

LEX MERCATORIA AND WORLD TRADE ORGANISATION LAW IN RELATION TO INTERNATIONAL COMMERCIAL CONTRACTS

In many respects, World Trade Organisation law and *lex mercatoria* lie at opposite ends of the spectrum of international trade, the former concerned with interstate relations and the latter with transnational contract principles. However, the two bodies of law are not as isolated as this structural difference might suggest, and it is with the interrelations between them that this essay is concerned.

The most intriguing area of potential overlap is at the level of legal principle, since many of the same principles underlie both the law of contracts and the law of treaties. This should come as no surprise, since both contracts and treaties involve parties consenting to enter an agreement which then becomes binding.¹ These shared foundations prompt the main question which this essay endeavours to answer: Could a legal principle adumbrated in WTO law be applied in a *lex mercatoria* case?

Before addressing this question it will be necessary to touch on two preliminary difficulties. First, controversy surrounds the *lex* itself and whether it can properly be called a body of contract law. Second, there is some debate around whether the WTO is underpinned by the normal principles of treaty law. This essay therefore turns first to these difficulties, before discussing the possibility of legal principles in one sphere affecting those in the other. I then briefly survey other possible points of contact between the two, before concluding with a comment on the broader objectives shared by the *lex* and the WTO.

The Lex Mercatoria

The original *Law Merchant* was a legal system employed in the Middle Ages to govern trading relations between merchants travelling to fairs and markets. Trade between merchants heralding from different jurisdictions and travelling through many more was smoothed by their confidence that their agreements would generally be governed by one legal system, accessible to all. Also important was the efficiency of

¹ It has been argued that this basic analysis underpins not just Western, but also Shari'ah legal analysis: Majeed, N., "Good Faith and Due Process: Lessons from the Shari'ah," Arbitration International 1 2004

that system, which frequently employed as judges individuals with merchant experience who would try a case between the arrival and departure of a ship.²

With the growth in international trade over recent decades, observers have claimed the emergence of a new *lex mercatoria*, to grant contemporary traders the same predictability and efficiency as their historical predecessors. This *lex*, it is argued, can be invoked by including in the contract such formulae as that it be governed by, “general common principles,” “principles of international law,” or “international trade usages”.³ The ability of parties to contract-in to such a delocalised legal framework is of course facilitated by international arbitration bodies, and in particular by the trend towards national courts recognising and respecting arbitral decisions. Most arbitration bodies⁴ recognise whichever “rules of law” have been agreed between the parties – a phrase now generally assumed to include *lex mercatoria*.⁵ The appeal of such rules was explained thus in an International Chamber of Commerce (ICC) Award:

“Application of international standards offers many advantages. They apply uniformly and are not dependent on the peculiarities of any particular national law. They take due account of the needs of international intercourse and permit cross-fertilization between systems that may be unduly wedded to conceptual distinctions and those that look for a pragmatic and fair resolution to the individual case.”⁶

However, the *lex mercatoria* has proved ripe territory for controversy. Of most importance to this discussion are two charges which go the heart of the *lex*’s credibility: that it is vague; and that it is hardly ever used. Both of these complaints contain some truth, and I will argue for a more pragmatic approach in understanding

² Trakman, L. (1983) “The Law Merchant: The Evolution of Commercial Law”

³ Draetta, U., Lake, R.B., Nanda, V.P. (1992) “Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria” Butterworth Legal Publishers p5.

⁴ Including the International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration, and WIPO Arbitration.

⁵ Derains, Y. and Schwartz, E.A. (2005) “A Guide to the ICC Rules of Arbitration” Kluwer Law International, Second ed., p235.

⁶ ICC Case No.8385 (1995), Note Derains, *Clunet* (1997) p.1061, cited in Derains (2005) *supra* p.237.

the *lex*, accepting it as a work in progress rather than as a complete and free-standing edifice of contract law.

Until relatively recently, the question, *What is the lex mercatoria?* had to be answered by reference largely to lists of principles drawn up by academics, or by appeals to fundamental rules shared by all legal systems.⁷ The former approach found few friends in common law countries uncomfortable with rooting law in academic commentary rather than *vice versa*; the latter rather quickly runs into the difficulty of what to do when different systems simply fail to agree.⁸ However, the emergence of international codifications of law – and in particular the Unidroit principles published in May 1994 and further elaborated in 2004 – has gone some way towards clarifying the *lex*.⁹ In the words of a 1995 ICC case:

“Rather than vague or general guidelines, the Unidroit Principles are mostly constituted by clearly enunciated and specific rules coherently organized in a systemic way.”¹⁰

These developments do not entirely answer the vagueness charge. For one thing, debate remains over whether the Unidroit principles actually do constitute a part of the *lex*, or whether they are instead an alternative body of principles into which parties can choose to contract. Further, the status of other international documents – including the Principles of European Contract Law, uniform laws like the 1996 Convention of the International Sale of Goods, and standard form contracts like the Uniform Customs and Practices of Documentary Credits - remains unclear. One solution is to view these various instruments as *evidence* of trade practice,¹¹ and one influential compilation of *lex* principles appears to draw from all available sources in search of compromise.¹²

⁷ It has also been suggested that the *lex* could be based on principles which emerge from a general consensus even if not necessarily shared by all legal systems: Gaillard, E. “Transnational Law: A Legal System or a Method of Decision Making?” *Arbitration International* 17(1) 2001 p59-71.

⁸ A criticism made by Right Hon. L.J. Mustill, “The New Lex Mercatoria: The First Twenty-Five Years” *Arbitration International* 4(2) 1987 p86-119, at p92.

⁹ Yves Fortier, L. “The new, new lex mercatoria, or, back to the future” *Arbitration International* 17(2) 2001 p121-128.

¹⁰ ICC Case No. 7110 (1995), ICC Ct Bull., Vol.10 No.2, cited in Derains (2005) *supra* at p237.

¹¹ As proposed by Draetta *et al* (1992), *supra*.

¹² Berger K.P. “Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.tldb.de” *Arbitration International* 18(1) 2002 pp83-94.

The second major criticism of the *lex*, that it is not much used, is connected to the above in that its apparent popularity clearly depends on the definition used. In his influential commentary on the topic, Lord Justice Mustill commented that in 1988 only about 25 reported arbitral cases actually used the *lex*.¹³ Another cited survey concluded that most international lawyers were strongly opposed to the selection of *lex mercatoria* as the governing law.¹⁴ It has more recently been said that in 2004, only eight of the contracts giving rise to new ICC arbitrations referred to national rules.¹⁵

On the other hand, one might highlight surveys showing that 69% of respondents had a positive or neutral attitude towards “transnational commercial law,”¹⁶ and that arbitrators increasingly refer to the Unidroit principles not only where parties have failed to designate the applicable law in their contract but also in interpreting or supplementing national laws.¹⁷ It should also be remembered that many tribunals anyway look to “trade usage” to decide their cases,¹⁸ and one arbitrator has said that this helps to determine the result as frequently as does the applicable law clause.¹⁹

These debates highlight the importance of thinking of the *lex* not as a complete body of law, but as an emerging set of contractual principles. In questioning the potential links with WTO law, this incompleteness is in fact no handicap. Rather, it is precisely because of the flexibility of this nascent system that there remains such scope for its interaction with other emerging doctrines of international law.

World Trade Organisation Law

Originally designed as a provisional agreement when plans for an International Trade Organisation fell through, the 1947 General Agreement on Tariffs and Trade (GATT) has instead become a permanent institutional basis for multilateral trade

¹³ Mustill (1987), *supra* at p116.

¹⁴ Goode, R. “Rule, practice, and pragmatism in transnational commercial law” International & Comparative Law Quarterly 54(3) 2005 p.539-562

¹⁵ ICC Ct. Bull., Vol 16, No.1 (2005) p11, cited in Derains (2005) *supra* at note 92.

¹⁶ Berger (2002) *supra* at p83.

¹⁷ ICC Ct. Bull., “Unidroit Principles of International Contracts, Reflections on their Use in International Arbitration – Special Supplement 2002” cited in Derains (2005) *supra* at p238.

¹⁸ This is allowed, for example, by Art. 17(2) of the ICC Rules.

¹⁹ Aksen, “The Law Applicable in International Arbitration: Relevance of Reference to Trade Usages”, ICCA Congress Series No.7 (Kluwer 1996) p471-472.

negotiations. Whilst early rounds focussed – very successfully – on the reduction of tariffs, the seventh, in 1979, was the first to address non-tariff barriers to trade, including government procurement policies, subsidy policies, customs valuation policies and technical standards. Since then, attention has shifted to an even wider range of concerns.

Established in 1995, the WTO itself is the result of the Uruguay Round of negotiations. Its main innovation is the resolution of disputes between countries by a panel of experts or on appeal by the Appellate Body (AB).

One of the main controversies surrounding WTO law is whether it is a part of the wider net of public international law, or whether it instead constitutes a *lex specialis*.²⁰ The relevance of this debate to this essay is clear: if WTO law were totally isolated from other legal domains, there would be very little chance of it affecting the *lex*. I will argue, in contrast, that the WTO is subject to the general principles of treaty law, and that its own rules and jurisprudence might therefore impact on those principles.

Article 3(2) of the Dispute Settlement Understanding reads:

“The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

It has been argued – including by the United States in submissions to the Panel²¹ - that this Article makes clear that public international law is relevant only for the *interpretation* of those rights and obligations created by the WTO, and that it

²⁰ For general discussion of this topic, see Lindroos, A. and Mehling, M. “Dispelling the Chimera of ‘Self-Contained Regimes’ International Law and the WTO” European Journal of International Law 16(5) 2005 p857-877.

²¹ United States – Continued Suspension of the Obligations in the *EC-Hormones* Dispute: Responses of the United States to Panel Questions October 3, 2005, at p58.

should not otherwise concern the DSB. The difficulty that this raises is of course familiar to most domestic courts: when does so-called ‘interpretation’ morph into the application of another rule?

In international law, rules of interpretation are outlined in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. The Appellate Body held in *Reformulated Gasoline*²² that these Articles constitute “customary rules of interpretation of public international law” for the purposes of DSU 3.2. Of particular relevance to this discussion is Article 31(3)(c):

There shall be taken into account ... any relevant rules of international law applicable in the relations between the parties.

The implication of this, it might be argued, is that when interpreting the rights and obligations of WTO members the dispute settlement body (DSB) must take into account any relevant rules of international law. This might appear nothing but a back-door way of prising public international law into the WTO, but it does help avoid the somewhat Kafkaesque possibility of the DSB reaching a decision which is illegal by normal international principles. Indeed, the Appellate Body in *Reformulated Gasoline* commented that the DSU direction to use customary rules of interpretation, “reflects a measure of recognition that the *General Agreement* is not to be read in clinical isolation from public international law.”

In accordance with this approach, WTO jurisprudence has in several fields been influenced by public international law. Unsurprisingly, the impact is clearest in relation to the approach taken to treaty interpretation, where the AB has criticised the tendency of panels to favour a purposive rather than literal approach.²³ Stressing that Article 31 of the Vienna Convention provides that “interpretation must be based above all upon the text of the treaty,”²⁴ the AB has repeatedly insisted that treaty interpreters focus on the actual language used.²⁵ It has elsewhere determined that in cases of ambiguity, the meaning less onerous to the party assuming an obligation

²² United States - Standards for Reformulated and Conventional Gasoline, AB-1996-1.

²³ This point is made by Trebilcock M.J. and Howse R. (1999) “The Regulation of International Trade” second ed. Routledge:London at p73.

²⁴ Japan - Taxes on Alcoholic Beverages, AB-1996-2.

²⁵ For example, in United States – Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4; and India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, AB-1997-5

should be preferred in accordance with the principle of *in dubio mitius*, an interpretive principle “widely recognized in international law.”²⁶

Less directly connected to treaty interpretation is the AB’s embrace of the proportionality principle in *Cotton Yarn*, in which it held that an exporting member could only be held responsible for an amount proportionate to the actual damage caused by its imports. The AB said:

“Our view is supported further by the rules of general international law on state responsibility, which require that countermeasures in response to breaches by states of their international obligations be commensurate with the injury suffered.”²⁷

In a later case, the AB found further justification for the proportionality principle by referring to Article 51 of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts, which provides that “countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.”²⁸

In the context of good faith rules, the AB has stressed that this “principle of general international law”²⁹ places several requirements on Members. These include being prompt in bringing raising complaints about procedural deficiencies,³⁰ refraining from improperly withholding arguments from competent authorities,³¹ being explicit in raising any objections to the authority of the Panel,³² and operating on the assumption that other members are also acting in good faith.³³

The AB has also relied on other principles of public international law. For example, the principle *jura novit curia* – that it is for the court rather than the parties

²⁶ EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4.

²⁷ United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, AB-2001-3, paras. 119–120.

²⁸ United States - Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea, AB-2001-9, para. 259.

²⁹ United States - Tax Treatment for "Foreign Sales Corporations", AB-1999-9, para. 166.

³⁰ United States - Tax Treatment for "Foreign Sales Corporations", AB-1999-9.

³¹ United States - Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, AB-2001-1, para. 115.

³² Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States - Recourse to Article 21.5 of the DSU by the United States, para. 47.

³³ European Communities - Trade Description of Sardines, AB-2002-3, para. 278.

to interpret the law – is known to public international law³⁴ and has been invoked by the AB.³⁵ The AB has also turned to international environmental law to determine the scope of the expression “exhaustible natural resources,” even accepting that its meaning has changed over time in tandem with international legal developments.³⁶ Similarly, the AB has interpreted the “development, financial and trade needs” of developing countries with reference to “broad-based recognition of a particular need set out ... in multilateral instruments adopted by international organizations.”³⁷

The AB has not as yet been faced with a straight choice between a WTO provision and public international law. However, even the most ardent internationalist observers concede that in the event of any such conflict, the WTO provision would prevail.³⁸

Lex Mercatoria and WTO Law: Shared Principles

This essay has thus far been concerned with two preliminary difficulties, namely the status of the *lex* and the status of WTO law. I turn next to the crucial question of whether developments of principle in one field might influence those in the other. It will first be necessary to outline some of the main principles which the law of contract shares with the law of treaties.

In its most basic terms, the doctrine of *pacta sunt servanda* in contract law means simply that a contract binds its parties and cannot be modified or terminated except by consent or if otherwise provided by law. Stated thus, the maxim is little more than a platitude, and it is at its most meaningful when developed into a doctrine of good faith. Typically, lists of *lex* principles include some form of obligation to act in accordance with good faith or fair dealing.³⁹

³⁴ For example, it was invoked in the ICJ in: *Military and Paramilitary Activities (Nicaragua/United States of America) Merits*. J. 27.6.1986 I.C.J. Reports 1986, p14.

³⁵ *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, AB-2004-1, para. 105.

³⁶ *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4, para. 129.

³⁷ *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, AB-2004-1, para. 162-4.

³⁸ Paulwelyn J. (2005) “Unity and Fragmentation in International Law: Introductory Report on the World Trade Organisation” at p13.

³⁹ This can be seen, for example, in the lists published at www.tldb.de.

Several reported arbitral decisions turn to the notion good faith.⁴⁰ For example, in a 1990 ICC award, discussing whether to ‘pierce the corporate veil’, the tribunal said:

“Art. 13 (5) of the ICC Arbitration Rules invites the tribunal to take account of the trade usages and the contractual stipulations. From that perspective, the tribunal is allowed to make reference to the *lex mercatoria* ... the tribunal therefore bases its decision on the general notion of good faith in business and the usages of international trade.”⁴¹

This general commitment to good faith is also recognised in international public law. Article 26 of the Vienna Convention is entitled *Pacta Sunt Servanda*, and provides that, “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” The application of certain good faith requirements in the WTO has been outlined above.

Another principle common to the *lex* and public international law is *rebus sic stantibus* – the notion that an agreement may cease to apply if the circumstances change substantially. The application of the doctrine in both spheres can be evaluated by comparing the description of the *lex* rule in an online Transnational Law Database⁴² with its public international incarnation in Article 62 of the Vienna Convention on the Law of Treaties. Both state the principle to apply only when neither party foresaw the change at the conclusion of the agreement. Both state that it does not apply when the change was brought about by either party. Both also allow for the change to ground a temporary suspension as an alternative to termination.

The notion that a party cannot be allowed to contradict itself to the detriment of another is also found in both the *lex* and in public international law. Often encapsulated in doctrines of estoppel or *venire contra factum proprium*,⁴³ it was treated as part of the *lex* in one of the Iran-US Claims Tribunal cases, in which the fact that Iran had given oral consent for certain tasks meant that they could not later

⁴⁰ For example, in ICC Award No. 8365, Clunet 1997; and in 1956 REV. CRIT. DIP 279.

⁴¹ ICC Award No. 5721, Clunet 1990, TLDB Document ID: 205721.

⁴² Berger K.P. “Lex Mercatoria Online: the CENTRAL Transnational Law Database at www.tldb.de” *Arbitration International* 18(1) 2002 p83-94.

⁴³ Fouchard Gaillard Goldman on International Commercial Arbitration (edited by Emmanuel Gaillard and John Savage) The Hague 1999, at 1462.

rely on a clause stating that any consent had to be in writing.⁴⁴ In public international law, the maxim has for example been used in two human rights cases. In both cases, the courts ruled that once the respondent states had asserted that the applicants had not exhausted domestic remedies, those states were then estopped from arguing the reverse.⁴⁵

It is worth remarking that these estoppel cases highlight a problem with using basic principles to draw parallels between these two branches of the law. That is, apparently similar appeals to principle may in fact mask very different rules. In the cases just discussed, for example, it might be argued that preventing a party from changing its stance during litigation is a rule of procedure, whereas contractual estoppel is generally a substantive principle.

However, it is on occasion possible to identify occasions in which a rule has been applied to very similar effect in both the *lex* and public international law. This can be seen in relation to the rule that the duty of good faith imposes on parties an obligation to share certain material facts when negotiating an agreement. In a 1999 ICC report, a contract was interpreted in the light of the duty of good faith and therefore “on what one of the parties should have communicated to the other.”⁴⁶ Similarly, a 1903 case concerning a deal Venezuela had struck with blockading allied powers hinged on what a negotiator *should have said*. Venezuela had proposed that “all claims against Venezuela” should be given special guarantees, and subsequently argued that “all claims” meant those of every creditor country, not just those of the allied countries. The Permanent Court of Arbitration held that:

“The good faith which ought to govern international relations imposes the duty of stating that the words 'all claims' used by the representative of the Government of Venezuela in his conferences with the representatives of the allied Powers . . .

⁴⁴ Iran-US Claims Tribunal, *Woodward-Clyde Consultants v. Iran et al.*, 3 IRAN-U.S. C.T.R. p239 et seq.

⁴⁵ Report No.72/03 Admissibility Petition 12.159 Gabriel Egist Santillan Argentina, October 22, 2003, Inter-American Commission on Human Rights; Also Neira Alegria et al – Preliminary Objections, Judgment of December 11 1991, Inter-American Court of Human Rights.

⁴⁶ ICC Award No. 8908, ICC Bull. 10/No. 2 (1999), p86. TLDB Document ID: 208908.

could only mean the claims of these latter and could only refer to them.”⁴⁷

Many of the above examples are not drawn from WTO caselaw, although it is no great stretch to see that, given the right facts, a WTO decision might affect a principle of public international law shared by the *lex*. For example, it has been suggested that the AB’s decision in *US-Shrimp*⁴⁸ might be significant in the development of an international customary law rule in favour of the transparency of administrative actions.⁴⁹ In that case, the AB held that deciding whether to certify a country’s product without allowing any opportunity for appeal amounted to a denial of basic fairness and due process.⁵⁰ In my submission, this case is unlikely to prove so influential, but nevertheless it does serve to highlight the possibility of the WTO having such a profound impact.

Other factual scenarios might in future create the conditions in which a WTO decision was helpful to a *lex* case. The most obvious starting point is to imagine a contract in which one of the parties is a state. Such situations are in fact familiar to the *lex*, since tribunals have proved particularly keen to avoid national laws when one party has the power to unilaterally write the laws of the land.⁵¹ It is clear that a conflict which might arise in such a contract may have a direct parallel in a WTO context. For example, in *Turkey-Textiles* the Panel concluded that Turkey could be held responsible for measures taken by the customs union between Turkey and the European Communities, concluding that where states act through a common organ each is separately answerable for the wrongful acts of that organ.⁵² It is relatively simple to imagine this conclusion being applied by an arbitral tribunal in a contract case against Turkey which itself hinged on the acts of the customs union.

⁴⁷ Cheng, B. (1987) *General Principles Of Law as Applied by International Courts and Tribunals*, reprinted, Cambridge, p108.

⁴⁸ United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, AB-1998-4.

⁴⁹ Hanna, J., Jr. “Is Transparency of Governmental Administration Customary International Law in Investor-Sovereign Arbitrations? – Courts and Arbitrators May Differ.” *Arbitration International* 21(2) pp187-210, at p196.

⁵⁰ At para. 75.

⁵¹ For example, in *Iran-U.S. Claims Tribunal, Gould Marketing, Inc. v. Ministry of National Defence, 3 IRAN-U.S. C.T.R.*; in *Texaco v Libya Arbitration, 4 YB Comm Arb 181 (1979)*; and in *Saudi Arabia v Aramco, 27 Int’l L Rep 117 (1967)*.

⁵² *Turkey - Restrictions on Imports of Textile and Clothing Products, AB-1999-5*.

Similar thought experiments suggest many other similar factual situations between WTO cases and contracts involving states. For instance, parallels may arise in addressing the question of when a state can claim *rebus sic stantibus*, or which domestic agencies a state can be held responsible for.

The parallels become slightly less clear-cut if both parties to a contract are private, although of course principles may be applicable across contexts. For example, the decision in *Turkey-Textiles* might be used to help decide how far a company should be responsible for acts taken by an entity acting on behalf of a group of companies.⁵³ One can also imagine that if the WTO were to allow a country to violate its commitments on the grounds of *force majeure* because of a particular natural disaster, that finding might be persuasive in convincing an arbitral tribunal to excuse a party from performance as a result of the same catastrophe.

Lex Mercatoria and WTO Law: Other Potential Points of Contact

Apart from the realm of general public international law principles, it is also conceivable that a *lex contract* case may be influenced by the main body of WTO law. Apart from via the public international law route discussed above, the WTO does not elaborate rules of contractual interpretation, and so its rules would be relevant mainly in elaborating the underlying rights of the parties.

The impact of this may be clearest in a contractual dispute between a state and a private party, in which an arbitral panel might hold that the state was obliged to implement its WTO commitments. The most likely reasoning by which this might occur would be for an arbitrator to hold that it was implied into the contract – perhaps by virtue of the general principle of good faith – that the state would abide by its international obligations. So, for example, a private party may argue in some future contract case against a state that it was an implied term of the contract that the state would implement certain WTO investment rules which would have benefited the party, and that failure to do so caused actionable damage.

This line of argument has the clear attraction of providing a mechanism whereby private parties could gain some power to enforce WTO rules. Although this

⁵³ Some lists of *lex* principles include a similar principle: For example, the list on www.tldb.de includes: “A corporate entity acting on behalf of a group of corporate entities binds all entities that belong to the group.”

mechanism would be extremely limited compared to the more sweeping proposals to allow all private parties – not just those in contractual relations with states – *locus standi* to enforce WTO law, it is one way in which the *lex* might play a role in pushing forwards this important agenda. Given the WTO’s increasing concern with issues beyond traditional tariff and quota policies – including most recently the declaration of principles to govern the future discussion of Trade Related Investment Measures, together with the establishment of a working group to look at competition policy – the opportunities for this line of reasoning look set to increase.

Applying the same logic to contracts between private parties clearly raises different concerns. Not only might it be unjust to hold a private party liable for a state’s violation of WTO law; it would also be slightly unreal to interpret a contract *as if* WTO agreements had been implemented, if in fact they had not. Perhaps the most that could be claimed in such a situation is that WTO law may be used as *evidence* in a contractual dispute. For example, one party in an intellectual property dispute might argue that its preferred interpretation of the contract was supported by WTO law since the other party’s approach would amount to a violation of TRIPS. Or, a party might argue *force majeure* because of a WTO-illegal act of a state – for example if breaking the anti-dumping rules meant that the party could not perform a contract to sell similar goods – and further claim that it was not foreseeable that a country would do something WTO-illegal.

One last point of potential contact is worthy of mention: the possibility of the WTO being used as an institutional framework through which states could negotiate a greater uniformity in contract law. It has been suggested that with the growth of international commerce, countries will increasingly find themselves under pressure to adopt uniform contract rules, most likely based on the Unidroit principles.⁵⁴ It might therefore be argued that some future ‘General Agreement on Contract Principles’ may render the *lex* redundant by universalising the application of one set of rules to every contract, whether domestic or international.

Apart from being politically unlikely, this approach ignores one of the main benefits of *lex mercatoria*: the ability of parties to freely choose to be bound by it. It also falls prey to the fallacy of thinking that there is a one-size-fits-all model of

⁵⁴ Discussed by Flanagan, P. “Demythologising the Law Merchant: The Impropriety of the Lex Mercatoria as a Choice of Law” International Company and Commercial Law Review 15(9) 2004 pp297-306.

economic development. Different systems of national contract rules should be celebrated because different rules may be more appropriate to the institutional, cultural and economic differences between countries, and because vibrant national systems compete with each other to find the most efficient solutions to contract problems. Such a step, in my submission, should therefore be resisted.

However, there is a simple and far less drastic solution whereby the WTO could acknowledge and promote the *lex* without dictating national rules. If WTO members were to agree to adopt the UNCITRAL Model Law on International Commercial Arbitration, that would considerably strengthen the ability of parties to choose arbitration, wherever they were in the world. Better still, if that Model Law were modified to make it absolutely clear that parties could choose the *lex* as the governing law, it would give parties the freedom to have their relations governed by transnational contract law.

Conclusion

This essay has outlined the main ways in which the WTO might impact on the *lex mercatoria*. In doing so, it has stressed the connections which exist between the two bodies at the level of legal principle. However, it is important in these debates not to lose sight of what might be called the ‘human’ dimension – with what makes these topics important beyond the realm of legal intellectualism. In drawing to a close, I therefore comment on the shared social objectives that run through the WTO and the *lex*.

The economic logic behind the WTO is that of comparative advantage: the reduction of trade barriers so that each country makes whichever products it is best able to, thus contributing to greater efficiencies and hence to development. Whilst there remains much debate around how quickly those barriers should be reduced and of the role of government and social safety nets in the process of liberalisation, there is now a general international consensus around the liberalising objective. The WTO has highlighted the benefits of this approach in its recent “development round” of trade talks, and its centrality is highlighted in the preamble to the GATT 1947:

“Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising

standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods ...”

A secondary objective of the WTO might be said to be the promotion of peace and stability. Signing the GATT just after the second World War – and having witnessed the contribution of the 1930s trade war to that conflict – its founders believed firmly in the benefits of trade connections between peoples. As the WTO still proclaims today, businessmen prefer not to fight their customers.⁵⁵ The dispute settlement mechanism is of course an integral component of the institutional management of conflict.

Whilst it may be overly-generous to attribute these same objectives to all international merchants, it is certainly true that those behind the institutional drive towards arbitration, as well as many of the most vociferous proponents of the *lex*, do share these concerns. In a 1958 text on the virtues of arbitration, the author commented that:

“As to prosperity, the contribution of arbitration is reasonably clear. The prosperity of the free world depends on the effectiveness with which its resources are allocated and the rate at which they grow over time. Effective allocation and rapid growth of resources are promoted by removing obstacles to the free flow of international trade and investment, so that goods can be bought where they are made cheapest and best and capital can flow to places where it can make the greatest contribution to productivity.”⁵⁶

For developing countries today, the benefits of arbitration are clear. Investors need worry less about the intricacies of an unknown legal system, or about the

⁵⁵ Mentioned at: www.wto.org/english/res_e/download_e/10b_e.pdf

⁵⁶ Gardner R.N. (1958) “Economic and Political Implications of International Commercial Arbitration” pp15-18, in Domke “International Trade Arbitration” New York.

possibility of sudden legal changes.⁵⁷ Much the same might be said about the *lex* itself, for its proponents routinely highlight the efficiency of an international legal framework which obviates the need to grapple with a plethora of national systems.

Peace has also been claimed as a benefit of arbitration. In 1919 the founders of the International Chamber of Commerce – which has for decades managed an active arbitration programme – stated their hope to foster reconciliation through international commerce,⁵⁸ and later writers on arbitration have continued to emphasise this objective.⁵⁹ Again, it is no stretch to extend this enthusiasm to the *lex*, since its main claimed benefit is the encouragement of commerce through the avoidance of conflict.

That the WTO and the *lex* are born of the same concerns and objectives serves to emphasise that they are both more than bodies of law. It is because of this shared purpose that I have avoided easy criticisms of the *lex* and its limitations: it is preferable, in my submission, to remain open-minded about the possibilities of *lex mercatoria* than to dismiss it, as many do, as doomed. The links discussed in this essay between the *lex* and the WTO are no more than contributions to an ongoing discussion about the future of international trade law – tentative imaginings of what that future may hold rather than descriptions of where we are now. It is to be hoped that any cross-fertilisation between WTO law and the *lex* will serve to strengthen the legal principles behind them and, crucially, to further the social purposes they serve.

⁵⁷ More benefits for developing countries are discussed in Blackaby, N. (2002) “International Arbitration in Latin America”, Kluwer

⁵⁸ Derains, Y. and Schwartz, E.A. (2005) “A Guide to the ICC Rules of Arbitration” Kluwer Law International, Second ed., p1.

⁵⁹ For example, Gardner (1958), *supra*, p17-18.