends of justice”.<sup>195</sup>

The ICA “culture” predisposes arbitrators to be comparativists. Even though the law to be applied by the arbitral tribunal is a specific national law, arbitrators still consider other national laws; their arbitral culture requires them to simultaneously take into consideration various national laws. Thus, arbitrators increase the legitimacy of the arbitral award from the viewpoint of parties who have different nationalities and national legal cultures.<sup>196</sup> Actually, arbitrators, in this respect, are somewhat self-standing actors of the ICA. They have considerable authority and space for manoeuvre in comparing, contrasting, interpreting and applying national laws to the dispute at hand.<sup>197</sup>

ICA is a reflection of private power the world over. Some even argue that ICA is the embodiment of the lawlessness of private government,<sup>198</sup> as ICA does not have its origin in a unified or coherent plan or programme.<sup>199</sup> It is a diffuse and civilised form of power.<sup>200</sup> Rather than a hierarchical order, ICA forms a network of constant pluralism, creativity and learning.<sup>201</sup> For example, “the transmission of pro-arbitration norms through legal networks seems to account best for the ratification of the New York Convention on the Recognition and

<sup>188</sup> Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (Oxford: Oxford University Press, 2013), pp.1–2.

<sup>189</sup> Rotolo, “Sources of Law in the Civil War” in *Legal Institutions and the Sources of Law* (2005), p.167.

<sup>190</sup> Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (2013), p.6.

<sup>191</sup> Aprigliano, “Homenagem a Pierre Lalive” (2014) 11(41) *Revista Brasileira de Arbitragem* 171, 221.

<sup>192</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.117.

<sup>193</sup> Prathima R. Appaji, “Arbitral Immunity: Justification and Scope in Arbitration Institutions” (2012) 1(1) *Indian Journal of Arbitration Law* 63, 65.

<sup>194</sup> *Seller (Turkey) v Buyer (Turkey)*, Final Award, ICC Case No.16168, in *Yearbook Commercial Arbitration* (2013), p.214, para.29, <http://www.kluwerarbitration.com> [Accessed 18 August 2016]: “When determining whether or not to apply a third country mandatory provision, the Arbitral Tribunal primarily considers whether its non-application would render the award unenforceable. Specifically, Article 35 ICC Rules provides that an arbitral tribunal shall make every effort to make sure that the arbitral award is enforceable at law.”

<sup>195</sup> Fukuyama, *Political Order and Political Decay* (2014), p.542.

<sup>196</sup> Karton, *The Culture of International Arbitration and the Evolution of Contract Law* (2013), p.139.

<sup>197</sup> Jens Meierhenrich, “The Practice of International Law: A Theoretical Analysis” (2013) 76(1) *Law and Contemporary Problems* 1, 21.

<sup>198</sup> Heinrich Kronstein, “Business Arbitration — Instrument of Private Government” (1944) 54(1) *Yale Law Journal* 36, 66.

<sup>199</sup> Kronstein, “Business Arbitration” (1944) 54(1) *Yale Law Journal* 36, 39.

<sup>200</sup> François Ost and Michel van de Kerchove, *De la pyramide au réseau: pour une théorie dialectique de droit* (Bruxelles: Publications des Facultés Universitaires Saint-Louis, 2002), p.13.

<sup>201</sup> Ost and Van de Kerchove, *De la pyramide au réseau* (2002), p.18.

Enforcement of Foreign Arbitral Awards<sup>202</sup> by so many states.<sup>203</sup> States have felt the need to integrate into the private world of ICA. The “private culture” of dispute settlement would appear to be irresistible.

Arguably, ICA is the confirmation of the fact that the state has never been in an omnipotent position.<sup>204</sup> The state, more or less, regulates social, economic and legal matters in co-operation with various actors. In the process, the state may devolve some of its powers to other actors. Governments may mask public functions as private initiatives subject to private law.<sup>205</sup> In this context, there is a public-private partnership of sorts—both explicit and implicit—inherent in ICA culture.

Granted, ICA actors—businesses, arbitrators and arbitral institutions—have obtained considerable powers. They have a certain autonomy vis-à-vis national laws and state institutions. Still, “a contract is valid because the substantive law of a sovereign state law applicable to the contract says that it is valid”.<sup>206</sup> Party autonomy exists and parties can provide for what they wish in their contract, but that is only because the applicable national law allows them to do so.<sup>207</sup> All in all, ICA reflects the culture of public-private partnership on an international scale, and this cultural partnership relies on one strong principle—that is, reasonableness.

## Reasonableness

ICA is a “dialogue” process in which continual learning and teaching among arbitrators and dynamic businesses take place. Early settlement—through “dialogue”—is encouraged in ICA. This is, indeed, apparent in the ICC Guide for In-House Counsel on Effective Management of International Arbitration<sup>208</sup>: “The ICC Guide encourages awareness of settlement options throughout the arbitration.”<sup>209</sup> For instance, early case assessment and the bifurcation of liability and damage phases are recommended as mechanisms that favour settlement.

Constant dialogue and adjustment in ICA lead to the formation of certain general principles and heuristics whereby ICA cements its own reasonableness.<sup>210</sup> Arbitral reasonableness consists of certain principles. For instance, the principle of good faith is an indispensable element in the evaluation and subsequent interpretation of contracts both during the pre-arbitral phase and during the arbitration itself.

Reasonableness may simply mean making “commercial sense”.<sup>211</sup> Actually, contract interpretation as a whole is to be made on a reasonable basis. For instance, in ICC Arbitration Case No.8128 (the *Chemical Fertilizer* case),<sup>212</sup> the real intentions of the buyer and the seller in a sales contract were interpreted through the manner in which a “reasonable person” would have understood the declarations and the conduct of both parties.<sup>213</sup> Likewise, where a high degree of communication and co-operation is required to make the relationship work, such as in franchise, joint venture and long-term distribution agreements, the principle of good faith plays a considerable role.<sup>214</sup> This is understandable in that this principle leads to the injection of honesty, fair dealing and fidelity into the parties’ bargain.<sup>215</sup> It induces the parties to act consistently with the justified expectations of the other party.<sup>216</sup>

The counter-argument is that where the commercial contract is weak, general principles of law emerge. The principle of good faith has less of an impact where the contract clearly indicates the terms of the bargain between the parties.<sup>217</sup> In other words, if contracts and treaties are poorly drafted, then general principles of law—such as the principle of good faith—conspicuously enter the stage. The criterion of good faith is aimed at preventing one of the parties to a treaty taking advantage of an ambiguous term.<sup>218</sup> Still, in deciding the “poor quality” of the contract and plugging the gap in the contract, reasonable commercial standards are taken into consideration. Reasonableness is thus diffuse and widespread.

<sup>202</sup> At present, the Convention has 156 state parties.

<sup>203</sup> Hale, “The rule of law in the global economy” (2015) 21(3) *European Journal of International Relations* 483, 506.

<sup>204</sup> Ost and Van de Kerchove, *De la pyramide au réseau* (2002), p.20.

<sup>205</sup> Eyal Benvenisti, “Coalitions of the Willing” and the Evolution of Informal International Law”, Tel Aviv University Law Faculty Papers, Paper 31 (2006), p.2.

<sup>206</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.245.

<sup>207</sup> Karrer, *Introduction to International Arbitration Practice* (2014), p.245.

<sup>208</sup> Sidley Austin LLP, “The ICC Launches New Guide for In-House Counsel on Effective Management of International Arbitration”, International Arbitration Update (12 June 2014), p.2, <http://www.sidley.com/news/the-icc-launches-new-guide-for-in-house-counsel-on-effective-management-of-international-arbitration-06-12-2014> [Accessed 1 September 2016].

<sup>209</sup> Sidley Austin LLP, “The ICC Launches New Guide for In-House Counsel on Effective Management of International Arbitration” (12 June 2014), p.2, <http://www.sidley.com/news/the-icc-launches-new-guide-for-in-house-counsel-on-effective-management-of-international-arbitration-06-12-2014> [Accessed 1 September 2016].

<sup>210</sup> Bhatia et al. (eds), *Arbitration Awards* (2012), p.11: “arbitrators tend to emphasize their authoritativeness and credibility, while at the same time endorsing their decisions with an aura of reasonableness and conclusiveness.”

<sup>211</sup> *Seller (Turkey) v Buyer (Turkey)*, Final Award, ICC Case No.16168, in Yearbook Commercial Arbitration (2013), p.218, para.52, <http://www.kluwerarbitration.com> [Accessed 18 August 2016]: “Contrary to Respondent’s allegation, the due dates for the partial shipments in the Contract are neither unclear nor intransparent but make commercial sense.” Para.53: “Advance payments are perfectly common in trade.”

<sup>212</sup> ICC Case No.8128, International Chamber of Commerce, International Court of Arbitration (1995) (English translation, second draft, translation by Serge Lapine), <http://cisgw3.law.pace.edu/cases/958128i1.html> [Accessed 1 September 2016].

<sup>213</sup> ICC Case No.8128, International Chamber of Commerce, International Court of Arbitration (1995), <http://cisgw3.law.pace.edu/cases/958128i1.html> [Accessed 1 September 2016].

<sup>214</sup> Travers Smith, “‘Good Faith’: What Does It Mean?” (July 2013), p.1, [http://www.traverssmith.com/media/1333036/good\\_faith\\_what\\_does\\_it\\_mean\\_july\\_2013.pdf](http://www.traverssmith.com/media/1333036/good_faith_what_does_it_mean_july_2013.pdf) [Accessed 1 September 2016].

<sup>215</sup> Travers Smith, “‘Good Faith’: What Does It Mean?” (July 2013), p.1, [http://www.traverssmith.com/media/1333036/good\\_faith\\_what\\_does\\_it\\_mean\\_july\\_2013.pdf](http://www.traverssmith.com/media/1333036/good_faith_what_does_it_mean_july_2013.pdf) [Accessed 1 September 2016].

<sup>216</sup> Travers Smith, “‘Good Faith’: What Does It Mean?” (July 2013), p.1, [http://www.traverssmith.com/media/1333036/good\\_faith\\_what\\_does\\_it\\_mean\\_july\\_2013.pdf](http://www.traverssmith.com/media/1333036/good_faith_what_does_it_mean_july_2013.pdf) [Accessed 1 September 2016].

<sup>217</sup> Travers Smith, “‘Good Faith’: What Does It Mean?” (July 2013), p.1, [http://www.traverssmith.com/media/1333036/good\\_faith\\_what\\_does\\_it\\_mean\\_july\\_2013.pdf](http://www.traverssmith.com/media/1333036/good_faith_what_does_it_mean_july_2013.pdf) [Accessed 1 September 2016].

<sup>218</sup> Manlio Frigo, “Free Circulation of Arbitral Awards and Interaction Between Structure of the Law and Structure of the Language” in *Arbitration Awards* (2012), p.18.

The international commercial community may be considered a high-trust society with a particular “culture” of its own. Reasonableness is an inherent value of such a society. Reasonableness is inherent to every stage of arbitration, which is a high-trust “dialogue”. In view of the contradictory assertions of the parties, arbitrators rely on common sense and the notion of reasonableness.<sup>219</sup> The balance of rights and obligations are interpreted in the light of “measures that a prudent and reasonable businessman would have taken”.<sup>220</sup> That is, the “reasonable” viewpoint of a prudent businessman is the benchmark in determining the necessary measures to be taken by economic operators.<sup>221</sup>

Good faith—as a principle under the rubric of reasonableness<sup>222</sup>—in fact can be implied in every contract concluded in the international commercial and business community, whatever the quality of the drafting and the clarity of the terms of the contract. The requirement of good faith connotes due diligence and legitimate expectations in the handling of business matters and in the treatment of business partners and associates. Thus, the principle of good faith is related to the political economy of the international business world.

The principle of good faith is also related to the concept of credibility in international transactions. For instance, in a Paris Chamber of Arbitration case, a seller of food products was found liable for not transmitting information regarding the risks of his products to the buyer on time, even though the damage to the food was uncertain<sup>223</sup>:

“The fact that the information was not processed with the promptness the relevant professional community could legitimately expect shows, on the part of seller as a professional in the food sector, a grave lack of organization in reacting promptly to an alert and suspicion in respect of goods it was marketing.”<sup>224</sup>

ICA may be conceptualised as a reflection of the political economy of law production,<sup>225</sup> which takes place where reasonable and credible deals can be made. Indeed, “economic exchange depends on the ability to make credible deals”.<sup>226</sup> This is all the more important as, arguably, few commercial transactions affect only the interested parties.<sup>227</sup> Every commercial transaction is a

reflection of the level of trust in society. The international society, as a whole, has an interest in the smooth functioning of commercial transactions. In this context, ICA’s significance with regard to the public interest can no longer be overlooked.<sup>228</sup>

Indeed, owing to public interest, national courts—the foremost representatives of public law—are on an equal footing with arbitrators as to the determination of jurisdictional matters.<sup>229</sup> In other words, “a state court at the seat of arbitration may order the arbitral tribunal to retain jurisdiction, disregarding their previous decision”.<sup>230</sup> “National laws of the place of arbitration and of the place of enforcement continue to play an important role in international arbitration”<sup>231</sup>—thanks to the need for interim measures and the recognition and enforcement of arbitral awards. That is, there is a continuous and inevitable interaction between national and international jurisdictions.<sup>232</sup> This means that ICA could not be deemed a mere “private system originating from the will of the parties”, but also “a distinct legal order operating side by side with national legal systems”.<sup>233</sup>

Indeed, the search for natural justice and reasonableness in the understanding and the interpretation of ICA may be seen in the interaction between national and international jurisdictions:

“International arbitration coexists with national laws and jurisdictions to the extent only that it is expected; and international law and comity require that national laws will recognize and support the international arbitration process.”<sup>234</sup>

ICA is the epitome of the interaction between national laws and international law, although it may be said that this international law in its general traits rather resembles comparative law.

Still, there is a conspicuous “public international law” dimension of ICA. For instance, the UNCITRAL (United Nations Commission on International Trade Law) Model Law<sup>235</sup> is adopted and incorporated into their national laws by many countries in order to cope with the developments in international arbitration. Many governments consider the UNCITRAL Model Law as a benchmark for the improvement of their national laws. The United Nations, the foremost organisation of public international law,

<sup>219</sup> *Exclusive Distributor (EU Country) v Manufacturer GmbH (EU Country)*, Final Award, Stockholm Chamber of Commerce Case, No.73/2011 (18 December 2013) in *Yearbook Commercial Arbitration* (2013), para.53 (accessible also at Kluwer Arbitration).

<sup>220</sup> *Buyer (Italy) v Seller (Germany)*, Final Award, ICC Case No.11440, 2003, in *Yearbook Commercial Arbitration* (2006), p.141, para.42.

<sup>221</sup> *Buyer (Italy) v Seller (Germany)*, Final Award, ICC Case No.11440, 2003, in *Yearbook Commercial Arbitration* (2006), p.142, para.43.

<sup>222</sup> *Distributor (Poland) and Daughter Company of Distributor (Isle of Man) v Manufacturer (Japan) and Manufacturer Europe (European Country)*, Final Award, ICC Case No.13730, p.97, para.44: “On the other hand, Respondents argue that the principle of good faith requires the observance of reasonable commercial standards of fair dealing and the exercise of legal rights in a non-abusive way.”

<sup>223</sup> *Seller (France) v Buyer (France)*, Final Award, 1 September 2009, *Yearbook Commercial Arbitration* (2010), pp.36–37, paras 16–17.

<sup>224</sup> *Seller (France) v Buyer (France)*, Final Award, 1 September 2009, *Yearbook Commercial Arbitration* (2010), p.37, para.16.

<sup>225</sup> Erin O’Hara O’Connor and Peter B. Rutledge, “Arbitration, the law market, and the law of lawyering” (2014) 38 *International Review of Law and Economics* 87.

<sup>226</sup> Hale, “The rule of law in the global economy” (2015) 21(3) *European Journal of International Relations* 483, 483.

<sup>227</sup> Kronstein, “Business Arbitration” (1944) 54(1) *Yale Law Journal* 36, 39.

<sup>228</sup> Kronstein, “Business Arbitration” (1944) 54(1) *Yale Law Journal* 36, 39.

<sup>229</sup> Giacomo Marchisio, “Jurisdictional Matters in International Arbitration: Why Arbitrators Stand on an Equal Footing with State Courts” (2014) 31(4) *J. Int. Arb.* 455.

<sup>230</sup> Marchisio, “Jurisdictional Matters in International Arbitration” (2014) 31(4) *J. Int. Arb.* 455, 472.

<sup>231</sup> Renata Brazil-David, “Harmonization and Delocalization of International Commercial Arbitration” (2011) 28(5) *J. Int. Arb.* 445, 466.

<sup>232</sup> Brazil-David, “Harmonization and Delocalization of International Commercial Arbitration” (2011) 28(5) *J. Int. Arb.* 445, 466.

<sup>233</sup> Marchisio, “Jurisdictional Matters in International Arbitration” (2014) 31(4) *J. Int. Arb.* 455.

<sup>234</sup> Lew, “Achieving the Dream” in *Arbitration Insights* (2007), Ch.20, p.485.

<sup>235</sup> See [https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998\\_Ebook.pdf](https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf) [Accessed 1 September 2016].

intervened for the sake of ICA. However, the developed laws of major arbitration countries do not have to rely upon the UNCITRAL Model Law because their laws continue to evolve with modern requirements owing to their frequent use in ICA.<sup>236</sup> If a country is a frequent seat of arbitration, its national law on arbitration develops.<sup>237</sup> These developed national arbitral laws become a source for law-making at an international level, as witnessed in the case of the UNCITRAL Model Law. The UNCITRAL Model Law is, indeed, inspired by “developed” national arbitration laws.

Nonetheless, owing to the possible difficulty of directly transposing the concepts and terms of strict national public law or public international law into ICA, the simplest and the most plausible bridge between them and ICA would appear to be the notion of “reasonableness”. ICA is thus a “reasonable” system. Actually, intervention by national courts in ICA in the name of “public policy” is limited to the extent that the arbitral process proceeds in a reasonable way. For instance, in order to challenge the validity of an arbitral award before national courts, a reasonable party should not have foreseen the type of reasoning adopted by the arbitral tribunal in the award.<sup>238</sup>

The New York Convention’s public policy exceptions to the recognition and the enforceability of foreign arbitral awards should be seen in the light of “reasonableness”. As a principle, it is presumed that any arbitral tribunal is reasonable in the conduct of proceedings. Arbitral awards are thus, purportedly, “appropriate”. The contrary should be proved in order to successfully challenge and set aside the arbitral award before the national court. As a matter of fact, “in the context of transborder dispute resolution, the dominant mechanism is a logic of legal appropriateness”<sup>239</sup>—that is, “reasonableness”. This is confirmed by a public international law instrument—the New York Convention.

Trust in the reasonableness and the concurrent common sense of the arbitrator is such that the arbitrator can make its own value judgment between the extremes as presented by the parties to the arbitral tribunal<sup>240</sup>: “Arbitrators make their own assessments of evidentiary weight and credibility.”<sup>241</sup> In this regard, there exists the autonomy of the arbitrator vis-à-vis the parties.<sup>242</sup> Tellingly, in the case *Commonwealth Coatings v Continental Casualty*,<sup>243</sup>

the US Supreme Court held arbitrators to be subject to stricter requirements of independence and impartiality than judges of national courts, since arbitral awards may not be appealed.<sup>244</sup>

In this respect, national laws may adopt different approaches to ICA awards as issued by reasonable and powerful arbitrators. For instance, a national court may enforce an arbitral award which has been set aside by another (foreign) national court. This stems from the purported reasonableness of the arbitrator. One national court may deem the arbitrator reasonable, while the other may not. Thus, the perceived breach of the boundaries of legitimate expectations and propriety—two criteria of reasonableness—constitutes the real criterion for intervention into arbitration by the national court. Only when reasonableness is breached should actual prejudice to a party be deemed to have taken place<sup>245</sup>—justifying the setting aside of the arbitral award.

In other words, national courts do not intervene in arbitration without “good reason”.<sup>246</sup> This good reason could be defined as the flagrant breach of natural justice:

“An award should be read generously such that only meaningful breaches of the rules of natural justice that have actually caused prejudice are ultimately remedied.”<sup>247</sup>

Thus, minor errors or non-prejudicial mistakes of the due process should not be causes for setting aside the award. Intervention should come when preserving party autonomy and the promotion of procedural fairness are at issue<sup>248</sup>—two important issues of reasonableness. Thus, the arbitrators’ divergent legal reasoning(s) and legal characterisations which differ from the characterisation by the parties to the dispute, or the arbitrators’ completely novel characterisations and interpretations of the dispute, are permissible so long as due process and natural justice are respected.<sup>249</sup>

Reasonableness, in fact, is a concept denoting the reality of adjudication. Indeed, “where there is no clear pre-existing rule, the judge must thus make a new rule”.<sup>250</sup> A lack of clear a priori rules should not shake the system. The guarantee for the sustainability of the system is found in the reasonableness of the international judge: “Judges thus will tend to follow earlier decisions, and package

<sup>236</sup> Rizwan Hussain, “International Arbitration — Culture and Practices” (2013) 9(1) *Asian International Arbitration Journal* 1, 11.

<sup>237</sup> Hussain, “International Arbitration” (2013) 9(1) *Asian International Arbitration Journal* 1, 13.

<sup>238</sup> Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138, 165.

<sup>239</sup> Hale, “The rule of law in the global economy” (2015) 21(3) *European Journal of International Relations* 483, 497.

<sup>240</sup> *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 N.Z.L.R. 452 HC NZ; Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138, 165.

<sup>241</sup> *Trustees of Rotoaira Forest Trust* [1999] 2 N.Z.L.R. 452.

<sup>242</sup> The English Supreme Court ruled that arbitrators are not the employees of the parties: *Jivraj v Hashwani* [2011] UKSC 40, [2011] 1 W.L.R. 1872, on appeal from (2010) EWCA Civ 712, [2011] 1 All E.R. 50; Hussain, “International Arbitration” (2013) 9(1) *Asian International Arbitration Journal* 1, 27.

<sup>243</sup> *Commonwealth Coatings v Continental Casualty* 393 U.S. 145, 149 (1968); Hussain, “International Arbitration” (2013) 9(1) *Asian International Arbitration Journal* 1, 26, citing Julian D.M. Lew, Loukas A. Mistelis and Stefan M. Kroll, *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), p.257.

<sup>244</sup> Hussain, “International Arbitration” (2013) 9(1) *Asian International Arbitration Journal* 1, 26.

<sup>245</sup> Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138, 166.

<sup>246</sup> *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd* [2007] SGCA 28, 1 S.L.R.(R) 32 Singapore CA at [59]; Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138, 167.

<sup>247</sup> *Trustees of Rotoaira Forest Trust* [1999] 2 N.Z.L.R. 452 at 463.

<sup>248</sup> Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138, 167.

<sup>249</sup> Williams, “Defining the Role of the Court in Modern International Commercial Arbitration” (2014) 10(2) *Asian International Arbitration Journal* 138, 177.

<sup>250</sup> Tom Ginsburg, “International Judicial Lawmaking”, p.3, SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=693861](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=693861) [Accessed 1 September 2016].

their decisions as self-evident, deductive extensions of pre-existing law.”<sup>251</sup> They create the impression of consistency in an ambiguous environment. This is all the more true of international arbitrators. ICA can claim its capacity and resourcefulness to resolve disputes by basing itself on the principle of “reasonableness”.

## Conclusion

ICA may be identified as a “dialogue”. It integrates dispute settlement methods, arbitrators, national judges and national laws into this dialogue. Thanks to universal

expertocracy, ICA also has a universal dimension. Experts—namely arbitrators—put this dialogue into action. Owing to the difficulty of qualifying ICA as a purely legal process, it helps to qualify it partially as a form of private diplomacy. Indeed, ICA reflects the culture of the public-private partnership on a global scale—it has both private and public dimensions. This partnership is feasible thanks to the “reasonableness” inherent in ICA, an “arbitral reasonableness” that has its origins in the international business community, which requires a high level of trust for the smooth functioning of international commercial transactions.

<sup>251</sup> Ginsburg, “International Judicial Lawmaking”, p.4, SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=693861](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=693861) [Accessed 1 September 2016], citing Martin Shapiro, “A Theory of Stare Decisis” (1972) 1 *Journal of Legal Studies* 125; Alec Stone Sweet, “Judicial Authority and Market Integration in Europe” in Tom Ginsburg and Robert Kagan (eds), *Institutions and Public Law: Comparative Approaches* (New York: Peter Lang Publishing, 2005), pp.93, 99; Vaughan Lowe, “The Politics of Lawmaking: Are the Method and Character of Norm Creation Changing?” in Michael Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (Oxford: Oxford University Press, 2000), p.215.

# An Interactional Account of Legality and Adjudication in the WTO: Part 1

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Ⓒ Adjudication; Dispute resolution; Fairness; Jurisprudence; World Trade Organisation

## Introduction

At first glance, evaluating the legal character of the World Trade Organization (WTO) Dispute Settlement Body's (DSB) rules in accordance with the Fullerian principles of legality might seem a curious approach.<sup>1</sup> One might ask why, after almost 20 years of operation, the legality of the WTO dispute settlement system should be probed, as WTO Member States' extensive use of the system shows a clear indication of its legal validity and presumed legitimacy. However, examining the following references to scholarship and compliance records, which focus on the quality and timeliness of compliance actions (with particular emphasis on the lack of settling consultation and high profile disputes), the premise of this article, that the DSB system is "ineffective", is not inexplicable. Furthermore, the WTO is facing a crisis of legitimacy, as manifested by the negotiation impasse in the area of institutional reform, which has had a detrimental impact on this issue: the undetermined legal status of the DSB rules, the Dispute Settlement Understanding (DSU).<sup>2</sup> A legitimacy deficit reduces the WTO's ability to liberalise trade or maintain rules, and eventually leads to widespread non-compliance by Member States with their WTO commitments.<sup>3</sup> It is noteworthy that recurring instances of non-compliance stemming from unresolved institutional or textual defects would be against the core purpose of the WTO.<sup>4</sup> Although full operation of and extensive reliance on the DSB show that Member States trust the WTO dispute settlement system, as will be argued below, this does not mean that the enforcement system does not require improvement and clarification.

Thus, examining the system's legality by analysing its rules, procedures and compliance record is a rational research strategy.

However, any discussion of the WTO compliance regime must proceed from the premise that the WTO functions are not divisible from each other, or insular, requiring individual evaluation. That is, the overuse of one mechanism, for example, by pressuring the DSB to legislate while adjudicating, indicates that other mechanism(s) are not functioning to serve their purposes adequately.<sup>5</sup> The Doha Development Round (DDR) impasse and the weakness of the Trade Policy Review Mechanism (TPRM), which have had detrimental effects on the DSB in terms of the revision of DSU, and its inability to facilitate interactions based on WTO law, testify to the overuse problem.<sup>6</sup> This highlights the need for a newer concept of international law to fully address the WTO defects that hamper the organisation's legitimacy and its core prompt compliance with the "trade rule of law" ideal.

The WTO was founded originally to secure effective compliance with world trade rules and rulings, which its predecessor, the General Agreement on Tariffs and Trade (GATT), failed to accomplish.<sup>7</sup> The interactional international law theory analytical framework (interactionalism), which comprises the elements of "shared understandings, principles of legality, and practice of legality", can provide a comprehensive account of WTO compliance rules.<sup>8</sup> Interactionalism's "realm of law" comprises practices that meet Fuller's eight principles of legality, and can be applied to test the legality of an individual set of rules as well as a system of rule-making.<sup>9</sup> Using the fictional character of the hapless King Rex, Fuller spoke of "eight ways to fail to make a law".<sup>10</sup> These practices then contradict the following eight constitutive elements of legality, namely, using David Luban's terminology:

1. Generality: laws must take the form of general rules.
2. Publicity: laws must be published and cannot be secret.
3. Clarity: laws must be comprehensible and not overly vague.
4. Consistency: laws must not contradict one another.
5. Feasibility: it must be possible for people to comply with the law.

<sup>1</sup> The Fullerian principles were developed by the jurist Lon L. Fuller as "the inner morality of law criteria"; they can be regarded as the eight constitutive elements of legality: see Lon L. Fuller, *The Morality of Law*, rev. edn (New Haven, CT: Yale University Press, 1969), pp.197–200.

<sup>2</sup> See Manfred Elsig, "The World Trade Organization's Legitimacy Crisis: What Does the Beast Look Like?" (2007) 41 J.W.T. 75; Daniel Esty, "The World Trade Organization's Legitimacy Crisis" (2002) 1 World T.R. 7.

<sup>3</sup> See Joshua Meltzer, *The Legitimacy of the World Trade Organization* (Oxford: Hart Publishing, 2010).

<sup>4</sup> C. Birkbeck, "Reinvigorating Debate on WTO Reform: The Contours of a Functional and Normative Approach to Analysing the WTO System" in Debra Steger (ed.), *Redesigning the World Trade Organization for the Twenty-first Century* (Waterloo: Wilfrid Laurier University Press, 2010), p.15.

<sup>5</sup> See Craig VanGrasstek, *The History and Future of the World Trade Organization* (Geneva: World Trade Organization, 2013), p.557.

<sup>6</sup> See Bernard Hoekman and Petros Mavroidis, "WTO Dispute Settlement, Transparency and Surveillance" (2000) 23 World Econ. 527.

<sup>7</sup> See Dispute Settlement Proposal, MTN.GNG/NG13/W/30 (10 October 1988), Stanford GATT Digital Library, <http://sul-derivatives.stanford.edu/derivative?CSNID=92060026&mediaType=application/pdf> [Accessed 1 September 2016].

<sup>8</sup> Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge: Cambridge University Press, 2010), pp.96–97; Robert Wolfe, "See You in Geneva? Legal (Mis)Representations of the Trading System" (2005) 11 Eur. J. Int. Rel. 339.

<sup>9</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), p.86.

<sup>10</sup> Fuller, *The Morality of Law* (1969), pp.33–34.

6. Constancy: the law must not change too rapidly.
7. Prospectivity: the law cannot be retroactive.
8. Congruence: the law must be administered and enforced as it is written.”<sup>11</sup>

By relying on these elements, especially “the congruence between official action and the law”, Brunnée and Toope explain the three interrelated components of interactionalism as follows:

“Interactional law only emerges when [the political and legal] *shared understandings* become fused with a ‘*practice of legality*’, rooted in *Fuller’s eight criteria of legality* and embraced by a community of practice that adheres to those criteria in day-to-day decision-making ... the criteria come alive when actors reason with the rules in continuing process of mutual engagement, creating a community of legal practice.”<sup>12</sup>

Hence, the development of interactionalism’s realm is dependent on the existence of shared understandings that “are relevant to law’s intelligibility and to perceptions of reasonableness”.<sup>13</sup> To uphold the ideal of “fidelity” to the law, legality must be practised through rules and practices that conform with the principles of legality.<sup>14</sup> Interactionalism will be adopted here to explicate the dynamism of international trade obligations and explain how these obligations should be effectively enforced.<sup>15</sup> The discussion of the WTO/DSB issues, such as judicial activism, whether the GATT/WTO rules should be collectively enforced, and whether the DSU should be revised for clarity, will always involve issues of rule-making “negotiation” and supervision. In interactionalism, three interrelated elements can explain the interdependency between WTO functions, and the optimal ways of maintaining and performing WTO obligations.

Specifically, however, interactionalism is relevant for analysing WTO law because of Fuller’s jurisprudential insights on legality and adjudication. Because of his background in economics, Fuller based his jurisprudence on the interactional legal obligations founded in trade law. His writings on the forms and limits of adjudication continue to be the most elaborate on this topic.<sup>16</sup> He regarded “legality” as a gradual concept whose existence and survival depend on meeting and maintaining the legality principles.<sup>17</sup> When applied to test the legality of an international system of rules, Fuller’s principles are able to “force a clear-headed assessment of the posited

rule” to distinguish between a legal rule and a social rule that has become legal over time, depending on the level and type of interaction.<sup>18</sup> The purpose of this article is to invoke Fuller’s notions of legality and adjudication to evaluate the DSB constructively. The application of Fuller’s jurisprudence to the WTO law will illuminate the ideal of “procedural fairness” that the WTO, including the DSB, is intended to uphold.

This article is structured as follows. The first part will investigate the WTO/DSB “effectiveness” claim, by probing the DSB compliance record and associated procedures. The second part will argue for the application of Fuller’s conceptions of adjudication and legality to the DSB. However, before applying the principles of legality to adjudication in the WTO context, it is helpful to evaluate the claim that the performance of the DSB is successful.

### An investigation of the WTO dispute settlement system

In a new WTO publication to commemorate the organisation’s 20th anniversary, a chapter entitled “The Dispute Settlement — Clarifying Rules and Resolving Disputes” maintains that the WTO/DSB is the most active international adjudicative body as measured by case load.<sup>19</sup> The chapter states that, from 1995 to 2015, the WTO/DSB had issued 300 reports (judgments), and in terms of accessibility, “to date developing country members have initiated 226 disputes compared to the 292 initiated by developed country members”.<sup>20</sup> The chapter proclaims that

“the fact more disputes are coming to the WTO reflects a growing faith in the system, and the increasing importance members attach to the rule of law in international trade relations”.<sup>21</sup>

The section of the WTO website pertaining to dispute settlement is particularly revealing, especially in terms of chronological order and the current status of disputes.

To date, the DSB has dealt with 509 disputes, which can be broken down as follows: currently in consultation (152 disputes); implementations notified by respondents (89 disputes); reports adopted with recommendation to bring measure(s) into conformity (34 disputes); and settled or terminated (withdrawn, or mutually agreed solution found) (96 disputes).<sup>22</sup> So, when we add to the categories of implementations notified/settled or terminated the number pertaining to the category of reports adopted, no

<sup>11</sup> David Luban, “The Rule of Law and Human Dignity: Re-examining Fuller’s Canons” (2010) 2 H.J.R.L. 29.

<sup>12</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), p.86 (emphasis added).

<sup>13</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), p.68.

<sup>14</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), pp.96–97.

<sup>15</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), pp.96–97.

<sup>16</sup> See Lon Fuller, “The Forms and Limits of Adjudication” (1978) 92 H.L.R. 353.

<sup>17</sup> Fuller, *The Morality of Law* (1969), pp.39, 91–94.

<sup>18</sup> Jutta Brunnée and Stephen Toope, “History, Mystery, and Mastery” (2011) 3 Int. T. 348.

<sup>19</sup> World Trade Organization, *The WTO at Twenty: Challenges and Achievements* (Geneva: World Trade Organization, 2015), p.61, [https://www.wto.org/english/res\\_e/booksp\\_e/wto\\_at\\_twenty\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf) [Accessed 1 September 2016].

<sup>20</sup> WTO, *The WTO at Twenty* (2015), p.61, [https://www.wto.org/english/res\\_e/booksp\\_e/wto\\_at\\_twenty\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf) [Accessed 1 September 2016].

<sup>21</sup> WTO, *The WTO at Twenty* (2015), p.61, [https://www.wto.org/english/res\\_e/booksp\\_e/wto\\_at\\_twenty\\_e.pdf](https://www.wto.org/english/res_e/booksp_e/wto_at_twenty_e.pdf) [Accessed 1 September 2016].

<sup>22</sup> WTO, “Current Status of Disputes”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm) [Accessed 1 September 2016].

further action(s) required (29 disputes), it can be found that out of the 509 disputes, only 214 disputes had been finalised. Some of them had been completed with or without the DSB help, because some of the settled or terminated disputes had been finalised by WTO members' own deliberations.<sup>23</sup> The remaining pending 295 disputes have been proceeding very slowly through the process, and some of them came to a standstill, delayed for very long time such as most of the consultations.

Notwithstanding these statistics, there are two narratives can be applied to the statement that the mere initiation of disputes "reflects a growing faith in the system". The first narrative suggests that seeking the help of the DSB to settle disputes clearly reflects the Member States' trust in the system and the importance they and the DSB adjudicators attach to the rule of law.

However, the second raises the suggestion that this heavy caseload with (less than half of the disputes settled), raises two problems: (1) Member States' misinterpretation of GATT/WTO rules; (2) the DSB's lack of early settlement and quality judgments. The first problem is manifest in the 509 complaints, which cover almost all WTO agreements, with the GATT 1994 being the most cited in 414 disputes.<sup>24</sup> According to Chayes and Chayes, in international relations, rather than from deliberate disregard, non-compliance often results from either "norm ambiguities" and/or "capacity limitations".<sup>25</sup> The first of these, norm ambiguities, relates to the formation of norms and the shared understandings that a norm requires to be adopted as a socially acceptable standard of conduct. In the literal sense, the word "dispute" connotes the following: heated argument, contention and a difference of opinion.<sup>26</sup> These terms of dispute reflect the difficulties WTO Member States experience when dealing with each other, and when interpreting GATT/WTO rules. Interactionalism maintains that norms must be socially constructed, starting with bottom-up interactions that involve all concerned actors in their formation and application.

However, if the norms ambiguities factor is taken at face value, the complaints come to represent a deeper problem, suggesting that almost all consenting states misapprehend GATT/WTO norms. Certainly, it would not be necessary for a member to initiate a dispute if the concerned agreements and DSU rules were intelligible, feasible and followed by officials. Thus, further studies of the type of agreements cited, and the way they are interpreted, are needed to explain the activism

surrounding the DSB, and its failure to deliver quality judgments in a timely fashion. Once more, the DSB statistics are revealing. For example, if through the accession process Member States have properly understood and internalised the GATT rules for optimal compliance, then disputes would be predicted to be few.

Both the GATT and WTO founding Agreements stipulate under GATT arts XXVI and XXIV:12, and WTO arts XIV and XVI:4, that upon acceptance and entry into force consenting states must implement the GATT/WTO concessions and obligations. Moreover, annexed to the WTO Agreement, a number of texts issue "understandings" on specific GATT provisions, such as art.II:1(B) on "schedules of concessions" and art.XXIV on "regional trade agreements". Nevertheless, since the establishment of the WTO, the GATT has been cited in 414 cases, starting with requests for consultations, with the non-discrimination principles of national treatment under art.III:4 being the most cited in 95 disputes, followed by the most favoured nation principle under art.I, cited in 86 disputes.<sup>27</sup> Had consenting states understood and internalised the rules, by instructing national authorities and courts to observe GATT/WTO concessions and obligations, there would be no reason to initiate 414 disputes on the most basic rules of the GATT.

It might be claimed that mere "initiation of consultation" is intended to exact assurances from the DSB and concerned members on the GATT rules for "optimal observance"; in this case, the large number of disputes shows that the DSB has a central role in facilitating trade norms. However, the DSB is not the only enforcement mechanism; the TPRM is also available and primarily concerned with the task of norms facilitation. According to the DSU art.3:7, "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute" that has arisen because of conflicting interpretations of the provision(s) of the GATT/WTO rules. Under international dispute settlement procedure, the reason for the "initiation of consultation" is that one state has anticipated that "a decision or a proposed course of action may harm" its rights and obligations, and therefore consultation can be "a way of heading off a dispute" by engaging in a dialogue with the offending state to find a mutual solution.<sup>28</sup>

<sup>23</sup> However, Alschner has said: "By offering a negotiated solution to hard cases, mutually agreed solutions (MAS) have added stability to the multilateral trading system. MAS, however, also raise concerns. Settlements favour the instant resolution of disputes, but may conflict with third party interests and collective stakes. Where WTO members use their MAS to contract out of WTO law ("WTO+/"WTO-MAS), the multilateral trading system may be at risk. In addition, new forms of bilateral (interim-)settlements not foreseen in the DSU have recently emerged which currently escape multilateral disciplines": W. Alschner, "Amicable Settlements of WTO Disputes: Bilateral Solutions in a Multilateral System" (2014) World T. R. 65. See Gregory Shaffer et al., "The Law and Politics of WTO Dispute Settlement" (March 2016), SSRN, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2748883](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2748883) [Accessed 1 September 2016].

<sup>24</sup> WTO, "Resolving Trade Disputes Between WTO Members", [https://www.wto.org/english/thewto\\_e/20y\\_e/dispute\\_brochure20y\\_e.pdf](https://www.wto.org/english/thewto_e/20y_e/dispute_brochure20y_e.pdf) [Accessed 1 September 2016].

<sup>25</sup> Abram Chayes and Antonia Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, MA: Harvard University Press, 1995), p.3.

<sup>26</sup> See "Dispute" entry in Oxford English Dictionary, Angus Stevenson (ed), Oxford Dictionary of English (Oxford University Press 2010) p.506.

<sup>27</sup> In third place, GATT art.XI on General Elimination of Quantitative Restrictions was cited in 76 disputes; in fourth place, art.III was cited in 73 disputes; and in fifth place, art.II on Schedules of Concession was cited in 67 disputes. See WTO, "Disputes by agreement", [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=49](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=49) [Accessed 1 September 2016].

<sup>28</sup> J. Merrills, *International Dispute Settlement*, 5th edn (Cambridge: Cambridge University Press, 2011), p.2.

The WTO affirms the legal basis of consultation, stipulating that “the request for consultations formally initiates a dispute in the WTO and triggers the application of the DSU”.<sup>29</sup> Furthermore, the WTO also acknowledges that

“a majority of disputes so far in the WTO have not proceeded beyond consultations, either because a satisfactory settlement was found, or because the complainant decided for other reasons not to pursue the matter further”.<sup>30</sup>

Despite this statement, the reality is that the “majority” of disputes are unresolved. In most consultations the DSB has not been notified of a mutually agreed solution, and complainants’ reasons for not requesting a panel are unknown. This implies a number of reasons, the most obvious of which is that despite the “good office, conciliation and mediation” procedures for facilitating consultation, the complainants still lack the legal capacity to find a solution or proceed to litigation.

Therefore, under DSB procedures, the large number of unresolved disputes involving the basic rules of the GATT, and other rules stated in WTO specialised agreements, highlight two problems, the weaknesses of the DSB, and the ambiguities of the GATT/WTO rules.<sup>31</sup> The rules of the GATT and WTO “founding” Agreements largely instantiate Fuller’s principles of legality; aside from the principle of promulgation that the WTO has effectively satisfied, these principles largely remain an aspirational ideal to uphold the system’s morality. The principles of legality have to be satisfied by all GATT/WTO rules, including the DSU, to inspire “fidelity” to law. The fundamental notion of fidelity cannot be measured merely by the large number of disputes brought before the DSB, but by the least number of disputes.

Understandably, disputes are more likely to arise in a society where its members have willingly engaged in the enterprise of subjecting their conduct to the governance of rules.<sup>32</sup> However, an appropriate measurement of the success of these rules depends on their ability to inspire full adherence and continuous practice. Conversely, delayed implementation or non-compliance suggest that the rules are ineffective. Moreover, the notion of fidelity connotes the fundamental term of “reciprocity” in relation to the idea of interaction internal to the concept of law. The WTO is founded on the principle of reciprocal obligations, yet a large number of disputes concerning

the most basic of these obligations, such as the article on schedules of concession and non-discrimination, show that they are not fully understood, with the result that fidelity to law is frustrated.

This key problem of misapprehension of rules, combined with the failure of the WTO function of negotiation, reveals the unsurprising truth that the only truly effective organs of the WTO are its specialist committees. It is contended that these committees that play a role in the function of the “oversight of rule” should not judicialise trade relation rules, where ambiguous norms have exhausted the functions of negotiations and enforcement. Moreover, if, as claimed, vague WTO norms are the cause of judicial activism, then the absence of precise treaty texts often leads to intrusive rulings and recommendations from the DSB Panel and Appellate Body (AB).<sup>33</sup> A proposed solution here is that the history of WTO negotiations should be compiled “to guide AB’s approach to ambiguous treaty texts”.<sup>34</sup> Although the DSB is bound by the Vienna Convention on the Law of Treaties (VCLT), which refers to “negotiating instruments” for interpretation, the AB rarely refers to such instruments to finalise the disputes.

The ambiguous GATT/WTO norms remain the main cause of prolonged dispute-related deliberations between Member States, and the lack of clear and conclusive DSB rulings and recommendations. This analysis is open to criticism, and cannot be fully understood unless one looks at how the DSB, tries and often fails to settle disputes. The aforementioned discussion on consultations leads naturally to the second problem of the DSB effectiveness claims, namely the lack of early settlements and quality judgments. This issue has to be deconstructed by distinguishing between two types of cases, those relating to pre-Panel, and those relating to post-ruling procedures. With regard to the latter, after examining the data for requests for consultation one observer noted that “a vast majority of WTO members simply do not channel their trade disputes through the Dispute Settlement Understanding”.<sup>35</sup> This is an accurate claim, especially when one considers the startling number of requests for consultation that are not settled in a timely manner.

In 2015 the WTO rightly claimed that “110 disputes have been resolved bilaterally or withdrawn” and that just “282 disputes have proceeded to the litigation phase”, meaning the Panel and AB review.<sup>36</sup> However, this evidence contradicts another revealing WTO statistic, which reveals that some disputes have been in

<sup>29</sup> WTO, “The Process – Stages in a Typical WTO Dispute Case: Consultation”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c6s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s2p1_e.htm) [Accessed 1 September 2016].

<sup>30</sup> WTO, “The Process – Stages in a Typical WTO Dispute Case: Consultation”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_settlement\\_cbt\\_e/c6s2p1\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c6s2p1_e.htm) [Accessed 1 September 2016].

<sup>31</sup> Murray Smith, “Accession to the WTO: Key Strategic Issues” in Jeffrey Schott (ed.), *The World Trading System: Challenges Ahead* (Washington, DC: Peterson Institute, 1996), p.180; Sam Laird and Raymund Valdes, “The Trade Policy Review Mechanism” in Amrita Narlikar et al. (eds), *The Oxford Handbook on The World Trade Organization* (Oxford: Oxford University Press, 2012), p.482.

<sup>32</sup> This is a paraphrase of Fuller’s notion of law as “the enterprise of subjecting human conduct to the governance of rules”: see Fuller, *The Morality of Law* (1969), p.74.

<sup>33</sup> Intrusive interpretations are usually found in the AB adjudication of anti-dumping rules: see Susan Esserman and Robert Howse, “The WTO on Trial” (February 2003), <http://www.steptoe.com/assets/attachments/1236.pdf> [Accessed 16 August 2016].

<sup>34</sup> Esserman and Howse, “The WTO on Trial” (February 2003), <http://www.steptoe.com/assets/attachments/1236.pdf> [Accessed 16 August 2016].

<sup>35</sup> Geraldo Vidigal, “WTO: The First 500 Disputes and the Last 100 Disputes”, *EJIL: Talk!* (11 November 2015), <http://www.ejiltalk.org/wto-the-first-500-disputes-and-the-last-100-disputes/> [Accessed 1 September 2016].

<sup>36</sup> WTO, “WTO Disputes Reach 500 Mark”, [https://www.wto.org/english/news\\_e/news15\\_e/ds500rfc\\_10nov15\\_e.htm](https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm) [Accessed 1 September 2016].

consultation since 1995. Of these, some concern requests for consultation on the same issue; for example, in 1995, Canada, Uruguay and Thailand requested consultations with the European Community (EC) on the duties it imposed on imports of rice and cereal.<sup>37</sup> It seems that neither the DSB, nor the EC as a major trading bloc, have been troubled by such an alleged anticipation of violation of GATT/WTO rules; hence, consultations have been adjourned (or are ongoing, if borne out by the data) for 20 years. According to the DSU art.4:7,

“If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel”.

One explanation for Member States not proceeding to litigation is because, in terms of the time, money and legal and non-legal expertise required, litigation is a costly pursuit. This does imply an “anticipation of violation” that clearly connotes a lack of understanding of the rules, meaning that there is a lack of “a practice of legality” with regard to adherence to the GATT/WTO rules. In terms of the weakness of post-Panel and AB rulings procedures, the WTO statistics again offer a helpful illustration. DSU rules have been cited in 15 disputes in the requests for consultation phase, with DSU art.23 on “strengthening of multilateral system” being the most cited in 7 disputes, followed by art.22 on “compensation and suspension of concessions in 6 disputes”.<sup>38</sup> The DSU *consultation* article (4) and compliance review article (21:5) have been cited in 4 disputes and *general provisions* article (3) cited in 8 disputes.<sup>39</sup>

The large number of citations of DSU articles concerning post-ruling procedures in arts 21–23 is indicative of Member States’ lack of understanding of these rules for optimal compliance. It is worth noting that the disputes involving challenges to the legal interpretations of the DSU, especially arts 21, 22 and 23, were between “developed” Member States, mainly the US and the EC.<sup>40</sup> The vagueness of these DSU articles has been highlighted in a number of critical reviews, and high profile disputes, which despite the authorisation of retaliation, and compliance proceedings under art.21:5, have endured a prolonged settlement period.<sup>41</sup> Examples of high profile disputes include *US—Large Civil Aircraft (2nd complaint)*, *US—Offset Act (Byrd Amendment)* and

*EC—Fasteners (China)*.<sup>42</sup> In these examples of disputes, the procedures have been exhausted with no settlement, and currently in five disputes the compliance proceedings were completed with findings of non-compliance, i.e. reports were adopted but no settlements reached.<sup>43</sup>

In most of these non-compliance disputes, the respondent merely expresses its “intention” to implement the DSB adopted reports, or simply disregard the rulings.<sup>44</sup> There are many reasons for the failure to resolve consultations and high profile disputes, but these mainly emanate from the weaknesses in the DSB procedures and rules. For instance, the reason for failing to force compliance is the inherited weaknesses of retaliation as a remedy for non-compliance. In addition to being an unsuitable remedy, it unsurprisingly makes little or no economic sense, as evidenced by its failure to affect US firms in *US—Offset Act (Byrd Amendment)*, following a decade of retaliation.<sup>45</sup> In addition, contrary to the free fair trade ideal, persistent retaliatory measures harm the private economic actors and developing countries involved in the disputes.<sup>46</sup>

After examining the WTO compliance procedure, Eeckhout said that “the rule of law plays but a limited role in WTO dispute settlement, and that it all depends on the politics of power”.<sup>47</sup> This reflects a growing debate among WTO experts over whether “trade rule of law” is manifested by compliance with “rulings”, or “rules”, or the equal attainment of both. For example, challenging Cho’s view that the “trade rule of law” is reflective of compliance with rules, Pauwelyn stated that

“we do not know exactly how many WTO violations are out there and not challenged. Rule of law is not merely court compliance, but primary norm compliance, and my fear is that the WTO does much better on former (compliance with rulings) than latter (compliance with rules)”.<sup>48</sup>

This implies that the WTO lacks a comprehensive system for ensuring compliance, hence transparent amicable solutions for settling disputes should be reached by Member States, which should continuously interact on the sound basis of legality.

Member States should be able to clarify the law, and judge issues relating to inconsistency with WTO law. The DSB should be the last resort for interpreting and applying WTO law. With a 509 caseload record, apparently the

<sup>37</sup> *European Community—Implementation of the Uruguay Round Commitments Concerning Rice*, WT/DS25/1 (request received 14 December 1995); *European Community—Duties on Imports of Cereals*, WT/DS29/1 (request received 30 June 1995); *European Community—Duties on Imports of Rice*, WT/DS17/1 (request received 5 October 1995).

<sup>38</sup> WTO, “Current status of disputes”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm) [Accessed 1 September 2016].

<sup>39</sup> WTO, “Current status of disputes”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm) [Accessed 1 September 2016].

<sup>40</sup> WTO, “Disputes by Agreement”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_agreements\\_index\\_e.htm?id=A5#](https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A5#) [Accessed 1 September 2016].

<sup>41</sup> See Karen Alter, “Resolving or Exacerbating Disputes? The WTO’s New Dispute Resolution System” (2003) 79 *Int. Aff.* 783.

<sup>42</sup> *United States—Measures Affecting Trade in Large Civil Aircraft: Second Complaint*, DS353; *United States—Continued Dumping and Subsidy Offset Act 2000*, DS217; *European Communities—Definitive Anti-Dumping Measures on Certain or Steel Fasteners from China*, DS397.

<sup>43</sup> WTO, “Current status of disputes”, [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_current\\_status\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_current_status_e.htm) [Accessed 1 September 2016].

<sup>44</sup> See *Canada—Measures Affecting the Export of Civilian Aircraft*, DS70; *United States—Certain Country of Origin Labelling*, DS384, DS386.

<sup>45</sup> Benjamin Liebman and Kassandra Tomlin, “World Trade Organization Sanctions, Implementation, and Retaliation” (2015) 48 *Empir. Econ.* 715.

<sup>46</sup> R. Rajesh Babu, *Remedies under the WTO Legal System* (Leiden: Martinus Nijhoff Publishers, 2012), pp.333–342.

<sup>47</sup> Piet Eeckhout, “Remedies and Compliance” in Daniel Bethlehem et al. (eds), *The Oxford Handbook of International Trade Law* (Oxford: Oxford University Press, 2009), p.437.

<sup>48</sup> Joost Pauwelyn, “Cool Arbitrator Finds That Only Lost Trade is ‘Recoverable’ Not Broader Economic Harm Suffered By Canada/Mexico” (10 December 2015), <http://worldtradelaw.typepad.com/ielblog/2015/12/cool-arbitrator-finds-that-only-lost-trade-is-recoverable-not-broader-economic-harm-suffered-by-canadamexico.html> [Accessed 1 September 2016].

DSB is not the last resort, but is overburdened with tasks unsuited for adjudication. Nonetheless, the DSU rules lack legal validity, in the sense that they are not intelligible or explicitly binding, rendering the practice of legality weak and increasingly in disarray, burdening the DSB with tasks such as economic allocation and determining social regulatory policies. However, adjudication differs from arbitration, as in the latter there is a procedure for the selection of arbitrators by the disputants, and type of law applied, but in the DSU both adjudication and arbitration are intertwined. Under art.25, the DSU has a separate arbitration procedure; however, the most commonly used procedure is arbitration by “the original panel or an arbitrator appointed by the Director-General” to determine the level of countermeasures under DSU art.22.

The *US—Foreign Sales Corporations Tax* case is an example of a high profile dispute in which the DSB through arbitrators engaged in an allocative task, by awarding \$4 billion of countermeasures, yet failed to compel the offending state into compliance and finalise the dispute.<sup>49</sup> On 30 August 2002, the complainant, the EU, welcomed the award in the words of its then Commissioner, Pascal Lamy, who said that

“we are satisfied by today’s decision that makes the cost of non-compliance with WTO crystal clear ... this countermeasure will create a major incentive for the US to eliminate this huge illegal export subsidy”.<sup>50</sup>

Yet, although since 2002 there have been two second recourses to compliance proceedings by the Panel and AB under art.21:5, and the EU has maintained its sanctions, the US has defiantly refused to comply. Clearly, the DSB procedures and rules lack the teeth to force compliance, and the current compliance deficit will assuredly affect developing Member States’ trust in the system. In brief, from the above analysis it is contradictory that the DSB is designated as a fully fledged legal system, while it lacks legality terms of law and implementation—thus the case for evaluating its procedures and rules is compelling.

## The applicability of the principles of legality to the DSB

According to Fuller, the relationship of reciprocity in the society of economic traders that show the value of reciprocal obligations best represents the morality of duty.<sup>51</sup> The history of international trade relations reflects this conception of obligation in the operation of the principles of reciprocity and non-discrimination. The optimal functioning of the principle of non-discrimination is under the authority of neutral adjudicators who treat like cases alike. The “progressive legalization” of the world trading system has a long history that began with the founding principles of reciprocity and non-discrimination, applying the influence of the latter to the evolution of the dispute settlement system.<sup>52</sup> The phrase “rule orientation”, highlighting the responsibility of rule-makers to set the right balance between, to use Fuller’s terms, “supporting structure and adaptive fluidity”, was also key.<sup>53</sup> In other words, there needed to be a structure to provide “predictability and stability” that is conducive to “the marginal utility ideal”, i.e. the efficiency of economic activities.

The role of law is to mediate between these two inherently economic ideals, while upholding the principles of procedural fairness and equality, while crucially minimising disputes. In light of interactionalism, the link between “shared understandings” and adjudication in the WTO law is represented by the interdependency between the principles of reciprocity and non-discrimination. This established link supports the case for an innovative thinking that relies on a newer concept of law, the Fullerian concept, and international law, interactionalism’s legality-centred elements, for answering this timely question: how can compliance with WTO law be improved in light of the procedural, textual and organisational defects that the DSB currently faces?

According to interactionalism, law is distinguished from non-law by the adherence to Fuller’s principles of legality, and once legality has been satisfied, it has to be practised, internalised and supported by a community of concerned actors.<sup>54</sup> With references to a rich record of trade negotiations, the GATT/WTO norms had been made (and continue to be made in the case of evolving WTO agreements such as the Technical Barriers to Trade (TBT)) largely in accordance with the constructivist account of norm-making. Trade norms are being advocated by entrepreneurs, e.g. individuals, organisations

<sup>49</sup> See *United States—Tax Treatment for “Foreign Sales Corporations”*, DS108). See Esserman and Howse, “The WTO on Trial” (February 2003), <http://www.steptoe.com/assets/attachments/1236.pdf> [Accessed 1 September 2016].

<sup>50</sup> “Foreign Sales Corporations: EU Welcomes WTO Award” (2002), [http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc\\_114513.pdf](http://trade.ec.europa.eu/doclib/docs/2003/november/tradoc_114513.pdf) [Accessed 1 September 2016].

<sup>51</sup> Fuller, *The Morality of Law* (1969), pp.19–27.

<sup>52</sup> Ernst-Ulrich Petersmann, “The Establishment of a GATT Office of Legal Affairs and the Limits of ‘Public Reason’ in the GATT/WTO Dispute Settlement System” in Gabrielle Marceau (ed.), *A History of Law and Lawyers in the GATT/WTO: The Development of the Rule of Law in The Multilateral Trading System* (Cambridge: Cambridge University Press, 2015), p.182.

<sup>53</sup> Fuller, *The Morality of Law* (1969), p.29; John Jackson, *The World Trade Organization: Constitution and Jurisprudence* (London: Royal Institute of International Affairs, 1998), p.61.

<sup>54</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), p.96.

and states, supported by the knowledge produced by epistemic community of experts, and finally embraced by a community of practice of states.<sup>55</sup>

Variation in this formula exists in relation to specific agreements, and Member States' lack of understanding these agreements, but still the constructivist account is the most accurate of norms' formation, and the WTO committees continue to play a crucial role in norms formation and facilitation. However, one important issue that had been realised in the GATT years, and is a source of attention under the WTO, is the role of the dispute settlement mechanism in upholding the non-discrimination standard. Recognising the importance of this mechanism was not accidental, as the development of the principle of non-discrimination testifies that only impartial working parties or adjudicators, not consenting states, should distinguish between discriminatory and non-discriminatory treatment. The history of trade relations, the expansion of trading states' membership and trade agenda required the progressive legalisation of the GATT dispute settlement system that eventually led to the establishment of the DSB. Furthermore, this need for an adjustment mechanism to supervise reciprocal trade obligations, and decide on discrimination related disputes, is supported by Fuller's jurisprudence.

In the morality of law and other publications that were mainly influenced by the economics of trade, Fuller maintained his position that

“economic freedom cannot be fully discussed in isolation from the specific mechanisms or procedures by which ... freedom to choose is allocated and conflicting choices are reciprocally adjusted”.<sup>56</sup>

Fuller defines adjudication as

“a social process of decision which assures to the affected party a particular form of participation, that of presenting proofs and arguments for a decision in his favour”.<sup>57</sup>

This participation has to be “institutionally guaranteed”, and the adjudicators' task of interpreting collective bargaining agreements “is not to bend the dispute to the agreement, but to bend the agreement to the unfolding needs of industrial [commercial] life”.<sup>58</sup> Organisation by

reciprocity and common aims, which Fuller embraced for deconstructing the concept of freedom, is epitomised by the WTO purpose.

Additionally, Fuller's elaboration on the task of interpreting “collective bargaining agreements” such as trade agreements with due regard to “the commercial stability and predictability” is illuminating for the WTO, as it is supported by its mission statement.<sup>59</sup> As a further step to linking Fuller's informative jurisprudence to the WTO, this section will apply the inner morality of law criteria, or what he interchangeably called “the principles of legality”, to adjudication in the WTO context. To recall, the eight constitutive elements of legality are “generality, publicity, clarity, consistency, feasibility, constancy, prospectivity, and congruence”.<sup>60</sup>

The consequence of failing to observe these elements simultaneously is that when the bond of reciprocity between the law-giver, and the law-subjects, with respect to the observance of rules, is “‘ruptured’ by [the law-giver], nothing is left on which to ground the [law-subject's] duty to observe the rules”.<sup>61</sup> The word “simultaneously” can be used here not to indicate that there should be a hierarchy in observing the principles, but to highlight the principle of constancy. The attempts of the fictional law-giver King Rex to make the law general, promulgated, prospective, clear, non-contradictory and possible to comply with have failed as “the substance of the code has been seriously overtaken by events [leading to] a daily stream of amendments”.<sup>62</sup> Frequent changes have deprived the law-subjects of sufficient time “for adjustment to the new state of the law”.<sup>63</sup> This means that a failure to simultaneously observe one principle, for example constancy, will violate the other principles.

However, Fuller noted that, with the exception of promulgation, these principles are largely an aspirational ideal. He explained that the inner morality of law

“suggest[s] eight distinct standards by which excellence in legality may be tested ... the inner morality of law is condemned to remain largely a morality of aspiration and not of duty. Its primary appeal is to a sense of trusteeship and to the pride of the craftsman”.<sup>64</sup>

<sup>55</sup> Brunnée and Toope, *Legitimacy and Legality in International Law* (2010), pp.60–64. According to Haas, an epistemic community is “a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area”: see Peter Haas, “Epistemic Communities and International Policy Coordination” (1992) 46 *Int. Org.* 1, 3; Lisa Toohey, “Accession as Dialogue: Epistemic Communities and the World Trade Organization” (2014) 27 *Leiden J. Int'l L.* 397.

<sup>56</sup> Lon Fuller, “Some Reflections on Legal and Economic Freedoms — A Review of Robert L. Hale's ‘Freedom through Law’” (1954) 54 *Colum. L.R.* 70, 80.

<sup>57</sup> Lon Fuller, “Collective Bargaining and the Arbitrator” [1963] *Wis. L.R.* 3.

<sup>58</sup> Fuller, “Collective Bargaining and the Arbitrator” [1963] *Wis. L.R.* 3, 10.

<sup>59</sup> See Panel Report, *United States—Sections 301–310 of the Trade Act of 1974*, WT/DS152/R (adopted 22 December 1999), para.7.73, where the Panel adopted a clear purposive interpretation that recognised that “Many of the benefits to Members which are meant to flow as a result of the acceptance of various disciplines under the GATT/WTO depend on the activity of individual economic operators in national and global market places. The purpose of many of these disciplines, indeed one of the primary objects of the GATT/WTO as a whole, is to produce certain market conditions which would allow this individual activity to flourish”.

<sup>60</sup> See Luban, “The Rule of Law and Human Dignity” (2010) 2 *H.J.R.L.* 29.

<sup>61</sup> Fuller, *The Morality of Law* (1969), p.39 (emphasis added), citing section 4, “Interaction in the Idea of Law”, in Kurt Wolff (transl. and ed.), *The Sociology of Georg Simmel* (Glencoe: The Free Press, 1950), pp.186–189. See Lon Fuller, “Human Interaction and the Law” (1969) 14 *Am. J. Juris.* 1.

<sup>62</sup> Fuller, *The Morality of Law* (1969), p.37.

<sup>63</sup> Fuller, *The Morality of Law* (1969), p.80.

<sup>64</sup> Fuller, *The Morality of Law* (1969), pp.41–43, 62.

For this reason, he associates these principles with the morality of aspiration, to demonstrate that they comprise “a moral ideal that is internal to the concept of law”.<sup>65</sup> However, he notes the exception that promulgation “lends itself with unusual readiness to formalization”, because this desideratum can be pursued as an aspirational ideal, but has to be legally required as a formalised standard for law-making<sup>66</sup>—in other words, promulgation; and it can also be inferred that the congruence between formulation and implementation, are non-derogable principles.

Following on from the simultaneous and aspirational ideal, it should be emphasised that only the complete failure to observe one of these principles “can result in a failure to make law”.<sup>67</sup> For example, a law that is kept in complete secrecy, or makes unrealistic demands, or the application of which is contrary to its original purpose, is not a genuine law worthy of compliance; in Fuller’s terms, it will not inspire “fidelity”.<sup>68</sup> However, interaction in the idea of law is derived from the fundamental reciprocal relationship between law-giver and law-subject, with respect to the observance of rules.<sup>69</sup> According to Fuller, the notion of obligation is traced back to the principle of reciprocity, which guides the relationship of exchange in a society of economic traders.<sup>70</sup> Both customary law and contract law, insofar as they have a positive bearing on the evolution of international trade law, are best treated as “interactional phenomena” dependent on the development of “stable interactional expectancies” between law-giver and subject.<sup>71</sup> Law as conceived through “interaction” should continue to facilitate “an interplay of reciprocal expectancies”, and not impose itself by “an exercise of authority”.<sup>72</sup> Nevertheless, the relationship of exchange, which depends on fidelity to contract and ensure respect for property must always be balanced with “the marginal utility” ideal, because if the contract and property rules become too rigid and restrictive then utility will be frustrated, and the regime of exchange will collapse.<sup>73</sup>

This tension is clearly visible in legalist versus anti-legalist scholars’ accounts of WTO law, in which legalists defend the economic counterpart to the morality of duty, the reciprocal obligations, while the anti-legalists

defend the economic counterpart of the morality of aspiration, the marginal utility.<sup>74</sup> However, Fuller’s point involves highlighting the need to set the right balance between aspiration and duty in economic regulation, which is again to highlight the notion of balance in pursuing the inner morality of law criteria to perfection. Additionally, the principles of legality, he argued, “constitute a special morality of role attaching to the office of law-maker and law-administrator”.<sup>75</sup> However, the tasks of economic allocation should not only be performed by adjudication, but also by economists and diplomats’ prudent management of resources. Under the heading “Legal morality and the allocation of economic resources”, Fuller maintained:

“When we attempt to discharge tasks of economic management through adjudicative forms there is a serious mismatch between the procedure adopted and the problem to be solved ... tasks of economic allocation cannot be effectively performed within the limits set by the internal morality of law. The attempt to accomplish such tasks through adjudicative forms is certain to result in inefficiency, hypocrisy, moral confusion, and frustration.”<sup>76</sup>

Therefore, applying laws that meet these principles through adjudication for “allocative tasks” such as economic management will be ineffective.<sup>77</sup> The above summary is illuminating for the WTO, with its primary allocative task of administration and secondary task of adjudication. However, before connecting the Fullerian principles to the WTO, it is helpful to provide a brief account of the applicability of these principles to international dispute resolution. After all, WTO law is an integral part of public international law, as it has to adhere to the international treaty rules of law-making and interpretation. The principles of legality were invoked in relation to international dispute resolution in what amounts to a series of commentaries prompted by Schultz’s article.<sup>78</sup>

Schultz relied on Fuller’s principles, viewing them as analogous to a certain conception of the rule of law, as means to illustrate the procedural fairness that a system

<sup>65</sup> Nigel Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights*, 4th edn (London: Sweet & Maxwell 2013), p.256.

<sup>66</sup> Fuller, *The Morality of Law* (1969), p.43.

<sup>67</sup> See Robert Moffat, “Fuller, Lon L. (1902–1978)” in Christopher Gray (ed.), *The Philosophy of Law: An Encyclopaedia* (Abingdon: Routledge, 2013), p.321; Fuller, *The Morality of Law* (1969), p.39.

<sup>68</sup> Fuller, *The Morality of Law* (1969), pp.39–41. Fuller said that “the fidelity to Law can become impossible if we don’t accept the broader responsibilities (themselves purposive, as all responsibilities are and must be) that go with a purposive interpretation of law”. See Lon Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1958) 71 *Harvard Law Review* 670.

<sup>69</sup> See Wolff, “Interaction in the Idea of Law” in *The Sociology of Georg Simmel* (1950), p.187.

<sup>70</sup> Fuller, *The Morality of Law* (1969), pp.22–24.

<sup>71</sup> Fuller, “Human Interaction and the Law” (1969) 14 *Am. J. Juris.* 1.

<sup>72</sup> Fuller, “Human Interaction and the Law” (1969) 14 *Am. J. Juris.* 1.

<sup>73</sup> Fuller, *The Morality of Law* (1969), p.28.

<sup>74</sup> John Jackson, “Editorial Comment: International Law Status of WTO DS Reports: Obligation to Comply or Option to “Buy Out”?” (2004) 98 *Am. J. Int’l L.* 109; Warren Schwartz and Alan Sykes, “The Economic Structure of Renegotiation and Dispute Resolution in the WTO/GATT System” (2002) 31 *J. Legal Stud.* 170. On the importance of having the right balance between “norms of aspiration” and “norms of duty” in trade agreements, see John Jackson, *World Trade and the Law of GATT* (Indianapolis: Bobbs-Merrill Co, 1969), pp.761–762.

<sup>75</sup> Fuller, *The Morality of Law* (1969), p.209.

<sup>76</sup> Fuller, *The Morality of Law* (1969), pp.172–173.

<sup>77</sup> Fuller, *The Morality of Law* (1969), p.171.

<sup>78</sup> Thomas Schultz, “The Concept of Law in Transnational Arbitral Legal Order and some of its Consequences” (2010) 2 *J. Int. Disp. Settlement* 59; Ralf Michaels, “A Fuller Concept of Law Beyond the State? Thoughts on Lon Fuller’s Contributions to the Jurisprudence of Transnational Dispute Resolution — A Reply to Thomas Schultz” (2011) 2 *J. Int. Disp. Settlement* 417; Peer Zumbansen, “Debating Autonomy and Procedural Justice: The Lex Mercatoria in the Context of Global Governance Debates — A Reply to Thomas Schultz” (2011) 2 *J. Int. Disp. Settlement* 427.

of international arbitration is intended to represent. Schultz explained that the Fullerian understanding of the concept of law based on the inner morality of law criteria was

“[a] device for expressing the necessary – though not always sufficient – conditions of regulative quality that every arbitral regime must follow in order to be considered procedurally just, and thus to deserve the label of law, with all of its attendant rhetorical consequences”.<sup>79</sup>

This claim was reiterated and supported by Michaels, who offered more jurisprudential insights into transnational dispute resolution, drawing on Fuller’s writings on customary law and the proper function of adjudication.<sup>80</sup> And the final comment came from Zumbansen, who embraced the Fullerian principles of procedural justice, but added fresh reflections on political and democratic theories of law and legitimacy to connect these principles to “the global administrative law”.<sup>81</sup> Although applied to test the legality of an international arbitral system, and subsequently endorsed by experts in this field, Fuller’s account of the rule of law can be equally and usefully applied to the DSB, because the WTO dispute settlement system involves arbitration, and requires the same regulative qualities of procedural justice and autonomy.

Thus, the applicability of the Fullerian principles to international arbitration supports its application to the WTO/DSB. However, Schultz was selective when choosing which principle of legality to apply to international dispute resolution, by ruling out the principle of “feasibility”, or what he endorsed as “compliance”.<sup>82</sup> Schultz’s justification for dismissing this principle was that it speaks of a substantial condition of legality, as “it relates to both the precise contents of the rules and the concrete abilities of their addressees [hence its fulfilment] does not depend on procedural qualities of a regulatory system”.<sup>83</sup> This preclusion poses a problem for three reasons. First, it should be recalled that a complete failure to observe one principle, for example, so-called compliance, results in a failed law.

According to Fuller, “infringements of legal morality tend to become cumulative”; for example,

“carelessness about keeping the laws possible of obedience may engender the need for a discretionary enforcement which in turn impairs the congruence between official action and enacted rules”.<sup>84</sup>

The procedures and rules that comprise a dispute settlement system must endeavour to make realistic demands, to ensure compliance with the concerned agreement(s) and rulings of the dispute settlement body. Secondly, from the above summary of the principles, and the attempt to apply them to the DSB, “compliance” can be both a procedural and substantial condition. To illustrate: according to the DSU art.3:3, the DSB has always to subject its rulings to the requirement of “prompt settlement”, and that is “essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of members”.

This implies that both the interpretation of rules and the phraseology of rulings have to ensure the prompt compliance of the concerned Member States. Compliance can also be a procedural condition by virtue of the subject-matter of the dispute that requires accelerated settlement, as illustrated by the DSU requirement of faster settlement of disputes which concern perishable goods. Thirdly, as will be demonstrated by the application of this principle to the DSB below, a consideration of compliance also includes the crucial issue of “legal capacity for obedience”, and an understanding of the implications of this issue on the ongoing progressive legalisation of world trade law.<sup>85</sup> There are persistent concerns that, because of capacity limitations, many developing and least-developed countries in the WTO struggle to participate effectively in the dispute settlement system.<sup>86</sup> Therefore, all of the principles of legality are applicable in the case of a dispute settlement system because of their inseparability and the procedural and substantial characteristics they share.<sup>87</sup>

However, there are two major reasons for the applicability of the principles of legality to the adjudication of GATT/WTO rule. First, regarding the adherence to the principle of constancy, the GATT/WTO rules have been reasonably stable for a very long time (the focus of too many disputes, the GATT rules, have not been reformed for over 70 years), hence the law is lacking fundamental reforms to cater for economic, political, social and institutional changes. Consensus, and the single undertaking rule that “nothing is agreed until everything is agreed”, have led to continuous negotiation debacles, creating reciprocal bargaining in the shadow of an outdated WTO law. The requirement that “the law must not change too rapidly” does not mean that it should not be changed at all, because uncertainty can result from norms that lack clarity and consistency. Secondly, it can be deduced from Fuller’s remarks on the ineptitude when using adjudicative forms for allocative tasks that

<sup>79</sup> See Schultz, “The Concept of Law in Transnational Arbitral Legal Order and some of its Consequences” (2010) 2 J. Int. Disp. Settlement 59, citing M.H. Kramer, *Objectivity and the Rule of Law* (Cambridge: Cambridge University Press, 2007), p.185.

<sup>80</sup> See Michaels, “A Fuller Concept of Law Beyond the State?” (2011) 2 J. Int. Disp. Settlement 417.

<sup>81</sup> See Zumbansen, “Debating Autonomy and Procedural Justice” (2011) 2 J. Int. Disp. Settlement 427.

<sup>82</sup> See Schultz, “The Concept of Law in Transnational Arbitral Legal Order and some of its Consequences” (2010) 2 J. Int. Disp. Settlement 59, 72.

<sup>83</sup> Schultz, “The Concept of Law in Transnational Arbitral Legal Order and some of its Consequences” (2010) J. Int. Disp. Settlement 59, 72.

<sup>84</sup> Fuller, *The Morality of Law* (1969), p.92.

<sup>85</sup> See Fuller, *The Morality of Law* (1969), p.73; Marc Busch, Eric Reinhardt and Gregory Shaffer, “Does Legal Capacity Matter? A Survey of WTO Members” (2009) 8 World Trade 559.

<sup>86</sup> See Chad Bown, *Self-Enforcing Trade: Developing Countries and WTO Dispute Settlement* (Washington, D.C.: Brookings Institution Press, 2009); Chad Bown and Bernard Hoekman, “Developing Countries and Enforcement of Trade Agreements: Why Dispute Settlement is not Enough” (2008) 42 J. World Trade 177.

<sup>87</sup> See Luban, “The Rule of Law and Human Dignity: Re-examining Fuller’s Canons” (2010) 2 H.J.R.L. 29.

adjudication procedures and rules that meet the inner morality of law criteria are unsuited for economic allocation.

This issue relates to the aforementioned problem of overuse of one WTO function at the expense of other functions. For Fuller, institutional design has to be perceived as “a problem of economising”, where economic managers execute their jobs with skills and prudence, trying to find the right balance between aspiration and duty in economic regulation.<sup>88</sup> Adjudication alone cannot perform satisfactorily as an allocative task, as it is limited by declared rules and procedures that only affirm the rights and obligations of the members of the society of economic traders. Further, as Fuller noted, adjudication “is an ineffective instrument for economic management and for governmental participation in the allocation of economic resources”.<sup>89</sup> For instance, the purpose of the WTO dispute settlement system is to ensure the free flow of trade by instructing the offending state to withdraw the market distorting measure(s); hence, it plays a role in trade liberalisation.

However, it has to be emphasised that the significance of the role of interactional law within the WTO institutions, when shaping Member States’ behaviour, exceeds that of adjudication. After examining the effective operation of the WTO Agreement on the Application of Sanitary and Phyto-sanitary Measures (SPS) through Member States’ constant “interactions” for setting standards and even settling disputes, Wolfe said:

“The simple existence of courts (like the WTO dispute settlement) does not prove that *the* or a *rule of law* exists. Actors, including states officials, can be *governed by law* without needing courts. To speak of the role of adjudication in the ‘enforcement’ of ‘binding’ rules obscures what the WTO actually does in helping to provide transparency, consensual knowledge, and legitimation for the regime.”<sup>90</sup>

It is noteworthy, therefore, that interactional law between economic traders existed prior to the WTO, and will continue to exist for generations regardless of the WTO’s continuance. Furthermore, the remedy of the last resort for breaching the GATT/WTO rules, “suspending concessions or other obligations under the covered agreements” (DSU art.22:2), so-called retaliation, can be

seen as undoing the benefits of trade liberalisation. For example, arguing against this remedy as an apt compliance strategy, Charnovitz says:

“It is somewhat ironic that the trading system, which ostensibly favours trade, is so willing to undo the benefits of trade through authorised retaliation. No other regime would take such self-contradictory action: for example, the World Health Organization does not threaten to spread disease.”<sup>91</sup>

This is also added to the growing problem that WTO Member States are increasingly forming preferential trade agreements (PTAs) that are not effectively scrutinised by the WTO for upholding the non-discrimination standard.<sup>92</sup> For this major reason, it is unclear whether a PTA is complementary to, or negatively competing with, WTO law.<sup>93</sup> Moreover, a recent study found that “WTO disputes do not, on average, increase a country’s imports of the products at issue”, saying that by “looking at particular dispute outcomes and issue areas, certain types of disputes have been associated with increased trade, and many have resulted in decreases”.<sup>94</sup> Both negotiation fiascos and the overuse of the WTO DSB have provided an inhospitable environment where the compliance strategy is outdated, and PTAs allegedly violate the non-discrimination principle unchecked.

This clearly supports Fuller’s argument that adjudication alone cannot perform all of the functions of an economic institution such as the WTO, because there has to be an adjustment of “the institutional design of administrative agencies to the economic tasks assigned to them”.<sup>95</sup> One crucial point to note here is that, when discussing adjudication, Fuller was mainly concerned with “the problem of finding the most apt institutional design for governmental control over the economy”.<sup>96</sup> Thus, his focus was primarily national; although it can be inferred easily from his thesis’s acknowledgment of international law, and his other writings where he praised international adjudication and called for an adjustment mechanism for economic freedoms, that he would also have endorsed the DSB.<sup>97</sup> Such an endorsement would be subject to two guarantees: (1) adjudication has to be an accessible social process for all those who are affected by its rules and rulings; (2) it should not perform the administrative tasks of economic allocation.<sup>98</sup>

<sup>88</sup> Fuller, *The Morality of Law* (1969), pp.178–181.

<sup>89</sup> Fuller, *The Morality of Law* (1969), p.176.

<sup>90</sup> Wolfe, “See You in Geneva?” (2005) 11 Eur. J. Int. Rel. 339 (emphasis added); Gregory Shaffer et al., “Can Informal Law Discipline Subsidies?” (2015) 18 J. Int’l Econ. L. 711.

<sup>91</sup> Steve Charnovitz, *The Path of World Trade Law in the 21st Century* (Singapore: World Scientific, 2014), p.xi.

<sup>92</sup> Once notified to the WTO, PTAs are only subject to the Transparency Mechanism for PTAs that organises the Committee on Trade and Development, Committee on Regional Trade Agreements (CRTA), and WTO Secretariat’s monitoring schemes. However, according to CRTA, “no examination report by the CRTA has been finalized since 1995 because of lack of consensus”, and only one case relating to PTA consistency with WTO law was reviewed by the DSB: *Turkey—Restriction on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 October 1999). See WTO, “Work of the Committee on Regional Trade Agreements (CRTA)”, [https://www.wto.org/english/tratop\\_e/region\\_e/regcom\\_e.htm](https://www.wto.org/english/tratop_e/region_e/regcom_e.htm) [Accessed 1 September 2016]; Petros Mavroidis and Bernard Hoekman, “WTO ‘a la carte’ or ‘menu du jour’? Assessing the Case for More Plurilateral Agreements” (2015) 26 Eur. J. Int’l L. 319; Michael Trebilcock, *Advanced Introduction to International Trade Law*, rev. edn (Cheltenham: Edward Elgar Publishing, 2015), pp.45–52.

<sup>93</sup> See Adrian Johnston and Michael Trebilcock, “The Proliferation of Preferential Trade Agreements: The Beginning of the End of the Multilateral Trading System” in Rainer Hofmans et al. (eds), *Preferential Trade and Investment Agreements from Recalibration to Reintegration* (Baden-Baden: Nomos, 2013).

<sup>94</sup> Stephen Chaudoin et al., “Do WTO Disputes Actually Increase Trade?” (2016) 60 Int. Stud. Q. 295.

<sup>95</sup> Fuller, *The Morality of Law* (1969), p.174.

<sup>96</sup> Fuller, *The Morality of Law* (1969), p.175.

<sup>97</sup> Fuller, *The Morality of Law* (1969), pp.232–234, 236–237; Fuller, “Some Reflections on Legal and Economic Freedoms” (1954) 54 Colum. L.R. 70, 80.

<sup>98</sup> Fuller, “The Forms and Limits of Adjudication” (1978) 92 H.L.R. 353, 401.

Fuller recognised that adjudication

“includes adjudicative bodies which owe their powers to the consent of the litigants expressed in an agreement of submission, as in labor relations and international law”.<sup>99</sup>

Nonetheless, he had always noted the problem of assigning allocative tasks that are not suited to adjudication, but to legislative or administrative bodies. This is illuminating for this article, since the DSB is burdened with a large number of unsettled disputes and, despite this lack of efficacy, it has legislated rather than adjudicate issues of law. Furthermore, the competitive nature of international economic activities requires a strict enforcement of non-discrimination rules to ensure stability and predictability for economic operators. This clearly supports the role of the DSB in enforcing GATT/WTO rules to uphold “the external morality of law” principles of fairness and justice. This Fullerian designation of the external morality of law would not be respected without adjudication. Therefore, examining the DSB procedures and rules is important in order to evaluate the DSB in terms of its legality and its perceived legitimacy as an impartial arbiter.

## Conclusion

The main finding of the above analysis is that the Fullerian conceptions of adjudication and legality are pertinent to deconstructing the DSB. However, the defects of the DSU partially highlight the WTO’s institutional

failures to secure a solid shared understanding regarding compliance, to reform the DSU, and to foster a practice of legality. Reforming the DSU is an urgent requirement, but of greater importance is the need to acknowledge the continued existence of the weak settlement rules and compliance problems that the WTO was originally intended to resolve. The current progress towards a compliance deficit, reminiscent of the 1980s period of GATT, should alert WTO experts to the need to adopt a newer concept of legality, akin to that developed by interactionalism. Without cultivating the urge to reform the DSU, and inserting “prompt and effective compliance” into the strategy for improving the WTO mechanisms, the WTO is jeopardising its primary aim of securing compliance with the trade rule of law.

The first step in redressing this looming institutional failure is recognition that a compliance deficit is real, and that restructuring is urgently needed. The WTO must rely not only on adjudication, but also on providing effective modes of legal governance to facilitate resolving Member States’ disputes informally. The WTO experts should forsake the current caricature of legality by reducing the operationality of the trading regime to the supposedly effective work of the DSB chambers, instead adopting the all-encompassing notion of interactional law.<sup>100</sup> The WTO rules concerning decision-making and dispute resolution must instantiate the Fullerian principles of legality to ensure predictability and stability in international trade. In Part 2 of the article, an evaluation of the legal character of the DSU rules and procedures based on Fullerian principles will be provided.

<sup>99</sup> Fuller, “The Forms and Limits of Adjudication” (1978) 92 H.L.R. 353, 354.

<sup>100</sup> See Wolfe, “See You in Geneva?” (2005) 11 Eur. J. Int. Rel. 339.

# The EFTA Court's Role in Strengthening the Homogeneity Objective of the EEA Agreement: An Examination in Light of Brexit

Aoife Coll\*

☞ EFTA Court; European Economic Area; European Union; Judicial decision-making; United Kingdom; Withdrawal

## Introduction

The year 2014 marked the 20th anniversary of the European Economic Area (EEA) Agreement (the Agreement) coming into force. Following the Brexit referendum on 23 June 2016 there has been a noted increase in interest in the Agreement and in particular what it entails for the EEA European Free Trade Association (EFTA) states. The EEA EFTA model is being touted by some as a viable alternative to EU membership for the UK.

At the time of its signature the Agreement was regarded with suspicion and doubt by many, largely owing to its ambitious and novel aims. Yet it remains in force and is commonly regarded as successful and of considerable value to both the EU and the EEA EFTA states. Haukeland Fredriksen argues this is in large part due to the EFTA Court.<sup>1</sup> This article will attempt to assess what contribution the EFTA Court has made to the operation of the EEA by reference to the Agreement's homogeneity objective. It will be argued that, in light of the strict stance the EFTA Court has adopted in relation to ensuring dynamic homogeneity, upon its exit from the EU the UK is unlikely to adopt the EEA EFTA model.

In order for the reader to have an informed understanding of the issues addressed, the first part of the article focuses on the Agreement and the history and structure of the EFTA Court. The second part examines the homogeneity objective.

## The European Economic Area Agreement

The Agreement brings together the 28 Member States of the EU and the three EFTA states of Iceland, Liechtenstein and Norway to form the EEA. The agreement was a "*chosen* alternative to accession"<sup>2</sup> and is the closest form of relationship the EU has offered to third countries, short of membership. Under the Agreement the 31 states form a single market known as the "internal market". The primary aim of the Agreement is to create a dynamic and homogenous area that ensures the free movement of persons, goods, services and capital within the EEA and guarantees equal treatment to all of its citizens.

The Agreement came about as a result of dissatisfaction from both an economic and political point of view with the development of the Community's relationship with the EFTA states. This was a particularly negative factor for the parties considering their geographical proximity, their common history and European identity and the importance of reciprocal trade. A strengthening of co-operation was called for. This resulted in the most sophisticated and "complex association structure ever conceived".<sup>3</sup> From the outset, doubts were expressed about the Agreement's viability and its likelihood of success. Such concerns centred on the compatibility of two fundamentally different systems, with many taking the view the Agreement would serve only as an interim measure.

Somewhat ironically, the UK was a leading player in the creation of EFTA as an alternative to the EU, the latter being seen as too focused on political integration. In order for the UK to participate in the EEA following its exit from the EU, it would first have to apply for EFTA membership before joining the EEA. Under this model, current UK laws in areas such as employment, company law, financial services and consumer protection would remain substantively unchanged. The UK would make a financial contribution to the single market but would be excluded from the costs and benefits of EU membership in other respects. Its ability to influence the legislative process in the EEA would largely vanish.

## History and structure of the EFTA Court

In order for the Agreement's overarching aim of dynamic homogeneity to be realised, it was necessary to provide for enforcement at a judicial level. "The best guarantee for homogeneity would have been acceptance of the jurisdiction of the EC Court also by the EFTA Parties"<sup>4</sup>; however, the EFTA states were not willing to accept the jurisdiction of a "foreign" court.

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<sup>1</sup> Haukeland Fredriksen, "The EFTA Court 15 Years On" (2010) 59 I.C.L.Q. 731.

<sup>2</sup> C. Hillion, "The evolving system of EU external relations as evidenced in the EU partnerships with Russia and Ukraine" (Dissertation, Leiden, 2005), p.50 (emphasis added).

<sup>3</sup> C. Baudenbacher, "Between Homogeneity and Independence: The Legal Position of the EFTA Court in the European Economic Area" (1993) 3 *Columbia Journal of European Law* 169, 175.

<sup>4</sup> Editorial, "European Economic Area and European Community: Homogeneity of legal orders?" (1999) 36 C.M.L. Rev. 697, 699.

The contracting parties therefore created a two-pillar model. Under this model, which was approved by the Court of Justice of the EU (CJEU) in *Opinion 1/92*<sup>5</sup> and remains in place today, the Community's institutions were kept separate from those of the EFTA states.

Article 108 of the Agreement obliged the EFTA states to create an independent surveillance authority and a court of justice.

The EFTA Court has no functional or personnel connections to the CJEU and is competent for:

- actions concerning the surveillance procedure regarding the EFTA states;
- appeals concerning decisions in the field of competition taken by the EFTA Surveillance Authority; and
- the settlement of disputes between two or more EFTA states.

The EFTA Surveillance Authority (ESA) represents the executive branch and its role is analogous to that of the European Commission (the Commission) in the EU. The ESA monitors compliance by the EEA EFTA states with their obligations under the Agreement and oversees their implementation of secondary legislation. This helps to ensure equal conditions for both EU Member States and EFTA EEA states throughout the EEA internal market.

In January 1994 the EFTA Court came into being, charged with the interpretation of the Agreement in respect of Austria, Iceland, Norway, Sweden and Finland. From its origins the EEA was looked upon as a stepping stone for EFTA states towards complete participation in the EU,<sup>6</sup> and indeed one year following the coming into force of the Agreement, Sweden, Finland and Austria acceded to the EU. Combined with Switzerland's rejection of EEA membership in a 1992 referendum, this development weakened the position of the EFTA Court within the European legal order. The original EFTA Court was terminated on 30 June 1995. It now continues from Luxembourg, with three judges nominated by Norway, Iceland and Liechtenstein. The ratio of the jurisdictions covered by the two pillars' respective courts went from 12:7 at the time of the *1992 Opinion*<sup>7</sup> to the present 28:3. As Haukeland Fredriksen notes,

“instead of a medium sized court taking cases from seven EFTA states the EFTA Court ended up with three judges, jurisdiction over one small and two tiny states and a disturbingly small number of cases.”<sup>8</sup>

Should the UK join EFTA and the EEA, the EFTA Court's workload and standing in the European legal order would significantly increase.

Against this background this article now examines the role the EFTA Court has played in relation to dynamic homogeneity in the EEA.

## Homogeneity

In order for the EEA to function in an undistorted way there must be a level regulatory playing-field for all its citizens and economic operators. This is achieved through dynamic homogeneity, the primary aim of the Agreement. The “price” that the EFTA states had to pay in return for participation in the Community's internal market was the acceptance of 65 per cent of relevant Community law. As Forman writes,

“not only was all of the relevant *acquis* which was adopted after the agreement came into force to apply in the *same form* throughout the EEA – therefore derogations have to be kept to a minimum – it was to apply (as far as possible) at the *same time* (dynamic) as it was to apply in the Community”.<sup>9</sup>

Norberg notes that by doing so the EEA EFTA states committed themselves to a significant transformation of their legal systems and that such a change was “much quicker and larger in scope than that which any of the present member states of the EU has undergone upon accession to the Community”.<sup>10</sup> Under this system of dynamic homogeneity it is for the ESA and the EFTA Court with the Commission and the CJEU (the two separate parts of each pillar) to ensure that the Agreement is dynamically homogeneously implemented by Norway, Iceland and Liechtenstein.

With the creation of the EFTA Court, a potential for competition between the EEA's two court systems arose that could have led to forum-shopping and a race to the bottom, or rather, in fact, to the top. Thus, specific obligations were placed on the EFTA Court regarding homogeneity. Article 6 of the Agreement provides that the provisions of the Agreement, insofar as they are identical in substance to the corresponding Treaty rules, should be interpreted in conformity with the rulings of the CJEU given prior to signature of the Agreement. The ESA and the EFTA Court must also pay due account to principles laid down in the rulings of the CJEU after the date of signature of the Agreement.

These requirements on the EFTA Court are not limited only to provisions with identical wording but also apply to provisions identical in substance. In addition, EU courts are under no corresponding formal requirement to consider EFTA case law. Thus, the limitations placed by the requirement of homogeneity upon the EFTA Court are significant.

<sup>5</sup> *Opinion 1/92* [1992] E.C.R. I-2821; [1992] 2 C.M.L.R. 217 at [13].

<sup>6</sup> S. Norberg, “The EFTA Court” (1994) 31 C.M.L. Rev. 1147, 1155.

<sup>7</sup> *Opinion 1/92* [1992] E.C.R. I-2821; [1992] 2 C.M.L.R. 217.

<sup>8</sup> Fredriksen, “The EFTA Court 15 Years On” (2010) 59 I.C.L.Q. 731, 736.

<sup>9</sup> J. Forman, “European Economic Area Agreement Five Years On: Dynamic Homogeneity in Practice and Implementation by the Two EEA Courts” (1999) 36 C.M.L. Rev. 751 760 (emphasis added).

<sup>10</sup> Norberg, “The EFTA Court” (1994) 31 C.M.L. Rev. 1147, 1147.

## How has the EFTA Court dealt with homogeneity?

From its first case, *Restamark*,<sup>11</sup> the EFTA Court has strongly emphasised the importance of the objective of the contracting parties to create a dynamic and homogenous economic area. The court has made significant efforts to secure a homogeneous development of the case law, and in fact the main characteristic of its case law is that it is built upon that of the CJEU.

The former president of the European Court of Justice (ECJ), Vassilios Skouris, writes that the EFTA Court has in fact gone beyond the obligations imposed on it by the Agreement and CJEU precedent, noting that

“the EFTA Court was inspired by the fundamental doctrines which underpin Union law, as developed in the CJEU case law within its corresponding domain of competence”.<sup>12</sup>

For example, despite the opposition of Iceland, Norway and Sweden, the EFTA Court established the doctrine of state liability in its *Sveinbjörnsdóttir*<sup>13</sup> ruling on the basis of homogeneity, stating that:

“The Court finds that the homogeneity objective and the objective of establishing the right of individuals and economic operators to equal treatment and equal opportunities are so strongly expressed in the EEA Agreement that the EFTA States must be obliged to provide for compensation for loss and damage caused to an individual by incorrect implementation of a directive.”<sup>14</sup>

The EFTA Court also noted in its judgment that “the EEA Agreement is an international treaty sui generis which contains a distinct legal order of its own”.<sup>15</sup>

The EFTA Court has been aided in its efforts to ensure dynamic homogeneity by a number of factors, which are outlined below.

## Mutual references

The courts of the EU have played a role in ensuring there is homogenous development of the internal market's jurisprudence. In *Opel Austria*<sup>16</sup> the Court of First Instance (CFI), as it was then known, stated that the two pillar system was reinforced not only by the similarity between the terms of the provisions of the Agreement and the EC Treaty but also by the specific rules promoting

homogenous development of the EEA's case law. The CFI then made reference to judgments of the EFTA Court in *Restamark* and *Scottish Salmon Growers*.<sup>17</sup>

Between 2003 and 2004 a number of judgments of the EU courts and the EFTA Court were of significance for ensuring homogeneity. In a case concerning national restrictions on the free movement of capital,<sup>18</sup> the ECJ identified its task as being

“to ensure that the rules of the EEA Agreement which are identical in substance to those of the treaty are interpreted uniformly within the Member States”.<sup>19</sup>

That case was subsequently referred to by the EFTA Court in *ESA v Iceland*.<sup>20</sup> In its 2004 *Bellio Fratelli* judgment the ECJ stated:

“Both the Court and the EFTA Court have recognised the need to ensure that the rules of the EEA Agreement which are identical in substance to those of the Treaty are interpreted uniformly.”<sup>21</sup>

Skouris writes of the “extraordinary collaboration of our respective courts”<sup>22</sup> in noting that there have been consistent efforts to maintain a high level of mutual understanding which allows for dynamic homogeneity, coherence and the advancement of the case law:

“All three EEA jurisdictions (the CJEU, the General Court and the EFTA Court) have not only stressed the need for uniform interpretation of EU and EEA law, but have vigorously endeavoured to preserve it. The EEA single market can only function in an accurate manner if there is a regulatory playing field for citizens and business operators.”<sup>23</sup>

This system of cross-referencing has assisted the EFTA Court in achieving its homogeneity objective and therefore aided the successful operation of the Agreement. It is likely that such a system and concentrated effort to maintain dynamic homogeneity in the EEA would not appeal to those who advocated for Britain to leave the EU, given that a major motivation for the Leave campaign was that “diktats” coming from EU judges interpreting Union law apply across the whole of the EU, including in the UK.

<sup>11</sup> *Ravintoloitsijain Liiton Kustannus Oy Restamark* (E-1/94) [1994–95] EFTA Court Report 15; [1995] 1 C.M.L.R. 161 at [15].

<sup>12</sup> Skouris, “The Role of the Court of Justice of the European Union in the Development of the EEA Single Market: Advancement through Collaboration between the EFTA Court and the CJEU” in C. Baudenbacher (ed.), *The EEA and the EFTA Court: Decentred Integration* (Oxford: Hart Publishing, 2014), p.5.

<sup>13</sup> *Sveinbjörnsdóttir v Iceland* (E-9/97) [1998] EFTA Court Report 95; [1999] 1 C.M.L.R. 884.

<sup>14</sup> *Sveinbjörnsdóttir* [1998] EFTA Court Report 95; [1999] 1 C.M.L.R. 884 at [60].

<sup>15</sup> *Sveinbjörnsdóttir* [1998] EFTA Court Report 95; [1999] 1 C.M.L.R. 884 at [59].

<sup>16</sup> *Opel Austria GmbH v Council of Ministers of the European Communities* (T-115/94) [1997] E.C.R. II-39; [1997] 1 C.M.L.R. 733.

<sup>17</sup> *Opel Austria* [1997] E.C.R. II-39; [1997] 1 C.M.L.R. 733 at [24], [29], [33] and [34].

<sup>18</sup> *Ospelt v v Unabhängiger Verwaltungssenat des Landes Vorarlberg* (C-452/01) [2003] E.C.R. I-9473; [2005] 3 C.M.L.R. 40.

<sup>19</sup> *Ospelt* [2003] E.C.R. I-9473; [2005] 3 C.M.L.R. 40 at [29].

<sup>20</sup> *ESA v Iceland* (E-1/03) [2003] EFTA Court Report 143 at [27].

<sup>21</sup> *Bellio Fratelli Srl v Prefettura di Treviso* (C-286/02) [2004] E.C.R. I-3465; [2004] 3 C.M.L.R. 34 at [34].

<sup>22</sup> Skouris, “The Role of the Court of Justice of the European Union in the Development of the EEA Single Market” in *The EEA and the EFTA Court* (2014), p.3.

<sup>23</sup> Skouris, “The Role of the Court of Justice of the European Union in the Development of the EEA Single Market” in *The EEA and the EFTA Court* (2014), p.5.

## Role of other bodies

A further means which has contributed to the fulfilment of the EFTA Court's obligations is the right of the Commission and of EU Member States to submit written observations and to intervene in cases before the EFTA Court. In practice, the Commission has exercised this right to intervene in all cases to date, and

“as a result of the Commission's extensive capacity and speciality knowledge it is capable of ensuring all relevant EU law sources including CJEU case law is brought to the attention of the EFTA Court”.<sup>24</sup>

Similarly, EU Member States have submitted observations in a large number of cases.<sup>25</sup> For example, in the 2015 case *EFTA Surveillance Authority v Principality of Liechtenstein*,<sup>26</sup> which concerned the failure of Liechtenstein to fulfil its obligations in relation to freedom of establishment, Ireland submitted written observations to the EFTA Court while the Commission made both written and oral submissions.

It should be noted that art.36 of the EFTA Court Statute provides that the Commission's right to intervene is without limitations. However, art.40 of the ECJ Statute does not list the EFTA States and the ESA as having the unconditional right to intervene in cases before the EU courts. Rather, it provides that the EFTA States and the ESA may only intervene in cases “where one of the fields of application of that Agreement is concerned”.

## Differences in interpretation

Given the homogeneity objective of the Agreement, “generally, the two courts will interpret the same provisions in the same way”.<sup>27</sup> However, at times differences in interpretation do occur. In the *Maglite*<sup>28</sup> case, the question of the international exhaustion of trade mark rights came first before the EFTA Court. The court held that the states under its jurisdiction should be free to adopt their own view on the issue. When the same issue arose before the ECJ, it took a divergent stance, instead recognising that a uniform solution was necessary across the EU. Moreover, it found that such a uniform solution must be that the EU Member States were precluded from applying exhaustion of international trade mark rights.<sup>29</sup> Therefore, the two judicial systems reached different conclusions in relation to the same issue. Jacobs notes, however, that there was an “objective justification” for this, as differing solutions among the Member States

could not sit with the single market system of the Union, while the “looser structure of the EEA, in contrast made a less stringent solution possible”.<sup>30</sup>

A number of years later, in the *L'Oréal* case, the question of exhaustion of trade mark rights again arose before the EFTA Court. Although the court itself remarked that

“it is an inherent consequence of such a system that from time to time the two courts may come to different conclusions in their interpretation of the rules”,<sup>31</sup>

it chose to follow the ECJ's *Silhouette*<sup>32</sup> ruling in place of its own *Maglite* case law. The court held that

“neither Article 3(2) SCA nor Article 2(1) of Protocol 28 explicitly addresses the situation where the EFTA Court has ruled on an issue first and the ECJ has subsequently come to a different conclusion. However, the consequences for the internal market within the EEA are the same in that situation as in a situation where the ECJ has ruled on an issue first and the EFTA Court subsequently were to come to a different conclusion. This calls for an interpretation of EEA law in line with new case law of the ECJ regardless of whether the EFTA Court has previously ruled on the question”.<sup>33</sup>

It should be noted that the EFTA Court did not admit that the interpretation preferred by the ECJ was superior or the reasoning more compelling than the one originally favoured by the EFTA Court. On the contrary, the EFTA Court in fact stated that both were supported by “weighty arguments” and that the courts had simply “opted” for alternative solutions.<sup>34</sup> It is clear from this that it was merely the authority of the ECJ's case law that led the EFTA Court to overrule *Maglite*.

Despite the fact there was an “objective justification” for the differing rulings, the EFTA Court instead chose to adopt the ECJ's finding rather than to maintain its own precedent. The *L'Oréal* ruling has been heavily criticised for representing a “full legal transplant of an EC solution”<sup>35</sup> that brings the EFTA Court dangerously close to legislative function.

In light of the above it is clear that the EFTA Court places the objective of homogeneity above all else, even to the extent where it is obliged to detach itself from its own case law and replace it with the jurisprudence of another court. Such actions may be commended as being

<sup>24</sup> T. Bjornsson, “Evaluating the Effectiveness of the EFTA Court” (2013) 46 *Israel Law Review* 61, 87.

<sup>25</sup> For further examples see Sweden in *Tore Wilhemsén AS v Oslo Kommune* (E-6/96) [1997] EFTA Court Report 53; [1997] 3 C.M.L.R. 823; and *Denmark and France in EFTA Surveillance Authority v Norway* (E-3/00) [2000–01] EFTA Court Report 73; [2001] 2 C.M.L.R. 47.

<sup>26</sup> *EFTA Surveillance Authority v Principality of Liechtenstein* (E-17/14) 31 March 2015.

<sup>27</sup> Jacobs, “Judicial Dialogue and the Cross-Fertilization of Legal Systems: The European Court of Justice” (2003) 38 *Texas International Law Journal* 547, 552.

<sup>28</sup> *Mag Instrument Inc v California Trading Co Norway* (E-2/97) [1997] EFTA Court Report 127; [1998] 1 C.M.L.R. 331.

<sup>29</sup> *Silhouette International Schwied GmbH & Co* (C-355/96) [1998] E.C.R. I-4799; [1998] 2 C.M.L.R. 953.

<sup>30</sup> Jacobs, “Judicial Dialogue and the Cross-Fertilization of Legal Systems” (2003) 38 *Texas International Law Journal* 547, 553.

<sup>31</sup> *L'Oréal Norge AS v Aarskog Per AS* (E-9/07 and E-10/07) [2008] EFTA Court Report 258; [2008] E.T.M.R. 60 at [28].

<sup>32</sup> *Silhouette* [1998] E.C.R. I-4799; [1998] 2 C.M.L.R. 953.

<sup>33</sup> *L'Oréal Norge* [2008] EFTA Court Report 258; [2008] E.T.M.R. 60 at [29].

<sup>34</sup> *L'Oréal Norge* [2008] EFTA Court Report 258; [2008] E.T.M.R. 60 at [24]–[25].

<sup>35</sup> B. Pirker, “Interpreting Multi-Sourced Equivalent Norms: Judicial Borrowing in International Courts” in T. Broude and Y. Shany (eds), *Multi-Sourced Equivalent Norms in International Law* (Oxford: Hart Publishing, 2010), p.105.

essential to the success and continued operation of the EEA Agreement, but it may equally be said that in elevating the importance of homogeneity, the EFTA Court has de facto acknowledged the CJEU as the supreme authority on the interpretation of EEA law. This is despite the Preamble to the Agreement emphasising that the objective of a uniform interpretation and application of the Agreement is “in full deference to the independence of the courts”.

## Conclusion

Despite the prediction of a short life span, the EEA continues to function effectively. This is in part due to the EFTA Court and the emphasis it places on ensuring dynamic homogeneity. Although this practice undoubtedly has benefits, it also comes at a high cost to the independence of the EFTA Court, and it has been suggested as explaining why Norway refers a significantly

lower number of cases than Iceland or Lichtenstein. Thus far, it appears this is a price the EEA EFTA states are willing to pay for participation in the internal market.

Although the UK's adoption of the EEA EFTA model would result in little disruption to its existing framework of laws, would reduce uncertainty for economic operators and would guarantee access to the internal market, it seems unlikely that the EEA solution would be suitable for the UK. Access to the single market via the EEA would require the UK to continue to grant reciprocal free movement rights to workers,<sup>36</sup> however, EU migration into the UK was a major driver for many Leave voters in June 2016. On top of that, as this article explains, the UK would need to be willing to accept the jurisdiction of a court that has essentially relegated itself to the status of junior partner in the European legal order. Given the opposition expressed during the course of the referendum campaign towards the CJEU, and outrage in the Leave camp as to how British judges can be overruled by their colleagues in Luxembourg, it is submitted that the UK would find it difficult to enter into such an arrangement.

<sup>36</sup> The European Council statement released on 29 June 2016 noted: “Any agreement, which will be concluded with the UK as a third country, will have to be based on a balance of rights and obligations. Access to the Single Market requires acceptance of all four freedoms.”

# Minimisation of Food Waste and Labelling Regulation

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✉ Australia; Comparative law; Dates; European Union; Food; Food waste; Labelling

## The food waste problem

In 2014 the Food and Agriculture Organization of the United Nations (FAO) estimated that some 805 million people are chronically undernourished.<sup>1</sup> The two studies on global food losses, one for high/medium-income countries and one for low-income countries, were carried out between August 2010 to January 2011 by the Swedish Institute for Food and Biotechnology (SIK) on request from FAO.<sup>2</sup> The results of the study suggest that roughly one-third of food produced for human consumption is lost or wasted globally, which amounts to about 1.3 billion tonnes per year.<sup>3</sup> The study observed that in medium- and high-income countries food was to a significant extent wasted at the consumption stage, meaning that it was discarded even if it was still suitable for human consumption, whereas in low-income countries food was lost mostly during the early and middle stages of the food supply chain, with much less food wasted at the consumer level.<sup>4</sup>

The per capita food waste by consumers in Europe and North America was estimated to be 95–115 kg/year, compared with 6–11 kg/year in sub-Saharan Africa and South/Southeast Asia.<sup>5</sup> An FAO report, *Food Wastage Footprint: Impacts on Natural Resources*, published in 2013, estimated that the direct economic cost of food wastage of agricultural products (excluding fish and seafood) was about US\$650 billion, equivalent to the GDP of Switzerland.<sup>6</sup>

The United Nations Secretary-General's High-Level Panel on Global Sustainability estimated that food wasted by consumers in high-income countries is roughly equal to the entire food production of sub-Saharan Africa.<sup>7</sup> Food waste also has significant environmental impacts. Rotting

food produces an estimated 3.3 billion tonnes of greenhouse gases, approximately 14 per cent of the world's CO<sub>2</sub> emissions.<sup>8</sup> Food left to rot in landfills also impacts on land biodiversity around the landfill, polluting waterways and groundwater. The United Nations Secretary-General's High-Level Panel on Global Sustainability estimated that water used for irrigation to produce the food which is wasted annually would be enough to meet the domestic water needs of 9 billion people.<sup>9</sup>

Reducing food waste can increase the efficiency of the food supply chain and bring economic benefits, including lower costs for businesses and lower prices for consumers. Business examples exist where innovative production methods turned what would have otherwise been wasted into inputs to new products. In other cases, the food manufacturing industry or the retail sector is prepared to pay for the removal of surplus food that would be otherwise wasted. New businesses are created that collect, handle and deliver this surplus to food banks.

## Date labelling of food

The importance of date labelling in informing both retailers and consumers about how long a food will remain safe for consumption makes it an obvious point for the identification of potential food waste. This article looks at the date labelling regimes in Australia, the UK and the EU.

### Australia

Food Standards Australia New Zealand (FSANZ) in December 2013 issued Standard 1.2.5 — Date Marking of Food. In its User Guide on this Standard it explains that

“the food business attaching the label is responsible for deciding whether a ‘use-by’ date or a ‘best-before’ date is needed. This will depend on whether these foods need to be eaten within a certain time because of health or safety reasons”.<sup>10</sup>

As is indicated in the UK and US studies, consumers are confused by the various date marking terms which are used by the food industry. This is illustrated by FSANZ's explanation of the meaning of the “best-before” date, since it explains that “food that has passed its ‘best-before’ date may still be perfectly safe to eat, but

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<sup>1</sup> FAO, “Food wastage footprint: impacts on natural resources” (Rome: FAO, 2013), <http://www.fao.org/docrep/018/i3347e/i3347e.pdf> [Accessed 1 September 2016].

<sup>2</sup> Published as FAO, “Global food losses and food waste — Extent, causes and prevention” (Rome: FAO, 2011).

<sup>3</sup> FAO, “Global food losses and food waste” (2011), p.v.

<sup>4</sup> FAO, “Global food losses and food waste” (2011), p.v; J. Parfitt, M. Barthel and S. Macnaughton, “Food waste within food supply chains: Quantification and potential for change to 2050” (2010) 365 *Philos. Trans. R. Soc. B-Bio. Sci.* 3065.

<sup>5</sup> FAO, “Global food losses and food waste” (2011), p.vi.

<sup>6</sup> FAO, “Food wastage footprint” (2013), <http://www.fao.org/docrep/018/i3347e/i3347e.pdf> [Accessed 1 September 2016].

<sup>7</sup> United Nations Secretary-General's High-level Panel on Global Sustainability, “Resilient People, Resilient Planet: A future worth choosing” (New York: United Nations, 2012), [http://www.acp.int/sites/acpsec.waw.be/files/GSP\\_Report\\_web\\_final.pdf](http://www.acp.int/sites/acpsec.waw.be/files/GSP_Report_web_final.pdf) [Accessed 1 September 2016].

<sup>8</sup> FAO, “Food wastage footprint” (2013), p.36, <http://www.fao.org/docrep/018/i3347e/i3347e.pdf> [Accessed 1 September 2016].

<sup>9</sup> FAO, “Food wastage footprint” (2013), p.36, <http://www.fao.org/docrep/018/i3347e/i3347e.pdf> [Accessed 1 September 2016].

<sup>10</sup> See *Standard 1.2.5 — Date Marking of Food, User Guide* (December 2013), para.1.2., <http://www.foodstandards.gov.au/code/userguide/Documents/Guide%20to%20Standard%201.2.5-%20Date%20Marking%20of%20Food.pdf> [Accessed 1 September 2016].

its quality may have diminished”.<sup>11</sup> It then continues by suggesting that “the label on a package of bread with a shelf life of less than 7 days may include, instead of a ‘best-before’ date: its ‘baked-on’ date; or its ‘baked-for’ date”.<sup>12</sup>

The User Guide to Standard 1.2.5 defines a “use-by” date as

“the last date on which the food may be eaten safely, provided it has been stored according to any stated storage conditions and the package is unopened. After this date, the food should not be eaten for health and safety reasons”.<sup>13</sup>

Clause 5 of Standard 1.2.5 requires that the “best-before” date and “use-by” date must at least consist of: the day and the month for products with a “best-before” date or “use-by” date of not more than three months; or the month and the year for products with a “best-before” date or “use-by” date of more than three months.

Clause 1.4 of Standard 1.2.5 permits the sale of food with an expired “best-before” date,

“provided the food is not spoiled and complies with any other applicable legislation, e.g. it is not damaged, deteriorated or perished to an extent that affects its reasonable intended use, or it is not unsound or unfit for human consumption”.

There are a number of other confusing aspects of Standard 1.2.5. First, it also refers to other Standards. For example cl.2 of Standard 1.2.5 requires most packaged foods for retail sale or catering purposes to have a date mark on the food. However, there are some exemptions to these requirements, namely: individual servings of ice cream or ice confection; small packages of food (except where the food should be consumed by a certain date for health or safety reasons); foods where the “best-before” date of the food is two years or more (except infant formula products)<sup>14</sup> and products listed in FSANZ Standard 1.2.1 — Application of Labelling and Other Information Requirements.<sup>15</sup> Clause 13 of Standard 2.9.5 — Food for Special Medical Purposes, permits a label on a package of food for special medical purposes to use the words “expiry date” or words to similar effect instead of the words “use by”, if the food is required to include a use-by date under Standard 1.2.5.

The focus of the Date Marking Standard is foods which are susceptible to bacterial contamination; thus the User Guide at p.4 states that “use-by” dates *do not usually apply* to the following types of food:

- shelf-stable food such as canned foods, cereals, biscuits, soft drinks, sauces, confectionery, flour and sugar—these foods either do not contain, or do not support the growth of, food poisoning bacteria;
- food such as ice cream, frozen vegetables, frozen meals, frozen fish and frozen meat—frozen food does not support the growth of food poisoning bacteria;
- most raw food such as meat, chicken and fish that is eaten in a cooked state—where the later process kills food poisoning bacteria that may be present.

Confusingly, the Standard does not apply to other contaminants. For example, the FAO refers to enzymic and chemical changes and the deterioration of nutritional quality, as well as caking caused by moisture absorption, as well as the activities of fungi, yeasts and moulds and microbiological factors such as insect pests.<sup>16</sup>

A 2011 report on a review of Australian food labelling confirmed that “the specific use of the terms ‘best before’ and ‘use by’ appears not to be clearly understood by the public”,<sup>17</sup> but made no recommendations as to how this situation might be improved.

## UK

The date labelling system was introduced in the UK in 1980 when the Food Labelling Regulations harmonised UK law with the 1978 EC Labelling Directive.<sup>18</sup> This coincided with a number of “food scares”, such as the outbreak of salmonella in 1988 which infected people throughout the country, including 120 members of the House of Lords, followed by several outbreaks of listeriosis, a bacterial infection of soft cheeses, cooked meats and pâtés.<sup>19</sup> Date labelling, as it then existed, was perceived to be inadequate to deal with food safety, particularly with the growth in the sale of pre-packed foods. A report, *The Microbiological Safety of Food*, commissioned by the Committee on the Microbiological Safety of Food and published in 1990, commended changes to the labelling system by the introduction of the “use by” date to assure food safety, as had not “been the

<sup>11</sup> Standard 1.2.5 — Date Marking of Food, User Guide (December 2013), p.3, <http://www.foodstandards.gov.au/code/userguide/Documents/Guide%20to%20Standard%201.2.5%20-%20Date%20Marking%20of%20Food.pdf> [Accessed 1 September 2016].

<sup>12</sup> Standard 1.2.5 — Date Marking of Food, User Guide (December 2013), para. 1.5, <http://www.foodstandards.gov.au/code/userguide/Documents/Guide%20to%20Standard%201.2.5%20-%20Date%20Marking%20of%20Food.pdf> [Accessed 1 September 2016].

<sup>13</sup> Standard 1.2.5 — Date Marking of Food, User Guide (December 2013), p.5, <http://www.foodstandards.gov.au/code/userguide/Documents/Guide%20to%20Standard%201.2.5%20-%20Date%20Marking%20of%20Food.pdf> [Accessed 1 September 2016].

<sup>14</sup> See FSANZ, Standard 2.9.1 — Infant Formula Products.

<sup>15</sup> See <https://www.comlaw.gov.au/Details/F2014C01178> [Accessed 1 September 2016]: excluded from the Standard are: (a) food not in a package; or (b) whole or cut fresh fruit and vegetables, except sprouting seeds or similar products, in packages that do not obscure the nature or quality of the fruit or vegetables; and foods for catering purposes.

<sup>16</sup> Mircea Enachescu Dauthy, “Fruit and vegetable processing”, FAO Agricultural Services Bulletin No.119 (Rome: FAO, 1995). See also Matteo Alessandro del Nobile and Amalia Conte, *Packaging for Food Preservation* (New York: Springer, 2013).

<sup>17</sup> N. Blewett, et al., “Labelling Logic : Review of Food Labelling Law and Policy” (Canberra: Commonwealth of Australia, 2011), para 4.6.

<sup>18</sup> Directive 79/112 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [1979] OJ L33/1.

<sup>19</sup> See A.D. Beardsworth, “Trans-science and moral panics: understanding food scares” (1990) 92 *British Food Journal*, 11.

case hitherto”.<sup>20</sup> Further EC Directives followed<sup>21</sup> culminating in Regulation 1169/2011.<sup>22</sup> Article 9.1 of this Regulation lists as a mandatory particulars:

- “(f) the date of minimum durability or the ‘use by’ date;
- (g) any special storage conditions and/or conditions of use.”

Article 24.1 provides that in the case of foods which, from a microbiological point of view, are highly perishable and are therefore likely after a short period to constitute an immediate danger to human health, the date of minimum durability should be replaced by the “use by” date. After the use-by date a food shall be deemed to be unsafe.<sup>23</sup>

Non-compliance with Regulation 1169/2011 is an offence in the UK, under reg. 10 of the Food Information Regulations 2014.<sup>24</sup>

In the UK, there was a growing scholarship on the role of labels as contributing to the unnecessary disposal of edible food by consumers.<sup>25</sup> The influential report by WRAP (Waste and Resources Action Programme), *The Food We Waste*,<sup>26</sup> and Tristram Stuart, *Waste*<sup>27</sup> (2009), suggested that almost a quarter of waste food was disposed of because it was past its use-by date but also significant quantities of food were thrown away because of confusion between “use-by” and “best-before” dates.

In September 2011, the UK minister responsible for food introduced new expiry date labelling guidelines for food businesses as a contribution to preventing the yearly waste of an estimated £750 million worth of food.<sup>28</sup> Unlike the FSANZ date marking guidelines, which are targeted at businesses, the UK guidelines aimed “to help consumers make safe and optimum use of food”. The guidelines explained the labelling rules in Directive 2000/13 as implemented in Great Britain by the Food Labelling Regulations 1996. The evidence from WRAP that some consumers did not understand the difference between the legally required date marks and those used by food businesses for stock control purposes was acknowledged in the guidelines, and it was suggested as

a best practice “the regularity and or visibility of the voluntary date marks” could be reduced to “reduce the amounts of food thrown away unnecessarily.”<sup>29</sup>

As best practice, food businesses should explore alternative ways of applying stock control dates that make them less visible to consumers and avoid diluting the key messages of the legally required date marks.

It was pointed out in the guidelines that there was no definitive list of which foods should carry a particular type of date mark. The food labelling applied to most pre-packed food which the guidelines indicated “should carry ‘an appropriate durability indication’, which would normally be a ‘best before’ date”.<sup>30</sup> As best practice in relation to date marking principles, it was suggested:

1. When setting date marks, it should be borne in mind that “use by” dates relate to food safety while “best before” dates relate to the quality of the food.
2. The “use by” date mark is a clear instruction to consumers not to consume the product after that date. An inaccurately determined shelf life can potentially pose a danger to human health. The “best before” date should be applied to shelf stable foods that are safe to consume or perishable foods that do not deteriorate rapidly and become unsafe to eat after the date mark.<sup>31</sup>

The effectiveness of these suggestions is, of course, dependent upon complementary consumer education.

## EU

The EU has not yet formulated a food waste policy. This is addressed in part by various policies and pieces of legislation.

A number of Communications from the European Commission have addressed the issue of food waste minimisation. Its 2011 Communication “Roadmap to a Resource Efficient Europe”<sup>32</sup> proposes ways to increase resource productivity and decouple economic growth from resource use and its environmental impact. On the

<sup>20</sup> M. Richmond, *The Microbiological Safety of Food, Report of the Committee on the Microbiological Safety of Food* (London: HMSO, 1990), p.144.

<sup>21</sup> Directive 89/395 amending Directive 79/112 on the approximation of the laws of the Member States relating to labelling, presentation and advertising of foodstuffs for sale to the ultimate consumer [1989] OJ L186/17–20; Directive 1999/10 providing for derogations from the provisions of Article 7 of Directive 79/112 as regards the labelling of foodstuffs [1999] OJ L69; Directive 2000/13 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs [2000] OJ L109/29; Directive 1999/10 providing for derogations from the provisions of Article 7 of Council Directive 79/112 as regards the labelling of foodstuffs [1999] OJ L69; Directive 2002/67 on the labelling of foodstuffs containing quinine, and of foodstuffs containing caffeine [2002] OJ L191/20–21; Regulation 608/2004 concerning the labelling of foods and food ingredients with added phytosterols, phytosterol esters, phytostanols and/or phytostanol esters [2011] OJ L304/18; Regulation 1925/2006 on the addition of vitamins and minerals and of certain other substances to foods [2006] OJ L404/26–38; Directive 2008/5 concerning the compulsory indication on the labelling of certain foodstuffs of particulars other than those provided for in Directive 2000/13 [2008] OJ L27/12–16.

<sup>22</sup> Regulation 1169/2011 on the provision of food information to consumers [2011] OJ L304/18–63.

<sup>23</sup> In accordance with art.14(2) to (5) of Regulation 178/2002.

<sup>24</sup> SI 2014/1855.

<sup>25</sup> Surveyed in Richard Milne, “Arbiters of waste: date labels, the consumer and knowing good, safe food” (2013) 60 *Sociological Review* 84.

<sup>26</sup> WRAP (Waste and Resources Action Programme), *The Food We Waste* (Banbury: WRAP, 2008).

<sup>27</sup> Tristram Stuart, *Waste: Uncovering the Global Food Scandal* (London: Penguin, 2009).

<sup>28</sup> DEFRA (Department for Environment, Food and Rural Affairs), “Expiry date for confusing date labels”, DEFRA Press Release (15 September 2011), <https://www.gov.uk/government/news/expiry-date-for-confusing-date-labels> [Accessed 1 September 2016]; quoted by Milne, “Arbiters of waste” (2013) 60 *Sociological Review* 84, 85.

<sup>29</sup> DEFRA, “Expiry date for confusing date labels” (15 September 2011), p.7, <https://www.gov.uk/government/news/expiry-date-for-confusing-date-labels> [Accessed 1 September 2016].

<sup>30</sup> DEFRA, “Expiry date for confusing date labels” (15 September 2011), p.9, <https://www.gov.uk/government/news/expiry-date-for-confusing-date-labels> [Accessed 1 September 2016].

<sup>31</sup> DEFRA, “Expiry date for confusing date labels” (15 September 2011), p.13, <https://www.gov.uk/government/news/expiry-date-for-confusing-date-labels> [Accessed 1 September 2016].

<sup>32</sup> Commission, “Roadmap to a Resource Efficient Europe”, COM(2011) 571 (20 September 2011).

subject of food, the Communication states that “the food and drink value chain in the EU causes 17% of our direct greenhouse gas emissions and 28% of material resource use”, and that “in the EU alone, we waste 90 million tonnes of food every year or 180 kg per person”, much of which is still suitable for human consumption.<sup>33</sup> The Communication predicted that by 2020 the disposal of edible food waste should have been halved in the EU. In the Communication the Commission indicated that it would further assess how best to limit waste throughout the food supply chain, and consider ways to lower the environmental impact of food production and consumption patterns and to develop a methodology for sustainability criteria for key food commodities by 2014.

In 2014, the Commission’s Communication “Towards a circular economy: a zero waste programme for Europe”<sup>34</sup> included a proposal for Member States to develop national food waste prevention strategies with the aim of reducing food waste by at least 30 per cent by 2025.

In its 2015 work programme, the Commission announced that it would withdraw its legislative proposal on waste targets and replace it by the end of the year with a new, more ambitious proposal.<sup>35</sup>

The agriculture sector has obvious implications for food waste minimisation. The Directorate-General for Agriculture and Rural Development (DG Agri) is responsible for the administration of the EU’s Common Agricultural Policy (CAP). The marketing standards prescribed in the CAP contribute to food waste generation because edible products can be taken out of the food supply chain for aesthetic reasons (e.g. related to size and shape), although the Regulation which deals with this<sup>36</sup> is being phased out.

The Common Fisheries Policy (CFP) is administered by the Directorate-General for Maritime Affairs and Fisheries (DG Mare). Catch restrictions which encouraged and sometimes obligated the discard of certain fish species have been identified as a source of food waste.

Food waste has an obvious environmental impact. The main EU administrative departments involved in this policy area are the Directorate-General for the Environment (DG Env) and the Directorate-General for Health and Consumers (DG Sanco).

A wide range of EU legislation has implications for food waste minimisation. A FUSIONS report on the drivers of food waste generation identified 271 food waste drivers across all stages of the food supply chain, from primary production on farms to final consumption in food services and households.<sup>37</sup> Thus a July 2015 FUSIONS, inventory of EU legislation impacting on food waste identified 53 EU relevant legislative acts.<sup>38</sup> This legislation was classified in a number of clusters, of which the following are the most relevant for food waste minimisation:

1. legislation with potential implications for food waste generation;
2. legislation with potential implications for food waste management;
3. legislation with potential implications for food waste reduction;
4. legislation with potential implications for food use optimisation.

### Legislation addressed to food waste generation

This cluster included regulations specifying the fishing opportunities available in EU waters and, to EU vessels, in certain non-EU waters for certain fish stocks and groups of fish stocks, including the minimum landing size of fish<sup>39</sup>; concerning the marketing standards for specified fruits<sup>40</sup>; prescribing what type and how food information must be provided to consumers in order to ensure a high level of consumer health protection<sup>41</sup>; establishing a common framework for the promotion of energy from renewable sources<sup>42</sup>; prescribing the minimum “best before” date of eggs<sup>43</sup>; laying down Community procedures to protect public health from contaminants in food<sup>44</sup>; setting out a series of measures seeking to ensure the hygiene of foodstuffs at all stages from production to consumption<sup>45</sup>; concerning the prevention, control, and eradication of transmissible spongiform encephalopathies (TSEs) in animals<sup>46</sup>; concerning the destruction of plants and plant-based products with invasive organisms<sup>47</sup>; concerning the approval of new foods and new food ingredients<sup>48</sup>; and prescribing tolerance limits for contaminants.<sup>49</sup>

<sup>33</sup> Commission, “Roadmap to a Resource Efficient Europe”, COM (2011) 571, para.5.1.

<sup>34</sup> Commission, “Towards a circular economy: a zero waste programme for Europe”, COM(2014) 398 final.

<sup>35</sup> Withdrawal of the proposal was formalised in “Withdrawal of Commission proposals” [2015] OJ C80/17–23.

<sup>36</sup> Regulation 1221/2008 of 5 December 2008.

<sup>37</sup> FUSIONS, “Drivers of current food waste generation, threats of future increase and opportunities for reduction” (August 2014).

<sup>38</sup> 29 Regulations, 10 Directives, 3 Decisions, 10 Communications and 1 Parliamentary Resolution: see FUSIONS, “Review of EU Legislation and Policies Impacting on Food Waste, Final Report” (15 June 2015).

<sup>39</sup> Regulation 44/2012; Regulation 43/2012; Regulation 43/2009; Regulation 850/98.

<sup>40</sup> Implementing Regulation 543/2011.

<sup>41</sup> Regulation 1169/2011.

<sup>42</sup> Directive 2009/28.

<sup>43</sup> Regulation 589/2008.

<sup>44</sup> Regulation 1881/2006.

<sup>45</sup> Regulation 183/2005; Regulation 852/2004; Regulation 853/2004; Regulation 882/2004; Directive 2002/99.

<sup>46</sup> Regulation 999/2001.

<sup>47</sup> Directive 2000/29.

<sup>48</sup> Regulation 258/97.

<sup>49</sup> Regulation 315/93.

## Legislation addressed to food waste management

This cluster includes: Communication 235 on future steps in bio-waste management in the EU (2010), and a number of measures dealing with the collection and management of waste data.<sup>50</sup> Directive 1999/31 (the Landfill Directive) provides measures, procedures and guidance to prevent or reduce negative effects on the environment from the landfilling of waste. The Directive sets targets for Member States to reduce the amount of biodegradable waste in landfills by 65 per cent by 2016 from 1995 levels. As food waste has constituted a significant portion of biodegradable municipal waste (BMW), both the reduction targets and the obligation to set up national strategies could affect food waste management and the amount of food waste going to landfills.

Regulation 142/2011 contains rules pertaining to the disposal of animal by-products and derived products. Regulation 1069/2009 lays down health rules concerning the movement, processing and disposal of animal by-products and derived products, in order to prevent or minimise risks to public and animal health. It prohibits the feeding to farmed animals of catering waste and kitchen scraps, as well as raw, partially cooked and cooked meat products in order to control the potential introduction and spread of major exotic notifiable diseases. As a consequence this may have implications for food waste generation as well as contributing to the management of these types of waste.

## Legislation specifically addressed to food waste reduction

European Parliament Resolution 2011/2175 (INI) of 19 January 2012 called on the Council and the Commission to declare 2014 the European year against food waste in order to focus the attention of European citizens and national governments on this important topic. Although 2014 was not designated the European year against food waste, the Resolution had the effect of raising awareness of food waste minimisation.

Decision 1386/2013 seeks to turn the EU into a resource-efficient, green and competitive low-carbon economy, and states that “the Commission should present a comprehensive strategy to combat unnecessary food waste and work with Member States in the fight against excessive food waste generation”. Communications 301 (2003) and 666 (2005) are concerned with the reduction of biodegradable waste, including food waste, which has

a negative environmental impact. Two-thirds of biodegradable waste must be redirected for disposal using methods other than landfill.

Food waste reduction is also an ingredient in Communication 60 (2012), calling for bio-economy as a key element of smart and green growth in Europe, and encouraging the use of sustainable and greener production processes in primary production sectors (such as agriculture, forestry, fisheries and aquaculture) in order to contribute to addressing major societal and economic challenges, including food security, climate change, fossil resource dependency and scarce natural resources. Similarly, Communication 571 (2011) promotes the idea of a competitive EU economy in which food waste reduction is one of drivers for the development of resource efficiency.

Directive 2008/98 prescribes measures to protect the environment and human health by preventing or reducing the negative impact of waste generation. Although it does not specifically set targets related to food, it deals generally with bio-waste.

This cluster also contains Regulations dealing with permissible animal feeds,<sup>51</sup> the reduction of unwanted fishery by-catches,<sup>52</sup> the simplification of certification procedures for fishery products to reduce overly lengthy procedures that could shorten the life of products and facilitate waste occurrence,<sup>53</sup> and specific measures to improve animal welfare during transport.<sup>54</sup>

A number of measures deal with the improvement of packaging to reduce food waste.<sup>55</sup>

## Legislation addressed to food use optimisation

This cluster concerns measures dealing with the use of processed animal proteins (PAPs) from non-ruminants (e.g. pigs and poultry) in feed to optimise food use<sup>56</sup>; the authorisation of the use of former foodstuffs in feed without further treatment if they have not been in contact with raw material of animal origin and the competent authority is satisfied that such use does not pose a risk to public or animal health<sup>57</sup>; the encouragement of the free distribution of fruit and vegetables withdrawn from the market to old people’s homes, etc.<sup>58</sup>; and the reduction of value added tax (VAT) on food intended for donation.<sup>59</sup>

Regulation 178/2002 lays down general principles and requirements of food law and food safety and establishes the European Food Safety Authority (EFSA). It allows the supply of food after the best before date is allowed, provided it is still safe and suitable for consumption.

<sup>50</sup> e.g. Regulation 1639/2001, implementing Regulation 1543/2000.

<sup>51</sup> Regulation 163/2009.

<sup>52</sup> Regulation 1380/2013; Commission, “A policy to reduce unwanted by-catches and eliminate discards in European fisheries”, COM(2007) 136 final (Brussels, 28 March 2007).

<sup>53</sup> Regulation 1664/2006.

<sup>54</sup> Regulation 1/2005.

<sup>55</sup> Directive 94/62; Directive 2004/12.

<sup>56</sup> Regulation 56/2013.

<sup>57</sup> Regulation 832/2007.

<sup>58</sup> Regulation 1308/2013.

<sup>59</sup> Directive 2006/112.

Finally, manufacturers are exempted from liability for products that are not distributed “in the course of his business”, which applies to food business operators who transfer surplus food.<sup>60</sup>

## Conclusion

The underlying philosophy of food labelling legislation in Australia, the UK and the EU is that the provision of information to consumers allows them to make prudent purchasing decisions. Thus consumers are provided with

mandatory information about product nutrition, place of origin and health claims. Date labelling regulations have been promulgated on the same assumption that enriching consumer information will produce a prudent purchasing decision. However, a review of the rules in all three jurisdictions indicates that consumer confusion as to the meaning of the various date labels which are used both prevents an appropriately informed purchasing decision and contributes to the unnecessary wastage of food, with its attendant economic and environmental impacts.

<sup>60</sup> Directive 85/374.

## BOOK REVIEWS

**Commentary on the UNIDROIT Principles of International Commercial Contracts, 2nd edn**, by Stefan Vogenauer (ed.), (Oxford University Press, 2015), cclxxxiv + 1528pp., £258.50, ISBN: 9780198702627.

The 2008 first edition of the *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, edited by Stefan Vogenauer and Jan Kleinheisterkamp, was destined to become the leading book on the UNIDROIT Principles and a standard reference tool for everyone who has to deal with the UNIDROIT Principles. The UNIDROIT Principles provide a “neutral and balanced set of rules” and thereby an international instrument which is “tailored to meet the specific needs of international commerce” (S. Vogenauer and J. Kleinheisterkamp, “Introduction” in *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2008), paras 40, 43), based on its underlying principles (key features), the concepts of freedom of contract (art.1.1.), *pacta sunt servanda* (art.1.3), party autonomy (art.1.5), the observance of good faith and fair dealing (art.1.7), informality (arts 1.2 and 3.1.2), openness to commercial usages, and the policy of keeping contracts alive whenever possible (*favour contractus*) (Vogenauer, “Introduction” in *Commentary on the UNIDROIT Principles of International Commercial Contracts* (2015), para.39, citing the chairman of the Working Group, Michael Joachim Bonell<sup>1</sup>).<sup>2</sup>

The second edition of 2015 is co-authored by authors with comparative legal experience from 13 different jurisdictions from five continents, acting under the editorial leadership of Stefan Vogenauer alone. By publishing this second edition, the editor, the authors and Oxford University Press have arguably started a tradition and have raised an expectation that this commentary will

continue to be updated from time to time. Despite the uncountable number of publications worldwide on the UNIDROIT Principles (Vogenauer’s bibliography of 56 pages speaks for itself), a commentary which discusses the UNIDROIT principles item by item comprehensively is an extremely valuable tool for day-to-day work with the UNIDROIT Principles. Vogenauer’s book covers a market need. This is evident in light of the increase in importance of the UNIDROIT Principles over the last decade. This increase has three principal elements:

1. First, the UNIDROIT Principles have become a valuable tool for legislators (Ralf Michaels, “Preamble I”, paras 143 et seq., with a useful country-by-country overview at paras 157–167). They were endorsed in 2004 and 2007 by the United Nations Commission on International Trade Law (UNCITRAL) (Michaels, “Preamble I”, para.120). Where states such as Lithuania (as an extreme example) have incorporated the UNIDROIT Principles, they have become a source of interpretation of domestic law (Michaels, “Preamble I”, para.138).
2. Secondly, the UNIDROIT Principles can play an important role in international arbitrations. Arbitrators sometimes use the UNIDROIT Principles as *lex contractus*, or—like courts (see Michaels, “Preamble I”, paras 135–136)<sup>3</sup>—to supplement or interpret the *lex contractus* (see the remarkable chapter by Matthias Scherer, “Preamble II”, paras 1–90, containing, e.g., a useful overview of examples with references to awards citing the UNIDROIT Principles at para.56). The UNIDROIT Principles are often used to supplement the United Nations Convention on the International Sale of Goods (CISG) (Michaels, “Preamble I”, paras 121–126), the CISG playing an important role outside the UK.<sup>4</sup> When interpreting “general principles of law” and the like as chosen by the parties, the UNIDROIT Principles can serve as an important source of law on a case-by-case basis (Scherer, “Preamble II”, paras 16 et seq.), sometimes in combination with the CISG<sup>5</sup>.
3. Thirdly, for the daily practice of international business lawyers, the UNIDROIT Principles have also become

<sup>1</sup> M.J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd edn (Irvington, NY: Transnational Publishers Inc, 2005), pp.87–172.

<sup>2</sup> In this context, it must be noted that art.1.6(2) PICC provides that issues within the scope of the Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying principles.

<sup>3</sup> See also Isabel Zuloaga Rios, “Art 2.1.15 (negotiations in bad faith)”, para.9, describing an example of the European Court of Justice in a case in which the Advocate General relied on art.2.1.15 PICC in conclusions which the ECJ accepted although without explicitly citing the PICC in the court decision.

<sup>4</sup> There are 84 Member States of the CISG. For example, it applies as international sales law in Australia, China, Germany, Russia and the US. See notably *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sales of Goods (CISG)*, 3rd edn, edited by I. Schwenzer (Oxford: Oxford University Press, 2010).

<sup>5</sup> A technique used once by the author sitting as an arbitrator in a Stockholm panel in a case where the parties had chosen “international commercial law”.

a valuable instrument of risk management<sup>6</sup> and international contract drafting (see Michaels, “Preamble I”, paras 33 et seq. for the choice of PICC, and para.170 for the use of the PICC as a checklist), even though Michaels strongly suggests adding a supplementary law to the choice of the UNIDROIT Principles (“Preamble I”, para.51).<sup>7</sup> UNIDROIT itself released 11 contractual model clauses in May 2013 which can be used by parties who consider choosing the UNIDROIT Principles (Vogenauer, “Introduction”, para.58).<sup>8</sup> In practice, one can either choose such a supplementary law<sup>9</sup> or rely, for supplementary topics if they come up, on the law which is otherwise applicable under the relevant conflict or law rules, as contained, e.g., in the chosen arbitral rules.<sup>10</sup> The UNIDROIT Principles provide a neutral and balanced set of rules (Vogenauer, “Introduction”, para.43).

The author of this review uses the UNIDROIT Principles not only for clients, but also for his own contracts in daily cross-border business relations with clients from abroad.<sup>11</sup> The UNIDROIT Principles, and in particular the principles related to standard terms of contract in arts 2.1.19 to 2.1.22 PICC, as combined with an arbitration clause, simply provide better and more practical rules of law compared with the German law on standard terms of contract. The German law is too onerous and therefore impracticable when it comes to the requirements for negotiating a valid limitation of liability clause for a law firm in a cross-border B2B context. In cross-border contexts, especially when bridging between different legal cultures is necessary, the UNIDROIT Principles provide an important tool for cross-border and bridge-building lawyers.<sup>12</sup> The UNIDROIT Principles, while they do not resolve all issues, cover most fields in the core areas of cross-border business contracts.

Each of us (the readers of the Vogenauer commentary) may think that, owing to our training in our various home jurisdictions, we have the best training and that we operate with the best law. The truth is, though, that many roads lead to Rome and there is always more than one alternative to quality contract drafting. For historical or political reasons, the law of our home jurisdiction may not be “top” in all respects and under all circumstances (the example given above from the daily practice of a law firm speaks for itself). Also for strategic or cultural reasons, it may sometimes be best to operate with international instruments such as the UNIDROIT Principles which are universally recognised and developed through cross-cultural dialogue (see Vogenauer, “Introduction”, paras 14 et seq., 25, 28).<sup>13</sup> This is particularly true in situations where common law and civil law traditions meet each other in a contract negotiation scenario. As common and civil law are slowly gravitating towards each other with increased acceptance of good faith and commercial reasonableness,<sup>14</sup> it is not alien for any law that includes common law jurisdictions to rely on the UNIDROIT Principles, which include the observance of good faith and fair dealing as a cornerstone (along with its other key features noted above).

It should also be noted that the UNIDROIT Principles are fit for use in modern times with increased awareness of compliance issues. Article 1.4 explicitly iterates that:

“Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.”

In this respect Gilles Cuniberti provides a concise and helpful overview of the status of international debate and what this means concretely, with a proper distinction between the application of the UNIDROIT Principles (and of their art.1.4) by courts and arbitration tribunals (Cuniberti, “Art 1.4 (Mandatory rules)”, paras 7–20).

Most of those of us (the readers of the Vogenauer commentary) who act as lawyers have not studied the UNIDROIT Principles at university (see Vogenauer,

<sup>6</sup> E. Brödermann, “The UNIDROIT Principles as a Risk Management Tool” in UNIDROIT (ed.), *Eppur si muove: The age of uniform law — Festschrift for Michael Joachim Bonell, to celebrate his 70th birthday* (forthcoming, 2016).

<sup>7</sup> In a forthcoming book for German Certified Specialists in International Business Law (a qualification created by the German Bar in 2014 under the German *Fachanwaltsordnung*), the author of this book review devotes entire sections on the choice of PICC clauses and their limits through the application of mandatory law as provided for in art.1.4 PICC. Knowledge of the PICC clauses and their applicability has become part of a state-of-the-art toolkit for international business law: see E. Brödermann, §6, “Internationales Privatrecht”, paras 271 et seq. (on the combination of the PICC with choice of court clauses), para.329 (on the combination of the PICC with arbitration clauses), paras 370 et seq. (on limits by overriding mandatory law), and paras 380–389, 392 et seq., 395 et seq. (on drafting of a choice of PICC clause) in B. Piltz (ed.), *Münchener Anwaltsbandbuch Internationales Wirtschaftsrecht* (Munich: C.H. Beck, forthcoming, 2016).

<sup>8</sup> See UNIDROIT, *Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts* (2013), <http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses> [Accessed 19 August 2016].

<sup>9</sup> See UNIDROIT, *Model Clauses* 1.2(a) and (b).

<sup>10</sup> e.g. LCIA Arbitration Rules art.22.3 sentence 2.

<sup>11</sup> For a detailed explanation, see E. Brödermann, “Choice of Law and Choice of UPICC Clauses in the Shadow of the Dispute Resolution Clause — Fundamental Aspects of Developing a Coherent Basis for Cross-Border Contracts” [2016] *Hamburg Law Review* 21, 26 et seq.

<sup>12</sup> See E. Brödermann, “The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice — the Experience of a German Lawyer” [2011] *Uniform Law Review* 589 (published also in Spanish in a translation by Maximiliano Rodríguez Fernández in Javier Mauricio Rodríguez Olmos (ed.), *Principios Unidroit: Estudios en torno a una nueva “lingua franca”* (U. Externado de Colombia, 2013), pp.183–216); as well as an updated version by Brödermann, “I principi Unidroit nella pratica commerciale internazionale — un’esperienza tedesca” [2012] *Diritto del Commercio Internazionale* 887.

<sup>13</sup> There was real dialogue and debate. In the discussions for the 2010 edition, the rapporteurs and the study group met five times with the observers for an entire week of discussions in Rome, based on the work of the rapporteurs during the year before.

<sup>14</sup> See, e.g., the acceptance of the “good faith” concept under certain circumstances in English jurisprudence such as in *Yam Seng PTE Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB), [2013] 1 All E.R. (Comm) 1321 at [119] (although the impact of the decision is still subject to debate); Berger and Arntz, “Treu und Glauben als Rechtsprinzip im englischen Wirtschaftsrecht” (2016) 115 *Zeitschrift für vergleichende Rechtswissenschaft (ZVglRWiss)* 167.

“Introduction”, para.46 on the “peripheral” role of the UNIDROIT Principles even in today’s legal education). When first confronted with them in real cross-border legal life, they may feel strange, new, unknown. But once we start reading their clear language (described by Vogenauer, “Introduction”, para.36 as “simple, concise, immensely readable, and at times even elegant”, with reference to Remien<sup>15</sup>), we have no choice but to open up our minds to their international and comparative legal wisdom.

Over 15 years ago, the author of this book review had just a week to consent to the application of the UNIDROIT Principles in a Swiss arbitration when the arbitration tribunal proposed the application of the UNIDROIT Principles in light of a possibly ambiguous choice of law clause, with due regard to the multiple jurisdictions involved and despite a claim which the author, then counsel in an arbitration, had based on the chosen law which was English law. After proper analysis of art.7.4.1 et seq. PICC and a cross-cultural workshop including English, Italian and German counsel, it was decided that, under the circumstances, the choice of the UNIDROIT Principles would not cause any harm whatsoever. They provide a solid basis with adequate limitations on liability as contained also in all potentially relevant domestic jurisdictions<sup>16</sup>; and in the end, as with those domestic laws, any such arbitration would be won (or lost) on the basis of the facts and the evidence.<sup>17</sup>

This background may suffice to describe that there is a real market need for the UNIDROIT Principles. This entails a parallel need for a clearly structured commentary which navigates the user through the principles and their background as well as their literature and jurisprudence.<sup>18</sup> While the “Official Comments” to the UNIDROIT Principles (see Vogenauer, “Introduction”, para.32)<sup>19</sup> make it a point not to reveal national examples underlying the conception and drafting of individual principles, the authors in the Vogenauer book often draw helpful comparisons with national law (see, e.g., Ewan McKendrick, “Art 7.4.2 (Certainty of harm)”, para.4 on rare limits to the principle of full compensation, or Ross G. Anderson, “Art 2.1.6 (Mode of acceptance)”, paras 10–11 with comparisons with US and English law on implicit indication of assent).<sup>20</sup> Such in-depth comparative scholarly analysis is combined with concrete illustrations (such as McKendrick, “Art 7.4.3”, para.6: “It appears that there are essentially four choices open to a tribunal faced with a case in which ...”). The authors draw comparisons with other compilations of principles of contract law such as the Restatement 2d of Contracts (US) and the Principles

of European Contract Law, and draw on the reports on the discussions in the working group (see, e.g., Francesca Mazza, “Art 9.1.1 (Definitions)”, paras 9–11 and Appendix 1 with a synopsis between the PICC, International Uniform Law Conventions and the Principles of European Contract Law). Very helpfully, the authors sometimes also comment on the Official Comments (see, e.g., Solène Rowan, “Art 5.3.3 (Interference with conditions)”, paras 22 et seq., discussing the illustrations in the Official Comments). In an unbiased approach to the subject, they also venture criticism (see, e.g., Zuloaga Rios, “Art 2.1.15 (negotiations in bad faith)”, para.5, criticising insufficient guidance by the Official Comments in respect of pre-contractual liability issues, or Francesca Mazza, “Introduction to Chapter 9 of the PICC”, para.13, regretting that the UNIDROIT Principles do not address issues of third parties in the context of assignment of rights).

The commentary is supplemented by a useful Table of (multiple) Transnational Instruments (30 pages), which enables the reader to find references and links between the UNIDROIT Principles and such instruments as the CISG and various other conventions. An additional Table of National Instruments and a Table of (national) Cases (including alone a 10-page list of English cases) allows serious comparative legal work with the help of Vogenauer’s book.

The 2010 edition of the UNIDROIT Principles contains new provisions on conditions, illegality, restitution and plurality of obligors and obliges, as well as a number of changes to the Official Comments. For example, the Official Comments to art.1.4 now state at para.4, for cases where the Principles are applied as the law governing the contract (“as may be the case if the dispute is brought before an arbitration tribunal”<sup>21</sup>), that the provision aims only at overriding or internationally mandatory law.<sup>22</sup> This has logic in light of the integration of a chapter on Illegality (as also noted by Cuniberti, “Art 1.4 (Mandatory rules)”, para.3: “The inclusion ... may force to rethink ...”). A Table of Correspondence of the Articles of the 1994, 2004 and 2010 Editions to the UNIDROIT Principles gives an overview of changes, including amendments to the Official Commentary.

Stefan Vogenauer has found a competent team to cope with the new provisions: Cuniberti (Oxford) for the rules on illegality as a new section in Ch.3 on “Validity” (section 3.3); Rowan (London, LSE) for a new section in Ch.5 on “Content, Third Party Rights and Conditions” (section 5.3); Sonja Meier (Freiburg) for the new Ch.11

<sup>15</sup> O. Remien, “Die UNIDROIT-Prinzipien und die Grundregeln des Europäischen Vertragsrechts: Ein vergleichender Blick” in E. Cashin-Ritaine and E. Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification* (Zürich: Schulthess, 2007), p.57.

<sup>16</sup> E. Brödermann, “Die erweiterten UNIDROIT Principles 2004 — Ein willkommenes ‘Werkzeug’ für die Vertragsgestaltung und für Schiedsverfahren” [2004] *Recht der Internationalen Wirtschaft* (RIW) 721.

<sup>17</sup> See, for a more detailed description, Brödermann, “Die erweiterten UNIDROIT Principles 2004” [2004] RIW 721, 723–725.

<sup>18</sup> See also the useful compilation at <http://www.unilex.info> [Accessed 19 August 2016].

<sup>19</sup> UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2010* (2010).

<sup>20</sup> Sometimes it is persuasive to be able to demonstrate to clients that the UNIDROIT Principles are akin to their home jurisdiction, which is often the case as they are often based on a filtered common international ground.

<sup>21</sup> UNIDROIT, *Official Comments*, comment no.4 to art.1.4.

<sup>22</sup> UNIDROIT, *Official Comments*, comment no.4 to art.1.4.

on “Plurality of Obligors and Obligees”; and, for the new provisions on restitution in the case of a failed contract which have been integrated into the existing Chs 3 (“Validity”: art.3.2.15 (Du Plessis, Stellenbosch) and art.3.3.2 (Cuniberti, Oxford)) and 7 (“Non-Performance”: arts 7.3.6–7 (Peter Huber, Mainz)). There have already been considerable efforts made in replacing parts initially written by Kleinheisterkamp in the first edition (Vogenauer, “Preface to the Second Edition”). New authors not yet mentioned include Anderson (Glasgow), on art.2.1.6. et seq. (Acceptance), Luke Nottage (Sydney) on art.2.1.1. et seq. (Offer) and Zuluoga Rios (Santiago de Chile) on arts 2.1.15 to 2.1.16 (Negotiations). They complement a team also including—in addition to those authors who have been cited elsewhere—Yesim Atamer (Istanbul), commenting on art.6.1.1 et seq. (Performance in general); Thomas Krebs (Oxford) on art.2.2.1 et seq. (Authority of Agents); Tjakie Naudé (Cape Town), on art.2.19 et seq. (Standard Terms); Pascal Pichonnaz (Fribourg), Ch.8 (Set-Off); Harriet Schelhaas (Utrecht) on art.7.1.1 (Non-Performance in general) and art.7.2.1 et seq. (Right to Performance); Robert Wintgen (Paris), Ch.10 (Limitation Periods).

When working with the book, there is no noticeable change between the different authors. Every section follows a logical order. For example, following the German tradition of commentary writing, where appropriate the sections end with comments on the burden of proof. The entire book is coherent.

The book stands for a living international debate. The debate in the Vogenauer work already includes participants from Europe, the Americas, Africa and Oceania. Only an Asian input is missing, and this would be desirable in some distant future. The discussion on the impact of the UNIDROIT Principles on the Organisation for the Harmonisation of Business Law in Africa (OHADA), the Association of South East Asian Nations (ASEAN), Greater China and China (Michaels, “Preamble I”, paras 149–151, 155, 164) as well as the bibliography (Appendix II) demonstrate that the Vogenauer book represents a discussion with a global perspective which is of the utmost importance in fostering international trade and in providing a backbone for cross-border business.

In a section entitled “Outlook”, Vogenauer discusses possible future changes to the UNIDROIT Principles (Vogenauer, “Introduction”, paras 50–54). In May 2016, at its 95th session, the Governing Council of UNIDROIT adopted additional principles and comments to one of the topics also discussed in the Vogenauer book: long-term contracts.<sup>23</sup> The new principles affect various provisions of the UNIDROIT Principles. Their final release is expected by December 2016.

The market of PICC users and Vogenauer readers may hope that these additional principles will also attract the attention of the Vogenauer team in due course, while for the next few years the exciting second edition of the Vogenauer book provides a perfect tool for the international community in working with the UNIDROIT Principles. Most issues in the daily work of most international lawyers do not relate to long-term contracts.

In sum, the Vogenauer book belongs in every library intended to support the making and interpretation of cross-border contracts. The book provides a triple value: (1) it gives advice and inspiration to international practitioners; (2) it inspires academic debate; and (3) it may also inspire UNIDROIT itself to continue its important work in the distilling and shaping of further international commercial principles, including the Official Comments.

Eckart Brödermann\*

**Advanced Introduction to International Trade Law**, by Michael Trebilcock, (Cheltenham: Edward Elgar, 2015), 232 pp., hardback, £67.50.

Michael Trebilcock’s new book is a welcome contribution to the field of international trade law. It provides a comprehensive, yet concise and accessible, account of the development of the world trade system since the adoption of the GATT in 1947 in the post-war context, through to the creation of the WTO in 1995; and finally evaluating recent developments (including the deadlock in the Doha Round of trade negotiations since 2001). With the fourth edition of Trebilcock’s seminal book (co-authored with Robert Howse and Antonia Eliason) *The Regulation of International Trade* (Routledge, 4th edn, 2013) running to 950 pages, it makes the publication of this advanced introduction to the study of GATT/WTO law all the more pertinent.

The structure of the book is similar to that of the aforementioned Trebilcock et al. (2013) text which many academics and students of WTO law will be familiar with. It starts with an introduction to the subject and the general issues (dispute settlement; tariffs; most favoured nation principle; national treatment), moving to the more specialist topics including preferential free trade agreements (FTAs); anti-dumping and subsidies; and safeguards. The book also addresses the international trade rules relating to specific sectors, including trade in agricultural products (Ch.9); trade in services (Ch.10); trade and investment (Ch.11); and intellectual property rights (Ch.12). In addition, the book covers other cross-cutting subjects and specialist topics, including

<sup>23</sup> See UNIDROIT 2016 C.D. 95 (3) at I.8.

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health and safety law (Ch.13); trade and the environment (Ch.14); labour standards and human rights (Ch.15); and the impacts of international trade policy on developing countries (Ch.16). The final chapter (Ch.17) evaluates future challenges for the world trading system.

The first chapter aims to set out the context of the subject-matter, discussing the classical trade theories which underpin the liberalisation of world trade, from Adam Smith's theory of absolute advantage in the 18th century through to Heckscher and Ohlin's factor proportion hypothesis. Yet the author notes that there are a number of qualifications to the trade theory that have allowed states to uphold a protectionist stance, such as reciprocity, infant industry, national security, as well as environmental and human rights arguments.

In Ch.2, the author discusses with a level of detail the evolution of the dispute settlement procedures. After suggesting the pre-eminence of the WTO dispute settlement bodies over the other governance structures created under the GATT/WTO, he notes that the dispute settlement procedures have evolved from the ineffective "positive consensus" rule—which required all parties to the GATT to agree before the "adoption of a Panel decision—to a system of "negative consensus", meaning that "decisions are now adopted automatically by the WTO General Council" (p.26). The author concludes this chapter by discussing proposals for reform of the dispute settlement mechanism, among some of the most far-reaching being the extension of public participation in the proceedings; access to justice by private actors; and the strengthening of remedies for non-compliance with dispute settlement rulings.

Chapter 3 discusses a number of challenges to the development and consolidation of the principles of tariffication and most favoured nation as cornerstones of the GATT/WTO system. Perhaps the most notable challenge (as discussed in Ch.4) is the proliferation of regional and bilateral free trade agreements (FTAs). Although the author notes that FTAs are permissible under the GATT, they have created a "spaghetti bowl" raising regulatory compliance and transaction costs and arguably risking the diversion of trade "from more efficient producers in third countries to less efficient producers in the customs union partner" (p.49). Although the legal and economic analysis of FTAs is well developed in this chapter, it would be commendable for future editions of this book to also discuss further significant proposals for creation of mega-regional trade agreements, particularly the TTIP and TTP.

Following an introduction to the national treatment principle that underlines the obligation of non-discrimination against foreign products in Ch.5, the book focuses on other highly contentious and widely litigated areas under the GATT/WTO: anti-dumping regulation (Ch.6); subsidies, countervailing duties and government procurement (Ch.7); and safeguards and adjustment assistance policies (Ch.8). The author analyses how the prohibition on the use (industrial) goods under the GATT and SCM Agreement has been interpreted by

Panel and Appellate Body rulings. After noting the high number of anti-dumping measures in force around the world (2,894 as of December 2013), he outlines the normative, economic and non-economic rationales for the introduction of anti-dumping measures.

The book then focuses on specific areas of international trade in which the interests of developed and developing countries have diverged dramatically (and ultimately have led to the deadlock in the Doha Round of trade negotiations), specifically the trade in agricultural products (Ch.9); trade in services (Ch.10); trade and investment (Ch.11); and trade-related intellectual property rights (Ch.12). The author starts by discussing the slow progress in the liberalisation of trade in agricultural goods. After outlining the specific targets under the 1995 WTO Agreement on Agriculture for the reduction of domestic support measures, export subsidies, tariffs and non-tariff barriers in the agricultural sector, he notes that trade in agricultural products is still marked by significant domestic protectionist measures (often justified on grounds of "multifunctionality") which are facilitated by the specific exceptions to trade in agricultural goods established under the GATT. This unevenness between trade in industrial goods and agricultural goods ultimately had the effect of allowing some developed economies to become among the biggest exporters of agricultural commodities. In the subsequent chapter the author discusses the extent to which trade in services (not regulated under the GATT itself) has been liberalised, and why the liberalisation of this sector has developed relatively timidly under the y. In this vein, he notes that:

"While in specific sectors such as financial and telecommunication services, significant progress has been made, the prospects for more general liberalization of international trade in services at the present time do not look strong."(p.127)

Likewise, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) evidences fundamental differences in the interests of developed and developing countries. This is particularly so as regards the sensitive question of giving developing countries access to medicines by issuing "compulsory licences" in the context of national public health emergencies. However, he notes that recent reforms of the intellectual property regime may not "ensure that there are adequate investments in pharmaceutical innovation for diseases that are primarily prevalent in developing countries ..." (p.148). In Ch.11, although initially focusing on the trade-related aspects of investment as set out under TRIMS, the author notes that the proliferation of bilateral investment treaties (BITs) has led to a number of concerns. This includes the fact that "many countries have signed multiple BITs with various other countries", and

“major disputes have arisen as to when foreign investors are able to invoke (‘cherry pick’) either substantive or procedural provisions in BITs other than the BIT to which their home country is party”(p.134).

The specific grounds for derogation from the free trade rules under the GATT/WTO are also analysed in this book, in particular health and safety regulations (Ch.13); environmental regulation (Ch.14); labour standards and human rights (Ch.15); and the special and differentiated treatment for developing countries in interstate trade relations (Ch.16). Following an informative discussion of particularly relevant and controversial cases disputed on the basis of the SPS and TBT agreements in Ch.13, the author discusses in the subsequent chapter how the environment-related grounds for derogation under the GATT have been interpreted by evolving WTO Panels and Appellate Body. He shows how the jurisprudence has evolved from denying to eventually recognising some legitimate extra-territorial effects to national environmental regulations setting standards for production and process methods (PPMs). This chapter also includes a discussion of other topical subjects in the context of climate change and trade, in particular the legality of carbon tax adjustment measures. As regards labour standards and human rights, the author notes with concern that trade sanctions for violations of core labour standards

risk protectionist abuse by some states, and argues that “there is no defensible case for privileging core labour rights over other basic international human rights ...” (p.181). It is commendable that Ch.16 is dedicated to discussing the basis for special and differentiated treatment for developing countries in interstate trade relations, as recognised under specific GATT provisions and WTO agreements (including the circumstances in which tariff concessions may be granted to developing countries on a non-reciprocal basis).

Chapter 17 is the final chapter of the book. In this chapter the author summarily evaluates future challenges for the world trading system, referring to specific areas which, in the author’s view, should be prioritised in the reform of the world trade system.

It should be noted that the book manages to convey both economic concepts and legal principles in a way that is accessible and easy to read, despite the often complex nature of the subject. The book is thus a much welcome contribution to the study of international trade law, and is recommended to all students, academics, practitioners and policy-makers working in the field of international economic law. It is to be hoped that future editions will continue to update this highly useful text.

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# News Section

## CANADA–EU FREE TRADE AGREEMENT

☞ Bilateral trade agreements;  
Canada; European Union;  
Ratification; United Kingdom;  
Withdrawal

The Canada–EU Comprehensive Economic and Trade Agreement (CETA) is one of the pending international agreements to be affected by the outcome of the 23 June 2016 referendum in the UK on exiting the EU.

Originally, Canada and the EU had planned for CETA to enter into force in 2017. Changes to the investment chapter had been made to accommodate various concerns about the right of national governments to regulate in the public interest, the appointment of panellists and an appellate mechanism. Since the UK referendum, the Government of Canada has made several announcements advocating the entry into force of CETA notwithstanding the potential exit from the EU of one of its principal members.

The EU has described CETA as “the most ambitious trade agreement the EU has ever concluded”. The EU has proposed to provisionally apply CETA after the EU Council and EU Parliament have approved it. This step will eliminate customs duties. However, full entry into force in respect of other aspects will only occur after each national parliament in the EU has approved it.

The new ratification process is much more cumbersome and fraught with the potential for national governments to frustrate the definitive entry into force of the CETA. The new process introduces considerable uncertainty. It is unlikely that the CETA could apply to the UK if and when it exits the EU. One possibility to avoid this outcome is for Canada and the UK to separately enter into a similar agreement between them. In the meantime, businesses will need to make investment and trade decisions based on whether they make sense in the absence of CETA, and its failure will not unduly prejudice their business operations.

**Peter Glossop**  
*Osler, Hoskin & Harcourt LLP*

# **International Trade Law & Regulation**

# International Trade Law & Regulation

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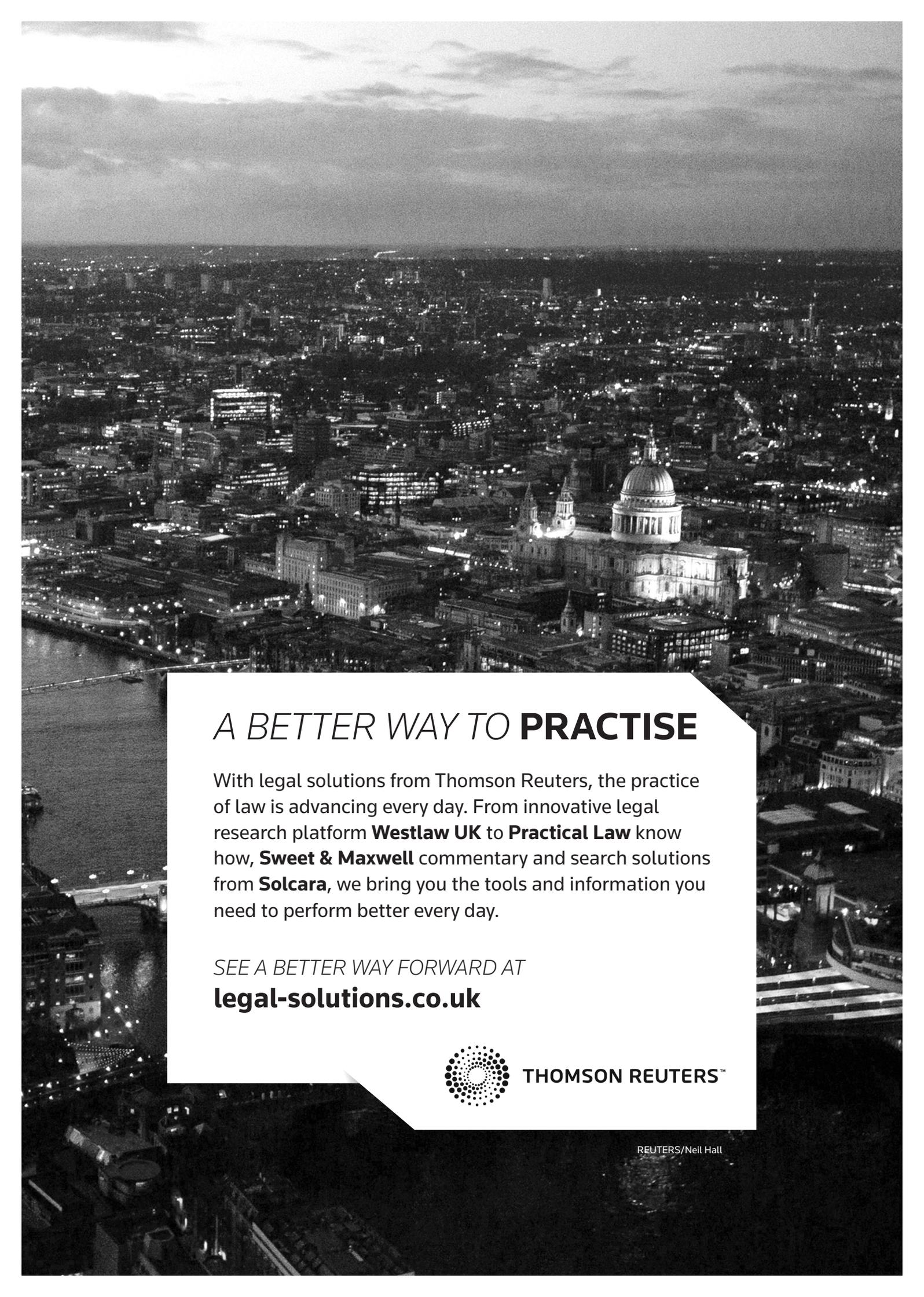
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