BRICK COURT CHAMBERS
BARRISTERS

In association with:
THE TIMES

Africa:
Expanding Legal Horizons

Monday 28 September 2015
A full day conference
at The Royal College of Surgeons

MORNING PROGRAMME

08:15 - 09:00 REGISTRATION AND COFFEE

09:00 - 09:15 WELCOME AND CHAIRMAN'S ADDRESS

09:15 - 10:30 SESSION 1: PUBLIC LAW AND HUMAN RIGHTS ISSUES

Chair: Richard Gordon QC, Brick Court Chambers
Paul Bowen QC, Brick Court Chambers
Emily MacKenzie, Brick Court Chambers
Andrew McIntyre, Brick Court Chambers
Prof. Robert McCorquodale, Brick Court Chambers, Director of the British Institute of International and Comparative Law
Dr Eva Thorne, Former Africa Government Initiative Strategic Advisor to the National Oil Company of Liberia

This session discusses the promotion and enforcement of human rights, including the role of human rights in business and investment. In particular, it will cover (1) Africa, state sovereignty and the International Criminal Court; and (2) corporate governance, business ethics and human rights in Africa, focusing on the UN Principles on Business and Human Rights.

10:30 - 11:00 COFFEE

11:00 - 12:15 SESSION 2: MARKET REGULATION AND COMPETITION

Chair: Fergus Randolph QC, Brick Court Chambers
Alastair Sutton, Brick Court Chambers
Jeremy Gauntlett SC, Brick Court Chambers
Robert O'Donoghue, Brick Court Chambers
José Costa Pereira, Adviser Policy and Communication, Africa Department, European External Action Service, European Union

This session discusses the development of single and common markets and currencies in Africa to underpin cross-border trade, including issues of free movement, competition law (both M&A and anti-trust), state aid and the environment. The session considers lessons to be learnt from EU and US experience, having regard to initiatives in the African Union and in regional economic communities.

12:15 - 13:00 SESSION 3: SANCTIONS

Chair: Maya Lester, Brick Court Chambers
Margaret Gray, Brick Court Chambers
Richard Blakeley, Brick Court Chambers

Sanctions are increasingly used in international relations, and they are intended to achieve different and often ill-defined aims. In relation to Africa, they usually consist of EU asset freezes, travel bans and arms embargoes.

This session explores developments in the use of sanctions, and how they impact on commercial relations, and on litigation in national courts and arbitration, including (1) recent cases on sanctions relating to Zimbabwe, Egypt, Tunisia and Libya and issues relating to misappropriation of State funds, mutual legal assistance and regime sanctions; and (2) sanctions issues in the English courts, including the impact of sanctions on contractual relations and judicial review of sanctions listing decisions

13:00 - 13:45 LUNCH

AFTERNOON PROGRAMME

13:45 - 14:45

SESSION 4: AFRICAN DISPUTE RESOLUTION IN LONDON

Chair: Helen Davies QC, Brick Court Chambers
Jonathan Hirst QC, Brick Court Chambers
Charles Hollander QC, Brick Court Chambers
Tom Adam QC, Brick Court Chambers
Edward Harrison, Brick Court Chambers

This session considers the approach of the English courts to disputes emanating from Africa. Advocates with direct experience of litigating commercial cases with an African dimension in London, including before the Commercial Court, will provide comment and insights in relation to recent cases and the specific issues that might arise in that context.

14:45 - 15:30

SESSION 5: ARBITRATION – ENFORCEMENT OF AWARDS

Chair: Harry Matovu QC, Brick Court Chambers
Jo Box, Brick Court Chambers
Kyle Lawson, Brick Court Chambers
Babajide Ogundipe, Partner, Sofunde, Osakwe, Ogundipe & Belgore (Lagos)
Aisha Abdallah, Partner, Anjarwalla & Khanna (Nairobi)

This session assesses regimes for the recognition and enforcement of arbitral awards in England and in Africa, including (1) the New York Convention and the OHADA regime in Africa; (2) the approach of the English Courts; (3) the approach of the Nigerian Courts; and (4) the approach of the Kenyan/East African Courts

15:30 - 16:00

AFTERNOON TEA

16:00 - 17:30

SESSION 6: CORRUPTION – A DISCUSSION

Chair: Sir Sydney Kentridge QC, Brick Court Chambers
Lord Hoffmann, Brick Court Chambers, former Lord of Appeal in Ordinary
Adv. Thuli Madonsela, Public Protector of the Republic of South Africa
Robert Barrington, Executive Director, Transparency International UK

Corruption has a massive impact on economies across the world. But how should it be combated in an age of globalised money-laundering and asset-moving? And should legal action be possible against government ministers and officials accused of plundering state assets without waiting for regime change? Should there be exceptions to principles of sovereignty and state immunity in international law in the fight against corruption? The Public Protector of South Africa will present an address to the conference and this session will consider these issues in a high-profile discussion.

17:30 - 18:15

KEYNOTE SPEAKER

Admiral Sir George Zambellas KCB DSC ADC, First Sea Lord and Chief of UK Naval Staff

Naval Power in the 21st Century: Supporting Global Business and International Law

18:15 - 20:00

CONFERENCE CLOSE AND DRINKS RECEPTION

Hunterian Museum, Royal College of Surgeons

Speaker biographies

Session 1

Richard Gordon QC

Richard Gordon is widely recognised as one of the leading silks in Administrative and Public Law, Constitutional Law, EU Law and Human Rights/Civil Liberties. Increasingly, his work encompasses public law issues arising in competition, commercial regulatory and energy cases. He acts in international jurisdictions at the highest level as well as in the UK.

During his career Richard has won landmark victories in cases that have changed the law. He won the Bournewood Case in Strasbourg which led to amendments to the Mental Capacity Act and in Coughlan he secured a Court of Appeal judgment that brought in the doctrine of substantive legitimate expectation. He has won victories in Europe over the illegality of NHS waiting lists (Watts v UK), legal protection for wild birds under the Birds Directive (the RSPB Case), and the need for environmental impact assessments for old planning permissions (Wells v UK). Most recently this year in the Supreme Court he won an important case involving the deprivation of liberty of persons lacking capacity which overturned three different judgments of the Court of Appeal. This year has also seen important wins in cases in Cayman (for the Cayman Water Authority) and for UK Power in a major energy case about consumer 'switching' rights at Heathrow.

Paul Bowen QC

Paul Bowen QC practises primarily in public & administrative, human rights, EU and constitutional law in judicial review and other civil actions, often with a significant cross-over with criminal law. His practise covers a broad range of subject areas including criminal justice, corporate governance, data protection, discrimination, education, EU law, freedom of information, healthcare & community care, immigration, inquests, legal aid, local government, media & entertainment, mental capacity & mental health, police, prisons, public procurement, regulatory and social security law. Paul is often instructed in high-profile challenges in the higher courts leading to significant legal changes, with over a hundred reported cases to his name.

He has appeared in a wide variety of Courts and Tribunals in the UK and abroad, up to and including the Supreme Court (twelve cases, four as leading counsel), the Privy Council and the European Court of Human Rights. He appears for claimants, defendants and interveners whether individuals, private companies, public authorities, regulators, charities and other NGOs and was recently appointed to the new 'A' Panel of Counsel to the Equality and Human Rights Commission (EHRC). He is equally comfortable drafting and presenting submissions on complex areas of law in the appellate courts as he is in managing large volumes of evidence and cross-examining witnesses at trial or at public inquiries. Paul is recommended in Chambers & Partners 2015 as a leading silk in five areas including Public and Administrative Law and Civil Liberties and Human Rights.

Emily MacKenzie

Emily MacKenzie practises in all areas of Chambers' work and regularly appears as an advocate, both led and unled. Emily is currently instructed in a wide range of cases including a shipping arbitration, Commercial Court litigation, the appeal from ***Forge Care Homes v Cardiff & Vale University Health Board*** [2015] EWHC 601 (Admin) and a human rights claim being heard in the Court of the Sovereign Base Areas of Akrotiri and Dhekelia.

Before coming to the Bar, Emily taught European Human Rights Law and Roman Law at Lincoln College, Oxford. This was after completing an LL.M at New York University School of Law, where she specialised in public international law. As an undergraduate, Emily also spent a year studying French Law at Université Paris II Panthéon-Assas. From January to August 2014 Emily worked as an international law fellow at the American Society of International Law in Washington DC, where she was involved in both public and private international law issues, focusing particularly on investment treaty arbitration.

Andrew McIntyre

Andrew McIntyre practises in all areas of Chambers' work. Before coming to the Bar, Andrew was a UN legal officer at the Khmer Rouge tribunal in Cambodia. He had previously worked for Yanagida and Partners, a leading commercial law firm in Tokyo. Prior to that, he worked in Johannesburg for

the Constitutional Litigation Unit of the Legal Resources Centre, a human rights NGO, and as a postgraduate fellow of Harvard Law School.

Professor Robert McCorquodale

Robert McCorquodale practices in public international law. He brings considerable expertise to this area of practice from his experience as the Director of the British Institute of International and Comparative Law, and Professor of International Law and Human Rights at the University of Nottingham. He is also a former Fellow and Lecturer at St. John's College, University of Cambridge, and he has practiced as a solicitor with leading commercial law firms. He is a Bencher of Middle Temple.

Robert has written extensively on public international law and international human rights law, including being an author of the leading Cases and Materials on International Law. He has also provided advice to governments, corporations, international organisations, non-governmental organisations and peoples concerning international law and human rights issues, including advising on the drafting of new constitutions and conducting training courses around the world.

Dr Eva Thorne

Dr Eva Thorne is Director of Policy and Research for Tony Blair Associates –Government Advisory (TBA – GA). Prior to that, she served as a strategic advisor to Liberia's National Oil Company (NOCAL) through the Africa Governance Initiative. While in Liberia, she worked with the centre of government (President, senior government ministers, and Chair, Board and CEO of NOCAL) on reform of the petroleum sector including: working on the country's new petroleum legal framework; liaising with international development institutions that provide technical assistance; designing and carrying out stakeholder consultations; and reforming NOCAL.

Eva has also worked with other governmental institutions in Africa, Asia and Latin America on governance-related matters. She has advised corporate clients on issues such as political risk and market entry, regulatory risk, joint ventures and stakeholder consultations. And she has worked on the ground with civil society groups in developing countries on social and environmental issues related to infrastructure projects. Eva has written for both academic and business publications on

environmental reform, natural resources, land rights, and political risk. She taught at Brandeis University, Boston University, Northeastern University, and Tufts University, all in the US. Eva holds a doctorate in political science from the Massachusetts Institute of Technology (MIT) and an undergraduate degree in history from Harvard University, both in Cambridge, Massachusetts.

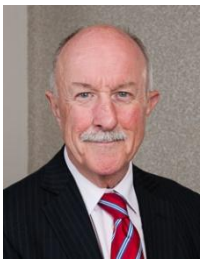
Session 2

Fergus Randolph QC

Fergus Randolph has over 25 years' experience litigating and advising on matters of EU and Competition Law. He is presently instructed in two multi-million pound competition damages claims on behalf of several national retailers against MasterCard and Visa, which has been named as one of the top 20 cases for 2014 by The Lawyer and said to be the largest ever such claims launched in the English courts. He has also appeared recently in several sanctions cases in the EU General Court. He is presently instructed to act on behalf of a shipping line in the EU Commission's investigation into price signalling.

He has appeared in several leading cases including Factortame (House of Lords), ***White v. White*** (House of Lords), Lonsdale (House of Lords), Quark (South Georgia Supreme Court and the House of Lords), Ingmar (European Court of Justice), ***Arkin v. Borchard*** (High Court and Court of Appeal), ***Albion v. Dwr Cymru*** (Competition Appeal Tribunal) and ***Churchill Insurance v. Wilkinson*** (High Court, Court of Appeal and European Court of Justice) and ***Bloomsbury International*** (Supreme Court). He recently secured a mandatory injunction to lift the unlawful blockade of live animal exports at Ramsgate.

Alastair Sutton



Alastair Sutton has been immersed in European Union Law for nearly 40 years, as an EU official and as a practitioner. His practice is primarily advisory and covers a broad spectrum of EU law issues, in particular the internal and external law of the Single Market. He was the legal advisor to the

Commission Vice President responsible for the launch of the Single Market project between 1985 and 1990, and his legal practice over the last 20 years has reflected this experience.

Alastair advises both private entities and State entities (including those outside the EU) on a wide range of EU law areas including EU constitutional law, the internal and external law of the Single Market (especially financial and related services), business taxation, competition, state aids, external relations, energy, environmental protection and international economic law. He has experience in appearing before the European Courts and also assisting in domestic litigation.

Jeremy Gauntlett SC

Jeremy Gauntlett has provided expert evidence on several occasions in relation to South African and Namibian commercial law, law of contract and tort and admiralty law. He practises at both the Cape and Johannesburg Bars, with chambers in both cities.

Jeremy has frequently been leading counsel in the Constitutional Court, the Supreme Court of Appeal, the Competition Appeal Court and the Labour Appeal Court of South Africa, and the High Courts and Supreme Courts of other Southern African countries. He often sits as an arbitrator. He is a Bencher of Middle Temple.

Robert O'Donoghue

Robert O'Donoghue has extensive experience of competition law, EU law, utility regulation, and related aspects of commercial and public law. Clients include companies such as British Airways, Google, Glencore, Telefónica, ASDA, Samsung, and Marks and Spencer, as well as competition authorities and sectoral regulators in the UK and elsewhere. He has appeared in major cases in the High Court, Competition Appeal Tribunal, Court of Appeal, the EU Courts, the Irish courts, international arbitral bodies, and in oral hearings before competition authorities and sectoral regulators in these matters.

In 2012 Robert was listed in the "40 under 40" of global competition lawyers by *Global Competition Review*– one of only three practising UK barristers included.

José Costa Pereira

José Costa Pereira is a Portuguese diplomat currently working in European External Action Service of the European Union as an Adviser for Policy and Communications in the Africa Department where he was previously Head of the Pan African Division.

He was the former Head of the Task Force Africa in the General Secretariat of the Council, European Union. José was Portugal's former Deputy Head of Mission in Washington and Tokyo and Consul-General in Sidney. He was Director for Human Rights, Defence and Security Organisations and European Bilateral affairs in the Portuguese Ministry of Foreign Affairs and served also in intelligence and home affairs departments.

Session 3

Maya Lester

Maya Lester is a barrister at Brick Court Chambers, specialising in European law, public law / human rights, and competition law. She has a particular expertise in sanctions (both advisory work and litigation), and co-writes a blog on European sanctions law: http://europeansanctions.com.

Maya has appeared in number of leading sanctions cases in the European courts in Luxembourg (including Kadi 2, Tay Za and IRISL) and the United Kingdom, and is currently acting in a number of ongoing cases involving sanctions against Iran, Belarus, Zimbabwe, Russia, Egypt, Tunisia, North Korea, Syria, and counter-terrorist sanctions as well as regularly advising on sanctions related issues. She spent 2011-12 as a Visiting Scholar at Columbia Law School researching comparative sanctions law, organised conferences on targeted sanctions and the rule of law at NYU Law School in 2012 and UCL in 2013.

Margaret Gray

Margaret Gray specialises in EU litigation, having appeared in around 50 cases before the EU Courts, and has expertise in competition and state aid, energy and environment, financial regulation, intellectual property and sanctions. She was standing counsel to ESMA advising on credit rating agencies. Her current cases include challenges to EU sanctions on Tamil Tigers and the Iranian Oil Company (for the UK Government), challenges to cartel infringements (for the European Commission), private competition and state aid recovery proceedings.

Margaret was one of the 12 barristers featured in "The Hot 100 2012" published by The Lawyer. She regularly advises on EU law matters arising before the national courts of the UK and Ireland, appearing in the Supreme Courts of both jurisdictions in the past few months. She has built up a unique expertise in EU regulation of utilities and services between the UK and Ireland, due to her practices at the Bars of Ireland and Northern Ireland, in particular in energy and telecommunications matters. She has acted for each of the UK devolved administrations in EU state aid and procurement matters.

Richard Blakeley

Richard Blakeley has a broad practice that covers all aspects of Chambers' work but with particular expertise in commercial dispute resolution, civil fraud, banking, competition law and EU law.

Richard also has particular expertise in challenging and advising on EU, UK and EU sanctions measures and is currently instructed by more than a dozen banks, companies and individuals to challenge the sanctions imposed upon them both in the General Court and the Administrative Court. Of Richard's sanctions cases that have reached final determination, the large majority have resulted in the sanctioned person or entity being de-listed.

In June 2015 Richard was named world sanctions Young Practitioner of the Year by the *World Export Controls Review*.

Session 4

Helen Davies QC

Helen Davies is the joint Head of Brick Court Chambers. She has extensive experience in all aspects of Commercial Litigation, EU and Competition Law, having appeared as an advocate in numerous cases in the Commercial Court and Chancery Division of the High Court, as well the Court of Appeal, Supreme Court and the CJEU. She has also acted in many international and domestic arbitrations, and sits as an arbitrator.

Helen Davies has been identified as one of the leading practitioners in the Commercial Litigation, Competition/European, Arbitration, Energy and Insurance/Reinsurance fields by the Legal 500 and Chambers and Partners for many years, and is featured in *The Lawyer* Hot 100 2014.

Jonathan Hirst QC

Jonathan Hirst is the joint Head of Brick Court Chambers. His career at the bar spans 39 years, the last 24 of those in silk, having been appointed QC at the age of 36.

Within that time he has served as the Chairman of the Bar and appeared in all the High Court divisions including the House of Lords and Privy Council on a regular basis. He is first and foremost an advocate, regarded by his peers and clients alike as robust and “devastatingly effective” in Court and someone who is always prepared to roll up his sleeves and work hard to obtain a satisfactory result for his clients.

Jonathan Hirst's practice covers a breadth of areas in General Commercial Litigation that includes Banking, Insurance and Reinsurance, Shipping, EU and Competition Law and Arbitration. Cases include cross-examining for 47 days in the year long “Sphere Drake” Commercial Court trial, being heavily involved in various substantial arbitrations following hurricanes Katrina and Rita and more recently advising in one of the first “credit-crunch” actions in a $2bn claim, as well as seeking to challenge a $100 million London arbitration award in New York.

Charles Hollander QC

Charles Hollander has been practising as an advocate for over 30 years. The breadth of his practice is unusual. Whilst the core of his practice has always been in commercial litigation, whether in the Commercial Court, Chancery Division, in offshore jurisdictions or in arbitrations, he has extensive expertise in sports law, and other media-related work.

He is increasingly used as an advocate in major EU matters, particularly in the High Court, in competition and freedom of establishment cases and also has expertise in professional negligence. As a result of his well-known books Documentary Evidence and Conflicts of Interest he has a specialised practice in those areas: he has argued many of the leading cases in relation to disclosure and legal professional privilege, and has a substantial practice advising law firms on conflicts of interest. Charles has now been called as a full member of the Hong Kong Bar and also practises from Temple Chambers, Hong Kong and accepts instructions for cases before the Hong Kong courts.

Tom Adam QC

Tom Adam has a substantial practice in Commercial Litigation. He is regularly instructed in professional negligence claims involving the leading firms of accountants, solicitors and insurance brokers. He is very experienced in substantial reinsurance/insurance disputes and was heavily involved in the PA spiral market arbitrations. His general commercial experience includes banking, shipping and energy cases, and he has a particular interest in the law of privilege.

Edward Harrison

Edward Harrison has a broad commercial litigation and arbitration practice. His practice encompasses energy, banking and finance, professional negligence (including auditor's negligence), insurance, civil fraud and the conflict of laws and jurisdiction. He also has experience of human rights issues. Before coming to the Bar, Edward was an undergraduate and graduate student at Worcester College, Oxford, where he was also subsequently a lecturer in contract law.

Edward is currently instructed for the Claimants in Arcadia v Bosworth et al, a c$300 million fraud claim arising in connection with oil trading in West Africa. He is also instructed in a substantial Commercial Court dispute between Bernie Ecclestone and BayernLB regarding the Formula 1 group of companies.

Session 5

Harry Matovu QC

Harry Matovu has a wide-ranging commercial practice and considerable experience of general commercial claims, including civil fraud, banking and finance, insurance and reinsurance law, oil and gas and public international law and public inquiries. He has been instructed in a number of very high-profile cases over the years, including the Lloyd's litigation in the 1990s; the MMR Vaccine Litigation; litigation arising out of an attempted coup in 2004 against the Government of Equatorial Guinea, which was listed by *The Lawyer* as one of the top 20 cases for 2006, 2007 and 2008; and a five month Commercial Court trial in 2012-13 of a US$1.7 billion dispute over oil exploration rights in Iraqi Kurdistan, which was listed by *The Lawyer* as one of the top 20 cases for 2012 (***Excalibur Ventures LLC v Texas Keystone Inc***).

Harry has recently acted successfully in a billion-dollar Kazakh bank fraud claim; and in a substantial longevity swaps dispute between a Swiss investment fund and a leading global investment bank. He lectures on hedge funds, private equity and the Alternative Investment Fund Managers Directive (AIFMD). He is currently engaged, amongst other cases, in a major fraud action before the High Court of Tanzania.

Joanne Box

Joanne Box practises in all areas of Chambers' work, with a particular emphasis on commercial litigation, arbitration and intellectual property law. She appears regularly as an advocate and is instructed in cases before the High Court, the County Court and in arbitration, both led and unled.

Joanne is currently acting in a number of different matters before the Commercial Court and in arbitration including ***Cattles Limited v PriceWaterhouseCoopers LLP***, one of top cases of 2015 listed by *The Lawyer*.

Kyle Lawson

Kyle Lawson also practises in all areas of Chambers' work, focusing on commercial litigation and arbitration. He regularly appears as an advocate in the High Court and County Courts.

During pupillage, Kyle gained experience across the full spectrum of commercial work, including banking and financial services, shipping, insurance, professional negligence, conflicts of law, arbitration and general commercial litigation. Cases in which he was involved include ***Deutsche Bank AG v Sebastian Holdings Inc, Energy Venture Partners Limited v Malabu Oil and Gas Ltd*** and ***Standard Chartered Bank v Dorchester LNG (2) Ltd ("the Erin Schulte").***

Babajide Ogundipe

Babajide Ogundipe obtained his LLB from the University of London in 1978 and was called to the Nigeria Bar in July 1979. After working in Chief Rotimi Williams' Chambers he co-founded Sofunde, Osakwe, Ogundipe & Belgore in September 1989. He is a notary public of the federal republic of Nigeria and a fellow of the Chartered Institute of Arbitrators. Between 1997 and 2009, he held various positions in the Nigerian branch of the Chartered Institute of Arbitrators, serving as chairman from 2006 to 2009. He continues to be engaged in the activities of the branch, and is an approved tutor of the institute. He served as president of the Lagos Court of Arbitration from February 2010 to February 2014.

He practises primarily as a commercial litigator. A significant part of this practice has involved acting on behalf of clients in the banking, insurance, petroleum, pharmaceutical and shipping industries, who have been the victims of various different types of fraud and other misconduct, and in seeking the recovery of assets lost as a result. He has gained enormous experience, and has come to be recognised as one of Nigeria's leading lawyers, in these fields.

Aisha Abdallah

Aisha Abdallah is Head of Litigation at the Nairobi head office of Anjarwalla & Khanna. Her practice focuses on all aspects of commercial litigation, with a particular emphasis on disputes over land, environmental issues and natural resources.

She is dual qualified as an Advocate of the High Court of Kenya and Solicitor of England and Wales. She joined Anjarwalla & Khanna from Shoosmiths in the United Kingdom in 2012 and has over 15 years of experience in commercial litigation, real estate and environment disputes, intellectual property, public procurement, employment and contentious insolvency issues. Aisha also has experience in alternative dispute resolution including multi-party mediation and arbitration.

Session 6

Sir Sydney Kentridge QC

Sir Sydney Kentridge has a very wide experience of Commercial and Constitutional cases. He is widely regarded as one of the leading advocates of the 20th century. In a career spanning nearly 60 years, he has undertaken some of the most challenging and interesting cases of the day.

In the recent past he has represented the displaced people of the Chagos Islands before the House of Lords, and appeared for the governments of Iran and Equatorial New Guinea in actions concerning state justiciability.

Lord Hoffman

Lord Hoffmann was an advocate of the Supreme Court of South Africa 1958-60, called to the English Bar by Gray's Inn in 1964 and appointed Queen's Counsel in 1977. He was a appointed a judge of the High Court (Chancery Division) 1985-1992, elevated to the Court of Appeal 1992-1995 and appointed a Lord of Appeal in Ordinary 1995-2009. From 1980 to 1985 he was a part time member of the Courts of Appeal in Jersey and Guernsey. Since 1998 he has been a non-permanent judge of the Court of Final Appeal of Hong Kong.

In his career at the Bar he undertook a wide range of commercial and property disputes including ICC and Swedish Chamber of Commerce arbitrations. During his judicial career his leading judgments concerning arbitration have included ***Premium Nafta Products Ltd v Fili Shipping Company Ltd*** and ***West Tankers Inc v RAS Riunione Adriatica***.

Adv. Thuli Madonsela

Adv Thulisile (Thuli) Nomkhosi Madonsela is the Public Protector of South Africa, a position she has occupied for over 5 years. The 3rdPublic Protector and first woman to occupy the position, Adv Madonsela was appointed by the President with effect from 15 October 2009 following a unanimous vote by all parties represented in Parliament. Since Advocate Madonsela took office, the Public Protector as a constitutional institution has tackled tough questions and has received unprecedented national and international recognition, which has included her being recognized by Time Magazine as one of the world's most influential people in 2014.

One of the drafters of South Africa's post-apartheid Constitution, Adv Madonsela forfeited a Harvard scholarship to focus on her constitution drafting role as one of the Technical Advisers that worked with the Constitutional Assembly in drafting the current Constitution. She is co-architect of Justice Vision 2000, the National Action Plan on the Promotion and Protection of Human Rights, Promotion of Equality and Prevention of Unfair Discrimination Act, Employment Equity Act, Local Government Transition Act. She has contributed to several other laws enacted to transform the SA legal system since 1994, including the Promotion of Administrative Justice Act and the Repeal of the Black Administration Act.

Adv Madonsela is the Chairperson of the African Ombudsman Research Centre, a research and training facility based at the University of KwaZulu Natal, established under her leadership in 2011. Until recently, she was the Secretary of the African Ombudsman and Mediators Association (AOMA) with her achievements in that capacity, including the conceptualization, drafting and adoption of the OR Tambo Declaration for Minimum Standards for African Ombudsman Offices. She is a sought out key note speaker on constitutionalism, corruption, ethics, leadership and the role of the Public Protector. Her addresses include the United Nations Global Compact Conference, World Economic Forum Council Conference, Tallberg Forum, International Ombudsman Institute Conferences, Institute for Cultural Diplomacy's *World Without Walls* Conference and at African Union (AU) Conferences. Her international work includes contribution to the drafting of key international documents, including the Beijing +5 and WCAR Outcomes documents and several country human rights reports. She has also given lectures at various universities on her work and various aspects of the law.

Robert Barrington

Robert Barrington joined Transparency International UK in 2008 and was appointed as Executive Director in 2013. His areas of expertise include the Bribery Act, integrity in the private sector and corruption within the UK. Recent projects and publications include 'Anti-Bribery Due Diligence for Transactions', 'Adequate Procedures – Guidance to the UK Bribery Act' and 'Corruption in the UK'. He was previously Director of Governance & Sustainable Investment at F&C Asset Management, and CEO (Europe) of the environmental research group Earthwatch Institute. He was a member of the Ministry of Justice's Experts Group drafting the official guidance on the Bribery Act and formerly a member of the of the UK Government's Export Guarantees Advisory Committee. He has a degree from Oxford University, where he recently held a 3-year Visiting Fellowship, and a PhD from the European University Institute.

Keynote speaker

Admiral Sir George Zambellas KCB DSC ADC

Appointed First Sea Lord and Chief of Naval Staff in April 2013, Sir George Zambellas has, since 1980, enjoyed a diverse range of Command and staff appointments throughout a career serving in the Royal Navy, Joint Organisations and the Ministry of Defence.

As the Royal Navy's professional head and Chairman of the Navy Board, George Zambellas is responsible to Secretary of State for Defence for the fighting effectiveness, efficiency and morale of the Royal Navy, Royal Marines and Royal Fleet Auxiliary. As well as shaping the direction of the Armed Forces as a member of the Defence Council and the Armed Forces Committee, he also advises the Chief of the Defence Staff on maritime aspects of all operations, strategy and policy.He is the Top Level Budget holder for the Naval Sector and advises the Permanent Under Secretary on resource allocation and budgetary planning in the light of defence policy and naval priorities.

His early years were spent in Zimbabwe, before his family moved to the UK where he continued his education at Stowe School and Southampton University. He has commanded the Hunt Class Mine Countermeasures vessel, HMS CATTISTOCK, with deployments to the Baltic and Mediterranean; the Type 23 frigate HMS ARGYLL in the course of a counter-narcotics deployment operating with US and a range of other maritime forces; and in 1999, the Type 22 frigate HMS CHATHAM during its contribution to joint operations off Sierra Leone. In 2004, he returned to sea in command of the Royal Navy's Amphibious Task Group and in 2006, he led the RN Battle staff contribution to the operation to evacuate civilians from the Lebanon.

Promoted to Rear Admiral in 2006, he was entrusted with designing and delivering the Fleet's new approach to the delivery of maritime forces and support to operations, part of the Navy's continuing commitment to generating forces as efficiently as possible. Then serving as Commander, United Kingdom Maritime Force in 2007, he went on to the UK's Permanent Joint Headquarters as Chief of Staff (Operations) where he supported the joint operational planning and delivery for operations in Afghanistan.

On promotion to Vice Admiral in 2011, George Zambellas was appointed as Deputy Commander-in-Chief Fleet, becoming Commander-in-Chief Fleet the following year on promotion to Admiral. In this role, he also took 4* NATO command responsibility for the Allied Maritime Command at Northwood as it was restructured to be the single Maritime Command within NATO.

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Conference papers

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The UN Guiding Principles on Business and Human Rights

Prof. Robert McCorquodale and

Paul Bowen QC

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A. INTRODUCTION

> Human rights are at stake - and so, too, is the social sustainability of enterprises and markets as we know them.[1]

With these words, Professor John Ruggie completed his term as Special Representative of the Secretary-General of the United Nations on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (SRSG).[2] Over the six years of his term he had changed the debate about corporation's responsibilities for human rights abuses and provided a framework for analysis (Framework) and guiding principles (Guiding Principles) to put this framework into operation.[3] The main purpose of this paper is to clarify the Framework and Guiding Principles developed by the SRSG.[4]

This Framework has three elements (or "pillars"): the state's duty to protect against human rights abuses by corporations; the corporate responsibility to respect human rights; and the need for more effective access to remedies. The justification for this Framework is stated to be:

> [There is] the State duty to protect because it lies at the very core of the international human rights regime; the corporate responsibility to respect because it is the basic expectation society has of business; and access to remedy, because even the most concerted efforts cannot prevent all abuse…. The three principles form a complementary whole in that each supports the others in achieving sustainable progress.[5]

The SRSG produced other reports that sought to "operationalize"[6] this Framework, [7] and

[1] Statement by John Ruggie to the United Nations Human Rights Council, 31 May 2011.
[2] The original mandate was given by the UN Commission on Human Rights (now the UN Human Rights Council) by Resolution 2005/69 of 20 April 2005, UN Doc. E/CN.4/2005/L.10/Add.17.
[3] There have been a number of attempts at the national, regional and international levels to deal with the impacts on human rights of corporate activity through legal regulation, see, for example, Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2 (2003); and the original OECD Guidelines for Multinational Enterprises, OECD Declaration and Decisions on International Investment and Multinational Enterprises: Basic Texts (DAFFE/IME, 2000). Most attempts have not succeeded, largely through lack of political will by states or through strong resistance by business enterprises.
[4] This paper is partly based on R. McCorquodale, 'International Human Rights Law Perspectives on the UN Framework and Guiding Principles on Business and Human Rights' in L. Blecher, N. Stafford and G. Bellamy, (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (American Bar Association, 2014) 51-78
[5] Report to the UNHRC by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 7 April 2008, UN Doc A/HRC/8/5 (SRSG Report 2008), para. 9.
[6] United Nations Human Rights Council (UNHRC), in extending the mandate of the Special Representative, stated that it "recognizes the need to operationalize this framework", HRC Resolution 8/7 (2008), Preamble.
[7] Report to the UNHRC by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, 22 April 2009, UN Doc.A/HRC/11/13 (SRSG Report 2009) ; and

then, in 2011 he provided the Guiding Principles,[8] which were adopted by the United Nations Human Rights Council on 16 June 2011.[9] Importantly, the SRSG clarified that corporations (called "business enterprises" to cover a broad range of corporations – so this is the term used in this chapter) can abuse all types of human rights - economic, social, cultural, civil, political and collective rights – and that all business enterprises, no matter what is their size, nature or location, should be subject to the framework and guiding principles.[10]

While there are some well-made criticisms of these developments (both conceptually and practically)[11], the Framework and Guiding Principles are generally seen as the current primary way forward.[12] However, as the SRSG has noted: 'the Guiding Principles are not intended as a tool kit, simply to be taken off the shelf and plugged in… When it comes to means for implementation, therefore, one size does not fit all'.[13]In addition, he has stated that

> The Guiding Principles' normative contribution lies not in the creation of new international law obligations but in elaborating the implications of existing standards and practices for States and businesses; integrating them within a single, logically coherent and comprehensive template; and identifying where the current regime falls short and how it should be improved.[14]

Report to the UNHRC by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises of 9 April 2010, UN Doc. A/HRC/14/27 (SRSG Report 2010).

[8]SRSG Report to the UNHRC, Guiding Principles on Business and Human Rights: Implementing theUnited Nations "Protect, Respect and Remedy" Framework' (21 March2011), A/HRC/17/L.17/Rev.1 (Guiding Principles).

[9]UNHRC UN Doc A/HRC/RES/17/4, 2 5http://www.unglobalcompact.org/docs/ issues_doc/human_rights/A.HRC.17.RES.17.4.pdf4 accessed 31 August 2012.

[10]SRSG Report 2008 (note 4), para 6.

[11] See, for example, R. Mares (ed), Siege or Cavalry Charge? The UN Mandate on Business and Human Rights (Brill/MartinusNijhoff 2012).

[12]UNHRC Resolution 8/7 (note 5), para. 1. See also the Office of the High Commission for Human Rights (OHCHR), 'The Corporate Responsibility to Respect Human Rights: An Interpretive Guide' (2012) UN Doc HR/PUB/12/02, 5http://www.ohchr.org/Documents/Issues/Business/RtRInterpretativeGuide.pdf4 (Interpretive Guide).

[13] Guiding Principles, *supra* note 7, Principle 15, commentary.

[14]Ibid, Principle 14, commentary.

B. FIRST PILLAR: STATES' DUTY TO PROTECT HUMAN RIGHTS

Under international human rights law, each state has a duty, or legal obligation, not only to avoid violating human rights itself or by its agents but also to protect against human rights abuses by non-state actors, including business enterprises, within its territory. These customary international law obligations (being obligations on all states) are essentially restated in the first Guiding Principle:

> **GP1**: States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

In the applications of these international legal obligations in relation to the activities of business enterprises, states have been found by the human rights treaty bodies to be in breach of their obligations where, for example, employees of business enterprises have been dismissed or victimized for joining a trade union,[15] the activities of business enterprises have polluted air and land,[16] and where there have been failures by the state to protect indigenous peoples' land from harm caused by corporate activities or from corporate development.[17] In all of these cases, the state was in breach of its obligations under the relevant human rights treaty because its acts or omissions (including its acquiescence) enabled the business enterprise to act as it did. Therefore, even where a state (or a state official) is not directly responsible for the actual violation of international human rights law, the state can still be held responsible for a lack of positive action in responding to, or preventing, the violation of human rights by the business enterprise.

The SRSG did not firmly conclude that a state's obligation to protect human rights extends to the regulation of the activities of their corporate nationals (i.e. those business enterprises

[15] ECHR, *Young, James and Webster v. United Kingdom*, Judgment of 13 August 1981, Appl. No. 7601/76, 4 European Human Rights Reports 38; *Laval un Partneri* C-341/05 [2007] ECR I-11767 and *"Viking," The International Transport Workers' Federation and The Finnish Seaman's Union*, Case C-438/05 [2007] ECR I-10779.

[16] See, for example, African Commission on Human and Peoples' Rights (ACommHPR), *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, Communication No. 155/96 (2001), para. 59: "[Nigeria is in violation] of local people's rights to [...] health [...] and life [by] breaching its duty to protect the Ogoni people from damaging acts of oil companies". See also ECHR, *Lopez Ostra v Spain*, Judgment of 9 December 1994, Appl. No. 16798/90, 20 European Human Rights Reports 277; ECHR, *Guerra v. Italy*, Judgment of 19 February 1998, Appl. No. 00014967/89 (1998) 26 European Human Rights Reports 357.

[17] See Inter-American Court of Human Rights (IACtHR), *Yanomani v. Brazil* (1985), Res. 12/85 Annual Rep. Inter-American Commission on Human Rights (IACommHR) 1985-84; IACtHR, *The Mayagna (Sumo) AwasTingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C No. 79; and IACtHR, *Case of the Kichwa Indigenous People of Sarayaku v, Ecuador,* Judgment of June 27, 2012.

incorporated or domiciled in that state) outside the territory of that state.[18] Yet in international human rights law a state's obligation to protect human rights is not normally limited to its territory but does extend to all those within its "jurisdiction".[19] For example, the Inter-American Commission on Human Rights had to consider this issue in relation to the legal status of the persons detained by the United States (US) at Guantanamo Bay, Cuba.[20] The Commission considered that, although the detainees were outside the territory of the US they were subject to its jurisdiction because they were "wholly within the authority and control of the United States government".[21]

While there are limits to the extent to which a state can be held to have jurisdiction and control, including over its own nationals, a state can be found to be in violation of its obligations under international human rights treaties for actions taken by it extraterritorially, in relation to anyone within the power, control or authority of that state, as well as within an area over which that state exercises effective overall control.[22] In fact, an extensive research project has shown that there is substantial state practice in which national laws have been extended extraterritorially.[23] This includes regulation of the conduct of corporate nationals operating extraterritorially through foreign subsidiaries, such as in areas of competition law, shareholder and consumer protection, anti-bribery and corruption, and tax law. In relation to bribery and corruption, states have concluded treaties imposing obligations on them to regulate extraterritorial conduct of corporate nationals and their subsidiaries.[24]

Therefore, it is argued here that the state's obligation to protect human rights goes beyond the hesitant comment in the Guiding Principles and includes an obligation to act in such a way that it has effective laws and practices that protect actions and omissions by state agents[25] and by their corporate nationals who violate human rights outside the territory of the state. Indeed, without some form of extraterritorial regulation of corporate nationals, such business enterprises "could easily bypass the mandate of municipal law by transferring

[18] The commentary to General Principle 2 (note 7), is: "at present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled within their territory and/or jurisdiction. Nor are they generally prohibited from doing so, provided there is a recognized jurisdictional basis".
[19] For example, the American Convention on Human Rights 1969, Article 1(1); and the European Convention on Human Rights 1950, Article 1.
[20] IACommHR, *Detainees at Guantanamo Bay, Cuba (Precautionary Measures),* 41 ILM 532 (2002).
[21] Id., 533.
[22] See ICJ, *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), Judgment on merits of 19 December 2005, 45 ILM 271, para. 217, where the International Court of Justice held that the African Charter of Human and Peoples' Rights and the Convention on the Rights of the Child applied extraterritorially.
[23] See J. Zerk, "Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas." Harvard CSR Initiative, Working Paper No. 59. June 2010.
[24] See for example the UN Convention Combating Bribery of Foreign Public Officials in International Business Transactions 2003, adopted 31 October 2003, entered into force 14 December 2005, 43 ILM 37 (2004). The Convention imposes obligations on states parties to establish laws and criminal sanctions with respect to the bribery of foreign public officials and officials of public international organisations (Article 16) and to extend liability (whether criminal, civil or administrative) and sanctions to legal persons.
[25] Note that Guiding Principle 8 requires states to have "policy coherence" across all government departments, which could prevent a state claiming that it did not know what all its officials were doing.

or relocating their business operations offshore where human rights obligations are less stringent".[26]

In many situations, the government of a state is less economically powerful than the business enterprise.[27] However, even where there is such economic inequality, a state is still responsible for the violations of human rights that occur in its jurisdiction by the business enterprise. Indeed, a state's obligation to protect human rights extends to situations where there is internal armed conflict and where the actions that violate human rights are committed by paramilitary or armed opposition groups,[28] and even to parts of a state's territory where it is not currently exercising effective control.[29]

The abiding message of the SRSG's approach in relation to the state's duty to respect human rights is that inaction by a state in this area is in breach of its international human rights legal obligations. He goes further to warn that 'States should not assume that businesses invariably prefer, or benefit from, State inaction, and they should consider a smart mix of measures – national and international, mandatory and voluntary – to foster business respect for human rights'.

C. SECOND PILLAR: CORPORATE RESPONSIBILITY TO RESPECT

The Framework, as elaborated in the Guiding Principles, has made clear that business enterprises have a responsibility to protect human rights. This responsibility is defined as follows:

> [The corporate] responsibility to respect is defined by social expectations – as part of what is sometimes called a company's social licence to operate … [and] 'doing no harm' is not merely a passive responsibility for firms but may entail positive steps. To discharge the responsibility to respect requires due diligence. This concept describes the steps a company must take to become aware of, prevent and address adverse human rights impacts.[30]

[26] S. Deva, Acting Extraterritorially to Tame Multinational Corporations for Human Rights Violations: Who Should "Bell the Cat"?, 5 Melbourne JIL 37, at 49 (2004).

[27] For example, BHP, an Australian-based business enterprise, had such a strong influence over the government of Papua New Guinea and its income, that the government passed laws to protect BHP from legal challenge over its activities there, even though those activities had a profound negative impact on its own citizens: see *BHP v. Dagi* [1996], 2 VR 117 (Victorian Court of Appeal). This situation is not necessarily limited to economically weaker states, as seen in M. Lewis, *Liar's Poker* (1990), in which he describes how traders at the merchant bank, Salomon Brothers, repeatedly succeeded in lobbying US Congress to relax laws regarding mortgage transactions, which he argues led to windfalls for Salomon Brothers and the financial industry, and a dramatic increase in home foreclosures.

[28] For example, ECHR, *Ergi v. Turkey*, Judgment of 18 July 1998, Appl. No. 23818/94, 32 European Human Rights Reports 388; and ECHR, *Timurtas v. Turkey*, Judgment of 13 June 2000,Appl. No. 23531/94. See also Guiding Principle 7.

[29] See ECHR, *Ilascu v. Moldova and Russia*, Judgment of 8 July 2004, Appl. No. 48787/99.

[30] SRSG Report 2008 (note 4), paras. 54-61.

This is a strong and important statement that is then set out in the Guiding Principles in five "foundational" principles, being Guiding Principles 11-15. Two of these reiterate that this responsibility is in relation to all human rights,[31] and that it applies to all business enterprises,[32] as discussed above, and the other three are discussed below. In addition, the Guiding Principles make clear that the corporate responsibility to respect human rights 'exists independently of states' abilities and/or willingness to fulfil their own human rights obligations [and]…over and above compliance with national laws and regulations'.[33]

The Framework does not alter the position that, under the current international human rights law structure, business enterprises do not have any direct international legal obligations. Accordingly, business enterprises cannot be directly responsible for violations of international law.[34]Yet, the SRSG acknowledged that this responsibility is not a "law-free zone", and will be affected by developments in law, especially national law.[35]

The key element of the Framework and Guiding Principles that will be explored here in terms of international human rights law is that of "due diligence", as it appears to rely to some extent on international human rights legal ideas.

The concept of "due diligence" is used throughout this pillar, with Guiding Principle 15, being one of the "foundational" principles, providing:

> **GP15**: In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
> (a) A policy commitment to meet their responsibility to respect human rights;
> (b) A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
> (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Guiding Principles 17-21, which discuss the practical steps that business enterprises should take to discharge this responsibility, appear under the heading '[h]uman rights due diligence'.[36] These steps include having a human rights policy; assessing human rights impacts of company activities; integrating those values and findings into corporate cultures

[31]Guiding Principle 12.
[32]Guiding Principle 14.
[33]Commentary to Guiding Principle 11.
[34] This is due to the fact that international human rights law imposes the legal obligations to protect human rights on states alone, and has not yet developed so as to regulate directly the activities of business enterprises, or other non-state actors. For a discussion of this, see R. McCorquodale and R. La Forgia, Taking off the Blindfolds: Torture by Non-State Actors, 1 Human Rights Law Review189 (2001).
[35] See SRSG Report 2010 (note 6), para. 66.
[36] For a fuller discussion of the issue of due diligence in the Guiding Principles, see J. Bonnitcha and R. McCorquodale, Is the Concept of "Due Diligence" in the Guiding Principles Coherent?, http://ssrn.com/abstract=2208588, on which some of this text is based.

and management systems; and tracking as well as reporting performance. Examples of these in practice include the requirement in the UK since October 2013 for all quoted companies to include in their annual Strategic Report information about social, community and human rights issues, including any policies of the company and their effectiveness[37], and now required throughout the EU since December 2014 for all companies with over 500 employees.[38]

This concept of "due diligence" is defined as:

> Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person or enterprise] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case. In the context of the Guiding Principles, human rights due diligence comprises an ongoing management process that a reasonable and prudent enterprise needs to undertake, in light of its circumstances (including sector, operating context, size and similar factors) to meet its responsibility to respect human rights.[39]

This appears to be an integration of the international human rights legal obligation of due diligence in relation to the actions of non-state actors (such as business enterprises),[40] and the general voluntary business practice of due diligence.[41] In relation to the general business practice, the SRSG Report 2009 notes:

> Businesses routinely employ due diligence to assess exposure to risks beyond their control and develop mitigation strategies for them, such as changes in government policy, shifts in consumer preferences, and even weather patterns. Controllable or not, human rights challenges arising from the business context, its impacts and its relationships, can pose material risks to the company and its stakeholders, and generate outright abuses that may be linked to the company in perception or reality. Therefore, they merit a similar level of due diligence as any other risk.[42]

[37] Sections 414A-414C Companies Act 2006 as introduced by Companies Act 2006 (Strategic Report and Directors' Report) Regulations 2013/1970

[38] Directive 2013/34/EU of the European Parliament and of the Council of 26 June 2013 on the annual financial statements, consolidated financial statements and related reports of certain types of undertakings, amending Directive 2006/43/EC of the European Parliament and of the Council and repealing Council Directives 78/660/EEC and 83/349/EEC Text with EEA relevance, as amended by Directive 2014/95/EU of the European Parliament and European Commission of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups

[39] OCHRC Interpretive Guide (note 11) 4.

[40] See ICJ, *VélásquezRodriguez v. Honduras*, judgment of 29 July 1988, (1989) 28 ILM 294, paras. 172, 176.

[41] See, for example, J. Perry and T. Herd Mergers and Acquisitions: Reducing M&A Risk through Improved Due Diligence' (2012) 32 Strategy & Leadership 12,12

[42] SRSG Report 2009 (note 6), para. 52.

Thus the Framework cleverly aims to use a terminology that is familiar to both human rights law and business management practices. This could be helpful, except that the terminologies are based on different types of understandings.

Under international human rights law, the obligation of 'due diligence' is a positive legal obligation on a state, demanding considerable state resources, to investigate whether there has been a breach of human rights, including when the original act was by a business enterprise.[43] There are a clear standards of 'due diligence' established by the human rights treaty bodies when investigating whether individuals' or a particular group's human rights have been breached. These may vary depending upon the context but are likely to include appropriate fact-finding and criminal and other investigations by a suitably independent body and the provision of appropriate legal redress.[44] In contrast, the business practice of 'due diligence', which is often undertaken as a form of audit, especially during mergers and acquisitions, is a procedural practice to reduce risk in relation to the business enterprise's own interests. Whilst the reality of management of risk is a vital part of corporate activity, and poorly conducted due diligence audit can have adverse consequences (especially to the legal and accounting advisors to the business enterprise), it is difficult to establish a clear standard of business due diligence that can be adjudicated by human rights treaty bodies and other dispute settlement bodies.[45] It is therefore puzzling that the SRSG Report 2009 adopts a definition of due diligence that includes a legal aspect:

> Due diligence is commonly defined as 'diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation' … The Special Representative uses this term in its broader sense: a comprehensive, proactive attempt to uncover human rights risks, actual and potential, over the entire life cycle of a project or business activity, with the aim of avoiding and mitigating those risks.[46]

This confusion is carried through into the Guiding Principles. When the Guiding Principles refer to processes to 'identify, prevent, mitigate and account for … adverse human rights impacts' (as in Guiding Principle 15(b) above), the term due diligence is used in the business practice sense of the term, being about the subjective means of conduct. In contrast, the general foundational statement in General Principle 11 is as follows:

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[43] See, for example, ECHR, *Jordan v. UK*, Judgment of 4 May 2001,Appl. No. 24746/94, where the ECHR considered that the conduct of the investigation, the coroner's inquest, delay, the lack of both legal aid for the victim's family and the lack of public scrutiny of the reasons of the Director of Public Prosecutions not to prosecute, was a violation of Article 2 of the ECHR. See also UN Committee Against Torture, *Halimi-Nedzibi v. Austria* (8/1991), 1(2) IHRR190, para. 13.5 (1994).

[44] See, for example, International Human Rights and Business, 'The "State of Play" of Human Rights Due Diligence' (2011) http://www.ihrb.org/pdf/The_State_of_Play_of_Human_Rights_Due_Diligence.pdf accessed 25 January 2013.

[45] See D. Davitti, 'On the Meanings of International Investment Law and International Human Rights Law: the Alternative Narrative of Due Diligence' (2012) 12 Human Rights Law Review 421. Sometimes due diligence can be a defence by business enterprises in relation to a regulatory strict liability offence or some corporate criminal offences, see J. Dine (note 33).

[46] SRSG Report 2009 (note 6), para. 71. The quotation is from Black's Law Dictionary (8th ed. 2006).

> **GP11.** Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

This is interpreted by the SRSG as reflecting that 'business enterprises should act with due diligence to avoid infringing on the rights of others and to address adverse impacts with which they are involved'.[47] This approach is the use of the term due diligence as a standard of conduct and so is used in the human rights law sense of the term. Thus there is some confusion in the application of the term "due diligence" in the Framework and Guiding Principles.

The other aspect of the term "due diligence" that can cause confusion is how it can be applied to different situations. General Principle 17 provides:

> **GP17**. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
>
> (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
>
> (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
>
> (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve**.**

General Principle 17(a) continues the distinction drawn in "foundational" General Principle 13 between human rights due diligence for adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, and human rights due diligence for adverse human rights impacts of third parties. General Principle 13 provides:

> **GP13**: The responsibility to respect human rights requires that business enterprises:
> (a). Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

[47] Introduction to the Guiding Principles by the SRSG (note 7), para 6.

> (b) Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

There is thus a clear distinction made here between the responsibility on a business enterprise to "avoid" causing or contributing to its own human rights impacts (13(a)) and the responsibility to "seek to prevent or mitigate" impacts by third parties (13 (b)).

This distinction is also seen in the use of the term "leverage" to describe how a business enterprise should respond to actions by third parties. For example, General Principle 19 (b)(ii) provides that appropriate action by a business enterprise will depend on the "extent of its[the business enterprise's] leverage in addressing the adverse impact. In the Commentary to General Principle 19, it is stated:

> Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm. Where a business enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity, the situation is more complex. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the abuse, and whether terminating the relationship with the entity itself would have adverse human rights consequences.[48]

Therefore, it can be seen that there are two different standards of due diligence operating in the application of General Principle 13: a strict standard of a business enterprise avoiding its own impacts, and a leveraged standard for seeking to prevent other's impacts.

To be consistent with international human rights law, objective legal criteria must be established in regard to the standard of conduct required of a business enterprise in relation to its own impacts. In addition, where the human rights standard of conduct applied, the operation of a business practice standard of 'due diligence' would not be a sufficient defence by a business enterprise to an action based on the business enterprise's failure to respect human rights. Indeed, this position was accepted by those who helped to draft the Framework and Guidelines.[49]

[48]Commentary to Guiding Principle 19 (note 7).
[49]J. Sherman and A. Lehr, 'Human Rights Due diligence: Is it too Risky?' <http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf> accessed 14 November 2012, 18 citing L. Dhooge 'Due Diligence as a Defence to Corporate Liability Pursuant to the Alien Tort Statute' (2008) 22 Emory International Law Journal 455.

However, and in any event, the lack of clearer legal obligations on business enterprises in the Framework and Guiding Principles in relation to their activities that violate human rights makes it very difficult to access or enforce any remedies against them.[50] This is of particular importance as Guiding Principle 22 provides that "Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes". This leaves the issue as to how to access a remedy, which is the third pillar of the Framework.

D. THIRD PILLAR: ACCESS TO REMEDY

The third pillar of the framework is the need for access to a remedy. This is expressed in terms that there should be "effective grievance mechanisms" for the actions of both states and business enterprises, "where there is a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, explicit or implicit promises, customary practice, or general notions of fairness".[51] The remedies can be judicial and non-judicial.[52] The Guiding Principles set this out in terms of state's duties and business enterprise's responsibilities in this area.

I. States

A state has an obligation under international human rights law to provide a remedy where there is a violation of human rights.[53] While there is some discretion in a state as to how to provide a remedy, it must be "accessible and effective … [with] appropriate judicial and administrative mechanisms for addressing claims of rights violations under domestic law".[54] As shown above, a state's obligation to protect human rights includes an obligation to regulate, through law and practice, the actions of business enterprises which violate human rights. This obligation requires states to regulate their corporate nationals as part of the state's responsibilities under international human rights law.[55]

This obligation is confirmed in Guiding Principle 25, which is the "foundational" principle of the third pillar. It provides:

> **GP25**. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative,

[50] See, for example, the cases against Coca-Cola in Colombia where the company was accused of complicity in the murder of trade union members working at a Coca-Cola bottler but it was not held liable because the company's involvement was not deemed sufficiently proximate to find legal liability. Sinaltrainal v. Coca-Cola, 578 F. 3d 1252 (2009); M. Thomas, "Colombia: To Die For." Guardian UK. 20 September, 2008; A. Frankel, "11th Circuit Invokes 'Iqbal' in Affirming Dismissal of Alien Tort Claim Against Coca-Cola and Bottlers." The American Lawyer. August 13, 2009.
[51] SRSG Report 2010 (note 6), para. 90.
[52] SRSG Report 2008 (note 4), paras. 82-103. See also Guiding Principle 25 on effective remedies.
[53] Guiding Principle 1 reiterates this position.
[54] UN HRC General Comment 31 (note 20), para. 15. Guiding Principle 25 reiterates this standard but also refers to *any* appropriate means.
[55] For a report on the current access to remedies in the UK, see R. McCorquodale, *Survey of the Provision in the United Kingdom of Access to Remedies for Victims of Human Rights Harms by Business Enterprises* (July 2015), http://www.biicl.org/accesstoremedies.

> legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

The Guiding Principles contain no additional enforcement mechanism to those available under other international human rights treaties. Rather GP25 obliges states to put in place appropriate mechanisms to remedy human rights breaches. The availability of suitable means of legal redress through the courts is the key means of ensuring compliance and in this regard there remains a long road to travel. As matters currently stand, if a business enterprise breaches an individual's human rights then a remedy is available against the state only if a remedy is otherwise available under another human rights treaty (for example under the European Convention on Human Rights by way of an application to the European Court of Human Rights) or under existing domestic human rights legislation (such as the Human Rights Act 1998). A remedy may be available against the business enterprise directly if the breach falls within some other legal remedy created by legislation or common law (e.g. the tort of negligence), although it is open to states to impose liability for human rights breaches upon business enterprises directly, either through the courts' development of the law (as the UK courts have done, for example, in developing the tort of unlawful interference) or by legislation (which the UK has done in relation to private enterprises that provide community care services[56]).

In relation to the duty of care in tort claims, a particular issue may arise about the links between one business and another, especially concerning a parent business and its subsidiary. In *Chandler v Cape plc,*[57] the Court of Appeal held that, in appropriate circumstances, the law may impose on a duty of care on a parent business in relation to the health and safety of its subsidiary's employees. The Court held that the following factors could give rise to such a duty:

> [In] appropriate circumstances the law may impose on a parent company responsibility for the health and safety of its subsidiary's employees. Those circumstances include a situation where, as in the present case, (1) the businesses of the parent and subsidiary are in a relevant respect the same; (2) the parent has, or ought to have, superior knowledge on some relevant aspect of health and safety in the particular industry; (3) the subsidiary's system of work is unsafe as the parent company knew, or ought to have known; and (4) the parent knew or ought to have foreseen that the subsidiary or its employees would rely on its using that superior knowledge for the employees' protection. For the purposes of (4) it is not necessary to show that the parent is in the practice of intervening in the health and safety policies of the subsidiary. The court will look at the relationship between the companies more widely. The court may find that element (4) is established where the evidence shows that the parent has a

[56] S 145 Health and Social Care Act 2008 ("HSCA"), introduced to reverse the effect of YL v Birmingham City Council & Ors [2008] 1 AC 95; [2007] UKHL 27 ("YL")
[57] *Chandler v Cape plc* [2012] EWCA Civ 525.

> practice of intervening in the trading operations of the subsidiary, for example production and funding issues.[58]

In that case, the Court found that the parent business had a duty of care in relation to asbestosis contracted by employees of a subsidiary as result of exposure to asbestos dust.[59] In deciding this, it:

> [E]mphatically reject[ed] any suggestion that this court is in any way concerned with what is usually referred to as piercing the corporate veil. A subsidiary and its company are separate entities. There is no imposition or assumption of responsibility by reason only that a company is the parent company of another company. The question is simply whether what the parent company did amounted to taking on a direct duty to the subsidiary's employees.[60]

This decision indicates that it is possible for a parent business itself to owe a duty of care for an abuse of human rights (in that case to the employee's rights to life and to health) depending on the particular facts.

The tort actions could be brought where the victim of the human rights abuse and the location of the abuse are overseas. However, there are two additional factors that must be shown before the case can proceed: jurisdiction; and applicable law. The UK has civil and commercial jurisdiction over all legal persons domiciled in the EU, due to the effect of the EU Brussels I Regulation (now Brussels 1 Recast).[61] In terms of business enterprises, "domicile" is defined as the location of its 'statutory seat', 'central administration' or 'principal place of business'.[62] It is likely that the 'central administration' of a business is 'where management decisions are taken and where entrepreneurial decisions take place irrespective of where its economic activities occur.'[63]

Brussels I Regulation only applies for an EU domiciled business enterprise. So it is possible that the common law principle of *forum non conveniens* (i.e. that the court hearing the case was not the appropriate forum for it to be heard as it has no real or substantial connection with the case) could be applied to business enterprises domiciled elsewhere. However, the general approach of the courts prior to the implementation of the Brussels I Regulation, was to interpret *forum non conveniens* narrowly, as seen in the words of Lord Bingham, speaking for a unanimous House of Lords:

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[58] Ibid, para. 80.
[59] Ibid, paras 72-76.
[60] Ibid, paras. 69-70.
[61] European Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Brussels I Regulation), Article 2(1). Brussels 1 Recast was passed in 2012 – EU Regulation 1215/2012 – and updates some areas but makes no substantive changes to the relevant part of Brussels I for our purposes. The relevant Article for Brussels I Recast is Article 4.
[62] Ibid, Brussels I, Article 60; Brussels I Recast, Article 63.
[63] *Vava*v *Anglo American South Africa Ltd* [2012] EWHC 1969 (QB), para 43.

> [If] these proceedings were stayed in favour of the more appropriate forum in South Africa the probability is that the plaintiffs would have no means of obtaining the professional representation and the expert evidence which would be essential if these claims were to be justly decided. This would amount to a denial of justice.[64]

This approach by the courts facilitates a broader access to remedies for victims, wherever the business enterprise is located and wherever the abuse occurred.

The other factor that affects a case concerning an abuse of human rights by a business enterprise overseas is the applicable law, being the law that deals with the harm done by the business. The relevant applicable law in such cases is now governed by the EU Rome II Regulation.[65] The Rome II Regulation provides a uniform rule for EU domiciled business enterprises[66] that the applicable law of a claim shall be the law of the State where the damage occurred, irrespective of the State where the claim is being brought.[67] There are limited exceptions to this rule.[68] The Rome II Regulation also provides that damages will be assessed in accordance with the law and procedure of the State in which the harm occurred.[69]

Hence, the courts in the UK must generally apply the law of the State in which the damage occurred. This is largely consistent with the previous situation.[70] This simplifies claims but does require the claimant's lawyers to investigate to the particular relevant law in another State, which may not always be easy to ascertain.

As the UK does not have a separate procedure for class actions or for collective redress for these types of cases,[71] the process of bringing a collective action is determined by court procedural rules, such as the Civil Procedure Rules of England and Wales.[72] There are two possible routes: the representative action[73] and the Group Litigation Order (GLO),[74] each of which are complex.

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[64] *Lubbe v Cape,* [2000] 1 WLR 1545 (HL), 1559-60.
[65] Regulation (EC) 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II Regulation).
[66] 'Domicile' is defined in the same way as for Brussels I and Brussels I Recast – see Rome II, Article 60.
[67] Ibid, Article 4(1).
[68] The exceptions include: where a claimant and the business share a common 'habitual residence' (Article 4(2)); where the event is manifestly more closely connected with another State (Article 4(3)); and or where the application of that law would conflict with mandatory laws or public policy of the State in which the claim is brought (Articles 16 and 26). There is also a special exception for environmental damage, where the law will be that of the State where the damage occurred unless the claimant chooses the law of the State where the event giving rise to the damage occurred (Article 7). See further G. Skinner, R. McCorquodale, O. de Schutter and A. Lambe, *The Third Pillar: Access to Judicial Remedies for Human Rights Violations by Transnational Business* (2013).
[69] Ibid, Articles 4 and 15.
[70] Private International Law (Miscellaneous Provisions) Act 1995, section 11 (1).
[71] See J. Sorabji, 'Collective Action Reform in England and Wales' in D. Fairgrieve and E. Lein, *Extraterritoriality and Collective Redress* (2012) 43, who notes that there is some specific representative action available in competition law.
[72] See D. Fairgrieve, 'Collective Redress Procedures: European Debates' in ibid, 15, 28-32. There are separate procedural rules in Scotland and in Northern Ireland.
[73] Civil Procedure Rules, Part 19.6.
[74] Ibid, Part 19III, and Ministry of Justice, 'Group Litigation Orders', www.justice.gov.uk/courts/rcj-rolls-building/queens-bench/group-litigation-orders.

There are also judicial remedies through employment tribunals and also some criminal provisions. Three recent pieces of UK legislation create criminal offences that can be committed by business enterprises, even if they are not aimed solely at this purpose. The Bribery Act 2010 includes offences for the bribery of another person, being bribed and bribing a foreign official,[75] including by an 'associated person',[76] as well as a form of strict liability offence for failing to prevent bribery, which can be committed by any 'relevant commercial organisation'.[77] This corporate offence circumvents the common law principles of corporate liability and the 'identification' approach, and places the burden firmly on corporations to ensure that their anti-corruption procedures are sufficiently robust to prevent bribery, even by third parties. It is a defence for the corporation to prove that it had in place adequate procedures to prevent bribery,[78] as the intention is to incentivise bribery prevention and corporate good governance. There is an issue about whether an act of bribery is an abuse of human rights, though the weight of opinion is that it does.[79]

The other two pieces of legislation that are relevant in this regard are the Serious Crime Act 2007, which includes business activity offences,[80] and the Modern Slavery Act 2015. The latter empowers a court to make a slavery and trafficking reparation order against a convicted person/business enterprise and to award compensation to the victim,[81] with a preference to the compensation being given where there are insufficient means to pay a fine and compensation.[82]

However, it is clear that judicial remedies are not the only legal mechanism that states can or must take to ensure compliance with GP25. States may, for example, amend their corporate/company law, including in areas such as directors' duties, to regulate the activity of a business enterprise in relation to any of the business enterprise's activities (including extraterritorially and for its subsidiaries) that could adversely impact on the protection of human rights. Many states are now doing this,[83] and some states are also extending their

[75] Ss. 1, 2, 6, Bribery Act 2010.
[76] Ibid, section 8.
[77] Ibid, s. 7. s. 7(5) defines a relevant commercial organisation as, (a) a body which is incorporated under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), (b) any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom, (c) a partnership which is formed under the law of any part of the United Kingdom and which carries on a business (whether there or elsewhere), or (d) any other partnership (wherever formed) which carries on a business, or part of a business, in any part of the United Kingdom, and, for the purposes of this section, a trade or profession is a business.
[78] Ibid, s.9.
[79] See, for example, M. Boersma, *Corruption: A Violation of Human Rights and a Crime Under International Law?* (2012), C.R. Kumar, *Corruption and Human Rights in India: Comparative Perspectives on Transparency and Good Governance* (2011), and K. Annan, 'Forward, UN Convention Against Corruption: http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf (2004), cf M. Goodwin and K. Rose-Sender, 'Linking Corruption and Human Rights: An Unwelcome Addition to the Development Discourse' in M. Boersma and H. Nelen (eds), *Corruption and Human Rights: Interdisciplinary Perspectives* (2010).
[80] Ss. 52-53 Serious Crimes Act 2007.
[81] S. 9 Modern Slavery Act 2015.
[82] Ibid, s. 8(6).
[83] See, for example, the UK Companies Act 2006 that requires directors to "have regard" to such matters as "the impact of the company's operations on the community and the environment" as part of their duties (Section 172 (1) (d)), and the

criminal law to include corporate activity.[84] This principle can extend beyond corporation/company law to other areas of law as well.[85]

As discussed above, laws should also be developed so that parent corporations are clearly legally responsible in their home state for the actions of their subsidiaries in other states that occurred due to the subsidiary operating the policies of the parent corporation (for example, on human resource policies, marketing and finances).[86] This may also be a means to enable appropriate capacity building support to occur in some economically weaker states. The same effect can be reached through the development of laws governing the enforcement of foreign judgments.[87]

In addition, there are international legal actions that can be taken by states. For example, the OECD Guidelines on Multinational Enterprises, which were revised to take some account of the Framework,[88] provide for national mechanisms (National Contact Points (NCPs)) to consider breaches by business enterprises of the OECD Guidelines. However, there are no effective compliance mechanisms in the Guidelines to enforce decisions by NCPs. It relies more on "peer pressure" of other OECD states or a business enterprise's own willingness to act.[89] These compliance mechanisms need to be stronger and with effective sanctions. These could, for example, link the NCPs more directly into the OECD state's existing national human rights institutions, require the state of the business enterprise in breach not to allow that business enterprise access to government contracts and export credits, or create a distinct OECD Guidelines legal committee with enforcement powers. There is a particular need for these types of powers where business enterprises are operating in conflict zones, fragile states and regions where there is weak governance.[90] Other possible means to ensure increased access to remedies under the current international legal system can be

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South African Companies Act 2008 allows the Government to prescribe social and ethics commitments for companies (Section 72 (4)).

[84] See, for example, Italian statute Decreto Legislativo 231#, 2001, and Australian Commonwealth Criminal Code 1995.

[85] For example, the UK Agency Worker Regulations (in effect from October 2011) require UK employers to ensure that short-term contract workers (many of whom are non-nationals) have comparable employment protections to permanent workers.

[86] An example is the California Supply Chain Transparency Act 2010, under which companies worth more than a stated amount are required to report on whether they are engaged in ethical supply chain management and the extent of this engagement. By setting a volume threshold in capturing companies under the law, foreign companies operating in California are subject to its extraterritorial effect, as foreign companies must report on foreign suppliers linked to California.

[87] See, for example, the very recent judgment of the Canadian Supreme Court in Chevron Corp v Yaiguaje, 2015 SCC 42 in which a judgment against Chevron in the amount of $9.5 billion obtained in Ecuador in respect of environmental pollution was held to be enforceable against Chevron in Canada.

[88] OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011)5 http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en4. See also L. Liberti, 'OECD 50th Anniversary: The Updated OECD Guidelines for Multinational Enterprises and the New OECD Recommendation on Due Diligence Guidance for Conflict-free Mineral Supply Chains' (2012) 13 Business Law International 35, 37...

[89] See the ECCJ, Fatal Transactions, Cafod, Global Witness, European office of the Jesuits, IPIS, Briefing for the European Parliament Human Rights Sub-Committee, 16 April 2009, at 5, available at <http://www.business-humanrights.org/Links/Repository/409429/jump>.

[90] See, for example, OECD, OECD Risk Awareness Tools for Multinational Enterprises in Weak Governance Zones, available at <http://www.oecd.org/dataoecd/26/21/36885821.pdf>.

found in areas such as trade, finance and investment, especially as all these areas facilitate global corporate activity.[91]

II. Business Enterprises

In relation to business enterprise's obligations for access to remedies, the Guiding Principles provide:

> **GP29**. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

The contrast between this Guiding Principle and Guiding Principle 25 is that the obligation on business enterprises is expressed here as a "should", whilst that on states is expressed as a "must". Indeed, while many business enterprises have committed themselves to global, sectoral or other statements about CSR, some of which include reference to human rights,[92]these are all voluntary commitments and none of them have any compliance mechanisms with independent dispute settlement bodies. This prevents access to legally effective remedies.[93]

Guiding Principle 31 sets out the effectiveness criteria for business enterprises in relation to access to a remedy (all of which are non-judicial). It provides that these mechanisms should be: legitimate, accessible, predictable, equitable, transparent, rights-compatible, a source of continuous learning and based on engagement and dialogue. While these are very useful and laudable, it can be argued that the due diligence responsibility of business enterprises, especially when related to impacts causes by the business enterprise itself, should, as discussed above, be directly linked to effective, legitimate monitoring and compliance mechanisms regulated by law and not left to regulation by a self-reviewing system.[94] Of course, such independent judicial mechanisms do not exist in some states, especially in

[91] A. Lang. "Trade Agreements, Businesses and Human Rights: The Case of EPZs." Harvard CSR Initiative Working Paper No. 57. (April 2010).

[92] For example, the UN Global Compact, available at <http://www.unglobalcompact.org>. The Global Compact includes the following principles that business enterprises should adopt: "World Business should *Principle 1*: support and respect the protection of human rights within their sphere of influence; *Principle 2*: make sure that their own corporations are not complicit in human rights abuses". See also the promotion of CSR by the International Council on Mining and Metals, available at <http://www.icmm.com/our-work/sustainable-development-framework>. The Equator Principles and the Extractives Industry Transparency Initiative are two additional examples.

[93] See, for example, the chemical industry activities: J. Colopy, Poisoning the Developing World: The Exportation of Unregistered and Severely Restricted Pesticides from the United States, 13 UCLA Journal of Environmental Law and Policy167 (1994/1995); R. Gottlieb *et al*, Greening or Greenwashing?: The Evolution of Industry Decision Making, in: R. Gottlieb (ed.), Reducing Toxics: A New Approach to Policy and Industrial Decision Making (1995). In relation to the oil and gas industry, see R. Lindsay, R. McCorquodale, L. Blecher, J. Bonnitcha, A. Crockett and A. Sheppard, 'Human Rights Responsibilities in the Oil and Gas

Sector: Applying the UN Guiding Principles', section 4 (note 36).

[94] There is also likely to be more consistency of international human rights standards are applied than if they are either nationally based or deal with cultural issues in a different way to international human rights law.

conflict zones and fragile states, and so there is also a requirement for the rule of law to be supported.[95]

Indeed, it might be argued that most business enterprises respond better to preventative regulation by a state than to reactive litigation, not least because it reduces uncertainty and risk for the business enterprise. Yet, when there is reference to legal regulation of business enterprises, it tends to focus on the possibility of criminal sanctions, especially in relation to corporate complicity. While a discussion of this issue is outside the parameters of this article, this issue of corporate criminal responsibility is particularly problematic because of the requirement in criminal law of showing intent.[96] This requirement usually necessitates that there be a specific individual in a business enterprises to whom the obligation would attach.[97]However, the requirement of individual responsibility to enable an access to a remedy for a corporate act is not necessary in many areas of civil liability. Business enterprises, as legal entities, have been held to be legally responsible around the world for actions that violate aspects of human rights, such as in consumer protection areas and environmental damage.[98] There is also the possibility of joint liability at the international level for a state and a business enterprises, in the same way as it can occur within many states' national laws.[99] All these civil liability aspects of a business enterprise's responsibility in relation to access to remedies should be explored in order to be consistent with international human rights legal developments.

Hence, the last pillar of the Framework is essential but, as it is built on the other two pillars, it has flaws, not least in whether there can be an effective access to a remedy against a business enterprise when there is no legal obligation on that business enterprise to have a legally enforceable grievance mechanism. There will also be issues of costs, standing and access to justice which will require effective cooperation between and within states.[100]

[95] For a fuller discussion of the importance of the rule of law in this area, see R. McCorquodale, Business, the International Rule of Law and Human Rights, in: R. McCorquodale (ed.),The Rule of Law in International and Comparative Legal Context (2010). Also Guiding Principle 7 stresses conflict zones as a major concern for corporate complicity in human rights abuses.
[96] See the *Talisman* case and how the construction of an intent requirement in civil law may be relevant in corporate complicity in human rights abuse under the Alien Torts Claims Act – Presbyterian Church of Sudan v. Talisman, 582 F.3d 244 – Court of Appeals, 2nd Circuit, 2009.
[97] See the Report of the International Commission of Jurists, Corporate Complicity and Legal Accountability (2008); and D. Silver, Collective Responsibility, Corporate Responsibility and Moral Taint, 30 Midwest Studies in Philosophy 269(2006).
[98] See Scott (note 28).
[99] See, for example, Morgera (note 77).
[100] This is also seen in the debate in the UK over contingency fees, which human rights advocates fear could be amended to prevent business and human rights cases from being viable due to cost implications for victims and plaintiffs' lawyers. R. James, "Global Justice Under Threat from Legal Aid Plan." Bristol 24/7. 28 March, 2012; D. Brennan, "The Legal Aid Bill Will Enable Multinationals to Exploit the Poor." The Guardian. 26 March, 2012.

E. CONCLUSIONS

The Framework created by Ruggie has made a significant change in the debate about the responsibility of business enterprises for violations of human rights, as has his method of active consultation. There is still a great amount of work to be done to ensure that the obligations and standards recommended are not the very minimum but are a platform for dynamic change, and that, as a consequence, there is support for capacity building initiatives to assist governments and business enterprises around the world towards upholding their responsibilities.[101]

However, legal regulation consistent with international human rights law is needed in the application of the Guiding Principles. Indeed, much of the activity of business enterprises is assisted substantially by the operation of a rule of law. A rule of law requires good governance consistent with justice and human rights, that all actors are accountable to the law (including governments and those with power), that all actors can have disputes settled in an independent and accessible way, and that there are compliance checking mechanisms.[102] Where there is an effective rule of law, business enterprises can conduct their business aware that there is likely to be a large degree of stability, certainty and recourse, and hence reduce their risks.[103] Therefore, as noted in the opening quotations, it is essential for both the protection of human rights and the integrity of markets to find the best solutions in law and practice.

It might be feasible to devise a treaty that would encompass business enterprise's obligations with respect to human rights, in the same way as there are aspects of international law, such as international criminal law and international humanitarian law that encompass non-state actors' obligations.[104] Yet this is unlikely to occur without the political will of states – both the host states who gain the investment of business enterprises and the home states who gain the returns on this investment – and the acceptance by the economically powerful lobby of business enterprises that this would be in their interest. Pressure by civil society on states and business enterprises would be relevant in any process. This acceptance is not impossible, as seen in the international tobacco

[101] This was done in relation to the oil and gas industry: see R. Lindsay, R. McCorquodale, L. Blecher, J. Bonnitcha, A. Crockett and A. Sheppard, 'Human Rights Responsibilities in the Oil and GasSector: Applying the UN Guiding Principles' (note 36).
[102] T. Bingham, The Rule of Law, 66 Cambridge Law Journal 67 (2007).
[103] See the report from the World Bank on the link between the Rule of Law and GDP: D. Kaufmann, A. Kraay and M. Mastruzzi, Governance Matters, available at <http://www.worldbank.org/wbi/governance> (2005).
[104] The SRSG did not preclude or encourage this development: see OHCHR, 'Recommendations on Follow-Up to the Mandate, Mandate of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises' (February 2011)5http://www. business-humanrights.org/media/documents/ruggie/ruggie-special-mandate-follow-up-11-feb-2011.pdf4.

regulation.[105] While the process of drafting a treaty can be slow, it can be an important one in allowing many ideas and voices to be heard, and can operate as part of a pull towards compliance of business enterprises with recognised international human rights legal standards.

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[105] See the World Health Organisation Framework Convention on Tobacco Control 2003, available at <http://www.who.int/fctc>. This reaffirms the right to the highest standard of health.

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Investment Treaty Arbitration and the Protection of Human Rights in Africa

Emily MacKenzie

BRICK COURT CHAMBERS

INTRODUCTION

1. African countries have historically embraced the regime of international investment law. They have entered into numerous bilateral investment treaties (BITs) and other instruments, such as the ICSID Convention, that make up the international investment regime.

2. These international investment agreements commonly include Investor-State dispute settlement (ISDS) provisions. These provisions grant the foreign investor the right to use a designated procedure, usually arbitration, to protect the investment against actions of the State in whose territory the investment is made.

3. The use of ISDS raises concerns which are particularly acute in the context of developing countries, where the need to secure social and economic rights comes to the fore, as well as in the context of States going through constitutional transformation. These concerns have led South Africa to change fundamentally its involvement in BITs. However, the extent to which there is a similar appetite for change in other countries in the region is unclear. And it must not be forgotten that ISDS has the potential at least to provide a forum for the vindication of human rights norms when no other forum exists.

CONCERNS ABOUT ISDS: THE RULE OF LAW, HUMAN RIGHTS AND CONSTITUTIONAL TRANSFORMATION

4. ISDS plays a controversial role when it comes to the protection of individual interests, including environmental and labour standards, consumer protection and human rights.

5. There are systemic rule of law concerns that arise out of the lack of transparency, inconsistency and unenforceability of arbitration awards and these concerns abound whenever ISDS is used. Nevertheless, it is fair to say that such rule of law concerns are of particular weight when raised in relation to developing countries and countries going through constitutional transformation. This is because the use of a segregated arbitration mechanism to resolve the complaints of privileged foreign investors may be said to inhibit the spread of good governance and strong jurisprudence in a state where the development of an open, accountable and just legal system is still nascent.

6. However, it is the substantive concerns – most significantly the use of ISDS by investors to challenge state policy measures and decisions that are designed to secure the human rights of its citizens – that are particularly acute when raised in relation to developing countries and countries going through constitutional transformation.

7. Several high-profile cases have served to fuel this concern.

8. For example, the ICSID arbitration *Biwater Gauff v Republic of Tanzania*[1]highlighted the lack of weight given, in the international investment setting, to the right to water.[2] The case concerned the failure of a private company to provide safe drinking water for the population of Dar es Salaam, which led the Tanzanian State, in an attempt to improve the desperate sanitation situation in the city, to terminate the 10 year lease to supply water that it had granted to the company. Despite strong criticisms in the Award of the company's performance, the termination of the lease was found by the ICSID Tribunal to be in breach of the applicable British-Tanzanian BIT. Although NGOs submitted an *amicus curiae* brief raising the importance of the right to water in this context, arguing, *inter alia*, that when investors choose to invest in the sanitation sector they inexorably assume responsibilities linked to the achievement of essential human rights, this seemingly gained no traction at all in the Award. The decision not to award compensation was instead based solely upon the nil value of the company and the failure to prove causation.

9. In the arena of equality legislation, ISDS cases attacking state measures instrumental in rebuilding post-apartheid South Africa, including the requirement that mining companies be partly owned by "historically disadvantaged persons"[3], led South Africa to conduct a comprehensive review of its BITs. The conclusion was that the BITs *"pose risks and limitations on the ability of the government to pursue its constitutional-based transformation agenda"*[4].

AN APPETITE FOR CHANGE?

10. Following the review of its BITs, South Africa decided to pull out of as many of them as possible.[5] The new Promotion and Protection of Investment Bill, thoroughly grounded in the South African Constitution, does not include ISDS as a recourse for disgruntled investors, but rather aims to strike a balance between the protection of investment and the ability of the State to engage in its reform agenda, including the promotion and protection of fundamental rights.

[1]Biwater Gauff (Tanzania) v United Republic of Tanzania, ICSID Case No. ARB/05/22, (Award 24 July 2008).
[2] Water and sanitation have been explicitly recognised as human rights in several international instruments, including in the International Covenant on Economic, Social and Cultural Rights (ICESCR), Arts. 11 and 12, and in the UN General Assembly Resolution A/RES/68/157 and the Human Rights Council Resolution A/HRC/RES/24/18.
[3] See, for example, Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01 (Award 4 August 2010).
[4] South African Trade Minister Rob Davies speaking at an UNCTAD event in Geneva on 24 September 2012, reported in Investment Treaty News, available at https://www.iisd.org/itn/2012/10/30/news-in-brief-9/.
[5] For a comprehensive account of this process see *"Process Matters: South Africa's Experience Exiting its BITs"*, Mohammad Mossallam, University of Oxford Global Economic Governance Programme Working Paper, January 2015.

11. Despite South Africa's concerns being echoed by Namibia[6], in general the African continent has been less vocal in its objection to ISDS than, say, the Latin American region.

12. Discontent with the current system can be inferred from communal moves to remedy the problematic aspects of ISDS in instruments such as the Southern African Development Community (SADC) Model BIT[7] and the model Investment Agreement for the Common Market of Eastern and Southern Africa (COMESA) Common Investment Area.[8]These Model BITs incorporate the notion of investor responsibility – including a duty to avoid corruption, to conduct environmental and social impact assessments and to maintain a minimum standard of human rights. They also specifically protect a regulatory space for the host state to engage in measures designed to protect national security, the environment and human rights, as well as ensuring the State the right to pursue development goals.

13. However, to date, the take-up of these model agreements has been extremely poor. And economically important counties in the region, most notably Nigeria, have not renegotiated or terminated BITs when the opportunity arose. The relative lack of participation African countries in discussion about the ISDS issue means that it is not clear whether the lack of change should be taken as indicating positive support for the current BIT system, or simply a lack of motivation or ability to alter the *status quo*.

14. It is certainly possible that the reforms set out in the SADC Model BIT (which are similar to those proposed by other organisations, such as UNCTAD[9] and the EU[10]) require a level of resources, particularly legal resources, that many African countries currently lack. The reforms may also require a level of engagement in the world of international investment organisations that historically has not been found amongst some African nations. For example, one proposed reform is to introduce a standing investment appellate court endowed with the ability to review tribunal decisions. That reform is unlikely to appeal to those African countries where participation in the existing WTO dispute settlement mechanism has been highly limited. It is also notable that, despite the relatively high rate of African States appearing as respondent States to ICSID arbitrations, there is very little representation of African citizens as arbitrators, conciliators or committee members.

[6] See, for example, the statement given by the Namibian Ministry of Trade and Industry at World Investment Forum on 16 October 2014, available at http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Lindeque.pdf.
[7] Available at http://www.iisd.org/itn/wp-content/uploads/2012/10/sadc-model-bit-template-final.pdf.
[8] Available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092.
[9] Summary available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.
[10] See the proposals of Commissioner Malmstrong made in May 2015 , available at http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

ISDS: A FORUM FOR THE VINDICATION OF HUMAN RIGHTS?

15. Strange though it may seem, given the discussion above, ISDS has the potential to provide a forum for the vindication of human rights norms when no other such forum exists.

16. A case to watch in this regard is the ICSID claim being brought by Al Jazeera against Egypt[11]over the crackdown on Al Jazeera's operations in Egypt, which included the arrest and recent trial of four of its journalists. The case is being brought under the terms of a 1999 BIT between Egypt and Qatar, with Al Jazeera arguing that Egypt has breached its rights as a foreign investor. This case will force ICSID to grapple with issues of freedom of expression and association in determining whether any compensation is due to Al Jazeera.

17. On the one hand, it is progressive and somewhat exciting to see human rights brought to the fore of the international investment regime, as well as important that the alleged human rights violations can be explored in a legal forum at all. On the other hand, this development could be seen as a worrying one and as giving rise to many difficult questions. These include whether, particularly given the rule of law concerns that surround ISDS, it is an appropriate forum in which to develop human rights jurisprudence. More fundamentally, is it desirable for human rights arguments to be deployed in order to provide remedies for investors, as opposed to remedies for individual victims on the ground?

18. It seems likely, in any event, that discussion of human rights will increasingly enter the international investment arena. Any modification of the ISDS system as a result of the importation of human rights safeguards, such as those seen in the South African Promotion and Protection of Investment Bill and the Model BITs, could mean that arbitrators will be increasingly confronted with respondent States relying on human rights norms to defend claims and, potentially, having more success in doing so than was seen in the Tanzanian example cited above.

CONCLUSION

19. This is an interesting time in which to consider the interrelationship between the protection of human rights and investment treaty arbitration. There is significant momentum towards reforms to ensure that State measures which are designed to protect human rights will not result in the State having to pay out to investors where such measures affect the value of an investment. Equally, human rights arguments are being deployed by investors, as seen in the Al Jazeera case.

[11] See report of 28 April 2014 in the Financial Times, available at http://www.ft.com/cms/s/0/7ff2210c-cec0-11e3-ac8d-00144feabdc0.html#axzz3lRQGCmX3.

20. Although there are reasons to welcome the increasing importance placed upon human rights in the investment context, there is also cause for concern arising from the fact that significant human rights jurisprudence may begin to develop in a forum that has significant and endemic rule of law problems. More fundamentally, we will have to decide whether it is desirable for human rights norms to provide compensation for investors or a defence for the State in a situation where there is little or no prospect of vindicating the rights of the individual victims of the human rights violation.

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A Brief Introduction to the International Criminal Court

Andrew McIntyre

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INTRODUCTION

1. The purpose of this paper is to provide a brief overview of the International Criminal Court and, in particular, to explain the scope of its jurisdiction.

2. While various international criminal tribunals (*e.g.*the International Military Tribunal at Nuremberg; the International Criminal Tribunal for the former Yugoslavia; the Special Court for Sierra Leone; the Extraordinary Chambers in the Courts of Cambodia) have been set up over the past eight decades in response to specific atrocities, the ICC is the first permanent international court with general jurisdiction over the most serious international crimes. It is supposed to be a court of last resort, and as such it may only intervene where a state is itself unwilling or unable to investigate or prosecute alleged perpetrators.

MEMBERSHIP

3. The ICC was established by the Rome Statute, which was adopted on 17 July 1998 and entered into force on 1 July 2002. 123 states are party to the Rome Statute, including 34 of the 54 fully recognised sovereign states in Africa. Africa's participation in the ICC is therefore relatively good compared to *e.g.* the Asia-Pacific and Middle East region (19 states party of approximately 49 total states), but still lags behind Europe (40 of 50 states).

4. A further 31 states have signed the Rome Statute but not ratified it. Under Article 18 of the Vienna Convention on the Law of Treaties, the only obligation of a signatory that has not ratified a treaty is to refrain from acts which would defeat the treaty's object and purpose. The USA, Israel and Sudan – all signatories to the Rome Statute – have indicated that they do not intend to become parties in the future, and are no longer bound even by that limited obligation. Notable non-signatories include China, India and Pakistan.

5. Pursuant to Article 12(3), non-parties to the Rome Statute may nevertheless accept the ICC's jurisdiction on an *ad hoc* basis. Ukraine – which has signed but not ratified the Rome Statute – has voluntarily accepted the ICC's jurisdiction in relation to certain crimes allegedly committed after November 2014.

CRIMES

6. The ICC has jurisdiction over the "*most serious crimes of concern to the international community as a whole*" (Article 5(1)). These are:

   (a) **Genocide**: the Rome Statute adopts the definition set out in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. Acts that may amount to genocide include not only killing and causing serious bodily or mental harm, but also the forcible transfer of children from one group to another, where the intent is to destroya national, ethnical, racial or religious group.

(b) **Crimes against humanity**: the essential feature of a crime against humanity is that it is committed as part of a widespread or systematic attack directed against a civilian population. A wide range of offences may fall within this category, including murder, enslavement, rape, enforced disappearance, political persecution and the forcible transfer of a population. Crimes against humanity may be committed in wartime or in peacetime.

(c) **War crimes**:unlike crimes against humanity, war crimes can only be committed in the context of an armed conflict, whether international or internal. This includes protracted armed violence between organised groups of non-state actors (*Prosecutor v Tadić*). The armed conflict must have played a substantial part in the perpetrator's ability or decision to commit the crime, or in the manner in which or the purpose for which it was committed (*Prosecutor v Kunarac*). War crimes include grave breaches of the Geneva Conventions and other serious violations of the laws and customs of war.

7. The Rome Statute also makes provision for the ICC to take jurisdiction over the crime of aggression, *i.e.* the preparation or execution by a person in a leadership position of an act of armed force by one state against another. The ICC will not be able to exercise this jurisdiction until it is 'activated' by a vote of the states party after 1 January 2017.

8. The ICC's jurisdiction extends only to crimes committed after the Rome Statute came into force on 1 July 2002.

ROUTES TO JURISDICTION

9. The ICC may exercise its jurisdiction over a crime in one of three ways.

10. First, a state party to the Rome Statute may refer to the ICC a situation in which one or more crimes within the Court's jurisdiction appears to have been committed (Article 14). The Court may only exercise its jurisdiction if the alleged crime took place in the territory of a state party, or if the alleged perpetrator was a national of a state party. At the time of drafting, it was anticipated that states party would use the Article 14 mechanism to refer crimes occurring in other countries to the ICC. In fact, to date Article 14 has largely been used for self-referrals (*e.g.* Democratic Republic of Congo; Uganda; Central African Republic), a prospect "*not seriously contemplated*" during pre-treaty negotiations (Politi&Gioia, 2008) but now actively encouraged by the Prosecutor.

11. Second, the UN Security Council may refer a situation to the ICC, even if it relates to conduct taking place in (or perpetrators who are not nationals of) any state party to the Rome Statute (Article 13(b)). To date the Security Council has made two referrals: Libya and Sudan. A Security Council resolution referring the situation in Syria to the ICC was vetoed by China and Russia in 2014. (Libya, Sudan and Syria are not parties to the Rome Statute.)

12. Third, the Prosecutor may initiate an investigation *propriumotu*(Article 15(1)). She may do so entirely of her own motion; in response to complaints filed by members of the public or non-governmental organisations (of which around 10,000 had been received by the end of 2013); or, as in the case of Ukraine, where a non-party to the Rome Statute voluntarily accepts the ICC's jurisdiction. While the Prosecutor can open a 'preliminary examination' at her own discretion, she must seek authorisation from the Court's Pre-Trial Chamber in order to progress to the formal investigation stage. There are currently nine ongoing preliminary examinations. A further eight preliminary examinations have proceeded to the investigation stage (including examinations begun as a result of self-referrals and Security Council referrals), while another three have been closed with no further action being taken. Where the Prosecutor initiates an investigation of her own motion, the Court may only exercise its jurisdiction if the alleged crime took place in the territory of a state party, or if the alleged perpetrator was a national of a state party.

PROCEDURE

13. There are three distinct phases to a case in the ICC: pre-trial, trial and appeal.

14. The pre-trial phase begins with a preliminary examination of the facts by the Prosecutor. On the basis of this examination, the Prosecutor decides whether to open a formal investigation under Article 53. Authorisation from the Pre-Trial Chamber to proceed will be required where the examination was begun by the Prosecutor *propriomotu*, but not where the situation was referred to the ICC by a state party or by the Security Council.

15. At the end of the investigation the Prosecutor decides, at her sole discretion, whether or not to bring formal charges. Where there are grounds to suspect that a person has committed a crime, that person has certain rights under Article 55 of the Rome Statute – including a right tolegal assistance – even before any formal charges have been brought. The Pre-Trial Chamber deals with any preliminary orders or rulingssought in the investigation stage (including applications by the Prosecutor for the issuing of an arrest warrant). The ICC does not, of course, have capacity or authority to execute arrest warrants, and depends on the co-operation of states for their enforcement.

16. If charges are to be brought, the Pre-Trial Chamber holds a hearing to confirm the charges on which the Prosecutor intends to seek trial. The personwho is to be chargedhas a right to be present. The Prosecutor must establish that there are substantial grounds on which to believe that the person committed the crimecharged. The person who is to be charged may put forward his own evidence. If the PTC declines to confirm any charges, the Prosecutor is not precluded from trying again with additional evidence.

17. Once the charges are confirmed by the PTC, a Trial Chamber is convened and the trial phase begins. Though it is possible in principle for the ICC to hold the trial elsewhere, *e.g.* in the Defendant's home country or the place where the alleged crimes occurred, all trials to date have taken place in The Hague. The trial procedure

is primarily adversarial in nature, but with elements of the inquisitorial process mixed in. The burden is on the Prosecutor to prove the guilt of the accused beyond reasonable doubt (Article 66). It is for the presiding judge to direct proceedings (Article 64(8)), and the Trial Chamber may request the submission of evidence that it considers necessary for the determination of the truth (Article 69(3)). The Trial Chamber may itself question a witness, either before or after the witness has been examined by the Prosecutor and by defence counsel (Rule 140).

18. The Rome Statute also provides for the participation of victims in the trial. Victims may be individuals or organisations or institutions, but the latter onlywhen their property dedicated to certain purposes (religion, education, art, science or charitable and humanitarianpurposes, or historic monuments or hospitals) has been harmed as a result of a crime. The effect is obviously to exclude most commercial enterprises. Victims have a right to be represented before the Court (typically by shared representatives) and may make submissions at all stages of proceedings. Through their representatives, they may make opening and closing submissions and (on making an application to the Trial Chamber) put questions to witnesses and experts.

19. If an accused person is convicted, the Rome Statute makes provision for the Court to order payment of reparations to victims (Article 75). Given that many defendants are likely to be indigent, the ICC maintains its own limitedfund for victims, although experience at other international tribunals (*e.g.* the ECCC) suggests that reparations paid from this fund will largely be symbolic in nature. It is possible for the Court to request states party to assist with the identification, tracing and freezing of assets with a view to their forfeiture (Article 93(1)(k)).

20. There is no separate sentencing hearing; submissions on sentencing are made in the course of the trial. The maximum sentence is life imprisonment. A right of appeal to the Appeals Chamber lies against a decision to acquit or convict; it is also possible for either the Prosecutor or the defendant to appeal against the sentence (Article 81). The appeal is the third and final phase of proceedings.

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Market Regulation and Competition in Africa

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[1] In addition to these notes, I attach my report drafted in 2014 on enhancing market integration in COMESA. This more detailed paper highlights not only the cornerstones of the EU's Single Market project, which may be of relevance in Africa, but also the very considerable challenges facing African countries as they seek to promote trade liberalisation and market integration as part of the economic development process.

BACKGROUND

Over the last four years I have worked with the European Commission, the Commission of the African Union, as well as regional organisations in Africa such as COMESA, SACU and UEMOA, on trade liberalisation and market integration. My work has been based on my experience (initially as legal advisor to Lord Cockfield, Vice President of the first Delors Commission between 1985 and 1989) on the EU's Single Market project. For the last 25 years, my legal practice in Brussels has centred on the internal and external aspects of the Single Market.

The EU has become a legal model and an economic magnet for regional integration programmes around the world, including Africa. This does not mean that EU law, institutions and procedures can be transposed without change to other regions with different historical, political and economic backgrounds. Nonetheless, many of the lessons learned in Europe over the last 65 years in the evolution from national markets to a customs union, common market (with the complete abolition of national frontiers on 31/12/92) and economic and monetary union, are relevant (even inspirational) in other (very different) regions. [2]

Cooperation between the EU and African Union (AU) now includes "continental integration" as a theme.[3] The roadmap adopted at the 2014 EU-AU Summit decided "to fast-track the establishment of a Continental Free Trade Area (CFTA) in Africa", with the EU offering to "draw on its experience of building the Single Market to provide capacity support to this initiative."

In parallel to the CFTA initiative amongst all 54 States of the AU, trade liberalisation and market integration is pursued (with EU financial and technical support) at a regional level in Africa. The EU would also support African countries in the WTO accession process, as well as in implementing the WTO trade facilitation process. Also in parallel to these continental and regional initiatives are Economic Partnership Agreements (EPAs) being negotiated between the EU and various African regions.

THREE FUNDAMENTAL CRITERIA

For trade liberalisation and/or market integration to succeed in contributing to economic development (as a pre-condition for political stability), at least three criteria need to be met:

[2] Even small countries in the Pacific are now building preferential trading areas (usually based initially on free trade areas).

[3] The EU-AU Summit in April 2014 agreed a roadmap for 2014-2017 containing 5 policy areas: peace and security; democracy, good governance and human rights; human development; sustainable and inclusive development and growth and *continental integration*; global and emerging issues.

a) The rule of law (including compulsory dispute settlement and effective enforcement of rules) and the elimination of corruption in order to provide legal certainty to economic operators;
b) Administrative cooperation between public authorities (regulators, supervisors and judges) to create a climate of mutual knowledge, trust and confidence leading to the pooling of national sovereignty;
c) Political accountability - in effect a "public-private partnership" between the public authorities and private sector "stakeholders" to ensure that agreements on paper are translated into economic and commercial reality.

DISTINGUISHING TRADE LIBERALISATION AND MARKET INTEGRATION - THE IMPORTANCE OF "SOVEREIGNTY" IN AFRICA

The relatively recent independence (and acquisition of notional "sovereignty") of virtually all African Stateshas important consequences for trade liberalisation and (especially) market integration in Africa compared with Europe:

a) A deep reluctance to cede "sovereignty" (or decision-making power) to international (or supranational) bodies;
b) A reluctance on the part of international institutions to take measures (e.g. enforcement actions or "infringement procedures" against Member States;
c) The continuing importance of national frontiers in Africa, meaning that trade liberalisation is confined to the reduction of "classical" tariff and non-tariff barriers to trade, stopping well short of market *integration* on the EU model;
d) A serious gap between national and international public authorities and "stakeholders" in the regulatory and law enforcement processes, thereby diminishing the credibility and effectiveness of the liberalisation process.

Against this background, international economic relations in Africa today are almost exclusively on the "trade liberalisation" rather than "market integration" model. The absence of significant WTO/GATT experience- despite formal membership - for most of the 54 AU States is a significant handicap in the liberalisation process.[4] Trade liberalisation (customs union or FTA) negotiations between developed countries have undoubtedly benefitted from their "Geneva experience" on technical issues such as technical barriers to trade (TBTs), tariffs, sanitary and phytosanitary barriers to trade (especially important in trade in agricultural products and raw materials which dominate trade in and with Africa), public procurement and other similar issues.

[4] This is so even if most AU Member States are now WTO Members. Since the creation of the GATT (WTO since 1995) very few African States have played a significant role in its trade liberalisation process, partly because of their special "development" status under Part IV of the GATT, partly because of a lack of resources (e.g. officials with trade policy experience), partly because of the perception of the GATT/WTO as a "rich mans' club" and latterly because of the diminished importance of the WTO following the prolonged failure of the Doha Development Round of trade negotiations.

THE PREVALENCE OF CORRUPTION AND "INFORMAL" BARRIERS TO CROSS-BORDER TRADE

These are two quite separate problems. As far as corruption is concerned, it is clear that the need (for example) to pay bribes to public officials (or to private individuals operating outside the law) is a common problem across Africa, amounting - in effect - to a non-tariff barrier (NTB) and additional costs for economic operators. Unless countered by African governments, bribery and corruption at best add significant costs to cross-border trade and, at worst, discourage attempts to export, import or invest at all.

Although there is much that the EU can do to assist African countries in promoting trade (e.g. through financial and technical assistance), the removal of bribery and corruption can only be addressed by political will in the African countries themselves, although accountability in the regular EU-AU (or regional) meetings – with "conditionality" being used to greater effect.[5]

"Informal trade" is a different matter and one which is hard to quantify, not least because such cross-border trade takes place without documentation or other formalities (e.g. customs controls). Such exchanges are often based on tribal or other historical relationships (especially between individuals, families or SMEs) which pre-date current borders. It was made clear in some regional meetings that such informal trade can be significant and is of considerable social importance (including for the employment of women). The message here was that, although intra-African trade would benefit from better regulation and supervision (e.g. in the interests of consumer protection and better statistical records), the importance of informal trade for the livelihood of those concerned means that it should in some way be protected.

THE PROLIFERATION (AND OVERLAPPING) OF TRADE AGREEMENTS – THE NEED FOR CLEAR, SIMPLE AND ENFORCEABLE RULES

The 54 States in Africa are linked by a plethora of continental and regional preferential trade agreements. In addition, most African States are now WTO Members, whilst an increasing number of African States and regions are (or soon will be) linked to the EU by Economic Partnership Agreements (EPAs). Many African States are parties to more than one regional agreement and organisation, often with different (if not actually conflicting) rules, standards and procedures (e.g. rules of origin).

Such an "alphabet soup" is complicated (to say the least) for private sector operators, as well as for trade officials of Member States and relevant international organisations and secretariats. The current negotiations for a CFTA risk adding one more layer of regulation (and cost) to the existing "legal lasagne". One of the problems with the CFTA is that, unless it results in a considerable *reduction and simplification* of the existing overlapping RECs (which is not clear), the costs of the new agreement will outweigh the benefits, especially

[5] A condition here is that the EU and its Member States themselves have the political will and determination to raise issues of bribery and corruption with their African counterparts, rather than being inhibited by post-colonial guilt complexes (see further below).

given the institutional weakness of the organs of the African Union in Addis Ababa in terms of enforcing the new agreement.

THE EU SINGLE MARKET AS A MODEL

In 1985 the European Commission produced a White Paper on completing the internal market. This was unanimously approved by Member States in the Council. The White Paper was revolutionary in a number of respects. First, it contained a regulatory *action plan*, not to add unnecessary new rules, but to remove conflicting national obstacles to cross-border trade in goods and services, as well as the free movement of capital (i.e. investment) and workers. Second and crucially, it contained a *binding timetable* to which politicians (in the Council of Ministers) could be held accountable. Finally, the White Paper established a "new approach" to regulation based on *minimum harmonisation of the essential requirements for the protection of health, consumers and investors*, complemented by *mutual recognition of (unharmonised) national rules, standards, procedures and decisions.*

The *economic and commercial need* for this action (involving the complete abolition of national frontiers) was demonstrated by a study, initiated by the Commission in 1986, of the "*costs ofnon-Europe*". This demonstrated - on a sector-by-sector basis – both the macro and micro-economic benefits which the successful completion of the programme would achieve.

The imperfections in the "EU model" as it has evolved over the last 30 years (and especially following the 2007/8 crisis) are well-known, as are the political, economic and legal reasons why the "model" cannot be simply copied in Africa.

There is however no reason why the *methodology* used in Europe could not be emulated in Africa, especially by the RECs, with their greater regional homogeneity. In particular, studies demonstrating the costs of "non-Africa" – given adequate publicity - could provide a spur to greater efforts towards liberalisation and an antidote to excessive reliance on "sovereignty".

THE SOVEREIGNTY ISSUE

In every meeting on trade liberalisation and (especially) market integration in Africa, the (relatively) recently acquired sovereignty or independence of most of the 54 AU Members is raised as a reason why anything approaching the EU model is politically impossible in Africa. In particular, the total abolition of frontiers and the implementation of the "4 freedoms"[6]- even at a regional level – is currently inconceivable.

There are at least two possible answers to this – in Africa as in Europe. First, greater economic prosperity resulting from economic liberalisation (complemented by proportionate measures to protect the "general good"[7]) will actually enhance "sovereignty" and the influence of African States and organisations in the global system. Secondly, to pool or share sovereignty is not to "use it, not lose it". Thus, relations between States in African

[6]The free movement of goods, services, persons and capital (including the right of establishment).

[7] I use this expression (drawn from EU insurance law) as a synonym for the essential requirements of public policy, such as the protection of health, the environment and consumers.

economic organisations (and between States and the institutions in such organisations) should not be viewed as adversarial, but rather as an advanced from of "classical" international cooperation based on the rule of law.

THE RULE OF LAW – INDISPENSABLE TO LEGAL CERTAINTY AND ECONOMIC GROWTH

It is (still) often said that the European Union is a "community of law". This is true: when the rule of law breaks down - as in the current migration/refugees crisis in the EU - the whole process of liberalisation/integration is threatened.

Looking back however, the role of law, lawyers and judges (both national and European) in the EU over the last 60 years cannot be over-estimated. Still today, lawyers (or officials with legal training) play a crucial role at all levels and in all the EU institutions. There is an *ingrained* habit of referring to and using the law in every step of the EU "process".

The development of the fundamental principles of EU law (i.e. the direct effect and supremacy of EU law as well as the right of EU citizens to remedies for breach of EU law by Member States) since the 1960s is perhaps the classic example of the rule and role of law in the EU. Although these were "judge-made" principles, it is significant that they have never been seriously challenged in any EU inter-governmental or "constitutional" conference, or Summit of EU leaders. There is no obvious reason why – at least to a certain extent- African Heads of State and Government could not support the same bold initiatives by African judges.

Most if not all African economic agreements (whether at the continental or regional level) contain a reference to the rule of law.[8] Article 9 of the Cotonou Agreement between the EU and ACP countries provides that "the structure of the Government and prerogatives of the different powers shall be founded on the rule of law, which shall entail in particular effective and accessible means of redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law.[9]

However, in practice, the implementation of continental and regional economic agreements in Africa still tends to depend more on political than legal factors. The role of lawyers in African administrations (both national and international) appears to be less important than in their European counterparts.

When discussing the rule of (economic) law in Africa (especially enforcement action by the Commission of the AU or its equivalent in the RECs), the "sovereignty" issue is often raised. Even in the EU, infringement proceedings by the Commission against Member States are not automatic. Political considerations intervene (sometimes too much). And of course the enforcement of EU law is (these days especially) as much (if not more) in the hands of national courts and tribunals, backed up by the "reference procedure" under Article 267

[8] Article 6(g) of the COMESA Treaty identifies "the recognition and observance of the rule of law" as a fundamental principle upon which COMESA is based.

[9] Article 8 of the Cotonou Agreement also calls for "a regular assessment of the developments concerning respect for human rights, democratic principles, the rule of law and good govenance."

TFEU. However, in Africa, the fact that political considerations tend to take priority over the enforcement of legal rules strikes at the credibility of the customs union and free trade agreements which have been negotiated - often with great difficulty.

African private sector organisations often complain that the weakness of law-enforcement by African economic organisations is a serious disincentive to trade or invest across frontiers. This is particularly the case for the small or medium-sized entities (SMEs) which are vital to economic growth. The credibility of the multiple customs union and free trade area agreements is diminished by the fact that the enforcement and dispute settlement provisions which all these agreements contain are simply not used. Likewise, with exceptions such as the East African Court of Justice and the COMESA Court, courts and tribunals established by the RECs are under-used and litigation in national courts is generally ruled out (at least as far as treaty rules are concerned) by the fact that the fundamental principles of EU law (direct effect, supremacy and the right to remedies for breach of EU law) have not been adopted in Africa.

Taken together, the absence of law enforcement exacerbated by the prevalence of corruption amongst public officials are the two biggest impediments to economic growth based on trade liberalisation and market integration in Africa. There is no simple solution to these (essentially political) problems. It is probably unrealistic to imagine that African judges (for example in the COMESA Court[10]) might emulate the ECJ in the 1960s in finding that at least certain clear and unconditional provisions of the COMESA Treaty (or other REC Agreements) had direct effect and took precedence over incompatible national law in Member States.

However, a number of relatively low-key steps could improve the situation (some of which are already under consideration or implementation in some RECs). These include:

a) Greater involvement of the private sector in law-making and law-enforcement (e.g. through stakeholder consultation and complaints procedures);
b) Better information provided by the institutions of RECs on stakeholders' legal rights under REC law and encouragement to make use of these rights and procedures;
c) Enhanced accountability of REC institutions and Member States in applying and enforcing REC law, including correcting infringements once identified;
d) Greater use of "technical" assistance and exchange programmes, whereby EU officials[11] with legal experience spend time in African institutions (including regional and national courts), at all levels, thereby contributing to a greater spirit of *practical co-operation* than is the case today;

[10] I discussed at length with 2 judges of the COMESA court at a 2 day seminar in Swaziland in 2013 the possibility that they might - like the ECJ in the 1960s – consider whether at least some of the clear and unconditional provisions of the COMESA Treaty might be given direct effect, so that national judges in the 19 COMESA Member States might be able to contribute to the better enforcement of COMESA law. Clearly this was felt to be a "judicial bridge too far"!

[11] From the institutions, including the European courts and Member States.

e) Greater use of techniques such as "peer review" for the transposition and implementation of rules into national law (thereby "softening" the enforcement process);
f) The systematic communication and review of new national technical regulations to prevent the creation of new barriers to trade in goods and services.

All of these "solutions" have been "tried and tested" in the EU. The preparation of candidate Member States for accession, especially in the years before 2005-7, is an excellent model, embracing both substance and procedure. In particular, the creation of a "collegiate" spirit (diminishing the adversarial or "win-lose" approach which tends to be found in most conventional international organisations) is the aim in Europe, in many policy areas such as customs, indirect taxation, financial supervision[12]and food safety where the abolition of national frontiers has made transnational cooperation indispensable.[13]

Of course, in times of economic (or political) difficulty (including the economic crisis which started at the end of 2007), national resistance to international or supranational cooperation is greater, even if more necessary than ever. Clearly, the political, social and economic strains in Africa (including armed conflicts in some regions) do not facilitate trade liberalisation and market integration. However, the better use of the "soft" techniques outlined above are at least a step in the right direction, even if stronger political leadership at State and REC level may be utopian.

THE NEED TO LIBERALISE SERVICES AND INVESTMENTS AS WELL AS TRADE IN GOODS

There has been a natural tendency in the negotiation of economic agreements in Africa (and especially in the daily application) to emphasise trade in goods, especially raw materials, primary (agricultural) and food products. In terms of economic growth however (if not always in terms of employment), there is clearly now a priority in providing an appropriate legal framework for trade in services, such as e-commerce (including financial services) telecommunications and transport. The free movement of capital (and the right of establishment) are also closely related to the freedom of services. Likewise, the free movement of workers (especially in the liberal professions) has a greater economic importance today than previously. The same applies to the mutual recognition of professional qualifications.

In short, any modern free trade area or customs union agreements – in order to secure maximum economic advantage - must reflect developments in technology and communications. In this respect, the *acquis* developed in the EU in the last 10 years is invaluable. There is no need for African States and organisations to "re-invent the wheel". Clearly, adaptations, derogations and transitional arrangements will be crucial to take

[12] One of the stated aims of the creation of the European Supervisory Authorities (EBA, ESMA and EIOPA) was precisely to create a "European supervisory culture". There is no obvious reason why the same aim could not be adopted in Africa, especially at the regional level.
[13] The creation of many sectoral European "agencies" operating autonomously but under the "umbrella" of EU the

account of economic, social, political and cultural differences. Here, as in the technical aspects of trade in goods, the EU has much to contribute in terms of technical and legal assistance.

COMPETITION LAW AND STATE AIDS

It is clear that, at the present level of economic development, competition policy (in the sense of controlling cartels, monopolies or mergers) is in its infancy in most African States and RECs.[14] The control of subsidies is however of greater importance, given their distortive influence on trade in manufactured and agricultural goods. In this respect, experience over the last 20 years in the EU is not irrelevant for modern-day Africa. In addition, the fact that most African States are now WTO Members means that they are already familiar with WTO/GATT rules on industrial and agricultural subsidies. Reinforcing these disciplines at regional level should not be impossible, given the necessary political will.

In 1985, when the Commission's White Paper on completing the internal market was launched, illegal (because non-notified) and incompatible (because distortive) aids proliferated in all Member States. As with new technical barriers to trade (TBTs) for which prior notification by Member States was made mandatory in 1983, so with State aids, the strict application (with the sanction - confirmed by the European court - of mandatory recovery of illegal aids) of the relevant Treaty rules, has had a significant effect of eliminating distortions of trade and competition and – at the same time - enhancing the credibility of EU law for economic operators. There is no reason why such a system could not be implemented by the RECs, given the necessary political will and legal/technical expertise in the RECs' Secretariats and Commissions.

THE POLITICAL CONTEXT – EU-AU COOPERATION – THE NEED FOR A STRONGER (SINGLE?) EUROPEAN VOICE IN AFRICA

As recent EU-Africa (and EU-REC) meetings clearly show there is - at least on paper (or in formal conferences) no shortage of aspiration to give more substance to the EU's relations with its nearest (and arguably most important) neighbour. Just as international law-making in Africa appears to be relatively easy but implementation and enforcement difficult or impossible, so the drafting of communiques, frameworks, roadmaps and architecture is likewise as between the EU and its African counterparts. A few well-publicised "success stories" are worth more than many (unimplemented or unenforced) international agreements.

African colleagues in the meetings I have attended have spoken of the relative ease of dealing with other partners, notably China. Reference is often made to the complexity of dealing with the EU. There may be at least two reasons for this. First, the institutional changes flowing from the Lisbon Treaty, including the creation of the European External Action Service (EEAS) and the establishment of EU Missions in virtually all African States. The

[14] There are of course certain exceptions, especially South Africa.

co-existence of the (still embryonic) European diplomatic service and traditional national embassies – as well as parallel systems of EU and national development a cooperation – does not (yet) make it easy for African States and institutions to understand and obtain optimal results from cooperation with "Europe".

Secondly, reference is also made to the emphasis placed by the EU on the rule of law, including respect for human rights in the context of continental and regional economic agreements. Although the "mercantilist" approach of some other partners may have superficial attractions, sustainable economic growth depends on the legal certainty which only the rule of law provides for economic operators, especially SMEs.

Against this background, it is hard to resist the argument that the EU needs to find – urgently – the political will and leadership to "get its act together" in its relations with Africa, as a Continent, as a set of distinct but related regions and individual States. As Jose Perreira has said, the economic partnership between Africa and its northern neighbour cannot be separated from the political and security aspects of the relationship. It is surely time to make better use of the comprehensive foreign and security policy tools provided by the Lisbon Treaty in order, *inter alia*, to make the most of our promising (yet unfulfilled) economic partnership.

EU-AFRICA RELATIONS IN THE GLOBAL CONTEXT

Finally, despite the crucial, strategic importance of the bilateral relationship(s) between the nearly 90 States and multiple institutions on our two continents, the global dimension must be kept in mind. I recently was involved in a (potential) food safety legislative project in UEMOA. It appeared that, in addition to the EU (Commission and EFSA[15]), technical assistance was being provided to UEMOA by the FAO and WTO, as well as certain private sector consultancies. The result was a potential conflict between different regulatory systems, not to mention wasteful and confusing duplication of time and effort.

Given the number and disparity of agencies involved in technical assistance in Africa, it is clearly important - both for the EU and its African counterparts - to ensure that EU "governance models" are presented in such a way as to provide not only effective regulatory solutions in Africa but also a basis for European trade and investment in Africa.

Alastair Sutton, Brussels, September 2015

[15] The European Food Safety Authority

Enhancing market integration in COMESA

A contribution to reflections on the draft COMESA sub-envelope for the regional indicative programme (July 2014)

BACKGROUND

The purpose of this paper is to contribute to the dialogue between the EU and COMESA in order to translate COMESA's strategic objectives for 2015-20 into a support programme under the 11th EDF COMESA sub-envelope. The paper builds upon my participation in the preparation for, and discussion at, the workshop held at the EU Delegation in Lusaka on 14 May, 2014. It outlines the conclusions which I – as moderator – drew from the workshop and contains my reflections on factors likely to enhance regional economic integration in COMESA.

DISCUSSIONS AT THE WORKSHOP (LUSAKA, 14 MAY 2014)

The workshop was intended as a brainstorming session, at a time when both COMESA and the EU were in the process of formulating their approaches to their cooperation in the period 2014-2020. In this context, and with specific reference to the regional integration "envelope" of the 11th European Development Fund (EDF), the European experience - notably as regards the Single Market programme - was of particular relevance. Because of my background on this programme, I was asked to moderate the workshop which was chaired jointly by the EU Ambassador to Zambia and COMESA and the COMESA Secretary General.

The issues covered in the workshop included the overall objectives of regional integration and the role of trade policy in this regard, impact indicators and the "measurability" of progress in integration, the relationship between work in COMESA and the Tripartite process, the approach to non-tariff-barriers (NTBs) including sanitary and phyto-sanitary (SPS) measures, trade facilitation, trade in agricultural products, investments and competition policies, the need for particular attention to SMEs, competitiveness, the role and engagement of the private sector, visa policies and the free circulation of persons including professionals.

There was a particular focus on institutional issues, including the role of the COMESA Secretariat, taking into account the limitations imposed by the COMESA Treaty and the limited resources available to the Secretariat. Similarly, the role and rule of law (both "hard"

and "soft") in the process of regional economic integration was discussed, with particular reference to the important role which European law (as interpreted and applied by the European courts) has played in the success of the European Single Market over the last 40 years and the extent to which – taking into account the important legal differences between the EU and COMESA – European experience could prove helpful for COMESA and its Member States.

Finally, there was discussion of the difficulties (some of which being unique to Africa) facing women, small enterprises and "informal" cross-border exchanges, which did not lend themselves easily to "classical" rules and procedures, but which were nonetheless of considerable economic and social importance, especially in border regions.

THE RELATIONSHIP OF THIS REPORT TO THE PAPER ENTITLED "DRAFT COMESA SUB-ENVELOPE"[16]

The present report is my contribution to the cooperation between the EU (notably the Commission) and COMESA (notably the COMESA Secretariat) in preparation for the implementation of the EU's support to COMESA under the regional sub-envelope of the 11th EDF. As provided in my contract, the objective of my consultancy is to "provide high-level technical insights and ideas to both the EU delegation in Lusaka and the COMESA Secretariat with the view to translate COMESA strategic objectives for the period 2015-2020 into a support programme under the 11th EDF COMESA sub-envelope, as well as to facilitate the process of exchanging views/ideas and finding common grounds between both parties."

The report is to contain an outline of the main conclusions of the workshop and recommendations on the way forward for the finalization of the RIP for the COMESA sub-envelope.

Against this background and taking into account the main thrust of discussion in the workshop on 14 May, the present report sets out in writing and builds upon the key points which I made orally as moderator in the workshop. It does not provide textual amendments to the draft paper which has now been submitted to the EU authorities in Brussels. Rather, the report sets out legal, political and administrative considerations aimed at optimizing (in terms of developing trade and promoting economic integration between COMESA Member States) the use of the funds allocated under the sub-envelope.

As is indicated below, the core of the report covers issues which have arisen in the context of the "European project"[17]. Neither in my oral contribution to the debate in Lusaka in May, nor in this report, do I suggest that the European experience is capable of being "exported" in its entirety to Africa in general or COMESA in particular. Political, economic, cultural and historical factors dictate otherwise.

[16] The latest version of this paper which I have seen is dated 1 July 2014.

[17] By this I mean not only the Single Market project launched in 1985 with the Commission White Paper on completing the internal market, but also the work between 1957 and 1985 in completing the EC's customs union. Much of what is said in this paper is also relevant to the promotion of trade and wider economic exchanges within the framework of a free-trade area, such as EFTA or the European Economic Area (EEA) Agreement between the EU and Iceland, Liechtenstein and Norway.

However, if I had to select *three fundamental principles* which imbued my contribution in Lusaka and which are the principal themes of this report (and which are undoubtedly applicable both in Europe and in Africa), these would be:

a) The importance of *the rule of law*[18] in international economic relations, not least in providing legal certainty to economic operators and States alike;
b) The importance of *administrative cooperation* at all levels between Member States and the institutions or organs of the regional organization, in order to create a climate of mutual knowledge, trust and confidence in which national sovereignty can be pooled effectively to achieve the greater common good of enhanced economic prosperity and political stability; and
c) The need for *political accountability*[19] against the background of a system which provides *measurable progress* towards the achievement of political and economic goals (e.g. the creation of a free-trade area through the abolition of internal tariff and non-tariff barriers (NTBs), the creation of a customs union or a regional economic community).

It goes without saying that these fundamental principles cannot be incorporated*as such* into the paper currently under discussion between the Commission and COMESA. They should however *imbue* the paper, since unless these principles are accepted and implemented in practice the effectiveness of the application of EDF monies to specific areas of activity is likely to be reduced.

THE EU SINGLE MARKET AS A POSSIBLE MODEL - THE KEY POINTS IN MY PRESENTATION AT THE WORKSHOP

My own experience in the drafting and implementation of the European Commission's 1985 White Paper on completing the EU's internal market was an important reason for my participation in this exercise.[20] However, it has been clear from the outset that there are significant political, economic and legal differences between the EU and COMESA, which must be taken into account in seeking to apply experience gained in Europe to the African context.

[18] The "rule of law" in this context embraces the existence of clear rules, the absence of arbitrary decision-making, the absence of corruption on the part of public authorities and the existence of a credible system of dispute resolution for States and economic operators alike.

[19] In the EU, the 5 years before the launch of the Single Market in 1985 had seen repeated political declarations by the European Council on the need to complete the internal market. However, in the absence of a *binding commitment* set out in a Treaty provision (now Article 26(2) TFEU), little progress was made. Similarly, the use of *action plans, scoreboards and peer reviews* is now standard in the EU and has contributed greatly to progress towards economic integration and the completion of a genuine single market without internal frontiers.

[20] Between 1985 and 1989 I was the Legal Advisor to Commission Vice President Lord Cockfield, who had specific responsibility in the first Delors Commission for the Internal Market. Since 1990, as a legal practitioner in Brussels, I have specialized in the practice of the law of the Single Market in both its internal and external aspects.

Nonetheless, despite these important differences, some factors (such as the rule of law[21] and legal certainty) are of universal importance. Thus, the fact that, in Europe, industry, commerce and citizens alike have been able to rely on clear and enforceable rules as a basis for the free movement of goods, services, persons and capital (as well as competition policy and external trade) has undoubtedly facilitated the achievement of the European Union's fundamental goals of political stability and economic prosperity in a region hitherto devastated by two European "civil" wars.

Against this background, I referred in my presentation to the importance of law (and lawyers) in *all* aspects of the work of the European Union, including its institutions and Member States. In Europe, vital decisions had been taken by the European Court of Justice (ECJ) in the 1960s (in cases referred to the ECJ by national courts in the Netherlands and Italy) on the *direct effect* and *supremacy* of EU law in and over national law.

These decisions had been complemented in the early 1990s by other decisions of the ECJ (acting on references from the English courts) on the *legal remedies* available to EU citizens and companies which suffered economic harm as a result of illegal action by Member States. These fundamental principles of EU law (none of which were written expressly in the EU Treaties) were "judge-made", but fully respected by all 28 EU Member States. Despite the impact of these principles on national sovereignty, they had *never been put in question* by the Member States at any of the 6 "constitutional conferences" held to reform the EU Treaties since 1986.[22]

In essence, it appears that – for all 28 EU Member States - there is an *acceptable political compromise* between the limitation of sovereignty[23] which these principles imply and the economic and political benefits flowing from enhanced integration. In other words, regional economic integration should not be seen as a game of "winners and losers". All Member States (as well as their economic operators and citizens) benefit from enhanced economic growth, resulting in greater prosperity and political stability. A "rising tide raises all ships". Is this not the case in Africa (COMESA) as in Europe?

If this is so, is there not a need for a "new look" at the issue of national sovereignty in COMESA? In this context, it may be helpful to keep in mind that many politically-sensitive subjects addressed by the EU in recent years (e.g. direct taxation or immigration policy) have been assisted by *communications* (or other "soft" instruments) prepared by the Commission and discussed with Member States (bilaterally and in Council meetings) in order to "de-fuse" or "banalise" the issue and render it suitable for EU (as opposed to national) treatment.

Similarly, as regards the *enforcement* of EU law, I said that – particularly since the launch of the Single Market by the Commission's White Paper of 1985 – special attention had been paid in Europe to the comprehensive and accurate transposition, implementation and

[21] Article 6(g) of the COMESA Treaty identifies "the recognition and observance of the rule of law" as a fundamental principle upon which COMESA is based.
[22] Similarly, no Member State has used the opportunity of the 7 enlargement negotiations to raise this issue.
[23] Complete "sovereignty" or autonomy being in any event an illusion in the modern world of "frontier-less" communications.

enforcement of EU law, both at EU and national level. In this respect, all national judges were also *European judges*, given their responsibility to ensure respect for EU law, even by their own Member State.

"Enforcement" could take many forms. First, the EU Commission was recognized as the "guardian of EU law" and could initiate infringement procedures against individual Member States which acted in breach of EU law. This was generally *not* perceived by Member States as a hostile or unfriendly act. It was *not* perceived as an attack on national sovereignty. It was perceived as a legitimate action *in the common interest.* In any event, infringement procedures under Article 258 TFEU were the basis for *consultations* between individual Member States and the Commission, leading - in more than 95% of cases - to an amicable settlement, without recourse to the ECJ.

In addition to formal infringement proceedings, individuals or companies could bring actions before national courts in order to secure their rights under EU law. Once again, securing respect for EU law was seen as being in the *mutual interest*, with a process of cooperation in good faith being established between the Commission and Member States. This involved the establishment of national centres or "contact points", where individuals or companies could seek advice on their EU law rights.[24] All of this tends to reinforce the *credibility* of EU law in the eyes of economic operators and ultimately the credibility of the EU itself.

Again, the question posed here is whether such "soft" procedures could be used by the COMESA Secretariat in a process of "constructive engagement" with all 19 Member States (or with certain of them more than others), in order to push ahead with cross-border exchanges, cooperation and (eventually) integration. In my eyes at least, there appears to be no reason, which could not be overcome by political will and sensitive diplomacy, why such procedures could not be deployed in pursuit of the "greater good" in COMESA, as in the EU.

MAKING BEST USE OF THE COMESA TREATY AS "LIVING LAW".

National sovereignty is even more sensitive in African nations than is the case in Europe. And the international agreements (such as the COMESA Treaty) providing for economic integration are still "classical" treaties governed by public international law, rather than the "supranational" treaties establishing the European Union.[25] This is why the term regional *integration* (as opposed to cooperation) in Africa in general and COMESA in particular, must be used with *great caution.*

Arguably (and as I repeatedly said in the workshop), the most significant political and legal development in Europe since the Second World War, was the **total abolition of national**

[24] The SOLVIT system is a recent creation by the Commission in this regard.

[25] Note that the concept of "supranationality" is a judge-made concept dating from the 1960s. However, it is one which has been received political endorsement from all 28 EU Member States and never put in question in the successive inter-governmental conferences which have amended the founding treaties 5 times over the last 30 years.

frontiers on 1 January 1993, in the Maastricht Treaty. [26] This provision is at the heart of the political goal of the EU which is a total integration of the economies of Member States (at least those in the Eurozone). This is **not the case** (or at least not yet the case) in COMESA, where inter-State relations continue to be based on a "classical" free trade agreement.

Nonetheless, even if the provisions of the COMESA Treaty are not (yet) directly applicable in the law of the 19 Member States, there is no reason why the trade-liberalising provisions of the Treaty cannot be applied (by Member States and the COMESA institutions alike) in a functional way which promotes inter-State trade and economic relations, whilst preserving the essence of national sovereignty. It is a question of balance, not dogma. Increased cross-border exchanges in COMESA – as in any preferential trading area – accompanied by reasonable, proportionate and non-discriminatory safeguards to secure essential minimum protection for health, safety and the environment, should benefit all participants.

As indicated above in the case of the EU, the extent to which law (and the *rule of law* in particular) is given importance in any political system (including COMESA or the African Union itself) is essentially a *political question.* Whilst it is true that, in Europe, it was the European judges in the 1960s who established the principles of direct effect and supremacy, it was always open to European political leaders to change the law – *by deciding on Treaty-changes* - if ever they felt this was politically necessary or desirable. They have not done so.

In Africa, the situation – in this regard at least – is *precisely the same.* Even if the judges of the COMESA Court do not take the initiative to interpret the COMESA Treaty in the way in which their European fellow-judges did in the 1960s, there is no reason why the "classical" trade and other provisions of the COMESA Treaty cannot be interpreted and applied in a *functional or teleological way*, in order to enhance the cross-border flow of trade, services, capital, workers and investments in COMESA. There is no imperative legal reason why the COMESA Court (or indeed the Secretariat and Member States) must apply classical public international law principles of (restrictive) treaty interpretation, especially in the case of a regional economic integration agreement designed to *promote* such cross-border flows.[27]

THE SUBSTANTIVE LAW OF COMESA – THE FREE MOVEMENT OF GOODS, PERSONS, SERVICES AND CAPITAL (INCLUDING THE RIGHT OF ESTABLISHMENT).

Unlike the EU treaties,[28] the COMESA Treaty does not (in general) contain provisions which are capable of being given direct effect or application, for example by national courts. By this I mean that the relevant Treaty provisions (e.g. Articles 45, 46, 49 etc.) are not drafted

[26] Article 26(2) TFEU today gives legal expression to this fundamental development as follows: "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties."

[27] The Preamble to the COMESA Treaty makes it abundantly clear that the establishment of a preferential trading system is merely a "first step" towards a common market and economic community. The Preamble also refers to the resolution of Member States to "strengthen and achieve convergence of their economies through the attainment of a full market integration".

[28] Since the entry into force of the Lisbon Treaty in December 2009, the Treaty on the Functioning of the European Union (TFEU)

(like their counterparts in the EU) in a sufficiently clear and unconditional way such as to permit their direct effect in national law. As indicate above however, this does not prevent their interpretation and application either by the Secretariat or the Court, in a functional rather than restrictive way.

As far as trade in goods is concerned, Articles 45 (on the scope of cooperation in trade liberalization and development), 46 (on customs duties) and 49 (on the elimination of non-tariff barriers) do contain clear and enforceable obligations. Article 45 provides, *inter alia,* that "within the customs union, customs duties and other charges shall be eliminated. Non-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States shall also be removed." Article 49 further provides that "except as may be provided for or permitted by this Treaty, each of the Member States undertakes to remove immediately upon entry into force of this Treaty, all the then existing non-tariff barriers to the import into that Member State of goods originating in the other Member States and thereafter refrain from imposing any further restrictions or prohibitions."

Article 46(1) provides that "the Member States shall reduce and ultimately eliminate by the year 2000….customs duties and other charges of equivalent effect imposed on or in connection with the importation of goods which are eligible for common market tariff treatment."

No comparable provisions exist as regards the cross-border provision of services, the free movement of persons and the right of establishment. Article 164(1) provides merely that Member States "agree to adopt, individually, at bilateral or regional levels the necessary measures in order to *achieve progressively* (emphasis added) the free movement of persons. Clearly therefore, the substantive scope of COMESA law is far more restricted than that of the EU. The fact that the COMESA Treaty itself is of more limited scope clearly also limits the extent to which the COMESA institutions can enact *secondary law*.

THE CRUCIAL ROLE OF COMESA INSTITUTIONS, ESPECIALLY THE SECRETARIAT, IN INTERPRETING, APPLYING AND ENFORCING COMESA LAW.

Although COMESA – with 19 Member States – has a smaller membership than that of the EU, the geographic, political, economic, social and cultural differences between COMESA States are far greater even (say) than between Finland and Greece or Ireland and Romania. In these circumstances, the role of COMESA institutions in "defending" the rules in the COMESA Treaty (and "secondary" legislation) to which COMESA Member States have subscribed and in promoting their effect in enhancing cross-border trade, is vital.

It is clear from experience gained in all regional economic organisations that the economic (and ultimately political) goals of such organisations cannot be achieved optimally without strong, central and neutral organs.[29] The suggestion that such organs detract from national sovereignty is without foundation. Clearly, such organs can only act within the powers

[29] Arguably this is true also for multilateral organisations such as the WTO or other UN "family" members. Note that the effectively of the WTO has been greatly enhanced (in the eyes of many) since the establishment of a compulsory dispute settlement system in the Uruguay Round Agreements in 1994.

conferred upon them by the founding Treaty. In this respect, the judicial control exercised by the COMESA Court is crucial. [30] However, in an organization like COMESA which purports to be based on the rule of law[31], it is clear that the Institutions – including the Secretariat – have a n inherent right (if not duty) to ensure that the rules set out in the Treaty are applied and respected.

Article 17 of the COMESA Treaty gives particularly wide-ranging powers to the Secretariat and its Secretary General. His independence is guaranteed under Article 17(6) which provides that the Secretariat and its staff "shall not seek or receive instructions from any Member State or from any authority external to the Common Market." Paragraph 7 requires Member States "to respect the international character of the responsibilities of the [Secretariat] and shall not seek to unduly influence them in the discharge of their responsibilities."

More specifically, Article 17(8)(f) requires the Secretary General to "ensure that the objectives set out in this Treaty are attained and shall, either on his own initiative or on the basis of a complaint, investigate a presumed breach of the provisions of this Treaty and report to the Council in accordance with the investigative procedure to be determined by the Council."

This formidable power is reinforced by sub-paragraph (g) which provides that the Secretary General to "keep the functioning of the Common Market under continuous examination and may act in relation to any particular matter which appears to merit examination either on his own initiative or upon the request of a Member State where appropriate and report the results of his examination to the Member State or organ of the Common Market concerned." Further, the Secretary General may "subject to the provisions of this Treaty submit references to the Court concerning the alleged breach of any obligation under this Treaty in relation to the Common Market or as to any action or omission affecting the Common Market."[32]

Clearly, the powers with which the COMESA Secretariat is endowed under the Treaty (thus, with the *consent* of all 19 Member States) is not dissimilar in substance from those of the European Commission. However, even if the "legal toolbox" is impressive, the use made of the "tools" needs to take account of national sensitivities. In the EU, the vast majority of the daily work of applying, implementing and enforcing the relevant rules is done by a process of "constructive engagement" between the Institutions and the Member States. And, given the importance of the private sector in economic development, the more economic operators can be "engaged" in this process, the better. In this context, the fact

[30] Unlike its European counterpart, the COMESA Court has not been given the power to annul actions taken by the Institutions, for example in cases of *ultra vires* actions by the Secretariat or other Institutions. However, the Court could consider such as issue in its advisory capacity under Article 32 of the COMESA Treaty.
[31] Last paragraph of Preamble.
[32] Sub-paragraph (h).

that Article 17 of the COMESA Treaty is followed by Article 18 establishing a "consultative committee of the business community and other interest groups" is entirely appropriate.[33]

THE IMPORTANCE OF ADMINISTRATIVE COOPERATION BETWEEN COMESA MEMBER STATES AND THE ORGANS OF COMESA- CREATING A "COMESA REGULATORY AND SUPERVISORY CULTURE".

Every working day in Brussels, more than 100 EU committees meet to discuss every aspect of EU business. The role of these committees is regulatory (i.e. participating in the rule-making process) and administrative (i.e. implementing rules which are already in place). As the EU has grown from 6 to 28 Member States, administrative cooperation (managed generally by the Commission) has become indispensable in preventing or resolving differences and (more importantly) in ensuring that goods and services move smoothly across frontiers. The *personal contacts and friendships* formed between national officials and their counterparts in the Institutions are indispensable, for example, in implementing common rules or in operating a system of *mutual recognition* based on *equivalent rules.*

The logistical and practical difficulties in operating such a system in COMESA (under, for example, Articles 14-16 of the Treaty) are of course far greater than in Europe. Nonetheless, the *principle* remains valid and can be assisted by modern technology (video-conferencing) and by the use of "variable geometry", where cooperation is pursued - selectively and more intensively - between some COMESA States, taking into account factors such as complementary trade interests, geographical proximity etc.

As the draft Commission/COMESA paper states, "greater national ownership is central to effective integration." During the workshop as in this paper, I have set out my own view that the economic growth which is at the core of COMESA is best likely to be achieved by a *cooperative process* and not an adversarial one. Cooperation in good faith between Member States and the COMESA institutions is the best guarantee of respect for national sovereignty, which is clearly of political importance to all COMESA Member States. The Committee system described above and which has a firm legal basis in Articles 15 and 16 of the COMESA Treaty embodies these principles and should be developed accordingly.

THE IMPORTANCE OF ADMINISTRATIVE COOPERATION IN THE AVOIDANCE AND REMOVAL OF NON-TARIFF BARRIERS (NTBS)[34]

Much discussion took place at the workshop on NTBs and this is reflected in Section 1.1 of the draft EU-COMESA paper. Considerable progress has already been achieved in COMESA on the basis of Article 50 of the COMESA Treaty, through the adoption of COMESA NTB

[33] Article 18(3) sets out the specific tasks of the Consultative Committee which include ensuring that private sector interests are taken into account by the organs of the common market, monitoring the development of the Treaty Chapters on the development of the private sector and (crucially in light of the discussion at the workshop) the role of women in development and business and taking part in meetings of technical committees.

[34] I use this term to include physical (i.e. customs) , fiscal and technical barriers (i.e. those caused by different standards or technical regulations).

regulations. However, discussion at the workshop appeared to reveal at least *three possibilities for the improvement of the current approach to NTBs in COMESA.*

First, the more systematic use of sectoral technical committees (if necessary using the "variable geometry" formula referred to above) could assist in the identification, alignment or removal of NTBs in areas such as construction, engineering, agro-food, digital technologies, as well as professional qualifications or consumer protection rules in the service sector.

Secondly, consideration could be given to the possibility for wider use of *mutual recognition of equivalent rules*, as a complement or alternative to the lengthy and sensitive process of harmonization. The emphasis here should be on *comparable outcomes* as regards consumer or investor protection in each Member State. Even if different COMESA States employ varying approaches to achieving the same ends in terms of risk assessment and prevention, agreement on *outcomes* will still enable products, services and people to move freely across frontiers. Clearly, the fact that the relevant officials in the key COMESA States involved *know and trust each other (and each other's rules and procedures)*, is crucial to the success of this system.

Finally, the fact that technology moves faster than regulation (i.e. it is practically impossible for governments to introduce standards for new products as they appear – even if this were desirable), means that priority must be given to *preventing the introduction of a multiplicity of conflicting or incompatible national standards.*

THE IMPORTANCE OF A SYSTEM OF MANDATORY PRIOR NOTIFICATION OF NEW TECHNICAL REGULATIONS.

In the workshop, I emphasized the success in the EU of the system of *mandatory prior notification* for new technical standards or regulations. Experience shows that, once legally in place, national standards and technical regulations are hard to remove, especially if enshrined in primary legislation. In this field, prevention is better than cure! For more than 30 years the EU has had in place a directive requiring the prior notification of all new technical regulations.[35] The European Court has held that failure to notify renders a national regulation unenforceable against importers of products from other Member States.

Notification to the Commission (which then informs all other Member States of the proposed new measure) is followed by a "standstill" period of 3 months. During this time, the Commission and other Member States assess the extent to which the proposed new regulation would create an unjustified barrier to trade. If this is the case, the Commission then discusses with the notifying State the adaptation of the proposed regulation. In cases where (for example because of parallel technological developments) several Member States propose to adopt similar regulations, the Commission may decide to propose an EU regulation or directive to ensure a level playing-field for economic operators in the Single Market.

[35] The latest directive is 98/34.

There appears to be no reason why, under the COMESA Treaty, a similar regulation or directive could not be adopted in accordance with the principle of international cooperation in good faith on which the COMESA Treaty (like its EU counterpart) is based.

STRENGTHENING THE ACCOUNTABILITY OF COMESA MEMBER STATES FOR THE TIMELY, ACCURATE AND COMPREHENSIVE IMPLEMENTATION OF COMESA OBLIGATIONS.

A major problem in the EU until 1985 was the lack of credibility (especially for economic operators) flowing from the failure of EU politicians to "keep their promises" by implementing the commitments undertaken at European Council meetings. The Commission White Paper of 1985 (which I took as a model for action to create a frontier-free internal market during the workshop) was a major step towards remedying this problem. Unanimously adopted by Member States, the White Paper set out an action plan containing some 300 measures to be adopted within an 8 year time-period, ending on 31 December 1992 (called the "1992 programme"). This was a legally-binding commitment by Member States, monitored by the Commission, with periodic progress reports.

The necessary political will for this unprecedented exercise in market liberalization and integration derived essentially from the realization by Europe's political leaders that, unless a single "continental market" existed to create economies of scale for Europe's industries, Europe would always lack competitiveness compared with the United States and Japan.[36] Successive Presidencies of the EU Council of Ministers[37] in effect competed with each other to ensure that the necessary measures to eliminate barriers were adopted in a timely fashion.

Since 1992, the EU has systematically adopted regulatory action plans in almost all sectors. These generally contain timetables, with progress being monitored in "scoreboards" which provide a basis for "peer review" amongst Member States. The point to note here – in a COMESA context where national sovereignty is even more sensitive than in Europe – is that it is "soft law" and "peer review" rather than "black letter law" and court proceedings which ensures respect for the law. The role of the Commission in Europe (and the opportunity for the COMESDA Secretariat) is essentially that of a mediator or conciliator, rather than a "classical" law enforcement agency.

THE "GOVERNANCE" OF COMESA – MAKING FULL USE OF THE TREATY POSSIBILITIES.

The issue of accountability discussed above is one aspect of the broader issue of "governance" of the common market. Ensuring respect for the rule of law (by a combination of "hard" and "soft" law methods) is another important aspect of "governance". In Europe, the management or "governance" of the single market now extends (perhaps even more crucially) to the economic and monetary union within the Eurozone. Given the ambitious plans in Africa for broadening and deepening economic cooperation and integration, European experience is relevant here too.

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[36] Since 1985 of course the economic logic for the single market has increased, with the advent of China, India, Brazil etc.

[37] The Presidency of the Council of Ministers "rotates" every six months.

At the workshop, I suggested **five ways in which the "governance" of COMESA** could be strengthened. These were:

a) To reinforce the technical ability of the Secretariat to perform its tasks under Article 17, through the secondment of national experts from Member States and (to the extent possible) from outside COMESA (including the EU);[38]
b) To make better use of the Technical Committees provided for under Article 15, especially the Committee on Trade and Customs, making maximum use of technology such as video-conferencing to create a spirit of "COMESA supervisory and regulatory cooperation", where national and Secretariat officials gradually increase their knowledge of and respect for each other's rules, procedures and decisions;
c) Strengthen the role of the Inter-Governmental Committee under Article 14(2)(a), which is "responsible for the development of programmes and action plans in all sectors of cooperation except in the finance and monetary sectors";
d) Strengthen and encourage the "constructive engagement" of the private sector (preferably on a sector-by-sector basis) in the identification and removal of barriers to economic exchanges in COMESA under Article 18;
e) Establish "COMESA Contact Points" in the national capitals of all 19 Member States, backed up by an inter-Ministerial committee in each Member State responsible for COMESA (or Tripartite) matters.

As indicated above (and as discussed in the workshop), it is clear that the geographical diversity of COMESA is such that simultaneous action by all 19 Member States may well not be feasible in most cases. As in the 28 – Member EU therefore, a system of "enhanced cooperation" , "variable geometry" or "multi-speed COMESA" may need to be developed, perhaps on a sectoral basis. Of all the measures mentioned above, perhaps the most important concerns the Secretariat which – like its European counterpart, the Commission – is (legally and institutionally) at the centre of COMESA's activities.

CREATING AND MAINTAINING THE NECESSARY POLITICAL WILL FOR ECONOMIC COOPERATION AND INTEGRATION

As experience in Europe shows, political support for market integration cannot be taken for granted, especially in times of economic downturn or recession. Equally however and again as Europe discovered in 1985, unjustified protection[39] for national "players" tends to be counter-productive.

A major political boost for the process of economic liberalization can be an objective assessment of the costs involved for the private sector as a result of the failure to remove barriers. These costs flow from the need to duplicate tests or other national procedures,

[38] The secondment of national experts to the European Commission has been of crucial importance in recent years, given the opposition of Member States to staff increases and the growth of regulation as a result of the crisis, especially in the field of financial services. This has also cemented cooperation between the Commission and national authorities, eliminating any suggestion of an adversarial relationship.
[39] i.e. protection which is not based on genuine (scientifically-based) threats to human or animal health or other (e.g. environmental) risks.

involving delays and additional administrative work. The multi-sectoral "cost of non-Europe" study run by the European Commission in 1986 not only injected political momentum into the liberalization process under the 1985 White Paper, but also provided a model for subsequent studies of the same nature. There is no obvious reason why such an exercise could not be launched and managed by the COMESA Secretariat, covering all (or a selection of) COMESA Member States.[40]

Legal complexity in the multiple economic integration processes envisaged in Africa – the need for assistance for economic operators.

As indicated throughout this paper, economic growth depends not only on market-opening measures taken by Member States within the framework of the COMESA Treaty and its institutions, but also (crucially) on the ability and willingness of economic operators to take advantage of these measures in practice. As the draft Commission/COMESA paper makes clear from the outset, COMESA and its Member States are engaged not only in an "internal" 2016-2020 Strategic Plan aimed at contributing to the "structural transformation of the economies of the COMESA Member States", but also in a Tripartite Arrangement with EAC and SADC and in a pan-African process of trade liberalization.[41]

Added to the actual or potential simultaneous application of different international legal instruments is the extra complexity flowing from overlapping REC[42] commitments by a number of COMESA Member States.

If the lack of legal clarity arising from this "spaghetti junction" of treaties poses problems for States and international bodies such as the COMESA Secretariat, the situation is infinitely worse for economic operators (especially small and medium enterprises) in the private sector. The parallel application of diverse rules of origin is only one example of these difficulties.

Against this background, consideration should be given to a simplified and "user-friendly" **guidebook for traders** clarifying the rules and procedures which apply in trade between COMESA States (and those which *will* apply when the Tripartite Arrangement enters into force) under all of the applicable instruments, in order to facilitate and therefore encourage cross-border trade.[43]

Recently, within the EU, great attention has been paid to the simplification of EU law under the heading of "better regulation". In COMESA as in the EU, there is a need to balance effective regulation to protect consumers particularly in the field of health, but at the same time to take into account the negative impact which excessive regulation can have on

[40] I see no reason why this could not be financed under the sub-envelope, but this clearly requires further consideration by the Commission and COMESA.

[41] To these diverse legal arrangements could be added COMESA Member States' obligations under the WTO including the recent Bali Agreement Trade Facilitation and the revised Kyoto Convention on the simplification and harmonization of customs procedures.

[42] Regional Economic Community.

[43] In this context, it is useful to note that the European Commission has frequently made use of such guidelines – often in the form of non-binding Communications - to assist economic operators in making use of EU law in specific sectors (e.g. "Frequently Asked Questions).

economic operators, particularly SMEs.[44] It is submitted that the legal complexity created by the parallel and - in some cases – overlapping legal regimes mentioned above requires urgent attention by the COMESA Secretariat and Member States, assisted as necessary by external technical expertise.

CONCLUSION

The issues discussed in the present paper reflect and support the three specific objectives currently set out in the draft Commission/COMESA paper:

1) Reduced cost of cross-border trade through removal of internal barriers in line with Tripartite agreements[45];
2) Increased private sector participation in regional and global value chains, through improved investment climate and enhanced competitiveness;
3) Enhanced capacity of the COMESA Secretariat and its Member States, including the private sector, to deepen regional cooperation.

As indicated at the outset, the purpose of this paper is to contribute to ongoing reflection in Brussels, Lusaka and the capitals of COMESA Member States on the optimal approach to regional integration on general and specifically by making use of the funding provided under the sub-envelope for the COMESA regional indicative programme.

It has been a privilege for me to participate in the present exercise and I would welcome the opportunity to remain associated with the process of drafting the regional indicative programme as it goes forward.

Alastair Sutton, Brussels, August 2014

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[44] In the EU, each and every piece of legislation is now subject to an "impact assessment" aimed at providing a "cost/benefit analysis" of the proposed legislation, balancing the interests of consumers on the one hand and manufacturers and traders on the other.

[45] I question whether this ought to read "in line with the COMESA Treaty and Tripartite Agreements".

BRICK COURT CHAMBERS
BARRISTERS

Notes from a Small Island: Natural Justice and the Institutional Design and Practice of Competition Authorities and Appellate Courts

By Robert O'Donoghue

& Tim Johnston[1]

BRICK COURT CHAMBERS

Robert O'Donoghue
Tim Johnston

ABSTRACT

The relationship between the institutional design, decision-making powers, and policy-making functions of competition authorities raises a diverse range of complex issues. These include how the authority's independence can be safeguarded, how it is funded, how to optimize resources, how to avoid confirmation bias, how to relate with non-competition authorities (e.g., sectoral regulators with concurrent powers or overlapping jurisdiction), and the relationship with the judiciary. This article starts from the optimistic—not to mention extremely presumptuous—position of trying to use the concepts of natural justice and procedural fairness as developed in the United Kingdom as something of a template for good practice and institutional design in competition law decision-making and appeals generally. Apart from familiarity (from the authors' perspective), there are some good reasons to do so. First, outside the realms of antiquity, the United Kingdom can lay a fair claim to popularizing the notion of a rule of law. Second, the United Kingdom is one of the oldest and most prominent adopters of a system of adversarial justice where the ability to challenge evidence remains paramount. Third, the common law is characterized as much by pragmatism as strict principle. The common law has developed an adaptable, rather than rules-based, approach to natural justice. As a result we consider that it is a useful resource when considering institutional design and operation of competition authorities. The law develops in real time, and not from the basis of an historic code. Fourth, in respect of competition law specifically, a fairly rich body of case law has developed in the United Kingdom around principles of natural justice, procedural fairness, and the use of evidence. That case law certainly appears richer than the corresponding case law of the EU Courts in Luxembourg. Finally, the United Kingdom has itself undergone major institutional reform of its various competition authorities, most notably by the creation of the Competition and Markets Authority, effective from April 1, 2014. This significant exercise prompted a period of introspection as to whether, for example, the practices applied by the competition authorities for the previous decades could be improved or adapted. The resulting guidance and related documents that emerged might therefore fairly be considered to be the state of the art in these matters.

Robert O'Donoghue
Tim Johnston

I. INTRODUCTION

The relationship between the institutional design, decision-making powers, and policy-making functions of competition authorities raises a diverse range of complex issues. These include how the authority's independence can be safeguarded, how it is funded, how to optimize resources, how to avoid confirmation bias, how to relate with non-competition authorities (e.g., sectoral regulators with concurrent powers or overlapping jurisdiction), and the relationship with the judiciary.

The design and use of evidence by competition authorities within the European Union has attracted considerable attention in recent years. In the first instance there is of course a need to ensure that the authority has the requisite legal powers, resources, and trained personnel to secure the relevant evidence. A second important facet is the desire to ensure that the rights of defendants or other affected parties are guaranteed, in both law and practice, by competition authorities and courts to whom an appeal against their decisions lie. This has led to a lively debate in the European Union as to whether the current practices of the Commission are fit for purpose and the supervisory role played by the EU Courts in this regard.[2]

The increasing emphasis on due process and the gathering and appreciation of evidence by competition authorities is unsurprising. First, the fines imposed by competition authorities have increased very significantly indeed, particularly at the EU level. Fines of *circa* EUR 1 billion have been imposed on Intel, Microsoft (cumulatively), and various cartelists (cumulatively). As the stakes increase, so too will concern as to process and institutional design on critical matters such as evidence. The concepts of natural justice and procedural fairness can and do adapt with the times. What was considered fair at the time of the EU's inception, with very limited enforcement and nominal fines, may not be acceptable today.

Second, the EU model of competition law has been exported with considerable success to a very large number of other jurisdictions—the International Competition Network has well over 120 members, many of whom have modeled their laws and institutions on the EU model. The export of substantive law almost inevitably leads to interest in the procedural and due process safeguards that underpin the application of that substantive law. Or perhaps more accurately, the significant fragmentation in enforcement has triggered a desire to identify the underlying common principles in relation to due process and evidence.[3]

Third, at least in the European Union, there has been a very significant trend towards the settlement of cases via (ostensibly) voluntary commitments, early resolution agreements, leniency, and other forms of resolution. These facilities have been applied in major global cartel cases as well as leading unilateral conduct cases. The rise and rise of these arrangements has raised twin connected concerns: whether a lack of fairness in

the process leading to a prohibition decision practically compels defendants to settle cases, and whether the relative lack of formality within these settlement procedures can itself lead to procedural and evidential unfairness.

Fourth, the issues of institutional design and procedural fairness in the European Union have taken on particular prominence in the light of the ongoing debate concerning whether the appellate role of the EU Courts complies with the requirements of Article 6(1) of the European Convention of Human Rights ("ECHR") and the equivalent provision in Article 47 of the EU's Charter on Fundamental Rights. If concerns arise as to the effectiveness of judicial review, this will also inevitably lead to increased focus on whether the procedure for decision-making by the Commission is deficient in material respects. Or put differently, if there is less confidence in the administrative decision-making process, more will be demanded of the appeal courts.

Fifth, the proper development of substantive competition law may be materially affected by matters of procedure and evidence and institutional design in ways that are not always fully appreciated. If the undoubted discretion vested in a competition authority is not subject to effective procedural safeguards, the likely result will be an expansion of the jurisdiction and impact of competition law: a "mission creep." This in turn is likely to result in an over-inclusive, or at least more haphazard, application of competition law since there may be insufficient internal checks and balances on the end-product: a competition authority's decisions. In short, procedural deficiencies may have at least an indirect impact on the substantive application of competition law. Better and fairer procedures are likely to restrain any unwarranted 'mission creep'.

Finally, matters of evidence and procedural fairness are not simply a one-way street intended to confer ever-increasing rights on defendants or other affected parties. Competition authorities will be better able to defend their own decision-making if appellate courts have greater confidence that the best evidence has been gathered and in a way that is fair to those affected. If the appellate courts have a high level of confidence in the robustness of the competition authority's institutional structure and procedures and practices in relation to evidence, they are not only much less likely to overturn decisions on matters of procedure, but are also likely have greater confidence in the decision-making as a whole.

This article starts from the optimistic—not to mention extremely presumptuous—position of trying to use the concepts of natural justice and procedural fairness as developed in the United Kingdom as something of a template for good practice and institutional design in competition law decision-making and appeals generally. Apart from familiarity, from the perspective of the authors, there are some good reasons to do so. First, outside the realms of antiquity, the United Kingdom can lay a fair claim to popularizing the notion of a rule of law. Second, the United Kingdom is one of the oldest and most prominent adopters of a system of adversarial justice where the ability

to challenge evidence remains paramount. Third, the common law is characterized as much by pragmatism as strict application of principle. The common law has developed an adaptable, rather than rules-based, approach to natural justice. As a result we consider that it is a useful resource when considering institutional design and operation of competition authorities. The law develops in real time, and not from the basis of an historic code. Fourth, in respect of competition law specifically, a fairly rich body of case law has developed in the United Kingdom around principles of natural justice, procedural fairness, and the use of evidence. That case law certainly appears richer than the corresponding case law of the EU Courts in Luxembourg. Finally, the United Kingdom has itself undergone major institutional reform of its various competition authorities, most notably by the creation of the Competition and Markets Authority ("CMA"), effective from April 1, 2014. This significant exercise prompted a period of introspection as to whether, for example, the practices applied by the competition authorities for the previous decades could be improved or adapted. The resulting guidance and related documents that emerged might therefore fairly be considered to be the state of the art in these matters.

The above rather highfalutin claims should not of course be overstated. In reality competition law is a small component of national legal systems and the approach to it will be conditioned heavily by the general approach to administrative and constitutional law and the legal system in individual jurisdictions. The United Kingdom system of enforcement and appeals in competition law cases is also by no means the predominant model even within the European Union. More fundamentally, there is nothing like universal agreement on what, precisely, natural justice and procedural fairness demand in the context of competition law proceedings (or, indeed, more generally). But the pragmatism at the heart of the common law means that much of what is contained in the case law and guidance in the United Kingdom is often a useful starting point when considering what is common sense or basic good practice. In this reductionist sense it may therefore have something to commend it more generally.

What follows divides broadly into four parts:

- Part II provides an overview of how the concepts natural justice and fairness have evolved under the general common law.
- Part III deals with two separate but related aspects of the European dimension to the debate, namely (1) the standards developed under the Article 6 case law of the European Court of Human Rights ("ECtHR") and (2) the position under EU law in respect of competition law proceedings and appeals to the EU Courts.
- Part IV sets out how the concepts of fairness and natural justice have been employed in U.K. competition law proceedings by reference to the guidance of the CMA and case law.

- Part V condenses our views into a series of core principles, set out as bullet points in the conclusion.

II. EVOLUTION OF NATURAL JUSTICE AND FAIRNESS UNDER ENGLISH LAW GENERALLY

The English common law has long antecedents in dealing with the scope and nature of the right to a fair trial and procedural fairness.[4] The leading case concerning what English judges have traditionally called natural justice is *R v Secretary of State for the Home Department ex parte Doody*.[5] The case concerned the setting of life sentences for serious criminals. The Secretary of State was entitled to set a minimum tariff to be served, having taken into account the view of the judge who sat at trial. The House of Lords held that the Secretary of State could not make that determination without first informing the prisoner what the sitting judge had recommended. He also had to allow the prisoner to make written submissions as to the proper punishment. Lord Mustill's leading judgment summarized the principles of fairness from the authorities as follows (p. 560 at D-G):

> What does fairness require in the present case? 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favorable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.

Thus, the judgment established two key overriding principles. First, that fairness has certain hallmarks that are likely to apply in most cases: a person who may be adversely

affected will very often need to be given an opportunity to make representations and they must ordinarily be made aware (at the very least) of the "gist of the case he has to answer." Second, that the standards that should be applied are not always the same, and will depend on the context.

Building on the principle of fairness identified in the common law, the cases may broadly be broken down into four headings:

A. The Right of Access to the Court

Parties to litigation must be allowed access to the court; that right has frequently been dubbed a "constitutional right" notwithstanding the lack of any written constitution in the United Kingdom.[6] That constitutional right may be subject to qualification, for example on procedural grounds: a plaintiff may lose its claim as a result of excessive delay. However, as Scrutton J held in *R v Boaler,*[7] the right of access to the court is "one of the valuable rights of every subject to the King... I should be slow to give effect to [any ouster of that right which] is a most serious interference with the liberties of the subject."

B. The Right to be Heard

The right to make submissions, on your own behalf, is an historic feature of English civil and criminal law. One of the best known statements on this issue was set out in a case concerning the right of a local authority to demolish buildings. The plaintiff's house had been destroyed because of his failure to give proper notice of his intention to build it. Willes J held that the property should not have been destroyed without first giving the owner the right to put his objections first:[8]

> a tribunal which is by law invested with power to affect the property of one Her Majesty's subjects, is bound to give such subject an opportunity of being heard before it proceeds: and that the rule is of universal application and founded on the plainest principles of justice.

C. The Right to Know the Case Against You

The right to be heard is closely connected to the further right to know the case against you. In *Ridge v Baldwin*, the Chief Constable of Brighton had been dismissed, after criminal proceedings were initiated against him.[9] He was not given the right to appear before the Watch Committee (which terminated his employment) or to make submissions in his defense. The House of Lords held that the Watch Committee had acted unlawfully. As Lord Morris explained (at 114):

> It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: see Kanda v Government of Malaya. My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case.

The common law courts have frequently described this principle as the requirement that there be "equality of arms." Equality of arms extends both to the right to prior notice of the case against you and also to know the evidence that is relied upon against you.

There has also been a substantial new body of case law, arising out of the new Closed Material Procedures (where defendants are not made aware of all of the evidence against them) in terrorism cases. The Courts have held, following *Doody*, that fairness must be determined by reference to the circumstances of the case as a whole.[10]

D. The Right to Test Evidence Brought Against You

The common law authorities establish that the right to an oral hearing is not absolute; the Court must ask whether the parties should be given an oral hearing in order to properly put their case. Where an oral hearing has been ordered, the normal position is that a party should be entitled to cross examine witnesses who have given evidence against them.[11] In a criminal case, the House of Lords has held that a defendant must know the identity of the party making allegations and accusations against them.[12] Witness anonymity is only allowed in cases where Parliament has expressly provided for it.

III. THE EUROPEAN DIMENSION

A. The ECHR Dimension

Article 6 (1) provides that:

> In the determination of his civil rights and obligations or of any criminalcharge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

The precise scope of procedural protection provided by Article 6 in competition cases has been the subject of extensive judicial and extra-judicial comment in recent years. The Article 6 case law imposes a higher standard of protection in the context of criminal, as opposed to civil, cases. At first glance, the position in respect of competition matters

appears clear. Regulation 1/2003 provides that any fine imposed by the Commission, in respect of infringements of competition law "shall not be of a criminal law nature." However, legislation cannot oust the application of Article 6(1) protections if, on a proper analysis, the matters at issue fall within the scope of Article 6(1). Indeed, it had long been accepted by the EU Courts prior to Regulation 1/2003 that at least some of the Article 6(1) protections are engaged in competition law cases.[13] That was also the unanimous view of the ECtHR in *MenariniDiagnostics v Italy*.[14]

The legal and procedural complexity arises out of the fact that not all criminal cases need to be treated in the same fashion. There is a longstanding historic distinction within the case law of the ECtHR between the procedural protections afforded in "hardcore" criminal cases and in less substantial matters.

The leading case (at least until recently) which elaborated on that distinction was *Jussila v Finland* (Application no 75053/01). The Applicant had had his tax returns examined by the Finnish authorities, who had imposed a EUR 308 surcharge, following reassessment. [15] The Applicant challenged that determination but was not offered an oral hearing in order to contest the tax authorities' decision. Under Finnish law, the imposition of the surcharge was an administrative punishment. Nonetheless, the Grand Chamber held that the imposition of a tax surcharge was a matter that attracted the protection of the criminal case law under Article 6.[16]

However, the Grand Chamber went on to find that no oral hearing was necessary in such a case:

> There are clearly 'criminal charges' of differing weight. What is more the autonomous interpretation adopted by the Convention institutions of the notion of a 'criminal charge' by applying the Engel criteria have underpinned a gradual broadening of the criminal head to cases not strictly belonging to the traditional categories of the criminal law, for example administrative penalties (Ozturk, cited above), prison disciplinary proceedings... customs law... competition law... Tax surcharges differ from the hardcore of criminal law; consequently the criminal-head guarantees will not necessarily apply with their full stringency.[17]

The different protections afforded in "hardcore" criminal cases, as opposed to "non-traditional" cases has become the object of intense focus in recent years. The dispute has turned, at least in the competition law sector, on whether or not competition law proceedings should still be treated as "non-traditional" cases that attract a lower level of judicial supervision.

In *Menarini v Italy* (Application no. 43509/08), Menarini had been fined EUR 6 million for participating in a price-fixing cartel in the diabetes diagnostics sector. It complained

that the standard of review applied by the domestic courts was only a review of legality, implying that its Article 6 (1) rights had been breached because the Italian courts had not conducted a full merits review by a court of full jurisdiction.

The Second Section of the Strasbourg Court affirmed, once again, that the imposition of a fine in a competition law context is a criminal sanction, for the purposes of Article 6.[18] Where such a sanction is imposed in a non-judicial context (for example by an administrative authority), Article 6 requires that it be subject to review by a court of unlimited jurisdiction.[19]

> The features characterizing a judicial body with unlimited jurisdiction include the power to quash all aspects of fact and law of a contested decision issued by the lower body. It must in particular have competence to examine all questions of fact and law relevant to the dispute brought before it.

The Court went on to hold that, in this case at least, the review had been a review of full jurisdiction. The various appellate courts, and the Conseil d'état in particular, had examined the facts in detail and had reviewed the sanction imposed. Therefore, there had been no violation of Article 6(1).[20]

However, the Court was not unanimous on this question. In a powerful dissenting opinion, Judge Pinto de Albuquerque determined that: "control by the administrative courts was simply formal since it did not touch upon the hardcore of the reasoning underlying the administrative decision to impose a fine... The applicant was deprived of an independent analysis of the grounds for its appeal."[21] In his view, Menarini had not been entitled to properly challenge the findings of fact that had already been made against it.

B. Evaluating EU Competition Law Procedure

The debate over issues of natural justice and the right to a fair trial (and the implications that these have for competition law proceedings) has if anything, longer antecedents—and raises greater concerns—at an EU level. Two separate but related criticisms have been ventilated. The first is that the Commission's procedures for the adoption of competition law decisions are no longer fit for purpose.[22] The second is that the level of judicial scrutiny of Commission decisions in competition law appeals to the EU Courts is insufficient and, in particular, that there is a light touch review of matters said to involve complex economic assessments by the Commission.

1. Criticisms of Commission Procedure

The essential elements of the Commission's procedures have remained in similar form since Regulation 17/62 in 1962.[23] The changes effected by Regulation 1/2003 were relatively minor in this regard.[24] In an attempt to address the concerns expressed, the Commission has made a number of changes to its procedures, such as having internal "peer review" teams in more difficult cases,[25] adding oversight from the Chief Economist Unit,[26] publishing Best Practices guidance on procedure for Article 101 and 102 TFEU cases,[27] some tinkering with the role of the Hearing Officer,[28] and the creation of the post of European Ombudsman.[29] But these changes are relatively minor overlays on a procedure that has remained largely unchanged for decades. They do not address the following fundamental criticisms:[30]

a. The Commission as Judge and Jury

The most fundamental criticism of the Commission's procedure is that it acts as "judge and jury," with the same officials drafting both the Statement of Objections and the ultimate Decision. Most of the officials are lawyers or economists and few—if any—will have had any training on making judicial-type assessments, including the skills and techniques of objective, forensic decision-making. The oral hearing before the Commission tends to be window-dressing because the same people presenting the Commission's case are also the decision-makers. The hearing is not public and involves no cross-examination of witnesses or any other real testing of evidence.

The Commission's recent changes to its procedures, while commendable, do not address this fundamental issue. The "peer review panel" process is private and, while reputedly probing, does not require the panel to read and review all the evidence and arguments. Their report is not made available to the defendant. The same applies to the Chief Economist's opinion. The Hearing Officer deals only with procedural issues, and does not really deal with substantive legal or factual issues. The Ombudsman too is mainly limited to procedural issues and competition law is a very small part of the office's overall work.[31]

b. The Decision-making Process is Arcane

The actual decision in a competition law case is taken by the College of 28 EU Commissioners.[32] These are political appointees who will not have seen any of the evidence in the case and will typically have little or no detailed awareness of the issues that arise for their decision. Lobbying of Commissioners is rare nowadays but it does occur—usually in the cases that matter most. When lobbying does occur, the submissions made are not part of the Commission's case file and it is entirely unclear what influence they may have had on the outcome.

c. The Actual Decision-making Process Has Become Diffuse and Lacks Transparency

It is of course a democratic right of undertakings and individuals to lobby public institutions and, in particular, legislative bodies. But lobbying tends to be extensive in major competition law cases, and in a manner that lacks transparency. Commissioners, Commission officials, the Legal Service, and other Directorates-General may be lobbied but it is typically unclear who has been contacted and whether they have been influential.[33] The chain of command may be ignored so those with formal responsibility for decision-making may not be the ones who are most influential in the actual decision-making. Again, notes of meetings will not usually appear on the Commission's case file. As one commentator notes "the procedure in practice has become less structured, less formal, and more diffuse."[34]

d. Record Fines and Significant Discretion

The levels of fines in many recent competition law cases have been staggering, with Intel fined EUR 1.06 billion in 2009 and Microsoft paying a similar cumulative amount for its various transgressions in respect of tying and interoperability abuses. This has led one commentator to say, probably correctly, that "the amount of the fines imposed by the Commission ... exceed fines imposed by the public authority in any democracy of which I am aware for any offence."[35] While the Commission has published Fining Guidelines,[36] it has been suggested anecdotally that the Competition Commissioner often decides the headline figure, himself/herself, with officials then tasked with working back to that figure using the Fining Guidelines.

e. Commission Procedures Not Compliant With the ECHR

It is frequently argued that the Commission's procedures do not correspond with the standards laid down in Article 6.[37] As a leading commentator notes:[38]

> the procedures of the European Commission in determining guilt or innocence under the competition rules, and in imposing sanctions, manifestly do not correspond to the standards established by the ECHR. Condemned parties have often invoked these arguments before the Community courts, so far with little success. The number of cases has grown and the concerns become more strident as the penalties have become fiercer.

This view is shared by others.[39] Concerns in this regard have become more pressing given greatly increased fines in recent years and the increasing role of the Commission as a lead enforcement agency in major cases such as *Microsoft*, *Intel*, and *Google*.

Moreover, the Charter of Fundamental Rights is now fully part of EU law,[40] and guarantees as a minimum the ECHR rights. It is also envisaged that the European Union will soon become a party to the ECHR.[41]

2. Criticisms of "Light Touch" Judicial Review by the EU Courts

Criticism has also been voiced about the robustness of judicial review of Commission decisions in competition law appeals.[42] The EU Courts have developed a self-imposed restraint based on limited oversight of "complex economic assessments."[43] This is not objectionable in itself—on matters of economic policy or judgment there may not be a single "right" answer—but it has been suggested that the notion of limited deference has been distorted. The initial notion of deference to Commission assessments had a decidedly narrow context.[44] However, its scope has expanded to comprise all manner of assessments by the Commission, including technical assessments where the Commission does not obviously possess any expertise or superior ability.[45]

It has also been suggested that the EU Courts have been too unwilling in recent years to make use of their own rules of procedure on matters such as oral testimony, expert evidence (they can appoint their own expert(s)), and a willingness to inspect places and things that may be of relevance to the issues on appeal.[46]

The issue of oral testimony is particularly important. Experience in adversarial litigation shows that documents read in context, with the benefit of oral explanation and testing from different parties, often have a quite different meaning to what one might suppose by merely reading the document "cold." In legal cases, context is everything. It is also suggested that the EU Courts have not been rigorous enough in establishing a clear forensic hierarchy that distinguishes evidence according to its inherent value.[47] The best evidence in any case is clearly contemporaneous evidence. *Ex post* statements, particularly those made by rivals or customers with a vested interest in the outcome of a decision/appeal, and which have not been tested in evidence, are of much less value. The position is *a fortiori* in relation to anonymous evidence.

Criticisms of judicial review by the EU Courts have perhaps been most acute in relation to Article 102 TFEU appeals.[48] In many cases, the EU Courts have engaged in extremely cursory analysis of anticompetitive effects, based largely on assumed, or inferential, effects. For example, in *BA/Virgin*, the Court of Justice concluded that the Commission had satisfactorily demonstrated the concrete anticompetitive effect of the rebates in question.[49] But there is no reference to what this "concrete" evidence was, and it is difficult to see what it could have been given that the Commission itself did not base its decision on such concrete effects. Similarly, in*Tomra*, the Commission set out a series of diagrams in its decision that were said to illustrate the anticompetitive "suction" effect of the Tomra rebates—based on negative prices at the margin. It was clear that those

diagrams contained multiple admitted errors. However, that was considered to be irrelevant by the EU Courts on appeal.[50] The logical conclusion of those errors was that Tomra's prices at the margin were not negative, and would therefore allow an equally efficient rival to survive. For the Commission to posit anticompetitive effects based on rivals' difficulties to match the prices seems hollow in such circumstances. Even if this did not vitiate all of the Commission's analysis, it clearly affected, and undermined, some of it. [51]

On the other hand, the EU Courts plainly have engaged in very detailed and sophisticated review of Commission decisions on occasion. The best recent example is *AstraZeneca.*[52]The General Court devoted over 260 paragraphs of its judgment dealing with the issues of market definition and dominance, and engaged in a degree of review that was extremely detailed, irrespective of whether one agrees with the outcome. Ordinarily one would think that such assessments were complex economic assessments *par excellence*. As impressive, the General Court engaged in a rigorous review on the issue of causation in respect of the second abuse of deregistration. While it accepted that AstraZeneca's deregistration tactics were capable of restricting competition insofar as it related to delaying generic entry, it held that the Commission's case insofar as it was alleged that deregistration prevented parallel trade had not been made out. The Court held that the Commission had to demonstrate that the public authorities in question were liable to withdraw, or did usually withdraw, parallel import licenses following deregistration.[53] In the case at hand, the Commission had established a causal link between deregistration and the revocation of parallel import licenses in Sweden, but not in Denmark or Norway.[54] Thus, the Court annulled the decision insofar as it was alleged that AstraZeneca's deregistration had prevented parallel trade to occur in Denmark and Norway.[55]

Overall, however, there is a lack of consistency in approach from the EU Courts under Article 102 TFEU. It is, for example, extremely difficult to reconcile the Court of Justice's apparent endorsement of the principles underpinning the Guidance Paper in *Post Danmark*[56] with its judgment, only two weeks later, in *Tomra*.[57] Another striking feature of the case law is inconsistency between Court of Justice judgments in Article 267 TFEU preliminary references and appeals in direct actions. Most of the Article 102 TFEU cases that are generally regarded as progressive arise in the context of Article 267 TFEU preliminary references, and not direct actions.[58] It is equally difficult to reconcile the low intensity of the General Court's review in cases such as *BA/Virgin* with its robust approach in *AstraZeneca*. One sometimes has the impression that much depends on the composition of the individual chamber of the EU Courts that happens to deal with the particular case. There does not appear to be a single overall coherent direction or approach.

C. The EU Courts and Article 6 ECHR

The division within the ECtHR in *Menarini* has been reflected in the commentary that has followed it. Much of the debate has focused on the standard of review applied by the EU Courts in competition law cases. Some commentators regard *Menarini* as an endorsement of the procedure and practices of the General Court.[59] Others have criticized the judgment as contradicting the ECtHR's own pre-existing case law and, in any case, regard the EU Courts practices and procedures deficient in material respects under Article 6(1).[60]

The EU Courts have, perhaps not surprisingly, rejected these criticisms of their judicial review functions.[61] They consider that the review of legality provided for under Article 263 TFEU—supplemented by the unlimited jurisdiction in respect of the amount of the fine, provided for under Article 31 of Regulation No 1/2003 in accordance with Article 261 TFEU—meets the requirements of the principle of effective judicial protection in Article 47 of the Charter of Fundamental Rights and, therefore, Article 6(1). In particular, they have held that the EU Courts' review of the law and the facts means that they have the power to assess the evidence, to annul the contested decision, and to alter the amount of a fine.[62] Accordingly, they have concluded that Article 6(1) does not preclude a "penalty" from being imposed by an administrative body such as the Commission which does not itself satisfy the requirements laid down in Article 6(1) since there is subsequent review by a judicial body that has full jurisdiction.

The EU Courts' (self-referential) view is not without controversy. Article 263 TFEU limits the EU Courts' review to Commission decisions to one of control of "legality" and this can only logically be understood as being a lesser form of review that the "unlimited jurisdiction" conferred on the EU Courts in respect of fines. Therefore, what the EU Courts' judgments on this issue appear to be saying is that, despite Article 263 TFEU only providing for a review of legality, the EU Courts **in practice** engage in a deeper review that includes review of findings of fact and—to a certain extent—more complex (non-factual) assessments made by the Commission. But this position is open to the forceful criticism that the protections of Article 6 /Article 47 are not therefore actually enshrined in the TFEU but depend on the willingness of the particular Chamber of the EU Courts to engage in a review compliant with these provisions in practice.[63] In short, it is argued, judicial protections ensured in this precarious way are simply not compatible with the obligations under Article 6/Article 47.

The critical question has now become whether the combination of a "limited" review of the decision itself, combined with the full review of the sanction by the EU Courts, is sufficient to satisfy the requirements of Article 6(1). In *Schindler*,[64] Schindler had been

fined over EUR 100 million for participating in a cartel in the elevator installation market. The Court of Justice affirmed that the combination of the roles of investigator, jury, and judge within the Commission was not, of itself, a breach of the company's Article 6 rights.[65] The crucial question is whether the decision is subject to review by a court of unlimited jurisdiction and whether or not, in practice, that court did conduct a full review. The courts should not rely on any margin of appreciation to be granted to the Commission as a basis for failing to conduct "an in depth review of the law and the facts."[66] The Court concluded that the General Court had conducted a proper and sufficient appeal on the basis of its unlimited jurisdiction.

The second plea raised in *Schindler* concerned the failure of the General Court to hear evidence from live witnesses. The Court's answer to that question was less than satisfactory. It pointed out that the burden lies on the appellant to put in evidence of the facts that it relies upon.[67] While that is true, as far as it goes, the Court failed to address the substantive issue underlying the complaint: whether the justice of the case made it useful to call witness evidence that might have a material bearing on key issues in the grounds of appeal.

The decision in *Schindler* demonstrates some of the less-than-satisfactory consequences of the *Menarini*decision. In the first place, the Court in *Menarini* answered the question by reference to the particular investigation and appeal process in the case itself. As a result, it failed to answer the critical question: whether or not control of legality review is sufficient **in principle**to satisfy the requirements of Article 6(1)? The Court made findings of fact as to what happened in that case, and avoided making findings of law that would have been of general application. Whether or not that approach was correct in this individual case, it failed to comprehensively clarify the issue. In order to determine whether or not a review of full jurisdiction has taken place, future courts will need to inquire into the precise nature of the review carried out in each particular case.

Furthermore in *Menarini*itself, the Strasbourg court did not provide much assistance as to the kinds of factors, or hallmarks, that would characterize a substantive merits review. For example, it can be argued with some force that the hearing (or otherwise) of evidence functions, in at least some cases, as an indicator of the kind of review that is being conducted. At a hearing where the appellate court calls witnesses (whether of its own motion or in response to a request by one or more parties), forms its own impressions of the evidence, and makes its own determinations as to reliability, it is highly likely that the court is conducting a substantive review on the merits. Of course a court will not always need to hear live evidence in order to conduct a full review: in the circumstances of a particular case it might well be possible to conduct a merits review without witnesses appearing in court. Nonetheless, where an appellate court rarely if ever actually hears live witness evidence, that is likely to be an indication that the court's general approach and methodology involves something rather less than a review

of full jurisdiction. At the very least, in our view, an appellate court should ask itself, in all cases, whether witnesses should be called in order to assist it in formulating its decision.

The second reason why the *Menarini*decision is unsatisfactory is that it failed to address the central underlying issue within the Article 6 case law: the distinction between "hardcore" and "non-traditional" criminal matters. The ECtHR relied on *Jussila* as its authority for the proposition that there are different types of criminal case. In principle that reasoning is sound. The procedural protection that is afforded where a small tax surcharge has been imposed need not be the same as the level of protection required in, say, a murder trial. Nonetheless, it is by no means clear that competition law now falls into the "non-hardcore" camp. *Jussila* itself was concerned with tax surcharges on a comparatively minor scale. The case relied upon in *Jussila* for the proposition that competition law cases were not "hardcore" (*SociétéStenuit*)itselfconcerned with a fine of 100,000 French francs applied during the 1970s. By contrast, the fines imposed by the Commission on individual companies in recent years have on occasion exceeded EUR 1 billion. If the distinction between hardcore cases and those which are not hardcore lies in the scale of the sanction, then it has clearly broken down in the competition context in the European Union.

It might be argued that competition cases are not hardcore on the grounds that competition law infringements are found against legal persons, not private individuals. Therefore, they are not criminal cases in the ordinary sense; they do not attract the full protection of Article 6(1). In the U.K. context, at least, that is no longer the case. The Enterprise Act 2002 has introduced individual criminal liability for certain types of cartel-based activity. However, even in jurisdictions where that is not the case, the severe sanctions imposed and the social stigma attached to an adverse finding may well affect private, as well as legal, persons.

In summary, *Menarini* was, at best, a missed opportunity. At worst, it affirmed an outdated and unwarranted distinction. It upheld the boundary between hardcore and non-hardcore cases and determined that competition cases do not attract the full criminal protections of Article 6(1). We consider that that distinction has lost its usefulness. The scale of sanction and the social stigma that arise in connection with competition law infringements make them more akin to hardcore criminality and less akin to taxation surcharges or small administrative fines.[68] It may well be that competition law was not hardcore at some point in the past but it is becoming impossible to credibly argue that that is the position now. Furthermore, *Menarini* failed to provide what would have been useful guidance concerning the standard of review that should be applied to non-hardcore cases. In short, the standard of review must be assessed against only a somewhat opaque set of criteria, on a case-by-case basis. As a result, we consider that *Menarini* is unlikely to be the final word on this question.

D. The Options for Reform

If compliance with Article 6 /Article 47 is not ensured by the practical availability of effective judicial review, there are two basic alternatives. The first is that the TFEU is amended to make expressly clear that the review is not limited to a control of legality but involves a full appeal on the merits or unlimited jurisdiction.[69] The second alternative is that the prosecutorial and decision-making elements of the Commission's process should be split, thus making the EU Courts an adversarial forum in which the Commission and the defendant(s) would put forward evidence and submissions. One commentator suggests that "the only way in which these criticisms could be satisfied without an amendment of the EU Treaties would be to give the General Court (formerly the Court of First Instance), instead of the Commission, the power to adopt prohibition decisions and to impose fines in competition cases."[70] This solution is not as radical as it seems: it was proposed by the European Parliament as early as 1981.[71] A Treaty amendment could do the same thing or go even further in terms of institutional redesign.

IV. PROCEDURAL FAIRNESS IN U.K. COMPETITION PROCEEDINGS

A. The CMA's Guidance

In recent years, the topic of procedural fairness in the context of competition proceedings has largely been articulated as a debate concerning the rights of parties to access information and the use of that evidence by the various U.K. regulators.

The UK's new consolidated regulator, the CMA, came into being on April 1, 2014. The CMA has published both general guidance and specific guidance for the competition context: *Transparency and disclosure: Statement of the CMA's policy and approachandGuidance on the CMA' investigation procedures in Competition Act 1998 cases*. This guidance builds on the considerable experience of its two predecessor competition authorities, the OFT and Competition Commission, in such matters.

The General Guidance stresses the CMA's commitment to openness and transparency. It grants the Authority a wide discretion to determine whether or not information that has been passed to it should be treated as confidential (¶¶4.12-4.24).

The CMA has a general power to redact confidential information and also to use confidentiality rooms and data rooms in order to enable disclosure, while also protecting the confidentiality of the data itself (¶4-29):

> Sometimes the CMA may use confidentiality rings or data rooms as a means of making disclosure of confidential information while recognizing the restrictive nature of the disclosure. Their use will be restricted to

> when it is necessary to make the disclosure for the purpose of facilitating the CMA's functions by ensuring due process...

Data rooms and confidentiality rings are described as a mechanism to enable the legal representatives of the parties to test the evidence that has been relied upon against them. The CMA reserves to itself the right to impose restrictions on the bringing into and taking out of the data room of "such items as materials, notes and equipment." (¶¶4.31-32)

In basic terms, the CMA seems to have established a hierarchy of confidentiality treatment, where information has been relied upon against a party. Material that is particularly confidential will be disclosed only through a data room, and possibly subject to restrictions concerning what notes are taken from that material. Less confidential material will be disclosed into a confidentiality ring.

The specific guidance relating to Competition Act 1998 investigations notes that the CMA will act in line with its confidentiality obligations (as set out in Part 9 of the Equality Act). It does not go much further than the general guidance. The CMA exercises its discretion to determine whether or not to use data rooms and confidentiality rings; they are used where it is proportionate to do so and where there are "clearly identifiable benefits" from doing so. The CMA's guidance also makes clear that they will only be used where "any potential legal and practical difficulties can be resolved swiftly in agreement with the parties involved." (¶11-24) What is not clear, in this context, is what the CMA will do with information that it does not consider should be placed into a confidentiality ring and/or data room. The CMA does not state explicitly that such information will be discounted from its analysis of any potential infringement. Nonetheless, the clear implication must be that information that cannot be shown in any form to the parties cannot be relied upon in order to find against them. This seems axiomatic under principles of natural justice in English law.

The mechanisms set out in the new CMA Guidance do not differ materially from those that were employed by the CMA's predecessors (the OFT and the Competition Commission). The Competition Commission's *Guidance on Disclosure of Information in Merger Enquiries, Market Investigations and Reviews of Undertakings and Orders Accepted under the Enterprise Act 2002 and the Fair Trading Act 1973* provides, in similar but different form, that "fairness" should be considered when deciding how to handle the dual imperatives of confidential information and the need to disclose.[72] It also considers the possibility of using data rooms and confidentiality rings. But it is fair to say that the new CMA Guidance on this topic is more comprehensive and more detailed.

B. The Case Law

In the 1990s U.K. competition law received a significant overhaul, bringing its essential features more closely in line with EU competition law. But even under the older legislation such as the Fair Trading Act 1973 the English courts had identified a duty of fairness on competition authorities when conducting investigations and found breaches of that duty in appropriate cases.[73]

In *Interbrew S.A. and Interbrew UK Holdings Ltd v. Competition Commission and others* [2001] EWHC Admin 367, the High Court summarized the principles in relation to fairness in competition law proceedings as follows:

1. A competition authority owes a duty of fairness in conducting its investigation (*in casu* merger control).
2. The standard of review on appeal in relation to procedural fairness is not based on principles of judicial review, namely whether the procedure adopted was one that no reasonable decision-maker could have adopted. Thus, the standard of review in respect of procedural unfairness does not require the degree of unreasonableness needed to overturn a decision on normal judicial review grounds under administrative law.
3. The content of the duty will vary from case to case but generally it will require the decision maker to identify in advance areas which are causing him concern in reaching the decision and to act fairly by giving to the person whose activities are being investigated reasonable opportunity to put forward facts and arguments in justification of his conduct before a conclusion is reached that may affect him/her adversely.
4. Where ECHR rights are at stake those adversely affected should be involved in the decision making progress to a degree sufficient to provide them with the "requisite protection of their interests."
5. The adversarial procedure followed in a court of law is not appropriate for investigations by a competition authority that acts as an administrative decision-making body. As a result, the authority has a wide discretion as to how its proceedings should be conducted.
6. Fairness is a flexible concept that is fact-and context-dependent. However, the Court will be slow to intervene in procedural matters (on the basis that, if the authority has directed itself properly on the requirements of fairness it will be unlikely that its choice of procedure will nonetheless be unfair).

On the facts, the High Court upheld Interbrew's complaint that it was given no opportunity to deal with the crucial ground upon which the Competition Commission recommended a divestment of Bass Brewers during its merger assessment. In particular, it was given no fair opportunity to deal with the reason why the Competition

Commission took the view that Whitbread, with Stella Artois, would not be a viable and independent competitor that would remedy the consequences of the duopoly.

Following the entry into force of the Competition Act 1998, the U.K. Courts have had multiple occasions to contend with the application of the concept of procedural fairness in the context of competition law proceedings. This body of case law has considerably developed the basic concepts of natural justice and procedural fairness as articulated in the earlier (non-competition) cases and adapted them to a competition law setting.

C. The Right to be Informed of the Case Against You

One of the basic tenets of administrative law decision-making is that the objections formulated by a public body must be made known to the defendant so that it has a proper opportunity to respond to, challenge, or correct objections made against it. This beguilingly simple principle gives rise to significant complexities in competition law cases.

First, the need to make the affected party aware of the case against it will often run up against the need to ensure the confidentiality of sensitive information provided by third parties. Indeed, in many cases, the third parties concerned will be direct rivals of the affected party and disclosure of the third-party information would in normal circumstances be likely to amount to a serious violation of competition law in other contexts.

A second related point is that the competition authorities will in many cases have a legal duty to protect third-party confidential information that is co-extensive with any duty they owe at common law or otherwise to comply with principles of natural justice.[74] At the very least, trade-offs may be required between the two sets of obligations.

Third, in certain cases, disclosure even of the identity of the third party providing the information may create issues regarding retaliation or other commercial consequences. This applies in particular for smaller rivals or downstream purchasers or customers.

Finally, the ever-increasing use of quantitative and other evidence of considerable granularity and data intensity in competition law proceedings means that there may be real practical difficulties in disclosing all available information to the affected parties, at least in a time frame that makes meaningful consideration of it possible. More importantly, one can query the need to disclose all such information to allow the affected party to meet the objection(s) against it. Typically, the communication of the gist of the information or point will suffice.

The English courts have grappled with these competing considerations in various competition law cases. In *BMI Healthcare Limited & others v Competition Commission* [2013] CAT 24 the Competition Appeal Tribunal (CAT) concluded that the measures put

in place by the Competition Commission allowing the affected parties and their access to a specially-created on-site "data room" for confidential information were fundamentally deficient and unfair. The case concerned the market investigation regime operated by the Competition Commission under the Enterprise Act 2002 whereby it can investigate whether the features of a particular market have an adverse effect on competition and, if so, then impose wide-ranging remedies. The Competition Commission sought to protect confidentiality by establishing an on-site data room, which its own guidance envisaged. Confidential information was made available in the data room and was accessible during working hours on two consecutive days.

The CAT found the data room regime fundamentally deficient in three respects.[75] First, the regime limiting the affected parties' advisers (e.g., economists) to recording in their notes only own client data or information derived solely from own client data and/or from data in the public domain was wrong in principle. This was because that information was already available to the advisers outside the data room from their own client(s). Moreover, the real information of interest was not confidential information that was own client data or in public domain, the parties' crucial concern was to see how the Competition Commission relied upon that data.

Second, while it may have been justified on confidentiality grounds to prevent the removal of items from the data room—in contrast to a confidentiality ring where the information is provided to a circumscribed list of individuals—the Competition Commission failed to put in place measures to ensure that this obstacle did not undermine the drafting of a proper and considered response by those affected by the market investigation. In particular, the advisers: (1) had no access to other material that they might need to look at, (2) had no opportunity to discuss matters with persons outside the data room, and (3) had no opportunity to test the robustness of the confidential information (for example, by analyzing and cross-checking data contained in tables of information and data redacted by the Competition Commission in its decision setting out its provisional findings).

Finally, the period of time in which the advisers were allowed access to the data room was unreasonably short. As a general rule of thumb, the CAT considered that a data room ought to be open at reasonable business hours up until the end of the consultation period, and ought to provide for multiple visits due to the iterative process of responding to the Competition Commission's provisional findings.

In two more recent cases—*Ryanair Holdings plc v Competition Commission* [2014] CAT 3 and *Group Eurotunnel SA v Competition Commission* [2013] CAT 30—the CAT grappled with situations in which confidential information had not been entirely withheld but the affected parties were only informed of the gist of the information or the point against them.

In *Ryanair*, the Competition Commission's final report concluded that Ryanair's minority stake in Aer Lingus granted it material influence over Aer Lingus and resulted in a substantial lessening of competition. The final report referred to the views expressed and evidence given to it by a number of airlines that had been specifically identified. However, certain passages referring to discussions that had taken place between Aer Lingus and other airlines were redacted to protect the identity of the airlines concerned and the confidentiality of those discussions.

Ryanair contended that disclosure of the identity of the various airlines referred to in redacted passages was important so that it could test the credibility of the evidence in question. The CAT disagreed, concluding that the Competition Commission did in fact disclose in broad terms the gist of the information which was redacted and that disclosure of the identity of the individual airlines was unnecessary. The redactions went no further than was necessary to protect the confidentiality of very sensitive commercial matters between airlines who were competitors or potential competitors of Ryanair. The duty to communicate the gist of the case did not imply that disclosure was always to be either detailed or limited. The CAT emphasized that the duty to disclose the gist of the information or objection varies from case to case depending on the context (at [8]):

> We agree that you do have to look at the facts of each case. At one end of the spectrum there may be a case where numbers are involved and you need to see the relevant numbers or data in order to understand the gist of what is being put. In other cases, more like the present, you need to know what the general position is.

A similar conclusion was reached in *Eurotunnel*. Eurotunnel, the operator of the Channel tunnel passenger and freight services, was one of several bidders for the assets of Sea France, a ferry operator between Dover and Calais. A competing bid was put in by DFDS, another ferry operator. The Competition Commission concluded that the Eurotunnel/Sea France merger might be expected to result in a substantial lessening of competition (i) in the market for the supply of transport services to passengers on the short sea and (ii) in the market for the supply of transport services to freight customers on the short sea.

In reaching the conclusions it did in its final report, the Competition Commission had to balance Eurotunnel's right to know the case against it with the need to protect third-party confidential information. The Competition Commission sent summaries or descriptions of specified information to (typically) the party who had provided it, in order to verify the factual correctness of the content and to identify any confidential material, prior to publication. The party was then asked to provide reasons for any requests of excisions of the material from published documents. Where the Commission considered appropriate, the names of parties were anonymized and ranges of figures

substituted for actual figures. Eurotunnel complained about the redactions and requested that the unredacted materials be disclosed into a confidentiality ring. The Competition Commission refused this request.

The CAT concluded that there was nothing in the Competition Commission's general approach to criticize. It sought to balance the interests of confidentiality and the interests of disclosure. Eurotunnel's argument that—in withholding information in the manner that it did (i.e., by using summaries of information provided, redacting, anonymizing, and using ranges)—the Commission acted unfairly could only succeed if the Competition Commission was obliged to disclose to Eurotunnel all inculpatory and exculpatory material including transcripts or summaries of evidence provided to it by third parties. The CAT rejected this argument, essentially because the gist of the points made had been communicated to Eurotunnel, in some detail, and it was in a position to make responsive submissions. In particular, the CAT held that, provided that the gist is properly disclosed, redactions or other forms of withholding of material can be perfectly proper. The situation would only be different if the defendant could show that this withholding meant that it was unable to understand the gist of the case being made against it. Thus, for example, the Competition Commission was justified in making omissions and redactions from the summaries of evidence from DFDS and customers and the transcripts of their oral evidence and of other persons who attended for interview because the gist of the points made by them was disclosed to Eurotunnel.

D. Third Parties and the Right to be Heard

As noted above, it is trite that objections formulated by a competition authority must be made known to the party/parties affected by them. This typically applies to defendants in competition law proceedings and the need to inform them of the objections made against the conduct or agreement(s) under scrutiny. But in *Unichem Limited v Office of Fair Trading* [2005] CAT 8 the CAT applied a more granular version of this general principle and further extended it to cover the situation of third parties.

UniChem complained about the OFT's decision not to refer the proposed acquisition by Phoenix Healthcare Distribution Limited of East Anglian Pharmaceuticals Limited to the Competition Commission. One of the grounds of appeal was that the OFT purported to make findings of primary fact about the logistics and economics of UniChem's distribution system, UniChem's past pattern of success in certain regions, and UniChem's service levels on the basis of information supplied largely by the merging parties, without checking certain facts with UniChem itself or discussing with UniChem the inferences about UniChem which the OFT was minded to draw from the material supplied by the merging parties.

Even though the CAT considered it "strongly arguable" that the OFT's decision not to refer the merger remained within the bounds of reasonableness,[76] it nonetheless quashed the decision on the basis that the OFT did not know enough about the reach and logistics of UniChem's network and the economics of delivery routing to have an adequate factual basis for its decision. In particular, the OFT's omission to seek comments from UniChem on those matters was considered to be of "decisive importance."[77]

Similar issues were raised in *CTS Eventim v Competition Commission* [2010] CAT 7.[78]Eventim, a provider of ticketing services and a ticket agent and a promoter of live music events, challenged the Competition Commission's decision to approve the merger between Live Nation and Ticketmaster. One of the grounds of appeal was that the Competition Commission had deprived Eventim of a reasonable opportunity to respond to the main reasons for the Competition Commission's reversal of its provisional view that the merger would result in a substantial lessening of competition, as well as the Competition Commission's analysis of (i) Eventim's own German language board documents and/or (ii) Eventim's own forecasts for its proposed U.K. activities before adopting its final decision.[79] The Competition Commission evidently considered that there was considerable force in these procedural arguments since it agreed to retake the decision before the appeal was even concluded before the CAT.

E. The Ability to Call and Challenge Witnesses

One of the most striking manifestations of natural justice in appeals in competition law cases in the United Kingdom is the fact that witnesses are often called by one or more parties to give evidence on matters of fact or expert opinion. This includes the competition authorities themselves tendering witnesses to support key factual or contextual aspects of the relevant theory of harm. Once a witness is tendered in this way, he/she can then be cross-examined by one or more adverse parties.

This oral tradition in English law reflects of course the adversarial nature of proceedings in common law jurisdictions. This tradition contrasts with the more judge-led inquisitorial model applied in many civil law jurisdictions (although some civil law jurisdictions do allow for questioning of witnesses upon application or for a party to submit questions for the judge to put to a witness). Oral evidence certainly plays a very important role in civil (and criminal) proceedings in the United Kingdom.

Oral evidence has also been used to great effect in competition law appeals in the United Kingdom. Perhaps the most notable example is a series of appeals in relation to decisions rendered by the OFT regarding price parity clauses in the tobacco sector, for which various manufacturers and retailers were fined a cumulative total of almost £200 million. The clauses concerned multiple different brands of the two main tobacco

manufacturers, Imperial and Gallaher. The parity clauses were expressed in different ways, such as requirements that a particular Imperial brand be sold at a price "not more expensive than," "at least 5 pence less than" or "not more than 3 pence more expensive than" the competing linked Gallaher brand. In elaborating the theory of harm the OFT posited four key effects of the price parity clauses:[80]

(a) If the retail price of Gallaher's brand increases, then the retail price of [Imperial]'s rival brand must also increase.

(b) If the retail price of [Imperial]'s brand increases, then the retail price of Gallaher's rival brand must also increase.

(c) If the retail price of [Imperial]'s brand decreases, then the retail price of Gallaher's rival [brand] must also decrease.

(d) If the retail price of Gallaher's brand decreases, then the retail price of [Imperial]'s [rival] brand must also decrease.

The only witness tendered by the OFT was a former tobacco buyer for one of the major retailers. She had given a signed witness statement to the OFT in 2005. In that statement she stated that if the price of Imperial's brands went up because of a wholesale price increase, she would not put up the price of the Gallaher brand if Gallaher had not announced a price increase. She also said that the Imperial account manager would ask her to move the prices up and down on his own brands but her recollection was that "he never told me to do anything with a competitor brand." Moreover, when asked in cross-examination whether she had regarded herself as bound by the four constraints identified above by the OFT she said firmly that she had not. Thus, there was nothing in her oral evidence that was inconsistent with what she had said in her witness statement. The fact that the OFT's own principal witness did not support the OFT's theory of harm led to the decision being quashed by the CAT. Critically, this lack of support was in part elicited in cross-examination, albeit the CAT did suggest that had OFT tested the evidence more stringently, the implications of that evidence for the OFT's theory of harm would have become clearer, and sooner.

Tobacco is a striking case where oral evidence and cross-examination had a material—if not decisive—bearing on the quashing of the competition authority's decision.[81] But it is not atypical.[82] Indeed, in multiple appeals before the CAT, both appellants and competition authorities have sought to tender witnesses on key factual issues in the appeal. For example, in *Tesco v OFT* [2012] CAT 31, Tesco relied on witness evidence, among other things in the context of a so-called ABC information exchange, to determine circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers.

Tesco also laid considerable emphasis on the OFT's failure to interview witnesses during its investigation or indeed to call witnesses for the appeal. The CAT did not consider that this circumstance was dispositive, since there was a credible explanation for the witnesses' absence—namely the OFT's position that its case stood or fell on the contemporaneous documents. But the CAT did not consider this explanation wholly satisfactory and it noted, for example, that (1) a number of the documents relied upon by the OFT were far from clear and explanations had not been available because of the OFT's decision not to gather evidence from the authors and/or recipients of the documents, (2) in light of the OFT's decision not to seek witness evidence, any doubt in the mind of the CAT as to the content or meaning of documents relied on by the OFT must operate to the advantage of Tesco, and (3) the lack of a formal power of witness compulsion should not be thought to either preclude or discourage the OFT from even attempting to contact witnesses who might be able to provide details or evidence of material facts, and the failure to do so may lead the court to conclude that the evidence of the infringement was not sufficiently strong.

F. Evidence and Corroboration

Because of the strong oral and adversarial tradition in English law, the English courts have also developed an acute—and nuanced—appreciation of the hierarchy of evidence that often appears lacking in analogous cases at an EU level. Several points bear emphasis. First, the best evidence will generally be relevant contemporaneous documents, subject of course to their meaning being at least tolerably clear. The position was well-summarized by Leggatt J in *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB) (para. 8):

> I approach the evidence on the basis that, as in almost every case where there is a contemporaneous documentary record, the documents provide the best evidence of what happened.

Second, not all written evidence is equal. A contemporaneous document is clearly primary evidence whereas, say, a written response to a request for information by a competition authority is *ex post* (and often self-serving) evidence, usually made on behalf of a body corporate or undertaking.[83] The same may be true of leniency statements or settlement agreements,[84] particularly in systems where subsequent applicants to obtain any reduction must bring to light matters not already known to the competition authority.[85] The temptation to gild the lily in such circumstances may be significant.[86] There is also a good, if rather old-fashioned, case for preferring written evidence accompanied by a statement of truth from the individual concerned.[87]

Third, care may need to be taken with oral evidence given some time after the facts in the context of a trial. Leggatt J, again, in *Yam Seng Pte Limited v International Trade Corporation Limited* [2013] EWHC 111 (QB), put it well (para. 8):

> Human memory is notoriously unreliable, and the strong interests and emotions to which disputes resolved through litigation give rise are powerful distorting factors, however honest and well-intentioned the witness. Indeed, the more patently honest and convincing the witness, the greater can often be the risk of placing reliance on their testimony.

Oral evidence may also have somewhat lesser value in competition law cases where the credibility of the witnesses is not central to the issues in the case, e.g., as in a fraud case. In competition law cases one is also not always dealing with a primary fact but with matters of appreciation that do not have a single "right" answer. And one has to control for the fact that (i) evidence in chief will often be prepared with considerable assistance from lawyers and (ii) oral evidence given a long time after the fact may have the gilt edge of hindsight.

The context in which the oral evidence is given may also matter. There may, for example, be a significant difference between witness statements tendered by business executives in the context of agreements which the parties operate in a clandestine fashion because they know they are acting illegally (and evidential difficulties arise because the participants deliberately failed to record or retain information about what they were doing) and situations in which agreements are entered into openly for legitimate purposes, albeit they may also have some anticompetitive effect.[88] The executives' evidence may, for example, shed important light on the purpose of particular agreements or practices or their effects. To state the obvious, those who conceived of and implemented an agreement or business practice, with novel- or difficult-to-discern effects, may be able to shed some useful light on its purpose(s) and effect(s).

Finally, while there may in appropriate cases be caveats as to the value of oral testimony, it can be an important source of evidence where the written evidence is fragmentary or expressed in a telegraphic manner. In particular, oral evidence may have considerable value in resolving a conflict between documents, which is a frequent occurrence. In *Armagas Ltd v Mundogas SA (The Ocean Frost)* [1985] 1 Lloyd's Rep 1 at 57, Goff LJ stated as follows:

> Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall

> probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a Judge in ascertaining the truth.

V. CONCLUSION—THE PRINCIPLES

In democratic countries, certain principles of institutional design and decision-making ought in our view to be regarded as immutable in competition law cases. They are:

1. The guaranteed independence of the decision-maker, which not only includes freedom from outside interference but also the resources and personnel to take effective decisions;
2. The right to know the case against you;
3. The right to see the evidence, both inculpatory and exculpatory, and to challenge it;
4. The right to be heard by the actual decision-maker;
5. The right to a reasoned decision within a reasonable period; and
6. The right to an appeal of the decision before an independent, competent court.

The above principles are in our view a non-negotiable minimum. But progressive jurisdictions interested in the quality of decision-making and fairness should in our view endeavor to go beyond this. Issues to bear in mind in this regard include:

1. Competition authorities need to develop a proper understanding of, and training in, the gathering and assessment of evidence. These are skills entirely separate from technical competence in substantive matters. The best evidence will usually be contemporaneous documents, assuming that their meaning is at least tolerably clear. But competition authorities should also make more use of oral evidence in appropriate cases, both to corroborate or explain documents and to understand the purpose and likely effects of particular agreements or conduct. This will entail the need for formal powers to take statements.
2. Competition authorities frequently act as investigator, judge, and jury. While obviously far from ideal, it may not be *per se* objectionable if there is a proper right of appeal (see (4) below). In any event, the processes that competition authorities acting as investigator, judge, and jury follow are not ordinarily, on their own, enough to satisfy the basic standards of procedural fairness (whether established under the common law or Article 6 EHCR). So, at the very least they should aim to ensure:

(a) Genuine separation between the investigative teams and decision-makers.

(b) A transparent decision-making process. For example, records should be kept of meetings and transmitted to the defendants or affected parties as a matter of course.

(c) A proper, adversarial hearing before the actual decision-maker.

(d) Parties should know the case against them in full and should be able to test the evidence against them properly. There is no reason why decision makers should not hear live evidence, where necessary and useful.

(e) Informality and lobbying should be deprecated.

3. Competition authorities will often have to balance the need for disclosure against the obligation to protect confidential information emanating from third parties. In general, the competition authorities should be given some leeway in doing so since the interests at stake require trade-offs to be made. The competing interests can normally be accommodated by the following sliding scale: (i) making the defendant or affected party aware of the gist of the information or point—the extent of which will depend on the context, including the importance of the issue and the level of confidentiality concerns; or (ii) putting it into a confidentiality ring accessible to circumscribed persons; or (iii) operating a data room at which the information may be meaningfully accessed by a party's advisers but not physically removed.

4. A competition authority's decision should be subject to oversight by a court with full jurisdiction. The precise meaning of "full jurisdiction" is still, disappointingly, unclear. Nonetheless, it is clear that a review by a court of "full jurisdiction" must include:

(a) A review on the merits extending to the review of evidence, findings of fact, findings of law, and the penalty imposed.

(b) The capacity to substitute the findings of the competition authority with its own determinations. This may not imply a full rehearing on all issues, but nor should the appeal proceed on the basis of a premise that just because a competition authority has made a decision in respect of a matter that requires some appreciation of complex matters, the competition authority must be presumed to have got it right. It should also be appreciated that competition authorities have no particular expertise in making technical assessments unrelated to

their core expertise (e.g., patent quality), and should be afforded no deference in such matters.

(c) Parties should be given an opportunity to make full and detailed submissions in their defense.

(d) While it is not necessary in every case, the court should be able and willing (on occasion) to call for live evidence and to make its own determinations on the facts. Documentary evidence is often expressed in telegraphic terms, or lacks context, or is fragmentary in nature. Novel agreements or practices may also benefit from explanation by those most familiar with them.

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[2] For an overview *see* International Chamber of Commerce, *Due Process in EU Antitrust Proceedings*, *Discussion Paper*, 15 April 2014. This is a draft document that has recently become unavailable. The *CPI Antitrust Chronicle* also recently ran a full series of articles on due process and competition law enforcement. *See* 6(1) CPI ANTITRUST CHRON. (June 2014).
[3] For an overview of these issues *see* P. Lugard, *Procedural Fairness and Transparency in Antitrust Cases: Work in Progress*, 6(1) CPI ANTITRUST CHRON. (June 2014). *See* also S. Wong, *Thinking About Procedural Fairness of Competition Law Enforcement Across Jurisdictions: A Suggested Principled Approach*, ICN Column in *Competition Pol'y Int'l*, (April 23, 2014), *available at*https://www.competitionpolicyinternational.com/thinking-about-procedural-fairness-of-competition-law-enforcement-across-jurisdictions-a-suggested-principled-approach.
[4] When describing the common law, it is normal to talk of "English law" (more properly the law of England and Wales). That common law differs from Scottish law. However, where we refer to competition law it is as U.K. law: the substantive and procedural law of competition in the United Kingdom is broadly consistent.
[5][2004] 1 AC 531.
[6]R. CLAYTON & H. TOMLINSON, THE LAW OF HUMAN RIGHTS, ¶11.44 (2009). See the judgment of Lord Diplock in *Bremer VujlkanSchiffbau and Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909, at 977.
[7][1915] 1 KB 21.
[8]*Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180.
[9][1964] AC 40.

[10]*Secretary of State for the Home Department v MB* [2008] 1 AC 440.
[11]*R v Newmarket Assessment Committee, ex p Allen Newport* [1945] 2 All ER 371.
[12]*R v Davis* [2008] AC 1128.
[13]Cases C-204/00P C-205/00P, C-211/00P, C213/00P, C-217/00P, and C-219/00P *Aalborg Portland and Others v Commission* [2004] ECR I-123.
[14]Application no. 43509/08 & 44.
[15]*Jussila v Finland* (Application no 75053/01) ¶ 10.
[16]*Id.* ¶¶38-39.
[17]*Id.* ¶43.
[18]*Id.* ¶¶41-45.
[19]*Id.* ¶59.
[20]*Id.* ¶¶64-67.
[21]Dissenting judgment, ¶7.
[22]*See*, e.g., J. Temple Lang, *Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003*,CEPS Special Report (November 2011), *available at* http://aei.pitt.edu/32989/1/Reform_of_Commission_Procedure_in_Competition_Cases_with cover.pdf; I. Forrester QC, *Due Process In EC Competition Cases: A Distinguished Institution With Flawed Procedures*, 34 EUR. L. REV. 817 (2009). This debate is not new: *see*, e.g., F. Montag, *The Case For A Radical Reform Of The Infringement Procedure Under Regulation 17*, 8 EUR. COMPETITION L. REV.428 (1996).
[23]EEC Council Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty, OJ 1962 L 13/204.
[24] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1.
[25] This involves selecting an internal "shadow" team to play devil's advocate on the core aspects of the case, leading to an internal debate. It is sometimes said to be influential, although it is impossible to verify such claims. For a discussion *see* P. Marsden, *Checks And Balances: EU Competition Law And The Rule Of Law*, COMPETITION L. INT'L (February 2009).
[26]*See* L.H. Röller, *Using Economic Analysis To Strengthen Competition Policy Enforcement*, MODELLING EUROPEAN MERGERS: THEORY, COMPETITION POLICY AND CASE STUDIES (P. Bergeijk& E. van Kloosterhuis, eds. 2005).
[27]*See* DG Competition, Best Practices on the Conduct Of Proceedings Concerning Articles 101 and 102 TFEU, OJ 2011 C 308/6. The most significant changes were the introduction of (voluntary) state of play meetings between the Commission and defendant(s) to give greater transparency on the stage of the Commission's proceedings. Three-way meetings between the complainant, Commission, and defendant were also proposed. For an overview *see* M. Glader, *Best Practices In Article 101 And 102 Proceedings: Some Suggestions For Improved Transparency*, 1 COMPETITION POL'Y INT'L (April 2010). On due process and EU competition law generally, *see*I. VAN BAEL, DUE PROCESS IN EUROPEAN UNION COMPETITION PROCEEDINGS (2011).
[28]*See* Decision of the President of the European Commission on the function and terms of reference of the hearing officer in certain competition proceedings, OJ 2011 L 275/29.
[29]*See* http://www.ombudsman.europa.eu/en.
[30] It bears emphasis that these criticisms are institutional or organizational, and are in no way reflective of DG Competition's (or the EU Commission's) officials, who are high caliber, extremely diligent, and of high integrity.
[31] A notable intervention by the Ombudsman was his decision in *Intel*. It concerned the Commission's failure to keep a note of a five-hour meeting with a senior Dell executive. Dell was the most important customer in the case and the Commission's decision relied extensively on evidence from Dell (including the individual concerned) to inculpate Intel. The Ombudsman found that this event should have been classed as a meeting for the purposes of Article 19 of Regulation No 1/2003, that it could not be excluded as it concerned potentially exculpatory evidence, and that the failure adequately to record it constituted maladministration on the part of the Commission. He did not, however, make any finding as to whether the Commission had infringed Intel's rights of defense. *See* Decision of the European Ombudsman Closing His Inquiry Into Complaint 1935/2008/FOR Against the European Commission of July 14, 2009. On appeal, the General Court held that (1) the meeting was not a formal meeting for purposes of Article 19 of Regulation No 1/2003 and (2) by making available to the applicant, during the administrative procedure, the non-confidential version of the note to the file and by offering it the possibility to submit its observations on that document, the Commission remedied the initial omission in the administrative procedure, with the result that that procedure was not vitiated by an irregularity. *See* Case T-286/09 *Intel Corporation Inc. v Commission* [2014] ECR II-nyr.

[32]In Case T-286/09 *Intel Corporation Inc. v Commission* [2014] ECR II-nyr, Intel argued that the Commissioner for Competition, NeelieKroes, had stated publicly that the Commission had applied a certain price/cost test in its decision in that case, which the Commission then sought to disavow on appeal. The General Court dismissed this argument on the basis that the decision was made by the College of Commissioners, not the Commissioner for Competition (¶159).
[33] This echoes a comment often attributed to Henry Kissinger: "Who do I call if I want to call Europe?"
[34]*See* J. Temple Lang, *Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003*,CEPS Special Report (November 2011), *available at*http://aei.pitt.edu/32989/1/Reform_of_Commission_Procedure_in_Competition_Cases_with cover.pdf. The same author, using Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, forced the Commission to publish its internal Manual of Procedure, which can now be *found at* http://ec.europa.eu/competition/antitrust/antitrust_manproc_3_2012_en.pdf. Following publication, he criticized the Manual of Procedure in certain respects, including: (1) it does not deal with submissions to other parts of the Commission in competition cases, which has been a feature of some recent (and controversial) decisions; (2) it does not deal with the legal principle of good administration, including in particular the need to take notes of meetings; (3) it does not refer to the Charter on Fundamental Rights, which is now part of EU law; and (4) it does not deal with due process and impartiality. See J. Temple Lang, *The Strengths And Weaknesses Of The DG Competition Manual Of Procedure*, 1(1) J. ANTITRUST ENFORCEMENT 104-131 (2013).
[35] I. Forrester QC, *Due Process In EC Competition Cases: A Distinguished Institution With Flawed Procedures*, 34 EUR. L. REV. 817 (2009).
[36]Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 2006 C 210/2.
[37] This also assumes that the Commission's procedures are not purely administrative in nature but have sufficient quasi-criminal character to fall within Article 6 ECHR. As discussed earlier in this article, by far the better view is that Article 6 ECHR is engaged.
[38]Forrester, *supra*.
[39]Temple Lang, *supra*.
[40]*See* Article 6 TEU. The Charter has the same legal value as the EU treaties.
[41] Accession became a legal obligation under Article 6(2) TEU. The Court of Justice will, however, need to render an opinion on the compatibility of the accession with EU law. But the EU Courts, the EFTA Court, and the ECtHR have taken a series of steps even before accession to subject Commission proceedings and judicial review of competition decisions to many of the obligations reflected in Article 6 ECHR. *See* Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-13125; Case C-407/08 P, *KnaufGips KG v Commission* [2010] ECR I-6375; Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, judgment of 12 April 2012, not yet reported (EFTA Court); and Case 43509/08, *A. Menarini Diagnostics SRL v Italy*, judgment of the European Court of Human Rights of September 27, 2011.
[42]*See* I. Forrester QC, *A Bush In Need Of Pruning: The Luxuriant Growth Of Light Judicial Review*, EUROPEAN COMPETITION LAW ANNUAL 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES, pp. 407-452 (C.D. Ehlermann& M. Marquis, eds. 2010).
[43]*See*, e.g., Case 42/84, *Remia and others v Commission* [1985] 2425, ¶34. For a detailed discussion *see* the contributions from Panel II in EUROPEAN COMPETITION LAW ANNUAL 2009: EVALUATION OF EVIDENCE AND ITS JUDICIAL REVIEW IN COMPETITION CASES, pp. 9-473 (C.D. Ehlermann& M. Marquis, eds. 2010), and in particular those by Judge Forwood, Judge (and now Advocate General) Wahl, and Judge Ó Caoimh from the EU Courts.
[44]*Remia*, *ibid* (*in casu* duration of a non-compete clause and the doctrine of ancillary restraints).
[45] Forrester, *supra* note 42 at 407-452.
[46]*Id*.
[47]*Id*.
[48] The Commission has enjoyed a staggering success rate in Article 102 TFEU appeals, and one that is asymmetrically better than other areas of competition law appeals. Data gathered in 2006 by the former Chief Economist, Damien Neven, record that the Commission's success rate in Article 102 TFEU cases was 98 percent, compared to only 58 percent under the EU Merger Regulation and 75 percent in Article 101 TFEU cases. *See*D, Neven, *Competition economics and antitrust in Europe* at 17, *available at*

http://ec.europa.eu/dgs/competition/economist/economic_policy.pdf. While Neven attributes this disparity in success rates to the fact that appeals outside the Article 102 TFEU context typically look at the effects of practices and not their form, this is not a fully satisfactory response. The disparity between Article 101 and 102 TFEU appeals is striking, since most Article 101 TFEU cases concern admitted cartel infringements. More to the point, in Article 102 TFEU cases the EU Courts are clearly looking at issues of anticompetitive effects in more detail than before: the concern is that it appears to be making no difference to the outcome in those cases whereas it has in the areas of merger control and Article 101 TFEU. Equally, the Commission's success rate in cases in the appeal courts in Luxembourg is not matched by the success rates of private litigants in national courts involving Article 102 TFEU or the success rates of NCAs applying Article 102 TFEU or its national law equivalent. This cannot be explained solely by the discretion the Commission enjoys over which cases to pursue. If anything, the incentives of private litigants should be at least as good in this regard, and probably more so in those national legal systems where the loser pays the winning side's costs.

[49]Case C-95/04 P, *British Airways plc v Commiss*ion [2006] ECR I-2331, ¶31. ("the Court further held not only that the bonus schemes at issue were likely to have a restrictive effect on the United Kingdom markets for air travel agency services and air transport, but also that such an effect on those markets had been *demonstrated in a concrete way by the Commission*.") (emphasis added). Given that the Commission and EU Courts eschewed any need to demonstrate actual or likely anticompetitive effects with concrete evidence, it is difficult to see how this conclusion was justified.

[50]Case T-155/06, *Tomra Systems ASA and others v Commission* [2011] ECR II-4361, ¶258 *et seq*.

[51]The EU Courts' approach in appeals against Commission decisions under Article 102 TFEU contrasts with their robust approach in reviewing Commission merger control decisions. The best examples are Case T-342/99, *Airtours plc v Commission* [2002] ECR II-2585 and Case T-5/02, *Tetra Laval BV v Commission* [2002] ECR II-4381, and Case T-80/02, *Tetra Laval BV v Commission* [2002] ECR II-4519, on further appeal in Case C-12/03, *Commission v Tetra Laval BV* [2005] ECR I-987.

[52] *AstraZeneca*, OJ 2006 L 332/24, on appeal Case T-321/05, *AstraZeneca v Commission* [2010] ECR II-2805 and Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

[53]*Id.*, ¶¶806-808.

[54]*Id.*, ¶845.

[55] The General Court's findings in this regard were upheld on appeal in Case C-457/10 P, *AstraZeneca v Commission* [2012] ECR I-nyr.

[56]Case C-209/10, *Post Danmark A/S v Konkurrencerådet*, [2012] ECR I-nyr.

[57]Case C-549/10 P, *Tomra Systems ASA and others v Commission* [2012] ECR I-nyr.

[58] *See*, e.g., Case C-7/97, *Oscar Bronner GmbH & Co KG v MediaprintZeitungs und Zeitschriftenverlag GmbH & Co KG, MediaprintZeitungsvertriebsgesellschaftmbH& Co KG and MediaprintAnzeigengesellschaftmbH& Co KG* [1998] ECR I-7791; Case C-418/01,*IMS Health GmbH & Co OHG v NDC Health GmbH & Co KG* [2004] ECR I-5039; Case C-52/09, *Konkurrensverket v TeliaSoneraSverige AB* [2011] ECR I-527; and Case C-209/10, *Post Danmark A/S v Konkurrencerådet* [2012] ECR I-nyr.

[59] K. Lenaerts*, Due Process In Competition Cases*, 1(5) NEUEZEITSCHRIFT FUR KARTELLRECHT – NZKART*,* 5 (May 2013): "the system of judicial review of Commission decisions relating to proceedings under Articles 101 TFEU and 102 TFEU affords all the safeguards required by Article 47 of the Charter[and by implication Article 6 of the European Convention on Human Rights]."

[60] International Chamber of Commerce, *Due Process in EU Antitrust Proceedings. Comments on and analysis of the European Commission's and EU Courts' Antitrust Proceedings* 225/717 (April 15, 2011): "Current EU Antitrust Proceedings Are Not in Line with the European Convention on Human Rights (ECHR*)*."

[61]*See* most recently Case T-286/09 *Intel Corporation Inc. v Commission* [2014] ECR II-nyr, paragraphs 1609*ff*, citing Case C-386/10 P *Chalkor*v *Commission* [2011] ECR I-13085 and Opinion of Advocate General Mengozzi in Case C-521/09 P *Elf Aquitaine* v *Commission* [2011] ECR I-8947, paragraph 31.

[62]*See* Case C-386/10 P *Chalkor*v *Commission* [2011] ECR I-13085, ¶67. *S*ee also Case C-389/10 P, *KME Germany AG, KME France SAS and KME Italy SpA v Commission* [2011] ECR I-nyr ; Case C-407/08 P, *KnaufGips KG v Commission* [2010] ECR I-6375; Case E-15/10, *Posten Norge AS v EFTA Surveillance Authority*, judgment of 12 April 2012, not yet reported (EFTA Court)

[63]*See* Sir C. Bellamy, *ECHR and Competition Law Post-Menarini: An Overview Of EU And National Case Law*, 47946 E-COMPETITIONS (July 5, 2012). In *MasterCard*, AG Mengozzi accepted that Article 6(1) ECHR compliance by the EU Courts

depended on "the way in which that review is actually exercised." *See* Case C-382/12 P *MasterCard and others v Commission* [2014] ECR I-nyr, ¶122.

[64]Case C -501/11 P *Schindler Holding and others v Commission* [2013] ECR II-nyr.

[65]*Id.* ¶¶33-35.

[66]*Id.* ¶37.

[67]*Id.* ¶46.

[68] This appeared to be the position of Advocate General Eleanor Sharpston in *KME*. While she had "little difficulty in concluding that the procedure whereby a fine is imposed for breach of the prohibition on price-fixing and market-sharing agreements in Article [101(1) TFEU] falls under the 'criminal head' of Article 6 ECHR," she added that the fining procedure in EU competition law cases "differ[s] from the hardcore of criminal law; consequently, the criminal-head guarantees will not necessarily apply with their full stringency." *See* Opinion in Case C-272/09 P *KME and others v Commission*[2011] ECR I-nyr, ¶¶64, 67. The Court of Justice did not explicitly address this distinction.

[69] Bellamy (*supra*) has proposed some suggested amendments in this regard.

[70] *See* J. Temple Lang, *Three Possibilities For Reform Of The Procedure Of The European Commission In Competition Cases Under Regulation 1/2003*, CEPS Special Report 194 (November 2011).

[71] *See* Resolution on the Tenth Report of the Commission of the European Communities on Competition Policy, OJ 1982 C 11/78.

[72] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/284387/cc7_revised_.pdf.

[73]*See*, e.g., *R -v- Take-over Panel ex parte Guinness PLC* [1991] QB 146.

[74]*See*, e.g., Sections 169(1)-(3) (duty to consult) and Section 169(4) (protection of confidentiality) of the Enterprise Act 2002 in the context of market investigations by the Competition Commission.

[75]*See* ¶¶70*ff*.

[76]*See* ¶278.

[77]*Id*.

[78] In *Stagecoach v Competition Commission* [2010] CAT 14, Stagecoach's ground of review that the Competition Commission acted unfairly in preferring evidence of Preston Bus Limited's witnesses over that of Stagecoach's witnesses (Preston Bus Limited being the (hostile) takeover target) was not ruled upon by the CAT since other grounds disposed of the appeal.

[79]*CTS Eventim AG v Competition Commission* [2010] CAT 7 (ground 1).

[80]*See,Imperial Tobacco Limited and others v OFT* [2011] CAT 41, ¶28.

[81]By way of counter-example, in the recent General Court judgment in Case T-540/08, *Esso v Commission* [2014] ECR II nyr, there was a clear conflict between the witness statement relied upon by one of the parties and certain documents on the Commission file. The General Court did not call the witness and cross-examine him, in order to resolve that conflict ¶ 67ff.

[82]The approach of the English courts to the hearing of evidence in competition law cases stands in marked contrast to the recent practice of the General Court in similar appeals. In *Duravit*, the General Court refused a request under Article 68 of its Rules of Procedure to hear witnesses in a cartel case. *See* Case T-364/10, *Duravit AG and others v Commission*, [2012] ECR II-nyr, ¶¶135, 147, 196, 200.

[83] Several commentators at a recent conference on the *Intel* judgment of the General Court questioned the Court's treatment of the evidence. Criticisms included: (1) the Court's preferring various "nuances" derived from Dell's response to a Commission Request for Information over a clear statement that the agreement on rebates was not "explicitly conditioned on exclusivity or minimum volume commitments" (*see* ¶468); (2) the Court considering a Lenovo response to a Request for Information as "not credible" (¶¶1070, 1078), despite its relying heavily on other responses in other contexts being sufficient evidence by themselves or, at most, as evidence requiring only weak additional corroboration; (3) the Court preferring the unsworn evidence of a single, apparently lower level Dell employee over sworn testimony given by Dell's CEO in U.S. proceedings (¶¶495, 502, 558, 566); (4) reliance on customer "expectations" and/or "impressions" to show *de facto* exclusive dealing, without evidence that Intel itself was aware of those expectations/impressions (or could avoid them being created or formed) (¶¶525, 527); and (5) ignoring evidence of individuals directly involved in negotiations with Intel in favor of evidence from individuals who were not. See "*Intel v Commission*: More Eco- Or More Ordo-Friendly?," Liège Competition and Innovation Institute (LCII), Brussels (June 16, 2014).

[84] *See,Tesco v OFT* [2012] CAT 31, ¶110(a) ("The [Early Resolution Agreements] are unsworn documents, containing admissions which Tesco has not had the opportunity to test by cross-examining the individuals who it is alleged engaged in the conduct or had the relevant state of mind.")

[85] Indeed, in U.K. case law, the leniency regime if anything has resulted in more adverse inferences being drawn **against** competition authorities in relation to evidential gaps. The reason is that a condition of leniency is that the applicant has an ongoing duty to assist the competition authority (including in appeals) and that the failure of a competition authority to secure support for its theory of harm or core factual evidence from a cooperating leniency applicant may be an eloquent silence justifying some adverse inference against the competition authority. *See*, e.g., See *Tesco v OFT* [2012] CAT 31, ¶110(a) ("This, it seems to us, is a particularly important factor given the obligation contained in each [Early Resolution Agreement] requiring the relevant admitting party to use its reasonable endeavors to secure the co-operation and attendance of witnesses—an undoubtedly powerful tool in the hands of the OFT but one of which it has not availed itself.")

[86] See, *Tesco v OFT* [2012] CAT 31, ¶110(d) ("Although entering into an [Early Resolution Agreement] with the OFT is, in one sense, contrary to the interests of an admitting party, which might be thought to make it more likely than not that the admission is true, there are a number of other factors that might lead an undertaking to take a 'commercial' decision to admit liability for an infringement, which might be, at least in part, untrue or which the undertaking simply has not investigated. These factors include the prospect of a substantial penalty reduction and the avoidance of potentially protracted proceedings both before the OFT and, possibly, before this Tribunal."). This comment was made in the context of early resolution agreements, which are not the same as leniency statements. But the general point remains good.

[87] *See,Imperial Tobacco Limited and others v OFT* [2011] CAT 41, ¶86.

[88] *Id.* ¶88.

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The EU Contribution to the Promotion of Rule of Law in Africa

José Costa Pereira

It is an old cliché to portray the relationship between Africa and Europa through the lens of the random "butterfly effect". Magnified by the fact that we are closer geographically than Brazil is from Texas, to quote its original source. Perhaps "old" and "cliché", but not necessarily wrong. Current events taking place in our continent amply demonstrate the weight of situations occurring in our southern borders, if proof was needed. The media has focused lately on those who originate from Middle-East but there is a strong African presence in the current wave of migrants. War, famine, terrorism, damaged environments, political prosecution; all have an impact in population flows, in reducing African aspirations to disenfranchise itself from the poverty cycle, which like in a spiral or, if you prefer, a vicious circle then feeds those same issues relentlessly (if poverty is one of the causes of conflict, then conflicts do nothing but exacerbate that same poverty). However, we would do Africa a disservice if we would restrain its portrait to a tabloid-type parody of chaotic randomness of endemic proportions, hopelessly forcing its subjects to the most grim and vile future.

Indeed, Africa is a continent not only of still unfulfilled promise but also of current positive narratives. Long gone, in many of its corners, the tired recipe of the strongman, preferably clothed by some shining uniform, as the perceived sole guarantee of nation-building. Long gone the anaemic economic growth of the seventies and eighties. Long gone, in most places, the constant fraudulent elections returning the same people to the same presidential palaces all over again. Long gone are the wars between the new independent countries. They were replaced by growth percentages that make the continent the envy of others still mired in tough recessions or escaping it after painful sacrifices (resisting even the strong drop of commodity prices); by political leaders that step down after they lost an election to their political opponents, by providing opportunities for young people, even those coming from previous colonial masters, to use their entrepreneurial acumen; by giving companies, including ours, a large field to do business and create jobs and wealth in Africa and beyond; by having a dynamic and spirited civil society that are the best checkpoint, even in more authoritarian regimes, to ensure that governments are not tempted to return to old, discredited ways. Swedish experts LottaThemner and Peter Wallensteen, writing in 2013, believed that there was a 15% drop on the severity and number of the conflicts in the Continent since 1990 which puts in perspective some of the headlines media choose to describe Africa whenever something goes wrong there.

Africa's young population might be a demographic and urban planning challenge but it is at the same time the most powerful antidote to a sleepy, idle society, based on nepotism and ethnic favouritism. Those young men, usually better educated than their ancestors, need jobs. The African leadership has accepted that the State by itself is not able to provide them.

Only private investment can cope with the challenge but it will only happen if there is a stable, predictable and safe environment attracting the kind of financial engagement that will lift the population out of the poverty line. Our contribution, as EU, is to help Africa build that environment.

In our view and decisively in more and more African views, this objective cannot be met without the primacy of rule of law. If you are an investor, local or international, you need to be sure that any conflicts you might be facing with the State, your associates, your suppliers, your clients or your labour force will be mediated by independent and fair institutions. You need to be sure that your business can be created without resorting to pay hidden fees to go-betweens and officials in charge. You need to be sure that the fiscal policy of the country where you intend to invest is clear and transparent. And you need to have assurances that the political process follows rules where voters choose their leaders in credible processes and not that every political dispute ends in violence and bloodshed because no other outlet is available to express frustration and disagreement.

We see more voices in Africa claiming for more respect of human rights, more political freedoms and a friendlier business climate. They are all interlinked, as a solid constitutional system anchored in a division of powers and true political representation is the best recipe for allowing Africa's growth to be spread amongst its populations instead of being high-jacked by specific groups, making difficult to argue against accusations of nepotism, corruption and mismanagement.

How can then EU support the objective of extending rule of law in Africa? Actually, Rule of law or related-governance issues is one of the priority sectors we support through our development funds in more than 20 countries in Sub-Saharan Africa. The rules of our mechanism, the European Development Fund (EDF), are defined by the Cotonou Agreement, which established that the choice of the fields should be attained by consensus between the donors and the recipients. Therefore, in any of those countries local authorities have agreed or requested themselves that governance should be a target of specific projects dealing with pertaining issues with the aim of reinforcing the structures of the State, its laws and its implementation.

Moreover, what we do at country level is complemented by equal efforts at sub-regional and regional level. The former includes organisations like ECOWAS, EAC, CEMAC or SADC[1] that have achieved or are working in defining common market areas with EU support. They can ensure a broader view and a wider application of any progress in rule of law matters, making possible intra-regional and extra-regional investments more attractive and more likely.

[1]EconomicCommunity of West AfricanStates, EastAfricanCommunity, Economic and MonetaryCommunity of CentralAfrica and Southern AfricanDevelopmentCommunity

By regional level, we mean the African Union (AU). Here again, it would make sense that a level-playing field should be attained by designing pan-African directives that would be followed by its complete membership. For instance, the AU is currently involved in preparing an investment code. This could be a relevant tool once it will be approved and embedded in the national law (domestication) of the AU countries but already shows a commitment and a willingness to face problems and propose solutions that are going the right way. A range of other projects could be mentioned, going from support to the strengthening of the African human rights system in the framework of the African Governance Architectureto support to Good Financial Governance in co-operation with the German agency for development not to speak about the support to the African Legal Support Facility.

However, there is another strand, perhaps less visible, that usually does not deserve a mention. An organisation like the AU cannot survive on whim or brute force, it needs rules, it needs structures. It needs people used to work with written directives and the legal implications of their and others acts. In a sense those officials that are now working in the AU and who will go back later to their own counties are the best human capital, our best Ambassadors if you prefer, in spreading a different type of mentality, based in more rigour, more accountability, more transparency because they are familiar with them, they were subject to them and they know the advantages of working in such an environment.

Another area that deserves a reference is the governance of natural resources, where rule of law is decidedly fundamental to fight an anarchic and law-defiant environment. Illegal logging, for instance, is an economic wound and an environmental disaster waiting to happen. Here the EU is leading global efforts to tackle the illegal logging through the EU FLEGT (Forest Law Enforcement Governance and Trade) Action Plan, adopted in 2003 that also targets associated trade of illegal timber through a combination of measures encompassing both the demand side (EU market and others) and the supply side (producer countries). It proposes support for timber producing countries, efforts to develop multilateral collaboration to tackle trade in illegal timber, support for private sector initiatives as well as measures to avoid investment in activities that encourage illegal logging.

The cornerstone of the Action Plan is the establishment of FLEGT Voluntary Partnership Agreements (VPAs) between the Union and timber producing countries. FLEGT VPAs are bilateral trade agreements which aim to guarantee that the wood exported to the EU is from legal sources and to support partner countries in improving their own regulation and governance of the sector. The second key element of the FLEGT AP is the EU Timber Regulation (EUTR) which entered into force since March 2013. The EUTR lays down the due diligence obligations of operators who place timber and timber products on the market.

VPAs have proved to be powerful tools to address forest governance challenges in partner countries. Through clarifying legal frameworks, stimulating governance reforms, increasing

states' capacity and accountability and promoting transparency and participation in decision making, VPAs stimulate a process of gradual change and improvements that will have positive and long-lasting impacts. Implementation for sure has been challenging and needs perseverance. The development of credible licensing schemes to guarantee timber legality is a long term endeavor and none of the agreements concluded is operational as yet.

Conflict minerals is another area where the EU has been active, once again promoting a better governance of a strategic sector in some African regions. Suffice to say that in theGreat Lakes the illegal trade has been a powerful financial source to armed groups responsible for the bulk of instability in the region. The EU launched in 2014 an Initiative entitled 'Responsible sourcing of minerals originating in conflict-affected and high-risk areas: towards an integrated EU approach(by that we mean conflict resolution and peace building, good governance and rule of law, sustainable development and growth, transparency of the supply chain and financial flows)to address the problems of linkages between the exploitation of and trade in minerals and conflict. The initiative outlines the EU comprehensive approach and proposes a draft Regulation setting up an EU system of self-certification for importers of tin, tantalum, tungsten and gold. Self-certification requires EU importers of these metals and their ores to exercise 'due diligence' by monitoring and administering their purchases and sales by increasing transparency and auditing their economic operations.The Regulation is currently being examined by the EU Council and Parliament where a debate exists about the critical element of the Regulation, opinions divided between those who think it should have voluntary character and those who prone for a compulsory one. The EU support is of course fully compatible to our support to other non-EU initiatives like EITI (Extractive Industries Transparency Initiative) and the Kimberley Process.

A final word concerning two documents: one political, the other legal. The former, the road map approved during the last EU-Africa Summit (2014) where two sides agreed that "the promotion of democratic governance remains at the core of our partnership. We will enhance our co-operation on democratic governance issues on both continents such as the fight against corruption and money-laundering, strengthening the role of public sector institutions, including accountability and transparency, the rule of law and the governance of natural resources, including measures to curb their illegal exploitation". I would like to underline here the African side acknowledgement that issues exist, that they will be tackled and that they count on our support to do so.

The latter is the Cotonou Agreement, a contractual relationship with the ACP Countries, including all sub-Saharan countries, that in its article 9 is crystal-clear in affirming that "The structure of the Government and prerogatives of the different powers shall be founded on rule of law, which shall entail in particular effective and accessible means of legal redress, an independent legal system guaranteeing equality before the law and an executive that is fully subject to the law".

The same Agreement in article 8 regarding political dialogue calls for "a regular assessment of the developments concerning the respect for human rights, democratic principles, the rule of law and good governance". Article 96, aptly titled "Essential elements: consultation

procedure and appropriate measures as regards human rights, democratic principles and the rule of law" goes further admitting that "a Party considers that the other Party fails to fulfil an obligation stemming from the respect for human rights, democratic principles and the rule of law…it shall supply the other Party… with the relevant information required for a thorough examination of the situation with a view to seeking a solution acceptable to the Parties". If the solution is not forthcoming, the said article accepts that "appropriate measures will be taken", meaning that EU development assistance can be revised or suspended.

In conclusion, the EU has a variety of tools to help Africa in its quest for a more robust application of rule of law and to prevent deviations from this pattern. No doubt problems remain in Africa from lack of political wisdom to meagre resources, from states near collapsing to close-captioned mentalities. However, the final balance has to be positive if we keep a Historical perspective and acknowledge the itinerary being trekked so far. That does not mean we shall be indulgent. On the contrary: resilience, persistence and goodwill remain essential if we want to achieve the objective of responsible and fair governance all around Africa, an essential condition for the continents prosperity.

Brussels, September 15th, 2015

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Sanctions Regimes Currently in Force

Richard Blakeley

Margaret Grey

Maya Lester

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	UN	EU	Summary
Central African Republic 	Y	Y	Since December 2013, arms embargo plus targeted measures. Targeted measures imposed on (*inter alia*) those who: • engage in or support acts undermining the peace, stability of security of the CAR; • violatethe UN arms embargo; • plan, direct or commit acts that violate international human rights law or international humanitarian law (acts involving sexual violence, targeting of civilians, ethnic- or religious-based attacks, attacks on schools and hospitals, and abduction and forced displacement); • recruit or use children in armed conflict; • supportarmed groups or criminal networks through the illicit exploitation of natural resources, including diamonds, wildlife and wildlife products, in the CAR.

Cote d'Ivoire 	Y	Y	Series of sanctions since December 2004:
			
			• Arms embargo (import/export);
			• Ban on exports of equipment for internal repression;
			• Import ban on diamonds;
			• Targeted measures (asset freezes / travel bans)
			  ○ against President Gbagbo, his wife and close advisors because of their use of broadcast media to incite discrimination, hostility, hatred and violence; and
			  ○ Those who constitute a threat to the peace and national reconciliation process in Cote d'Ivoire, in particular those who are determined as responsible for serious violations of human rights;
			  ○

Democratic Republic of Congo 	Y	Y	EU sanctions were first imposed on the DRC (then Zaire) in April 1993 in the form of an arms embargo in response to then-President Mobuto dissolving the government of Prime Minister Tshisekedi and violence in the country. Following the First and Second Congo Wars, the arms embargo continued in 2002 in support of the Lusaka Ceasefire Agreement. In 2005 the EU measures were brought into line with UN sanctions against the DRC. These measures expanded the arms embargo against armed groups to all recipients of weapons with the exception of the military and police that have completed integration.

			They further included travel bans and asset freezes against those acting in violation of sanctions.
			
			Currently in force:
			
			• Arms embargo;
			• Targeted measures against:
			  ○ Those deemed to be acting in violation of the arms embargo.
			  ○ Typically military commanders of militias and armed groups; business leaders and other individuals said to be involved in violating the embargo; and those hampering the efforts of humanitarian aid distribution.

Egypt	N	Y	EU sanctions only. Targeted measures from March 2011 against those persons who "have been identified as being responsible for the misappropriation of Egyptian state funds", including former president Mubarak and members of his family and those connected to the Mubarak regime.

Eritrea	Y	Y	UN sanctions from late 2009, EU sanctions (implementing them) from March 2010.
			
			• Arms embargo;
			• Targeted measures against:
			  ○ Individuals or entities who violate the terms of the arms embargo;
			  ○ Eritrean individuals or entities providing support to armed opposition groups aimed at destabilising the region;
			  ○ Individuals or entities obstructing the implementation of UNSCR 1862 (2009) concerning Djibouti;
			  ○ Individuals or entities harbouring, facilitating, financing, organising, training or inciting terrorism;
			  ○ Individuals or entities obstructing the work of the UN Monitoring Group.

Guinea-Bissau	Y	Y	Since May 2012, asset freeze and travel ban on coup leaders. In particular: certain persons, entities and bodies who seek to prevent or block a peaceful political process, or who take action that undermines stability in the Republic of Guinea-Bissau, those who played a leading role in the mutiny of 1st April 2010 and the coup d'etat of 12th April

			2012 and those whose actions continue to be aimed at undermining the rule of law and the primacy of civilian power.

Liberia 	Y	Y	Since 2001 when the EU followed the UN's renewal of a 1992 arms embargo. Includes:
			
			• Arms embargo;
			• Ban on the import of rough diamonds from Liberia;
			• Travel ban on senior members of the Liberian government and military (though there is now an exception for vetted military and police)
			• Current sanctions focus on Charles Taylor and other non-state actors;
			• Targeted measures imposed on:
			  ○ Those deemed a threat to the peace process;
			  ○ Former President Charles Taylor and those associated with him and his family;
			  ○ Those who violate the arms embargo.

Libya 	Y	Y	UN and EU sanctions imposed and subsequently relaxed in parallel (although EU imposed additional autonomous sanctions on entities not initially listed by the UN).
			
			• Arms embargo;
			• Targeted measures:
			  ○ Those deemed responsible for the violent repression in Libya (members of the Gaddafi family and senior members of the Gaddafi regime);
			  ○ Businesses and institutions associated with the Gaddafi regime.

Republic of Guinea 	N	Y	Only EU sanctions. Sanctions imposed in response to the violent crackdown on protests by the country's military regime in September 2009. Consists of an arms embargo and embargo on supply of equipment that could be used for internal repression The restrictions were eased since the presidential election of 2010: the embargo was lifted in April 2014; but asset freezes and travel bans against members of the 2009 government remain in place.
Somalia 	Y	Y	UN sanctions have been in place since 1992. EU sanctions imposed in 2002 and replaced in 2009 with a new regime containing exemptions aimed at developing the nascent security infrastructure in the country.

			• Arms embargo (exemptions for AMISOM and the development of Somali security infrastructure); • Targeted measures imposed on those who have: ○ conducted or provided support to actions that threaten the peace, security or stability in Somalia; ○ made violent threats against the federal government or AMISOM; ○ violated the arms embargo or prevented the distribution of humanitarian aid.
South Sudan 	Y	Y	From July 2011, the EU extended the arms embargo over Sudan to cover South Sudan. It subsequently separated the sanctions for clarity. • Arms embargo; • Targeted measures: ○ those who obstruct the political process in South Sudan, including by acts of violence or violations of ceasefire agreements; ○ persons responsible for serious violations of human rights in South Sudan. UN sanctions were imposed from March 2015 setting up a sanctions committee to impose targeted measures on those who expand or extend the conflict, or obstruct peace talks etc.
Sudan 	Y	Y	Sanctions have been in place since 2004. • Arms embargo; • Targeted measures: ○ those who impede the peace process, or constitute a threat to stability in Darfur and the region; ○ those who commit violations of international humanitarian or human rights law or other atrocities; ○ those who violate the arms embargo; ○ those who or are responsible for certain offensive military overflights in and over the Darfur region.
Tunisia 	N	Y	EU sanctions only, imposed pursuant to the EU's autonomous Common Foreign and Security Policy powers. EU sanctions were first imposed in relation to Tunisia in January 2011 following the resignation of President Ben Ali and members of his government. The Tunisian authorities instigated legal action against a

			number of these individuals for appropriation of public property, and the EU restrictive measures were designed to support this action. The measures therefore took the form of asset freezes against those deemed responsible for the misappropriation of state funds.
Yemen 	Y	Y	From 2014, targeted measures were imposed on those engaging in or providing support for acts that threaten the peace, security or stability of Yemen, including: • obstructing or undermining the successful completion of the political transitionas outlined in the Gulf Cooperation Council (GCC) Initiative and Implementation Mechanism Agreement; • impeding the implementation of the outcomes of the final report of the Comprehensive National Dialogue Conference through violence, or attacks on essential infrastructure; or • planning, directing or committing acts that violate applicable international human rights law or international humanitarian law, or acts that constitute human rights abuses, in Yemen.

Zimbabwe 	Y	Y	Targeted measures:
			
			• Prohibition on the provision of technical assistance, financing and financial assistance related to military activities;
			• Prohibition on supply of equipment that might be used for internal repression;
			• Targeted measures:
			  ○ at UN level, against those assumed or proved to be involvement in the illicit trade of high value commodities including diamonds;
			  ○ at EU level, against individual members of the Government of Zimbabwe and to any natural or legal persons, entities or bodies associated with them.

SOME AFRICA SANCTIONS CASES IN THE EUROPEAN COURT

EGYPT

Case C-220/14P *Ezz&Ors*

IVORY COAST

T-406/13 *Marcel Gossio*

T-119/11 *Simone Gbagbo*

C-478-482/11 P *Gbagbo, Koné, Boni-Claverie, Djédé&N'Guessan*

TUNISIA

Case T-133/12 *Mehdi Ben Ali*

Case T-200/11 *Al Matri*

T-187/11 *Trabelsi*

T-188/11 *Chiboub*

ZIMBABWE

T-190/12 *Tomana&Ors*

T-168/12 *Georgias&Ors*

SOME SANCTIONS CASES IN THE ENGLISH COURTS

National Iranian Tanker Company and Golparvar v Secretary of State for Foreign and Commonwealth Affairs[2015] EWHC 282 (Admin) (Green J) (**Iran**)

R (Bredenkamp) v Secretary of State for Foreign and Commonwealth Affairs [2012] EWHC 3297 (Admin) (Ouseley J) (**Zimbabwe**)

R (El-Maghraby and El Gazaerly) v HM Treasury and Foreign and Commonwealth Office [2012] EWHC 674 (Admin) (Coulson J) (**Egypt**)

Regina (Youssef) v Secretary of State for Foreign and Commonwealth Affairs [2013] EWCA Civ 1302 (**Egypt**)

Maud v The Libyan Investment Authority [2015] EWHC 1625 (Ch) (Rose J) (**Libya**)

Melli Bank plc v Holbud Limited [2013] EWHC 1506 (Comm) (Robin Knowles QC) (**Iran**)

DVB Bank SE and others v Shere Shipping Co Limited and others [2013] EWHC 2321 (Simon J) (**Iran**)

Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd (Rev 1) [2010] EWHC 2661 (Comm) (Beatson J) (**Iran**)

Soeximex SAS v Agrocorp International PTE Limited [2011] EWHC 2743 (Comm) (Gloster J) (**Burma/Myanmar**)

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Renaissance Capital v African Minerals

Tom Adam QC

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1. Tom Adam QC will talk about the first instance and appeal decisions in **Renaissance Capital Limited v African Minerals Limited** ([2014] EWHC 2004 and [2015] EWCA 448[1]).

2. The first instance trial involved multiple disputes between Russian-based investment bank Renaissance Capital and African Minerals Limited ("AML"), a company which indirectly owned the largest iron ore mine in West Africa (in Sierra Leone).

    a. AML, founded by well-known City figure Frank Timis, had taken the project from effectively virgin jungle to a fully productive modern mine in less than four years: a remarkable feat in itself, but the more so given that it included constructing hundreds of kilometres of new railway and a new deep water port. This was a highly capital intensive process and AML was thus constantly raising funds through the life of the project, culminating in the injection of $1.5bn by a Chinese state-owned steel mill in 2012.

    b. Renaissance claimed, on a large variety of legal bases but including in particular numerous estoppels by convention, fees on a number of the corporate finance transactions undertaken by AML during the fund-raising process.

    c. The Commercial Court judge (Field J) dismissed most of the claims, but awarded $30m to Renaissance as its commission on the $1.5bn investment. (Renaissance had claimed $100m for this element of the claim.)

3. AML appealed (on the basis that it was not liable at all) and Renaissance cross-appealed (seeking the full $100m).

    a. The appeal turned on the construction of a bespoke engagement letter between AML and Renaissance, providing that a commission would be payable if a qualifying transaction 'consummated' within one year of the engagement being terminated. Field J had held that the deal 'consummated' merely when its main terms had been agreed (prior even to a contract being signed). The Court of Appeal disagreed, and upheld AML's argument that the investment was only 'consummated' when it actually completed.

    b. The Court of Appeal relied on two matters in particular in reaching this conclusion: the ordinary meaning of the word 'consummated'; and secondly the fact that, in a preceding contract between the same parties, of which the subject contract was an amended version, the parties had used 'consummated' in contradistinction to 'agreement', and that their continuing use of the word 'consummated' in the amended contract indicated that the same concept was intended.

[1] Tom Adam QC and Colin West (instructed by Morrison & Foerster UK LLP) acted on behalf of AMLat first instance; Mark Howard QC acted in addition in the Court of Appeal.

4. A number of interesting legal and commercial points arise and Tom will reflect on lessons which can be learned.

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The New York Convention Regime on Recognition and Enforcement

Joanne Box

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1. The New York Convention provides for both recognition and enforcement of arbitration awards.

   a. States bound by the Convention undertake to respect the binding effect of awards to which the Convention applies. Accordingly, such awards may be relied upon by way of defence or set-off in any legal proceedings.

   b. Contracting States undertake to enforce awards to which the Convention applies, in accordance with their local procedural rules. They also undertake not to impose substantially more onerous conditions or higher fees or charges for such enforcement than are imposed in the enforcement of their own domestic awards (see Article III).

2. Recognition and enforcement of an award may be refused only where a party can establish one of the grounds in Article V. Article V(1) specifies five such grounds, namely where it is proved:

   a. that a party to the arbitration agreement was (under the law applicable to him) under some incapacity, or that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   b. that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   c. that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or

   d. that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place; or

   e. that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

3. Article V(2) of the Convention further provides that recognition and enforcement of an arbitral award may be refused if:

   a. the award is in respect of a matter which is not capable of settlement by arbitration; or

   b. it would be contrary to public policy to recognise or enforce the award.

4. It is evident from Article V that the circumstances in which an award will not be recognised or enforced are limited. The Convention does not permit any review of the merits of an award. The grounds in Article V are exhaustive, and the burden of proof is placed upon the party resisting recognition and enforcement. Even if one of the grounds for refusal of recognition and enforcement is established, the court *may* refuse enforcement but is not obliged to do so.

5. Accordingly, refusals are rare. A recent study demonstrated that out of approximately 850 New York Convention enforcement decisions reported in the Yearbook of Commercial Arbitration, only 70 refused enforcement of the award.[1] Nonetheless, the public policy exception has been the source of controversy.

6. The Convention's *travaux préparatoires* equate public policy with "*fundamental notions and principles of justice*". However, as Lord Neuberger recently observed, "*the notion of public interest or policy is necessarily open-textured*".[2]

7. Enforcement was refused by the English court in ***Soleimany v Soleimany*** [1999] QB 785, where the award gave effect to a contract between a father and son that involved the smuggling of carpets out of Iran in breach of Iranian revenue laws and export controls. The father and son had agreed to submit their dispute to arbitration by the London Beth Din, which applied Jewish law. As a matter of Jewish law, the illegal purpose of the contract had no effect on the rights of the parties, and the Beth Din proceeded to make an award enforcing the contract. However, in overturning the High Court decision and declining to enforce the award, the Court of Appeal held that:

> "The Court is in our view concerned to preserve the integrity of its process, and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they, or rather one of them, is seeking to enforce an illegal contract. Public policy will not allow it."

8. Nonetheless, the English courts have generally been reluctant to refuse enforcement on grounds of public policy. The Court of Appeal confirmed in ***Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd*** [2000] QB 288 that enforcing arbitration awards is itself a matter of public policy. This dispute arose from a 'consultancy' agreement for the procurement of contracts for the sale of military equipment in Kuwait. Jugoimport defended Westacre's claim for its fees on the grounds that the contract had involved bribing Kuwaiti individuals to exert their influence in Jugoimport's favour, in violation of Kuwaiti law and policy. The agreement between the parties was governed by Swiss law and provided for arbitration in Switzerland. The arbitral tribunal found that there was no evidence of corruption, and that lobbying to obtain public contracts was not illegal under Swiss law. Attempts to enforce the award were subsequently challenged in the English courts, where

[1] Maurer, *The Public Policy Exception Under the New York Convention*, Revised Edition 2013, p.345
[2] Lord Neuberger, *Arbitration and the Rule of Law*, speech to the Chartered Institute of Arbitrators, 20 March 2015, paragraph 12.

Jugoimport filed new affidavit evidence in support of its allegation of corruption. Dismissing the application to refuse enforcement, Waller LJ held:

> "The court is in this instance performing a balancing exercise between the competing public policies of finality and illegality; between the finality that should prima facie exist particularly for those that agree to have their disputes arbitrated, against the policy of ensuring that the executive power of the English court is not abused."

9. A similarly 'pro-enforcement' approach has been taken by the US courts. In ***Parsons Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier (RAKTA)*** 508 F2d 969 (2nd Cir 1974), it was argued that recognition and enforcement of an award should be refused on the grounds that diplomatic relations between Egypt (the respondent's State) and the US had been severed. The New York District Court rejected this argument and referred to "*the general pro-enforcement bias*" informing the New York Convention. It held that the Convention's 'public policy' defence should be construed narrowly; and that enforcement of foreign arbitral awards should only be denied on this basis "*where enforcement would violate the forum state's most basic notions of morality and justice*".

10. Other jurisdictions have recognised the need to give an international dimension to the application of public policy to the Convention. In ***Renusagar Power Co Ltd v General Electric Co*** (1995) XX Ybk Comm Arb 681, The Indian Supreme Court said:

> "This raises the question of whether the narrower concept of public policy as applicable in the field of public international law should be applied or the wider concept of public policy as applicable in the field of municipal law. The Court held that the narrower view should prevail and that enforcement would be refused on the public policy ground if such enforcement would be contrary to (i) fundamental policy of Indian law; or (ii) the interests of India; or (iii) justice or morality."

11. Similar concepts have been adopted in decisions of the courts in Switzerland (***KS AG v CC SA*** [(1995) XX Ybk Comm Arb 762), Germany ((1987) XII Ybk Comm Arb 489), France (***SA Laboratoires Eurosilicone v Société Bez Medizintechnik GmbH*** (2004) Revue de l'Arbitrage 133), and Korea (***Adviso N.V v Korea Overseas Construction Corporation*** (1996) 21 Ybk Comm Arb 612)).

12. More recently, one Hong Kong judge commented:

> "Public policy is often invoked by a losing party in an attempt to manipulate an enforcing court into re-opening matters which have been (or ought to have been) determined in an arbitration. The public policy ground is thereby raised to frustrate or delay the winning party from enjoying the fruits of a victory. The court must be vigilant that the public policy objection is not abused in order to obtain for the losing party a second chance at arguing a

case. To allow that would be to undermine the efficacy of the parties' agreement to pursue arbitration." (***A v R*** [2009] HKCFI 342 per Reyes J).

13. However, other jurisdictions have shown a greater readiness to uphold the public policy exception. Japanese legislation applies the test of 'public policy or good morals' in the enforcement process, and Vietnamese legislation requires that the award should not be contrary to the basic principles of Vietnamese law.[3]

14. Chinese law refers to the 'social and public interest' which is potentially an even broader concept. The Supreme People's Court has explained that "*The principle of public interest can apply where there are breaches of fundamental principles of Chinese law, national sovereignty or national security, or breaches of the principles of social ethics and fundamental moral value*."[4]

15. In ***American Production Co and Tom Hewlett v Chinese Women's Travel Agency Ta*** [1997] No. 35 ***(The Heavy Metal Case)***, the Supreme People's Court considered whether to enforce an arbitral award which directed the respondent to pay compensatory damages to a US heavy metal rock band after its performances were banned by the Ministry of Culture on the grounds that the artists performed 'outrageous acts' such as drinking, smoking, splashing water, lying on the stage floor while performing, and jumping down from the stage. The Supreme People's Court denied enforcement on the grounds that the performance of heavy metal music was against 'national sentiments', and accordingly contrary to the social and public interests. Such reasoning is clearly at odds with the pro-enforcement approach of the UK and US courts.

16. In an attempt at harmonisation, the International Law Association's Committee on International Commercial Arbitration has sought to define 'public policy', 'international public policy', and 'transnational public policy'. It was recommended that *"[t]he finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances"*, where international public policy would be violated.[5] 'International public policy' was defined as that "*part of the public policy of a state which, if violated, would prevent a party from invoking a foreign law or foreign judgment or foreign award*". Whilst the focus on international public policy is helpful, it is questionable whether this definition of 'international public policy' assists matters. It is likely that the public policy exception will continue to be invoked by those resisting enforcement.

17. The varying approach to the public policy exception is of greater concern following a recent decision of the English High Court where it was held that enforcement of a Convention award could be refused on grounds of issue estoppel: ***DIAG Human Se v Czech Republic*** [2014] EWHC 1639 (Comm). DIAG had agreed to modernise the Czech blood transfusion system. Following the breakdown of the business

[3] Redfern & Hunter, *Law and Practice of International Commercial Arbitration* (5th Ed.) at para 11.114
[4] Ibid. at para 11.115
[5] ILA, Committee on International Commercial Arbitration, Final Report on Public Policy, Transnational Dispute Management, Vol 1, Issue 1 (February 2004)

relationship between DIAG and the Czech government, and arbitration proceedings, both parties sought a review of the award by invoking the review process set out in the arbitration agreement. DIAG subsequently withdrew its application for a review and issued proceedings in the English court seeking enforcement of the award. DIAG had previously attempted to enforce the award in other jurisdictions, including Austria. The Supreme Court of Austria had concluded that the review process had been properly invoked, and therefore that the award was not yet binding and thus unenforceable. Eder J held that the earlier decision of the Austrian Supreme Court created an issue estoppel and thus prevented enforcement in England. Where foreign courts apply different notions of public policy, issue estoppel could create difficulties for those seeking to enforce an award not only in those foreign jurisdictions but also in other Contracting States which would otherwise adopt a pro-enforcement approach.

18. To conclude, it is clear that the New York Convention is designed to minimise the risk that an arbitral award will prove incapable of enforcement. Most of the exceptions in Article V are narrow and there will be no difficulty in the majority of cases. However, where there is potential for an argument concerning public policy, parties should be alert to the risks here, and should consider carefully where to seek enforcement – and in what order.

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The Enforcement of Arbitration Awards in England and Wales
The Approach of the English Courts

Kyle Lawson

BRICK COURT CHAMBERS

INTRODUCTION

1. The recognition and enforcement of arbitration awards in England is governed by sections 66 to 69 of the Arbitration Act 1996 (**"the Act")** (in relation to "domestic" awards of tribunals that have their seat in England) and by sections 100 to 104 of the Act (in relation "foreign" awards of tribunals that have their seat in a state that is a party to the New York Convention).

2. The relevant provisions of the Act are considered in more detail below. However, in terms of the general approach of the English courts, the following dictum from the judgment of Bingham J. in ***Zermalt Holdings v Nu-Life Upholstery Repairs*** [1985] EGLR 14 has been frequently cited in subsequent cases:

> "... the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes, inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way, expecting, as is usually the case, that there will be no substantial fault that can be found with it."

SECTION 66 – THE RECOGNITION AND ENFORCEMENT OF DOMESTIC AWARDS

3. Section 66 provides two principal methods of enforcing an arbitration award made in England– (1) the court may give permission for the award to be *"enforced in the same manner as a judgment or order of the court*"; and (2) the court may *"enter judgment in terms of the award."*The latter is probably more advantageous, but the two options are not mutually exclusive and, in practice, the award creditor will usually combine an application for permission to enforce the award under section 66(1) with an application for permission to enter judgment in terms of the award under section 66(2).

4. Section 66(4) also preserves the possibility of enforcing an award at common law by commencing an *"action on the award"* in reliance on an implied promise in the arbitration agreement to pay the award. However, as Thomas L.J. recognised in ***The Amazon Reefer*** [2010] 1 Lloyd's Rep. 222, "*the summary procedure ... under ... section 66 of the 1996 Act is so convenient that it is by far the most common way of enforcing an award."*

5. Strictly speaking, section 66 applies even if the seat of the arbitration is outside England (see section 2(2)(b)), but in practice foreign awards are invariably enforced under sections 101-104. Section 66 cannot be used to circumvent the defences that would be open to a respondent under section 103 as enforcement under section 66 is expressly provided to be without prejudice to enforcement under the New York Convention (see section 66(4)).

SECTION 67 – CHALLENGING THE AWARD: SUBSTANTIVE JURISDICTION

6. Section 67(1) enables a party to apply to the court in order (a) to challenge any award of the arbitral tribunal as to its *"substantive jurisdiction"*; or (b) to obtain an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have "*substantive jurisdiction."*

7. *"Substantive jurisdiction"* is defined in section 30 to mean (a) whether there is a valid arbitration agreement; (b) whether the tribunal is properly constituted; and (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.

8. Section 67 is a codification of the principle that, insofar as any arbitration has its seat in England, it is the English court (and not the tribunal) that has the final say on questions of jurisdiction.

SECTION 68 – CHALLENGING THE AWARD: SERIOUS IRREGULARITY

9. Section 68(1) provides that a party may apply to the court in order to challenge any award in the proceedings on the ground of *"serious irregularity"* affecting the tribunal, the proceedings or the award.

10. Section 68(2) sets out the grounds of *"serious of irregularity"* that may be relied upon in any application under section 68 and these include, among other things, the following:

    - failure by the tribunal to comply with its general duty under section 33 to *"act fairly and impartially as between the parties"* (68(2)(a));
    - the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67) (68(2)(b));
    - failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties (68(2)(c));
    - failure by the tribunal to deal with all the issues that were put to it (68(2)(d));
    - the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy (68(2)(g)).

11. The grounds identified in section 68(2) are exhaustive and it is not open to the court to seek develop new or additional grounds of *"serious irregularity* in a manner that

might lead to the exercise of a general supervisory jurisdiction over the conduct of arbitral proceedings.[1]

12. Even if an applicant can establish that a *"serious irregularity"* has occurred by reference to one or more of the grounds set out in section 68(2), it will also need to satisfy the court that the irregularity has caused or will cause it to suffer *"substantial injustice."* This additional requirement will normally present a serious obstacle to the success of any challenge under section 68, as the Departmental Advisory Committee (**"DAC"**) explained in their Report on the Arbitration Bill at [280]:

> "The test of "substantial injustice" is intended to be applied by way of support for the arbitral process, not by way of interference with that process. Thus it is only in those cases where it can be said that what has happened is so far removed from what could reasonably be expected of the arbitral process that we would expect the Court to take action. The test is not what would have happened had the matter been litigated. To apply such a test would be to ignore the fact that the parties have agreed to arbitrate, not litigate. Having chosen arbitration, the parties cannot validly complain of substantial injustice unless what has happened simply cannot on any view be defended as an acceptable consequence of that choice. In short, Clause 68 is really designed as a long stop, only available in extreme cases where the tribunal has gone so wrong in its conduct of the arbitration that justice calls out for it to be corrected."

13. The House of Lords considered the effect of section 68 in ***Lesotho Highlands Development Authority v Impregilo SpA*** [2006] 1 AC 221, where Lord Steyn explained that the *"pre-condition"* that there be *"substantial injustice*" to the applicant was *"designed to eliminate technical and unmeritorious challenges."*

14. Despite the high threshold to success, there has been no shortage of attempts to use section 68 to impugn the arbitral process and overturn an unfavourable award in recent years. The vast majority of these applications have been unsuccessful and the courts have been particularly critical of impermissible attempts to use section 68 to challenge findings of fact made by the tribunal and to circumvent restrictions on the right to appeal on a point of law under section 69.

15. See for example:

- ***Primera Maritime (Hellas) Ltd v Jiangsu Eastern Heavy Industry Co Ltd*** [2014] 1 Lloyd's Rep. 255 (Flaux J.) - an unsuccessful challenge under 68(2)(d) on the grounds that the tribunal had failed to deal with an issue of law and an issue of quantum that had been raised by the claimant. Flaux J. held that it was not seriously arguable that the tribunal had not dealt with either issue and he

[1] The DAC Report at [280]: *"the Court does not have a general supervisory jurisdiction over arbitrations. We have listed the specific cases where a challenge can be made under this clause."*

characterised the application as a *"scarcely veiled attempt to challenge findings of fact of the tribunal which the claimants do not like*." He elaborated on this point at [50]:

"It is clearly not appropriate to use an application under section 68 to challenge the findings of fact made by the tribunal. If it were otherwise every disappointed party could say it had been treated unfairly by pointing to some piece of evidence in its favour which was not referred to in the Reasons or not given the weight it feels it should have been. That is precisely the situation in which the Court should not intervene. Matters of fact and evaluation of the evidence are for the arbitrators."

- ***Konkola Copper Mines Plc v U&M Mining Zambia Ltd*** [2014] 2 Lloyd's Rep. 649 (Cooke J.)–an unsuccessful challenge under 68(2)(a) on the grounds that the tribunal had proceeded to make an award following a hearing that had taken place in the absence of the applicant and had not given it an opportunity to present its case. Cooke J. had no hesitation in finding that the application was unfounded and that, in reality, the applicant had been given *"every opportunity"* to participate in the hearing and to put in submissions and evidence. However, the judge noted that the case was *"not untypical of applications of the kind made in the commercial court,"* and he made the following additional observations in the *"finale"* to his judgment at [110]-[112]:

  "...The vast majority of section 68 challenges which come before this court are unfounded and occupy too much of this court's time... This is such a case where KCM deliberately chose not to participate in the hearing on 9th December, having failed to pay the First Award... It cannot justifiably complain about the consequences of its own conduct. It has since failed to pay the Second Award, which is the subject of these applications, and subsequently the Third Award.... Costs must follow the event and, subject to hearing any submissions on the subject, it appears to me that this case is sufficiently "out of the norm" to justify costs being awarded on an indemnity basis..."

- ***Flame SA v Glory Wealth Shipping Pte Ltd*** [2014] Q.B. 1080 (Teare J.) – an unsuccessful application on the grounds that, among other things, the repeated refusal by the tribunal to order disclosure from the respondent until shortly before the hearing. Teare J. robustly dismissed the application on the basis that it had *"no prospect of success."*The initial decision not to order to disclosure *"may be said to have been wrong, but making a wrong decision is not a serious irregularity."* The inability of the applicant to properly investigate parts of the case or to cross-examine a number of the witnesses was *"regrettable,"* but was something that *"happens from time to time, both in litigation and arbitration"* and which could have been dealt with in a number of different ways that had not been explored by the applicant at the time.

- ***BV Scheepswerf Damen Gorinchem v the Marine Institute ("The Celtic Explorer")*** [2015] EWHC 1810 (Comm) (Flaux J.) – an unsuccessful application under 68(2(a) and/or 68(2)(c) in respect of a delay of 376 days in the publication of an award following a 3-day hearing. Flaux J. concluded that a delay in the publication of an award could not itself be a ground of *"serious irregularity"* because, without more, the delay could not have caused the applicant *"serious injustice."*However, he was nevertheless at pains to emphasise that it *"does not follow that extensive delay, let alone inordinate delay of twelve months in publishing an Award, should be permissible."*

16. For a rare example of a successful application under section 68, see the recent decision ***Secretary of State for the Home Department v Raytheon Systems Ltd***[2014] EWHC 4375 (TCC), in which Akenhead J. upheld a challenge under 68(2)(d) on the grounds that an arbitral award that ran to over 267 pages had nevertheless failed to deal with two issues as to liability and the quantum of the claim. The misery of the respondents was compounded when, at a subsequent hearing to determine the appropriate relief, Akenhead J. held that the award should be set-aside in its entirety instead of being remitted to the tribunal for further consideration of the issues that they had failed to address in their original award: see [2015] 1 Lloyd's Rep. 493. Despite recognising that remission was *the "default option"* on an application under section 68, the Judge concluded that the failure of the tribunal had been *"towards the more serious end of the spectrum of seriousness in terms of irregularity"* and that it would be *"invidious and embarrassing for the tribunal to be required to try to free itself of all previous ideas and to re-determine the same issues."*

17. Finally, it is worth noting that the Commercial Court Guide creates a *"fast track"* procedure for the determination of weak section 68 applications and, at paragraph O8.8, it provides that *"if the nature of the challenge itself or the evidence filed in support of it leads the court to consider that the claim has no real prospect of success, the court may exercise its powers under rule 3.3(4) and/or rule 23.8(c) to dismiss the application without a hearing."* The utility of this procedure is, however, debatable in that, as Cooke J. pointed out in ***Konkola Copper Mines Plc***, *"a detailed investigation is often required which renders the summary process unworkable in practice."*

SECTION 69 – APPEAL ON A POINT OF LAW

18. Section 69 provides that a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

19. The right to seek permission to appeal against the decision of an arbitral tribunal under section 68 is probably the most controversial provision of the Act from an international perspective. During the consultation on the drafting of the Act, the DAC received a number of responses calling for the abolition of any right to appeal on the substantive issues in the arbitration: *"these were based on the proposition that by agreeing to arbitrate their dispute, the parties were agreeing to abide by the decision*

of their chosen tribunal, not by the decision of the Court, so that whether or not a Court would reach the same conclusion was simply irrelevant. To substitute the decision of the Court on the substantive issues would be wholly to subvert the agreement the parties had made.[2]

20. The DAC eventually opted for a compromise position in which a limited right to appeal on points of law was preserved in the Act, subject to the operation of a series of procedural *"safeguards"*:

- An appeal on a point of law may only be brought (a) with the agreement of all the other parties to the proceedings (... unlikely in practice), or (b) with the leave of the court (69(2));
- the point of law must be one that will *"substantially affect the rights of one or more of the parties"* (69(3)(a));
- the point of law must be one that was raised before the tribunal and which it was asked to determine (69(3)(b));
- The court must consider the point of law *"on the basis of the findings of fact in the award*" and it is impermissible (... although not uncommon) to attempt to dress up questions of fact as questions of law (69(3)(c);
- The decision of the tribunal on the point of law in question must have been (a) *"obviously wrong"*; or (b) the question must be one *"of general public importance"* and the decision of the tribunal must at least *"be open to serious doubt"* (69(3)(c);
- The court retains a residual discretion to dismiss the application unless it is satisfied that, despite the agreement of the parties to resolve the matter by arbitration, it is *"just and proper in all the circumstances for the court to determine the question"* (69(3)(d).

21. The considerable hurdle imposed by these *"safeguards"* and restrictions on the right of appeal under section 68 is well illustrated by the decision in the ***Keydon Estates Ltd v Western Power Distribution (South Wales) Ltd*** [2004] EWHC 996 (Ch), in which, having found that (a) the relevant question (as to the proper construction of an assignment clause in a sublease) was one of general public importance; and (b) that the decision of the arbitrator on the point was open to serious doubt, Lloyd J. nevertheless declined permission to appeal on the basis that the parties had agreed to submit their dispute to an expert tribunal (an experienced Chancery QC) and on the grounds of the *"presumption of finality"* inherent in the parties having decided to submit their disputes to arbitration.

22. Section 69 is not a mandatory provision of the Act and the parties are free to *"opt out"* of their right of appeal against the decision of the tribunal: section 69(1). This will often be done as a matter of course by virtue of the incorporation of institutional

[2] See the DAC Report at [284].

arbitration rules such as the LCIA Rules (2014) (see in particular Article 26.8, which provides for irrevocable waiver of any right of appeal).

SECTION 101-102 – RECOGNITION AND ENFORCEMENT OF NEW YORK CONVENTION AWARDS

23. Section 101 contains an equivalent provision to section 66 and provides that the court may give permission (a) for a New York Convention award to be enforced in the same manner as a judgment or order of the court to the same effect and (b) for judgment to be entered into the terms of the award. The procedure for enforcement is the same irrespective of whether the application is made under section 66 or section 101 in that the application is made without notice in an arbitration claim for: CPR 62.18(1).

SECTION 103 – REFUSAL OF RECOGNITION AND ENFORCEMENT

24. The English courts cannot refuse to recognise or enforce a New York Convention award unless one of the grounds in section 103(2) or section 103(3) is made out. There have been a number of recent decisions under these provisions:

- ***Yukos Capital Sarl v OJSC Rosneft*** [2014] EWHC 2188 (Comm) (Simon J.) - this was the latest instalment in the long-running dispute between the Yukos Oil company and Russia. Yukos sought to recover interest in England on four awards that had been made in Russian in 2006. Russia sought to resist enforcement on the basis that awards had been set-aside in 2007 by the Moscow Arbitrazh Court. Simon J. held that the awards were prima facie enforceable at common law and that it was open to Yukos to argue that no effect should be given to the decisions of the Moscow Court on the basis that the judgments were obtained by fraud, that it would be contrary to public policy to enforce the judgments, or that the judgments were obtained in breach of the rules of natural justice.

- ***Honeywell International Middle East Ltd v Meydan Group LLP*** [2014] EWHC 1344 (TCC) (Ramsay J.) – allegations of bribery during a tender process for an electrical works contract in the UAE were not sufficient to resist enforcement in England of a Dubai arbitration award relating to non-payment under the contract. Ramsay J. held that, even if the bribery allegations had any prospect of success (which they did not), it would not be contrary to English public policy to enforce an arbitration award based on an arbitration agreement that had been procured by a bribe.

- ***Diag Human SE v Czech Republic*** [2014] EWHC 1639 (Eder J.) - this was the first case to deny recognition and enforcement of an award in England on the basis of an issue estoppel arising out of enforcement proceedings elsewhere in the world. Eder J. held that there was no reason in principle why an earlier decision of the Austrian Supreme Court that an award had not yet become binding could not give rise to an issue estoppel between the parties. The fact that the decision had been made in the context of enforcement proceedings as opposed to any other type of proceedings was not, of itself, material.

- ***Malicorp Ltd v Government of the Arab Republic of Egypt and others*** [2015] (Walker J.) - in contrast with the result in ***Yukos Capital Sarl*** (above), Walker J. refused to enforce a Cairo Regional Centre for International Commercial Arbitration award under 103(2)(f) on the ground that it had been validly set aside by a decision of the Cairo Court of Appeal in 2012. Walker J. emphasised that English court could not accept an allegation that judges responsible for the set-aside decision were guilty of pro-government bias without positive and cogent evidence and that the Malicorp's evidence in this regard did not go beyond generalised, anecdotal material that did not approach the required high level of cogency. Walker J. also refused enforcement under 103(2)(c) on the ground that the award granted remedies on a basis that had neither been pleaded nor argued during the arbitration.

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Arbitration – Enforcement of Awards in Nigeria

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ARBITRATION LEGISLATION

1. There are, presently, two Arbitration statutes in force in Nigeria:

   (i) The Arbitration & Conciliation Act[1]("the Act"), which applies by default to domestic arbitration proceedings and international arbitration proceedings in Nigeria with the exception of in Lagos State, and in Lagos State where the parties have expressly adopted that Act as the statute under which their proceedings are to be conducted.

   (ii) The Lagos State Arbitration Law[2] ("the Law"), which applies to domestic and international arbitration proceedings in Lagos State, and to proceedings where the parties have expressly adopted the Law as governing their proceedings.

2. The Act essentially adopted the UNCITRAL Model Law for use in both domestic and international arbitration. It also expressly incorporated the New York Convention into Nigerian law, adopting the Convention with reciprocity and commercial reservations.

3. English practitioners will recognise the Lagos State Arbitration Law, which drew heavily on the 1996 English Arbitration Act, and also introduced some of the 2006 amendments to the Model Law.

4. There are two arbitration statutes in force in Nigeria because, under Nigeria's federal constitution, the National Assembly cannot legislate on all aspects of arbitration in Nigeria. Rather, its powers and jurisdiction under the constitution are limited to legislation on international and inter-state arbitration, but not on intra-state arbitration, which, as a residual matter, is within the exclusive constitutional legislative capacity of states. Lagos State, the commercial centre of the country, was dissatisfied with the federal statute and passed its own law in 2009.

ARBITRATION & THE COURTS

5. By virtue of provisions in the both statutes, courts are vested with limited supervisory jurisdiction over arbitration proceedings and are not permitted to interfere with arbitration proceedings in the absence of enabling statutory provisions. In confirmation of this principle, section 34 of the Act and section 59 of the Law provide that:

   > "***a court shall not intervene in any matter governed by this Act***[***Law***]***, except, where so provided in this Act***[***Law***]"

   The courts are empowered to supervise and assist arbitration proceedings by:
   - Ordering the attendance of witnesses;
   - The recognition and enforcement of awards;
   - Staying proceedings and referring the parties to mandatory arbitration;

[1]CAP A18 Laws of Federation of Nigeria 2004
[2]Laws of Lagos State CAP A69 2009

- Appointing and removing arbitrators in accordance with the arbitration agreement; and
- Ordering Interim measures to assist arbitration proceedings;

6. Judges tend not to be formally trained in arbitration before being appointed to the bench. In order to qualify for appointment as a judge, a person is required to have been qualified to practise as a legal practitioner in Nigeria for at least 10 years. The nature of this practice is not specified, so it is not unusual for legal practitioners with little or no dispute resolution experience to be appointed to the bench. Nigeria is fortunate, however, to have a very active branch of the Chartered Institute of Arbitrators that has recognised the importance of having a judiciary knowledgeable about arbitration. The Nigerian branch of the Institute has, in recent years, conducted courses for members of the judiciary in Lagos and Rivers States, as well as the Federal Capital Territory. In addition, the Lagos Court of Arbitration (an initiative of the Lagos State government that is private sector run, has organised more advanced arbitration training for judges in Lagos State. A number of judges have also, privately, taken arbitration courses either before, or after having been appointed, viewing an arbitration practice as a useful supplement to pensions (high court judges retire at 65).

7. Notwithstanding the existence of federal and state courts with exclusive jurisdiction over different matters, Nigeria has no specialist courts that hear arbitration related cases. In the Lagos High Court, arbitration related cases will be heard in that court's commercial division, and arbitration related cases that involve any non-Nigerian party that come before the High Court of Lagos State are automatically assigned to that court's fast track procedure. The Federal High Court is not divided into divisions, nor are the courts in any of the other 35 states of the federation or of the Federal Capital Territory.

8. The Act provides, at sections 31, 32, 51 and 52 specific provisions for the recognition and enforcement of domestic and international arbitration. Sections 31 and 32 relate to domestic arbitration while sections 51 (which incorporates section 32) and 52 relate to international arbitration. An arbitrationis international where

"(a) the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different countries; or

(b) one of the following places is situated outside the country in which the parties have their places of business –

(i) the place of arbitration if such place is determined in, or pursuant to the arbitration agreement;

(ii) any place where a substantial part of the obligation of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country; or

(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration."[3]

9. Applications for the recognition or enforcement of awards are required to be made "in writing to the Court", and applications must include an authenticated original award or a certified copy, the original arbitration agreement or a certified copy and, where the award is not in English, a certified translation into English.

10. Grounds upon which a Court may refuse the recognition or enforcement of an award in an international arbitration include the following:

(a) one of the parties to the arbitration agreement was under some incapacity;

(b) the arbitration agreement is not valid under the law applicable to the agreement or under the law of the country where the award was made;

(c) one of the parties was not given notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

(d) the award contains decisions on matters beyond the scope of the submission to arbitration and such decisions or matters cannot be separated from matters submitted to arbitration;

(e) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties; or

(f) (where there was no agreement concerning the composition of the tribunal or the arbitral procedure) the arbitral procedure was not in accordance with the law of the country where the arbitration took place; or

(g) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which the award was made; or

(h) the subject matter of the dispute is not arbitrable under the law of Nigeria; or

(j) recognition or enforcement of the award is against public policy in Nigeria.

11. In recent times, there has been a distinct improvement in the attitude of Nigerian courts to arbitral tribunals and the awards handed down. Essentially, the courts have shifted from what many perceived to be a posture of opposition to an attitude of support for arbitration proceedings. Nigerian courts, more regularly, uphold arbitration, staying proceedings commenced in breach of agreements to arbitrate, and declining to interfere with awards, except in the most egregious cases, holding that parties to arbitral agreements choose their arbitrators for better or for worse, both as to decisions of law and decisions of facts in the dispute between them. Examples of decisions that demonstrate the prevailing attitude of Nigerian courts to arbitration include:

[3]Section 57(2) Arbitration and Conciliation Act, Cap. A18 LFN 2004

***Aye Fenus Ent. Ltd v. Saipem (Nig.) Ltd*.**[4]

The Court of Appeal reversed the decision of the High Court setting aside an award, stating that ***"The general rule guiding arbitration is that the parties to a transaction choose their arbitrator for better or worse to be the judge both as to decisions of fact in the dispute between them. Thus none of them can, when the award is prima facie good on the face of it, object to its decision either upon the law or the facts, simply because the award is not in his favour. In the instant case, I am of the humble view that the award of the arbitrators was prima facie good on the face of it, the respondent having faced to establish any of the grounds for setting aside the award. The learned trial judge was therefore in error to have sat as an appellate court over the award and to have held that the award of N24,000,000.00 was "on the high side"***

***Triana Ltd v. U.T.B. Plc.*[5]**

The Court of Appeal dismissed an appeal against the decision of the High Court to order the enforcement of an award, holding ***"It is both logical and legal, that having willingly chosen their arbitral tribunal and arbitrators, the parties should be bound by the decision reached by their chosen arbitrators, provided the recognized exceptions, such as where the award is the result of fraud, corruption or proven case of misconduct against the arbitrators, do not apply"*** and "***The question is, would the appellant had complained if the arbitral award was in his favour? I do not think so. The court should not be tempted to set aside arbitral awards duly entered on any flimsy complaint. To hold otherwise would open a wide door for all sorts of attempts to get rid of arbitrators deliberately chosen by parties to contracts"***

***Tulip (Nig.) Ltd. v. N.T.M.S.A.S*.**[6]

The Court of Appeal dismissed an appeal by an unsuccessful party in an arbitration against the refusal of the High Court to uphold a plea that the claim in an arbitration held in the United Kingdom was statute barred, stating that ***"The law is settled that where parties agree to refer their dispute to arbitration and an award is made, it is binding on the parties. See Onwu v. Nka [1996] 7 NWLR (pt.458) 1 at pg. 17 paragraphs D – E, where the Supreme Court, per Iguh, J.S.C had this to say:"The law is well settled that where disputes or matters in difference between two or more parties are by consent of the disputants submitted to a domestic forum, inclusive of arbitrators or a body of persons who may be invested with judicial authority to hear and determine such disputes and matters for investigation in accordance with customary law and general usages, and a decision is duly given, it is as conclusive and unimpeachable (unless and until set aside on any of the recognized grounds) as the decision of any constituted court of the land. Such a decision is consequently binding on the parties and the courts in appropriate cases will enforce it"***

[4] **[2009] 2 NWLR (Pt. 1126) 483**
[5] **[2009] 12 NWLR, (Pt. 1155) 313**
[6] **[2011] 4 NWLR (Pt. 1237) 254**

12. Decisions such as these cannot, however, mask what remains a problem with proceedings in courts in Nigeria, the considerable delay that can be encountered in proceedings before Nigerian courts. The English case of ***IPCO Nigeria Limited v. N.N.P.C***[7] illustrates this in relation to proceedings to enforce awards. In that case, the English High Court granted the partial enforcement of an arbitral award due to what it considered to be the gross delay in proceedings before a Federal High Court in Nigeria, challenging the award, which had been published four years earlier. The case before the Federal High Court in Nigeria continued for a further six years, finally ending ten years after the award was published.Delays like this are, unfortunately, not uncommon. When one takes into consideration the generous rights of appeal guaranteed by the Constitution – all final decisions of a high court may be appealed to the Court of Appeal as of right, as may interlocutory decisions where questions of law alone are raised, and decisions of the Court of Appeal on grounds of law alone can be appealed to the Supreme Court as of right, and leave may be sought in all other cases – delays in reaching finality in cases relating to arbitration will remain a major challenge in Nigeria.

13. The Lagos State House of Assembly, recognising the challenges posed by delays, have attempted to address this by the inclusion of special Arbitration Applications Rules in the Law. These rules are intended to provide for the expeditious hearing of applications relating to arbitration. It is not yet apparent, however, that these rules have made any significant impact on arbitration related cases in the Lagos State High Court.

14. That said, the clear trend, as demonstrated by recent decisions, is that the courts recognise the value of arbitration and have shown a greater appreciation of their role in the process. Courts in the main commercial centres of Lagos, Abuja and Port Harcourt (which is recovering from a politically influenced strike that went on for more than a year) endeavour to ensure the expeditious hearing of arbitration related cases. This is almost certainly a result of training provided to judges by the Nigerian branch of the Chartered Institute of Arbitrators and by the Lagos Court of Arbitration. In addition, the Lagos State Law contains special rules designed to expedite the hearing of all arbitration related cases. There is still room for improvement, especially in the Federal High Court, which has exclusive jurisdiction over cases related to copyright, patents, designs, trade marks, shipping and all mining (including oil and natural gas related matters). Notwithstanding the decision of the Court of Appeal in ***Bendex Engineering & Anor. v. Efficient Petroleum Nigeria Ltd.*** [2001] 8 NWLR (Pt. 715) 333, that the jurisdiction of the Federal High Court to act under the Act is not limited to the areas set out in the Constitution, parties endeavouring to resist and block arbitration related proceedings still raise the issue on a regular basis.

[7] [2008] EWHC 797

CONCLUSION

15. Nigeria's public policy is in favour of international arbitration. This is evident from its ratification of both the New York and Washington conventions and its being one of the first countries to introduce the UNCITRAL Model Law into its domestic law. The level of the understanding of arbitration, both at the bar and the bench, is uneven around the country. Judges and lawyers in certain parts of the country are more conversant with the subject than in other parts of the country.

16. Whilst, in general, courts in Nigeria will endeavour to deal with arbitral proceedings as quickly and efficiently as they can, the judicial process in Nigeria, being slow and cumbersome in spite of efforts to reform the process, remains an obstacle to the ability of the courts to deliver the necessary speed and efficiency on a regular basis. As a consequence, it has to be recognised that what can be gained by way of speedy resolution through the arbitration process may be lost if the award or some part of the process ends up before a court in Nigeria. The IPCO case, which took ten years to be concluded in the High Court, is an example of that.

17. All is not doom and gloom however. As recognised in a recent Who's Who Legal Analysis of arbitration in Nigeria[8], "Arbitration in Nigeria has been gathering momentum over the last few years, with the country experiencing an increased demand for arbitration services. Despite the socio-political and security challenges facing the country, Nigeria is coming to play a leading role in arbitration in West Africa with Nigerian arbitration practitioners increasingly internationally recognised." This is the reality and it is incumbent upon arbitration practitioners in Nigeria to continuously strive to ensure that both the bar and the bench are educated on the benefits of arbitration and that they work together to make the process work as efficiently as possible.

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[8] Who's Who Legal Nigeria Special Report August 2015

RECOGNITION AND ENFORCEMENT OF AWARDS WITH A FOCUS ON EASTERN AFRICAN COUNTRIES

Aisha Abdallah, Anjarwalla & Khanna

Overview

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- Geographic scope and legal framework
- New York Convention
- Grounds for Refusal of Recognition and Enforcement
- Public policy ground
- Procedural Requirements
- Finality
- Appeals
- Talking points

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Legislative background

3

Kenya	Tanzania	Uganda	Rwanda
• The 1995 Arbitration Act, Cap 49 of the Laws of Kenya • Act applies to all international and domestic arbitration (S.2) • UNCITRAL model law • Constitutional recognition	• The Arbitration Act, Cap 15 (2002 revised ed) of the Laws of Tanzania • Act applies to all disputes. However, land disputes not arbitrable under Lands Act, Cap 113. • Amends 1931 Act • Needs updating	• The Arbitration& Conciliation Act, Cap 4 amends older act, but no express repeal • Act applies to domestic and international arbitration and conciliation (S.1) • UNCITRAL model law	• Law No. 005/2008 of 14/02/2008 on Arbitration and Conciliation in Commercial Matters • Law applies to domestic and international commercial arbitration and conciliation (Art.1) • Subject to any other law that excludes arbitration • UNCITRAL model law

New York Convention

4

Kenya	Tanzania	Uganda	Rwanda
• Is a party to the convention • Will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State (S. 36 (2)) • Reciprocity reservation (S. 36 (5)	• Is a party to the convention* • Will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State* • Party to the Convention on the Execution of Foreign Arbitral Awards S.28*	• Is a party to the convention • Will apply the Convention to the recognition and enforcement of awards made in the territory of another Contracting State (S.39(1) and s.41)	• Is a party to the convention*

Refusal to Recognise and Enforce

5

Kenya	Tanzania	Uganda	Rwanda
• Refusal to enforce S.37(1): a. Incapacity b. Invalid agreement c. No notice of appointment of arbitrator d. Dispute not contemplated e. Composition of tribunal improper f. Award not binding g. Fraud, bribery, corruption or undue influence h. Non arbitrable dispute i. Offends public policy	• Refusal to enforce **foreign awards** S.30(1) and S.302(2); a. Incapacity b. Invalid agreement c. No notice of appointment of arbitrator d. Dispute not contemplated e. Composition of tribunal improper f. Award not binding g. Fraud, bribery, corruption or undue influence h. Non arbitrable dispute i. Offends public policy	• Award to be enforced like a decree S.36 where: a. Expiry of time limit for setting aside (.i.e. 90 days) b. An application to set aside has been made and refused NB: Set aside grounds are same as for other 3 countries.	• Refusal to enforce award or interim award if Art. 51 a. Incapacity b. Invalid agreement c. No notice of appointment of arbitrator d. Dispute not contemplated e. Composition of tribunal improper f. Award not binding g. Non arbitrable dispute h. Subject matter of dispute not capable of arbitration i. Offends public policy

Refusal on Grounds of Public Policy

6

- *Christ For All Nations vs. Apollo Insurance* Co. *Ltd (2002)* HCt Nbi– Repudiation of insurance policy extended to cover Zambia on basis extension was only third party cover. Award in favour of insured. Insurer applied to set aside on ground of public policy as industry would react very negatively and award contrary to justice. No Kenyan cases under s35 but grounds for refusal same as for setting aside. **Public policy was a broad concept incapable of precise definition**: Inconsistent with Constitution or other laws; Against national interest (incl national defence and security, good diplomatic relations with friendly countries and economic prosperity) and Contrary to justice/morality (corruption, fraud or contract against public morals). No evidence re economic interests. Error of fact and/or law not breach of public policy. **Public policy leans towards finality and parties must accept awards "*warts and all*".**

Case Law: Refusal to recognise

7

- *Tanzania National Roads Agency vs. Kundan Singh Construction Limited (2014) eKLR* – 2007 contract by TNRA to KS to upgrade road subject to Tanzanian law and arbitration under Stockholm Chamber of Commerce rules. Dispute went before 3 arbitrators and majority award in favour of TNRA and it applied to recognise and enforce it in Mombasa High Court. KS objected, appealed in Stockholm and also applied to set aside award in Nairobi High Court on grounds of public policy (that tribunal applied English rather than Tanzanian law). Nairobi HCt held that application must be made in Court of primary jurisdiction being the seat of the arbitration, Stockholm. At Mombasa, judge held that tribunal had failed to apply Tanzanian law to the contract and refused to recognise the award. TNRA appealed to the CA. KS objected that no right to appeal under s37. Held **no automatic right to appeal a refusal to recognise an international award**. UNCITRAL policy was to limit Court intervention. CA had no jurisdiction to entertain the appeal.

Procedural Requirements

8

Kenya	Tanzania	Uganda	Rwanda
• Application to be made if no application to set aside award (Rule 6) • Original arbitral award or certified copy (S.36(3)(a) • Original Arbitration agreement or certified copy (S.36(3)(b) • If award not in English, a certified translation (S.36(4)	• Original award or certified copy (S.31) • Evidence that award is final (S.31) • Evidence that it is a foreign award and a certified translation (S.31) • Arbitrators to file award (S.12(2) • Enforceable as a decree of the court (S.17(1) • Award may be conditional or in the alternative (S.17(2)	• Enforcement only after the expiration of 90 days after service of notice of filing of the award (S.36 and Rule 2) • Original arbitral award or certified copy (S.35) • Original Arbitration agreement or certified copy (S.35) • If award not in English, a certified translation (S.35(3)	• Original or certified copy of the award (Art.50) • Original or certified copy of the arbitration agreement (Art.50) • If award not in any of the official languages of Rwanda, a translation of it (Art.50)

Case Law on Procedure and Objections

9

- *Structural Construction Co Ltd v International Islamic Relief Organisation* (Nbi HCt Misc Case No 596 of 2005) - Applicant failed to furnish the original or certified copy of the arbitration agreement. Not fatal. The copy annexed to the supporting affidavit was sufficient for purposes of enforcement.
- National Oil Corporation of Kenya Ltd v Prisko Petroleum Network Ltd – (Nbi HCt No 27 of 2014) – Application to enforce award by NOCK opposed by Prisko. No application to set aside within 3 months. Court held that Prisko could still object to enforcement.

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Principle of Finality

10

Kenya	Tanzania	Uganda	Rwanda
• Award is final and binding and no recourse available otherwise than in accordance with the Act (S.32A, S.36(1), S.10) • Finality of matters ruled by the arbitrator in relation to interim measures (S.7(2)	• No express provisions on finality or binding nature of an award* • **Foreign award** binding save when there are pending proceedings contesting validity in the country in which the awards was made (S.29 and S.32)*	• Award is final and binding and no recourse available otherwise than in accordance with the Act (S.6,S.9) • Finality of matters ruled by the arbitrator in relation to interim measures (S.6)	• Non intervention of the court save where provided by the Act (Art. 7) • Awards, interim measure, preliminary order final and binding irrespective of country of issue subject to reciprocity (Art.50, Art. 21)

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Appeals

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Kenya	Tanzania	Uganda	Rwanda
Domestic awards: Appeal to the HC by agreement of the parties on points of law S.39(1), S.39(2) 2nd appeal from HC to CA by agreement of parties or if CA considers a point of law of general importance S.39(3), S.39(3)(b)	• No provisions for appeal	• Appeal to the HC by agreement of the parties on points of law S.38(1) • Appeal lies from HC to CA by agreement of the parties or with leave of the HC or special leave of CA	• Appeal or cassation of a case that is yet to be decided lies to the court on grounds similar to those for setting aside award in Rwanda (Art.47)

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Cases on Finality and Appeals

12

- *Kenya Shell Limited vs. Kobil Petroleum Limited* –Public policy is an indeterminate principle or doctrine that is relevant to the exercise of the discretion as to the grant of leave to appeal. It is variable and must fluctuate with the circumstance of time. In this case, public interest is that there should be an end to litigation. Leave to appeal to CA denied.
- *Tanzania National Roads Agency and Kundan Singh Construction Ltd (2014) eKLR CA, Mombasa* TNRA awarded KS a contract to upgrade a road. Under cl 5.1 contract subject to Tanzanian law. Disputes subject to arbitration. KS referred a disputed to Stockholm Chamber of Commerce. Panel of 3. Majority signed award in favour of TNRA in its counterclaim. KS appealed to Stockholm CA. Also applied to Nairobi HCt set aside part of award that allowed counterclaim on basis of English law. TNRA applied to Mombasa HCt to enforce under s36.
  - A) Havelock J in Nairobi dismissed application to set aside as Kenyan Courts had only secondary jurisdiction to recognise and enforce. Swedish Courts had primary jurisdiction to set aside.
  - B) Muya J in Mombasa refused to enforce award on the grounds that not based on Tanzanian law and therefore contrary to the public policy in Kenya. TNRA appealed and KS filed preliminary objections.

CA in Mombasa held Arbitration Act provided a limited right to appeal only against domestic awards and was silent on international awards. Act based on UCITRAL model laws. Clear intention to limit court intervention. Act provided one step intervention under s 36. No appeal from HCt decision on recognition and enforcement.

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Talking Points

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- Public policy is very wide and leans towards finality
- Finality can mean no award at all or that award cannot be recognised/enforced

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Recognition and Enforcement of Awards under the OHADA Arbitration Regime: Law and Reality

Harry Matovu QC

BRICK COURT CHAMBERS

INTRODUCTION

1. OHADA is the *Organisation pour l'Harmonisationen Afrique du Droit des Affaires* (the Organisation for the Harmonisation of Business LawinAfrica). It was created by a Treaty signed at Port Louis, Mauritius, on 17 October 1993 (hereafter "**the OHADA Treaty**") following a meeting of the finance ministers of the CFA Franc Zone in 1991.[1]The 14 original Contracting States are Benin, Burkina Faso, Cameroon, Central African Republic, Comoros, Republic of Congo, Côte d'Ivoire, Gabon, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo. Guinea-Bissau joined in 1994, Guinea in 2000 and the Democratic Republic of Congo in 2012. There are, therefore, currently 17 Contracting States in OHADA. In addition, Nigeria, Sao Tome and Principe, Ghana, Liberia, Djibouti, Ethiopia, Madagascar, Rwanda, Burundi, Mauritius and Cape Verde have expressed an interest in joining OHADA in the future.[2]

The OHADA Member States

2. The promotion of arbitration as the preferred dispute resolution mechanism for commercial disputes is a fundamental aim of the OHADA project. This is enshrined in the OHADA Treaty itself, whose principal objectives include"*the harmonisation of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures,* ***and by encouraging arbitration for the settlement of contractual disputes***" (emphasis added).[3]

3. The OHADA project has been described as "*critical in promoting the strategic coherence and coordination of business law and alternative dispute resolution in West*

[1]CommunautéFinancièreAfricaine (African Financial Community)

[2]Beauchard and Kodo, "*Can OHADA Increase Legal Certainty in Africa?*", World Bank Justice & Development Working Paper Series 17/2011

[3] Art. 1. This is part of the overarching objective of"... *making progress toward African unity and creating a climate of trust in the economies of the Contracting States with a view to creating a new centre of development in Africa*" (paragraph 1 of the Preamble to the 1993 Treaty).

and Central Africa",[4] and OHADA has earned wide praise for its achievement in introducing in less than 15 years nine "*simple, modern and adaptable*"[5] Uniform Acts covering a wide landscape of business law across Member States. Pursuant to Art. 10 of the OHADA Treaty, these Uniform Acts are automatically and directly applicable in every Member State as soon as they are enacted, and they replace national legislation on any matters they cover. One of these Acts is the Uniform Act on Arbitration, which establishes the OHADA arbitration regime.[6]

THECCJA AND THE UNIFORM ACT ON ARBITRATION

The CCJA

4. The judicial authority of OHADA is the Common Court of Justice and Arbitration ("**CCJA**") based in Abidjan, Côte d'Ivoire. As well as being the supranational court of OHADA which acts as the interpreter and final court of appeal on matters relating to the OHADA Treaty and the Uniform Acts, the CCJA also has a significant role in the promotion and supervision of arbitration within the Community. It is an arbitration institution with its own set of procedural rules.[7] No other legal institution has this dual judicial and arbitral role.

5. In its capacity as an arbitration institution, the CCJA may accept references where (1) the dispute is contractual in nature, and (2) one of the parties is habitually resident in an OHADA Member State or (3) the contract is performed, wholly or in part, in the territory of one or more OHADA Member States.[8]

The Uniform Act

6. OHADA's Uniform Act on Arbitration ("**the Uniform Act**") came into force on 11 June 1999. Its provisions are based on the UNCITRAL Model Law, and the Arbitration Rules of the CCJA have many similarities with the Rules of the ICC. Until 1999, very few of

[4] Vasu Gounden, Founder and Executive Director of the African Centre for the Constructive Resolution of Disputes (ACCORD): "*The Summer of Opportunity: ADR and Arbitration in Africa*", Address to the Cape Chamber of Commerce ADR in Africa Conference 2013, 28 November 2013

[5] These words are taken from the Preamble to the 1993 Treaty, which states that the realisation of OHADA's aims demands "*demands an application in the Contracting States of a business law which is simple, modern and adaptable*".

[6] The other Acts are (1) the Uniform Act on General Commercial Law which came into force on 1 January 1998 (amended in 2010 with effect in 2011); (2) the Uniform Act on Commercial Companies and Economic Interest Groups which came into force on 1 January 1998; (3) the Uniform Act on Securities which came into force on which came into force on 1 January 1998 (amended in 2010 with effect in 2011); (4) the Uniform Act on Simplified Recovery Procedures and Measures of Enforcement which came into force on 10 July 1998; (5) the Uniform Act on Collective Proceedings for Clearing of Debts (Bankruptcy) which came into force on 1 January 1999; (6) the Uniform Act on Accounting which came into force on 1 January 2001 and 1 January 2002; (7) the Uniform Act on Carriage of Goods by Road which came into force on 1 January 2004; and (8) the Uniform Act on Co-operative Societies which came into force on 15 February 2011.

[7] See Arts. 21-26 of the OHADA Treaty and the CCJA Rules

[8] CCJA Rules, Art. 2.1

the OHADA Members States had legislation specifically relating to arbitration. OHADA has changed this, and it is now possible for parties to a contract to include an arbitration clause providing for the arbitration proceedings to take place in any of the Members States. This brings the Uniform Act into play.

7. The Uniform Act applies to any arbitration when the seat of the Arbitral Tribunal is in one of the OHADA Member States.[9] So long as that requirement is met, the parties to the arbitration do not have to be based or resident in an OHADA Member State. The Uniform Act even applies to arbitrations involving States or public bodies – and such parties cannot contest the arbitrability of a claim on the basis of their national laws.[10]

RECOGNITION AND ENFORCEMENT OF AWARDS

Awards from CCJA Arbitrations

8. The CCJA has an original jurisdiction to determine issues relating to arbitrations administered by it.[11] Awards made under the CJJA arbitration rules are binding as *res judicata* in the territory of each Member State as if they were judgments of the national courts of that Member State.[12] This provision does away with any complicated procedure regarding recognition of CCJA awards in OHADA Member States. Subject to any successful challenge to validity, such awards are recognised automatically as if they were judgments of the relevant national court.

9. Where an arbitration is conducted under the auspices of the CCJA (*qua* arbitration institution), the CCJA (in its judicial role) will rule on any challenge to recognition of an award from that arbitration[13] and on any application for exequatur to enforce such an award.[14] Any challenge to the validity of an award must be made as soon as possible, and it will be inadmissible if it is not lodged within two months after the notification of the award.[15]

10. If the CCJA grants an exequatur in respect of a CCJA award, it is enforceable in any OHADA Member State as an "*exequatur communautaire*".[16] The exequatur is granted by order of the President of the Court or by another CCJA judge delegated for this purpose.[17]

11. A challenge to the validity of a CCJA award may be based only on one or more of the limited grounds set out in Art. 30.6 of the CCJA Rules (grounds for opposition of

[9] Uniform Act, Art. 1
[10] Uniform Act, Art. 2
[11] CCJA Rules, Art. 2.3
[12] CCJA Rules, Art. 27
[13] CCJA Rules, Art. 29.2
[14] CCJA Rules, Art. 2.2. Exequatur is an order by a court authorising the enforcement in its territory of a foreign judgment or arbitral award
[15] CCJA Rules, Art. 29.3
[16] CCJA Rules, Art. 30.2
[17] Ibid.

exequatur). Any petition to the CCJA for an exequatur to enforce a CCJA award may only be refused:[18]

11.1. if there was no valid arbitration agreement or the agreement was void or had expired;
11.2. if the tribunal exceeded its mandate/authority;
11.3. if the principle of adversary procedure had not been respected; or
11.4. if the award was "*contrary to international public policy*".[19]

For a discussion of these grounds, see paragraphs 17-26 below.

12. There can be no appeal on the merits against a CCJA award, whether on a point of law or otherwise.

Awards from Non-CCJA Arbitrations with Seats in an OHADA Member State

13. An award from any non-CCJA arbitration can only be enforced in an OHADA Member State by an exequatur granted by a competent judge in that Member State.[20]A ruling by a national court which grants exequatur cannot be appealed, and a ruling refusing exequatur can be appealed only to the CCJA.[21]

14. Furthermore, as with a CCJA award, an award from anon-CCJA arbitration with its seat in any OHADA Member State cannot be challenged or appealed on the meritsin the CCJA or in the courts of any Member State (including the court of the forum state), whether on a point of law or otherwise. Art. 25 of the Uniform Act states:

> The award is not subject to any opposition, appeal or judgment setting it aside. It may be subject to a petition for nullity, which must be lodged with the competent judge in the Member State.
> The decision of the competent judge in the Member State can only be set aside by the Common Court of Justice and Arbitration.

15. A petition for nullity can be lodged as soon as the award is published, but it has to be lodged within one month of notification of the grant of exequatur to enforce the award. If it is not lodged within this time, it is inadmissible.[22]However, Art. 25 does not identify who is meant by "*the competent judge in the Member State*":a judge in the courts of the seat of the arbitration or a judge in the courts where the award is to be enforced?On the current state of the law, it appears that the courts of either Member State have jurisdiction to hear a petition for nullity. This lack of clarity invites forum-shopping for nullity petitions.

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[18] CCJA Rules, Art. 30.6
[19]Although this wording is different from Art. 26, para. 6 of the Uniform Act, which refers to the "*international public policy of OHADA Member States*" (see para. 24post), any decision by the CCJA on "*international public policy*" will presumably reflect its interpretation of the "*international public policy of OHADA Member States*".
[20] Uniform Act, Art. 30
[21] Uniform Act, Art. 32
[22] Uniform Act, Art. 27

16. Under Art. 26 of the Uniform Act, there are only six grounds on which a national court in an OHADA Member State may nullify an award.[23] These are as follows:

16.1. No or an invalid/void arbitration agreement, or the arbitration agreement has expired: Art. 26, para. 1
16.2. Irregularity in the composition of the arbitral tribunal: Art. 26, para. 2
16.3. Tribunal acting in excess of authority: Art. 26, para. 3
16.4. Lack of due process in adversarial proceedings: Art. 26, para. 4
16.5. No reasons given for the award: Art. 26, para. 5
16.6. Violation of theinternational public policy of the OHADA Member States: Art. 26, para. 6

Like the New York Convention, the OHADA arbitration regime seeks to limit judicial interference in relation to arbitral awards.

17. **No or an invalid/void arbitration agreement, or the arbitration agreement has expired** – This ground of nullity may be established if the arbitration agreement was entered into as a result of fraud, lack of consent or authority, misrepresentation, mistake or undue influence.

18. **Irregularity in the composition of the arbitral tribunal** – Subject to Art. 8, any composition of an arbitral tribunal or arbitral procedure which goes against the parties' agreement can render an award null and void. However, Art. 8 stipulates that a tribunal shall be composed of a sole arbitrator or a panel of three arbitrators, and that if the parties have agreed to the appointment of an even number of arbitrators the tribunal shall be completed by the appointment of an additional arbitrator. This is a rare express exception in the Uniform Act to the principle of party autonomy in arbitrations. Accordingly, contravention of the requirements of Art. 8 in the composition of a tribunal is a ground for nullification of an award. It appears that a tribunal of five members would contravene Art. 8, even though it contains an odd number of arbitrators, sinceit is not composed of a sole arbitrator or a panel of three arbitrators, as required by the first sentence of Art. 8.

19. It is, however, possible for a party to lose the right to challenge the appointment of an arbitrator or the composition of a tribunal through waiver or delay.

20. **Arbitrator(s) acting in excess of authority** –A tribunal is entitled to rule on its own jurisdiction (*Kompetenz-Kompetenz*).[24]Nevertheless, a court may subsequently rule that the tribunal did not, in fact, have jurisdiction, and it could thus refuse to enforce an award.[25]

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[23] The only grounds for refusal are those contained in the Uniform Act: *Monsieur D. G. et Madame D. J. v Société*SOTACS, CCJA, Arret No. 010/2003 19 .06.03,Le Juris-Ohada, no. 3/2003, July-Sept. 2003, p.30; Recueil de Jurisprudence CCJA, no. 1, Jan-June 2003, p.49.
[24] Uniform Act, Art. 11
[25] *ComplexeChimiqueCamerounaise v SAFIC ALCAM SA*, Arrêt no. 061/CC 4 July 2005

21. **Lack of due process** – Art. 9 stipulates that each party must be given "*a full opportunity to present its case*", but a tribunal generally has a wide discretion as to how it conducts a reference, subject to any rules agreed by the parties.[26]As to governing law, Art. 15 provides that:

> The arbitrators shall decide the dispute in accordance with the rules of law chosen by the parties or, in the absence of such a choice, according to those chosen bythem as the most appropriate taking into account, where necessary, international trade usages. The arbitrators may also decide as *amiable compositeur* when the parties have authorised them to do so.

22. This ground covers the basic principle of *audialterampartem*, and it includes, for example, improper notice of the proceedings, inability to present a case and a denial of the right to be heard. But on a petition for nullity, by what law is a violation of due process to be judged – the law of the forum state or the law of the enforcing state? Or should OHADA establish its own autonomous law on this issue, which may be applied on a harmonised basis across the 17 Member States? It may be that this debate is more theoretical than real, because most states are likely to have a common understanding of the basic requirements of due process, and enforcement of an award is unlikely to be refused on this ground unless the violation is serious.

23. **No reasons given for the award** – Art. 20 states that "*reasons upon which the award is based shall be given*" (emphasis added). Accordingly, if no reasons at all are included in the award, this would constitute a ground for nullity. However, if reasons are given which a losing party considers to be inadequate, an award would not be declared a nullity on this ground.

24. **Violation of international public policy of the OHADA Member States** –Under Art .26, para. 5, it is not enough for a petitioning party to establish that a violation of the public policy of the enforcing Member State alone; it must establish a violation of the "*international public policy of the OHADA Member States*".[27]In this respect, the Uniform Act differs from the New York Convention, which permits national courts to apply their own notions of what constitutes "*international public policy*".[28]The CCJA must have the leading role in defining the content and bounds of such international public policy.

25. In 2000 and 2002, the International Law Association's Committee on International Commercial Arbitration published reportsentitled "*Public Policy as a Bar to the Enforcement of International Arbitral Awards"*. These give some guidance for the classification of public policy grounds.[29]

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[26] Uniform Act, Art. 14

[27] See also Art. 31, para. 4: "Recognition and exequatur shall be refused where the award is manifestly contrary to international public policy of the Member States."

[28] New York Convention, Art. V.2.

[29] See the recommendations in the 2002 Report. "*The international public policy of any State includes: (i) fundamental principles, pertaining to justice or morality, that the State wishes to protect even when it is not directly concerned; (ii) rules designed to serve the essential political, social or*

26. On any challenge to an award, the burden is not upon the party seeking recognition and enforcement, but on the party resisting it. Furthermore, even if any of the Art. 26 grounds for refusal of enforcement is established,the enforcing court is notobligedto refuse enforcement. Art. 25 states that an award "*may be subject to a petition for nullity*" (emphasis added).This gives the court adiscretionwhether to make such a declaration or whether to enforce the arbitral award, even though grounds for nullity exist. In addition, the grounds set out in Art. 26 are generally interpreted narrowly. This means that awards will be nullified only in cases of serious violation.

Awards from Non-CCJA Arbitrations with Seats Outside OHADA Member States

27. Art. 34 of the Uniform Act provides that:

> Awards made on the basis of rules different from those provided by this Uniform Act shall be recognised as binding within the Member States under the conditions provided by international agreements possibly applicable, failing which, under the same conditions as those provided in this Uniform Act.

28. In practice, an award from an arbitration with a seat outside OHADA may be recognised and enforced under the New York Convention in an OHADA Member State which is also a signatory to that Convention.[30] If the place of recognition and enforcement is an OHADA Member State which is not a signatory to the New York Convention, Art. 34 provides that **recognition** of the award will be governed by the Uniform Act (Arts. 31), but it says nothing about **enforcement**. Enforcement of a non-OHADA award in an OHADA Member State which is not a signatory to the New York Convention must, therefore, be governed by the national laws of that OHADA Member State.[31]Accordingly, it may be difficult to enforce a non-OHADA award in a Member State which is not a signatory to the New York Convention.

The Risk of Conflicting Decisions on Recognition and Enforcement

29. A concern about the regime for the enforcement of awards is the lack of a rule for the ready recognition and enforcement of judgments and orders of **national courts** (as

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economic interests of the State, these being known as "lois de police" or "public policy rules"; and (iii) the duty of the State to respect its obligations towards other States or international organisations": Recommendation 1(d). "*An example of a substantive fundamental principle is prohibition of abuse of rights. An example of a procedural fundamental principle is the requirement that tribunals be impartial. An example of a public policy rule is anti-trust law. An example of an international obligation is a United Nations resolution imposing sanctions. Some rules, such as those prohibiting corruption, fall into more than one category*": Recommendation 1(e)

[30] Nine of the 17 OHADA Member States have ratified the New York Convention: Benin, Burkina Faso, Cameroon, Central African Republic, Côte d'Ivoire, Mali, Niger, Senegal, Guinea and DRC. Comoros, Republic of Congo, Gabon, Equatorial Guinea, Guinea-Bissau, Chad and Togo have not ratified.

[31] See the Opinion of the CCJA, *Avis no. 001/2001/EP*, which applies the principle of subsidiarity to the effect that the Uniform Act overrides national laws only if and to the extent that it conflicts with them.

opposed to the CCJA) on OHADA matters by the courts of other OHADA Member States. There is no simple procedure for the cross-border recognition and enforcement of such judgments in the OHADA region. Unless the award is a CCJA award, the party seeking to enforce the award in an OHADA state has to apply for *exequatur* in each state. As a result:

> "... issues of jurisdiction, recognition, and enforcement within the OHADA judicial space tend to follow national rules, which suffer from the same problems as the laws OHADA replaced: they are frequently outdated, unavailable, unenforced, and/or nonexistent."[32]

30. Thus a decision by one national court to recognise and enforce an arbitral award resulting from an OHADA arbitration may be ignored by the court of another OHADA state, which may decide instead not to enforce the award on one or more grounds provided for in the Uniform Act on Arbitration. The matter would then have to be appealed to the CCJA – if admissible,[33] and if the parties are fully aware of the CCJA and its appellate jurisdiction as part of the OHADA arbitration regime – with the further costs and delay that this would involve. Beauchard describes this shortcoming as a lack of an "*integrated judicial space in OHADA*".[34]

THE OHADA ARBITRATION REGIME IN OPERATION: REALITY AND CHALLENGES

31. The OHADA arbitration regime applies to, and is intended to promote, domestic, cross-border and international arbitration alike. It should therefore be as attractive and useful to the local businessman and market trader as it is to a multinational conglomerate or global investment bank seeking to do business in Africa. Commentators have particularly emphasised the importance of arbitration as an aid to foreign investment in Africa. Thus, for example, in a 2012 paper, Rudahindwa observed:[35]

> "Foreign investors are traditionally suspicious about African national judicial systems, which have been plagued by corruption, long and costly procedures, and lack of efficient enforcement of the law.
>
> ...
>
> "In the past, foreign investors deplored the lack of a reliable arbitration reference in Sub-Saharan Africa and the lack of international arbitration institutions capable of monitoring complex arbitration proceedings with competence, confidentiality and impartiality."

[32] Renaud Beauchard, "*OHADA Nears the Twenty-Year Mark: An Assessment*", World Bank Legal Review, Vol. 4 (2013), 323-333.
[33] It should be noted that although a decision of a national court to refuse *exequatur* of an OHADA arbitral award may be appealed to the CCJA, a decision to grant *exequatur* cannot be challenged unless the award is set aside.
[34] Beauchard, loc.cit.
[35] Jonathan BashiRudahindwa, "*From Port Louis to Panama and Washington DC: Two Regional Approaches to international Commercial Arbitration*", European Journal of Law Reform 2012 (14) 1, pp.44-64

32. In theory, the OHADA arbitration regime offers an answer to most or all of these concerns, particularly when used in combination with other Uniform Acts which harmonise business law. In addition, Rudahindwa explains that since foreign arbitration institutionsand regimes "*were not always adapted to the African reality and issues*", the founders of OHADA decided to create a new international commercial arbitration regime in Africa, which was "*meant to fill the gap and compete with other major international arbitration regimes in the world*".[36]One would therefore expect the OHADA arbitration regime to have attracted considerable interest and usage among the business communities of the OHADA states. But what is the reality?

33. It has been difficult to find statistics about the number of arbitrations conducted under the aegis of the CCJA since the commencement of the OHADA arbitration regime. However, commentators suggest that it has been underused.[37]Furthermore, statistics on decisions rendered by the Court from October 2001 to 30 June 2011 indicate that only 8.4% of the decisions of the CCJA concerned arbitrations.[38] The CCJA jurisprudence on the OHADA arbitration regime is undeveloped.

34. The picture that emerges from this limited data is that the OHADA arbitration regime has been almost invisible to the business communities in the region. This conclusion is fortified by World Bank data on contract enforcement in OHADA states.

35. The World Bank's series of annual reports, *Doing Business*, presents quantitative indicators on business regulations and the protection of property rights that can be compared across 189 economies over the world.[39]The *Doing Business* 2015report noted that economies in all regions had improved contract enforcement in recent years. It asked the question, what reforms making it easier to enforce contracts has *Doing Business* recorded in OHADA? The answers given pointed in almost every case to the establishment of specialist commercial courts and/or amendments of court procedural rules in the OHADA states in question. Only in relation to Burkina Faso was it suggested that the introduction of alternative dispute resolution mechanisms had improved contract enforcement. However, no mention was made of the OHADA arbitration regime. This suggests that, for all the care that was taken in establishing a

[36] Jonathan BashiRudahindwa, loc.cit.

[37] According to Frilet, because the role of the CCJA as an arbitral authority "*is not well understood by the private sector and is underused, the number of authoritative awards is limited*": "*Legal Innovation for Development: the OHADA Experience*", World Bank Legal Review, Vol. 4 (2013), 335-346. See also BabatundeFagbayibo, "*Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview*", 2013 (16)1 PER/PELJ – "*... the role of the* [CCJA] *as an arbitration centre remains undeveloped*".

[38]Beauchard and Kodo, "*Can OHADA Increase Legal Certainty in Africa?*", World Bank Justice & Development Working Paper Series 17/2011. As at the date of that paper (2011), it was recorded that the CCJA had rendered a total of only 500-600 judgments over the previous 12 years since the establishment of OHADA.

[39]The data set covers 47 economies in Sub-Saharan Africa, 33 in Latin America and the Caribbean, 25 in East Asia and the Pacific, 26 in Eastern Europe and Central Asia, 20 in the Middle East and North Africa and 8 in South Asia, as well as 31 OECD high-income economies.

regional, harmonised arbitration regime using a modern arbitration law and an autonomous, supranational arbitral institution (the CCJA) governed by modern rules, the OHADA arbitration regime has had little impact on improving contract enforcement and the business/investment climate in OHADA states. Why?

The Informal Economy

36. As with most African economies, a very significant proportion of the GDP of OHADA states is produced in the informal economy. These are the conditions in which the OHADA arbitration regime is intended to operate. Beauchard postulates the Dantokpa market in Cotonou, Benin, as a paradigm of a typical OHADA constituent local economy.[40]

> "A fascinating place, it is a complex, multilayered, pyramidal structure. The base consists of minor transactions in local goods, usually perishable and cheap. The next level is fabrics, jewelry, and arts and crafts, more expensive and often transported from far away. At the very top of the pyramid is the active money market.
>
> What is most important in places like Dantokpa is not what appears at first sight. It is the credit, rather than the commodities. The Dantokpa market is where accounts are settled, where debts meet and cancel each other out. The complex structure operates almost entirely outside the realm of formal law and ignores OHADA. Therefore, when considering OHADA, one should think about the small merchants at the Dantokpa market as OHADA's constituents."

37. The OHADA arbitration regime and the use of the CCJA as an arbitration institution cannot realistically be expected to answer the needs of all the businessmen and traders in Dantokpa market, at least at the present stage of development of these African economies. Of course, there are many more sophisticated domestic businesses and companies in OHADA states, but the truth remains that the OHADA arbitration regime seems to have had little relevance as an aid to domestic trade within thesecountries.

A 'Hard Sell'?

38. During the 60th anniversary celebration of the ICC Court in 1983, KebaM'Baye, the architect of OHADA and the CCJA regime, was recorded as commenting that international arbitration served solely to protect businesses in the Western industrial world, and that in Africa, Asia and Latin America, arbitration was seen as a foreign institution imposed upon the local people.[41]In a similar vein, 30 years later Beauchard was saying:[42]

> "Arbitration is a hard sell in OHADA countries. Perceived as expensive, the payment of fees up front is often dissuasive, except for very sophisticated businesses. Mediation and conciliation, which, compared with adjudication, are costless alternatives and centred on consensus building, would be easier to sell."

[40]Beauchard, loc.cit.
[41]Attila Harmathy, "*New Experiences of International Arbitration*", Electronic Journal of Comparative Law, Vol.11.3 (December 2007), <http://www.ejcl.org/113/article113-11.pdf>.
[42]Beauchard, loc.cit.

Another commentator, AmazuAsouzu, suggests that, although arbitration, as an institution or a process, was prevalent in the customary laws of African jurisdictions or societies, "*its nature, purpose and philosophy were entirely different from those of the arbitration imported into the continent*".[43] This raises interesting sociological issues.

39. Is arbitration in fact an alien concept in Africa? And is the OHADA arbitration regime doomed to fail? There is no reason why it should. On the contrary, the rapid growth of foreign investment and cross-border trade in Africa has provided a fertile climate for arbitration, and scepticism about the demand for arbitration in Africa does not appear to be the prevailing view on the continent, where many new arbitration institutions have recently been established in different jurisdictions.[44]

Relations between OHADA and Member States

40. As Beauchard observes, "*OHADA can succeed only if member states demonstrate the requisite level of political will and dedication to implement OHADA laws*."[45]This applies to the OHADA arbitration regime. Lack of political will is not the only difficulty: a recurring concern of commentators is the lack of proper engagement with OHADA by the judiciary of Member States. This is relevant to the role of the CCJA as the supreme authority on in the Uniform Act on Arbitration. Thus:

40.1. According to Beauchard and Kodo in 2011:[46]

> "... the domestic statutes that contradict OHADA have not even been identified, still less removed. This enforcement problem is exacerbated by the frequent refusal, whether out of ignorance or obstinacy, of members' domestic courts to adhere to OHADA provisions, attitudes that are likely themselves exacerbated by the inadequate efforts made to disseminate knowledge about OHADA's statutes, either through training or by making documentation more readily available."

40.2. According to Frilet in 2013:[47]

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[43]AmazuAsouzu, "*Some Fundamental Concerns and Issues about International Arbitration in Africa*", African Development Bank Law Development Review, Vol. 1, pp. 81-98 (2006)

[44] Of particular note (this list is not exhaustive) are the **Lagos Court of Arbitrationin Nigeria** (opened in 2012 with the support of the Lagos State Government); the **Permanent Centre for Arbitration and Mediation (*Centre Permanent d'Arbitrage et de Médiation*) in Cameroon** (launched in 2012 by the African Centre for Law and Development); the **LCIA-MIAC Arbitration Centre in Mauritius** (opened in 2012 with the support of the Government of Mauritius, the LCIA and the Mauritius International Arbitration Centre); the **Kigali International Arbitration Centre in Rwanda**(opened in 2012 with the support of the Government of Rwanda); and the **Nairobi Centre for Arbitration in Kenya**(approved by President Kenyatta in 2013). These institutions are in addition to the **Cairo Regional Centre for International Commercial Arbitration** (established in 1979 by the Asian African Legal Consultative Organization), and the **International Centre of Mediation and Arbitration of Rabat (CIMAR)** (established in 1999 with the support of the Government of Morocco).

[45]Beauchard, loc.cit.

[46]Beauchard and Kodo, "*Can OHADA Increase Legal Certainty in Africa?*", World Bank Justice & Development Working Paper Series 17/2011

[47]Frilet, loc.cit.

> "The superior courts in member states have resisted acknowledging that the CCJA possesses ultimate jurisdiction. Furthermore, many judges have only limited knowledge of OHADA."

40.3. According to Beauchard in 2013:[48]

> "...OHADA has encountered serious challenges regarding the application and the reception of the uniform acts. OHADA has an Achilles' heel: the way it is implemented at the state level. Only if the focus is on effective implementation can OHADA deliver results; this, however, does not seem to be the case."

41. The situation does not seem to have improved much over the years. It appears that both legal professionals and the business community may not be fully aware of the OHADA Uniform Acts, including the arbitration regime, and that further efforts are required to increase awareness within and across OHADA states.[49] This in turn points to a weakness of ERSUMA, OHADA's Regional Training Centre for Legal Officers (based in Benin), in its resources and work for the promotion of OHADA laws and institutions.

42. A further problem concerns the failure in many OHADA states to analyse and expressly to repeal local laws which conflict with OHADA Uniform Acts. As a result, the business communities in OHADA states – which are supposed to be the principal beneficiaries of the harmonisation project – still do not have a clear idea of the applicable law in the areas where OHADA Uniform Acts conflict with pre-existing local laws: businessmen would have to consult lawyers familiar with the Uniform Acts in order to understand the basic law in their sphere of activity. This is unsatisfactory, and one can perhaps understand Beauchard's criticism that this deficiency in national legislative processes has contributed to the state of affairs where "*OHADA remains largely an abstraction for those actors*".[50]

[48]Beauchard, loc.cit.
[49]Beauchard and Kodo, loc.cit.
[50]Beauchard, loc.cit.

Resources

43. The CCJA faces competition from the other regional arbitration institutions, and it must justify its existence as an arbitral institution against this competition. However, without adequate resources, the CCJA cannot properly fulfil its function as an arbitral institution in addition to its role as the court of final appeal on issues of interpretation of the OHADA Treaty and Uniform Acts.[51] The role of the CCJA as an arbitral institution needs greater advertisement, and resources need to be allocated to this long-term task.

44. The CCJA also needs to be staffed by a secretariat with sufficient resources and experience to administer arbitrations and to advise parties and arbitrators on appointments, procedural issues and the drafting of awards. This is fundamental.

> "The OHADA arbitration rules are modern and in accord with international standards, but they need to be implemented by administrative services provided by the secretary of the arbitration court. So far, the track record of implementation is limited. Promoting the arbitration system has proved to be a challenge."[52]

45. In addition, ERSUMA has a principal role in the training of judges and lawyers in OHADA laws and procedure, including the Uniform Act on Arbitration. However, a measure of its shortcomings in this respect can be seen in a report by Dickerson in 2005:[53]

> "The principal criticism of OHADA's education mission is that it does not have the resources to do enough. In Anglophone Cameroon, for example, many sitting judges did not know about OHADA until after the first OHADA laws were already in effect. The judges were furious to have learned about OHADA for the first time, not from the government or from OHADA, but rather from counsel pleading a case."

46. The blame for lack of resources cannot be placed at the door of the CCJA and ERSUMA. It lies with the governments of the OHADA states, which are required by the OHADA Treaty to contribute to the budget of the OHADA institutions. In 2005, Dickerson reported that "*to date, these contributions have been honoured in the breach, leaving the OHADA institutions underfunded*".[54] The lack of funding remains a major problem.

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[51] As Beauchard says, "*Among all the OHADA institutions, the one that seems to be suffering the most is the CCJA, which has backlogs despite a rather modest caseload... It is difficult to understand how a court with nine judges can have backlogs with a docket of a few hundred cases, as compared, for example, with the US Supreme Court, which has the same number of judges and an annual docket of 10,000 cases but little backlog*.": Renaud Beauchard, loc.cit. The answer is that the CCJA Judges have not been given sufficient resources to do their work.

[52] Marc Frilet, "*Legal Innovation for Development: the OHADA Experience*", World Bank Legal Review, Vol. 4 (2013), 335-346

[53] Claire Moore Dickerson, "*Harmonizing Business Laws in Africa: OHADA Calls the Tune*", 44 Colum. J. Transnat'l L. 17 (2005), citing an interview with a magistrate of the Court of Appeals in Douala.

[54] Dickerson, loc.cit.

Supranational Regional Organisations: A Crowded Field

47. A further important consideration is the existence of other, overlapping regional organisations. Regionalism is not a novel concept in Africa. There have been, and continue to be, a significant number of supranational regional organisations in Africa, which have been established with the aim of promoting development in their Member States.[55] Several states may be members of more than one regional organisation. For example, nine out of the 15 Member States of the Economic Community of West African States (ECOWAS) are also currently Member States of OHADA.[56] Similarly, WAEMU/UEMOA[57] and CEMAC are two CFA Franc economic zones in Africa.[58] The eight Member States of WAEMU are also Member States of ECOWAS and OHADA,[59] and the six Member States of CEMAC are also Member States of OHADA.[60]

48. The number of regional organisations and their overlapping membership creates the risk of a confusion of agendas and a dissipation of resources.

    48.1. First, the Member States of each regional economic community are required by each Treaty to contribute to the budgets for the institutions of that community, including the various Courts of Justice. For any government, there must be sound justification for funding a number of different and overlapping supranational institutions, all of which share an objective of harmonising laws to facilitate economic development. Given that a lack of funding and financial resources has been responsible for much of the difficulty experienced to date in the implementation of OHADA's laws and arbitration regime, it is a matter of concern that funding is dissipated by most states amongst a number of supranational organisations which have the same fundamental objective of promoting economic development through regional integration. This cannot assist the establishment of a coherent and well-understood regional arbitration regime.

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[55] Eight regional economic communities have been designated by the African Union as 'building blocks' towards the achievement of an African Economic Community by 2027: CEN-SAD (Community of Sahara-Sahel States), COMESA (Common Market for Eastern and Southern Africa), EAC (East African Community), ECOWAS (Economic Community of West African States), IGAD (Intergovernmental Authority on Development), SADC (Southern African Development Community) and UMA (Arab Maghreb Union).

[56] The nine states are Benin, Burkina Faso, Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Niger, Senegal and Togo. ECOWAS States which are not currently Member States of OHADA are Cape Verde, Gambia, Ghana, Liberia, Nigeria and Sierra Leone, although some of these have expressed interest in joining OHADA. The Preamble to the Revised ECOWAS Treaty records that the final goal of the organisation is "*the accelerated and sustained economic development of Member States, culminating in the economic union of West Africa*".

[57] The West African Economic and Monetary Union is known by its English acronym (WAEMU) and its French acronym (UEMOA).

[58] Both organisations are harmonising projects, whose objectives include the harmonisation of laws, the creation of a common market, and the convergence of the macroeconomic policies of their Member States.

[59] Benin, Burkina Faso, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Senegal and Togo

[60] Cameroon, Central African Republic, Chad, Congo, Equatorial Guinea, Gabon

48.2. Second, the number of different regional laws, courts and institutions is a drain on legal resources. If there were a multiplicity of arbitration regimes, there would be pressure on the number of judges and lawyers in any jurisdiction with sufficient experience of international commercial arbitration.

48.3. Third, a multiplicity of arbitration and enforcement regimes would invite forum shopping and, worse, confusion as to which regime were to have precedence on issues of enforcement. For example, if ECOWAS introduces an arbitration law to apply in its Member States, it may be difficult, in a country which is a Member State of both OHADA and ECOWAS, to decide by what regional law any application to enforce an arbitral award should be determined. Which arbitration law should have precedence: the OHADA Uniform Act or the ECOWAS arbitration law?

49. States need to address these risks and issues. It may be that the number of regional economic communities should be rationalised in order to allocate resources as effectively as possible. In any event, there needs to be close cooperation between the different regional institutions in order to avoid conflicting legislation over the same terrain. As matters stand:

> "The proliferation of regional organisations is an indicator of the failure of African states to genuinely commit to a single, well-thought-out and implementable programme. The competing objectives and programmes of these institutions ensure that member states are unable to wholly adhere to the supranational programmes of the various institutions they belong to. This lack of coordination provides an avenue for non-commitment to supranational objectives."[61]

CONCLUSION

50. Whilst it is right to praise the establishment and the legislative achievements of OHADA in harmonising areas of business law across Member States, the overall achievements of the OHADA arbitration regime to date as a vehicle for economic growth have been less impressive in practice. The analysis and conclusion by Beauchard and Kodoin 2011 was severe:[62]

> "OHADA has been a surprise achievement, as illustrated not least by the commitment of Member States' legal professionals to the treaty and the interest in it expressed by neighboringnonmember states.
>
> However, many challenges persist and new problems have emerged, including resource deficits, institutional deficiencies, language ambiguities, and intransigent attitudes within Member States. Most if not all OHADA institutions face crushing budget shortfalls, which have in turn

[61] BabatundeFagbayibo, "*Common Problems Affecting Supranational Attempts in Africa: An Analytical Overview*", 2013 (16)1 PER/PELJ. The author goes on to comment that, although the Constitutive Act of the African Union provides that the AU must "*coordinate and harmonize the policies between the existing and future regional economic communities for the gradual attainment of the objectives of the Union*", the AU has yet to adopt the Protocol which will provide a legal framework for the relationship between it and the RECs.

[62] Beauchard and Kodo, loc.cit.

> produced serious understaffing and debilitating case overloads. The problems are particularly acute for the all-important CCJA, which was created without a critical fast-track option that would have enabled it to avoid the considerable backlogs that currently plague it. The CCJA's usefulness also appears to be limited by its geographical location, particularly the provision requiring domicile in country (in this case, Côte d'Ivoire) during proceedings, and by the fact that its jurisdiction continues to be insufficiently outlined and enforced. In addition ... the coherence between OHADA provisions and those from other regional organizations has not been fully established, leaving open the very real potential for conflict in that area.
>
> Significant as they are, all of these problems are overshadowed by the need to effectively and uniformly implement OHADA within the Member States. Indeed, it is the absence of this consistent implementation that most seriously hinders the creation of the legal certainty needed to realize the treaty's ultimate goals. Although sufficiently comprehensive formal laws have been adopted, their overall application and enforcement continue to lag and there are legitimate concerns about whether they ever will be uniformly applied, since the domestic statutes that contradict OHADA have not even been identified, still less removed. This enforcement problem is exacerbated by the frequent refusal, whether out of ignorance or obstinacy, of members' domestic courts to adhere to OHADA provisions, attitudes that are likely themselves exacerbated by the inadequate efforts made to disseminate knowledge about OHADA's statutes, either through training or by making documentation more readily available."

51. These are serious concerns. Nevertheless, as far as the arbitration regime is concerned, arbitration in Africa is still in its infancy, and there is reason to believe that it will grow in popularity as a mechanism for commercial dispute resolution as African economies develop, and that it will in turn promote trade and development.Arbitration is both a creator and a creature of economic growth and development, and regional arbitration systems have an important role to play in this development.

52. Nevertheless, a greater political commitment to OHADA and other regional arbitral institutions will be required from African governments in order to realise the full potential of these economies. More work is required to raise awareness of the OHADA arbitration regime within the business communities of the various economies of Member States, and sufficient resources need to be allocated to this task. This is the responsibility of government.

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