The Internationalisation of Australia's Trade Laws

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1. *Background*

As the centenary of Federation draws closer, some significant debates have emerged about our geo-political goals and the desirable institutions and laws to foster those goals. In the area of trade and investment, a key question is whether our legal system is adequate to support desirable trading relationships. Each country in the international trading system faces this question individually, but a collective issue is the extent to which there are, or ought to be, common principles and rules affecting international trading transactions. The purpose of this article is to address this question from the Australian perspective. The article is basically a survey of the main stimuli to harmonisation of Australian commercial laws, particularly those dealing with international trade.

The effect on Australian commercial law of international norms and customs is subsumed into the wider question of the reality or otherwise of a developing new law merchant, a new *lex mercatoria*. Over 100 years ago, Blackburn LJ asserted that "the general rules of the law merchant are the same in all countries".[1] A relatively longstanding debate has ensued on this question.[2]

Before we begin our survey, a brief note on legal history in this area is desirable. The history of international economic law can in fact be seen as having three distinct phases.[3] The first stage, predating the rise of the nation State, involved the identifiable *lex mercatoria*, the law of the merchants who undertook international trading transactions. This was not a clear or codified

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1 *McLean v Clydesdale Banking Co* (1883) 9 App Cas 95 at 105.

2 Carbonneau, T E (ed), *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (1990). Highet, K, "The enigma of the lex mercatoria" (1989) 63 *Tulane LR* 613. Delaume, G R, "Comparative analysis as a basis of law in state contracts: the myth of the lex mercatoria" (1989) 63 *Tulane LR* 575. Goldstajn, A, "The new law merchant" (1961) *J Business L* 12. Cremades, B M and Plehn, S L, "The New Lex Mercatoria and the Harmonisation of the Laws of International Commercial Transactions" (1984) 2 *Boston U Int'l LJ* 317. Stoecker, C W O, "The lex mercatoria: to what extent does it exist?" (1990) 7 *J Int'l Arbitration* 101. Berman, H J and Kaufman, C, "The law of international transactions (*lex mercatoria*)" (1978) 19 *Harv Int'l LJ* 221. Lando, O, "The *lex mercatoria* in international commercial arbitration" (1985) 34 *ICLQ* 747. Mustill LJ "The new *lex mercatoria*: the first 25 years" in Bos, M and Brownlie, I (eds), *Liber Amicorum for Lord Wilberforce* (1987) at 149. Trakmann, L E, "The evolution of the law merchant: our commercial heritage" (1980/81) 12 *J Maritime L and Comm* 1. Schmitthoff, C M, "International business law: a new law merchant" (1961) *Curr L and Soc Prob* 129. Langen, I E, *Transnational Commercial Law* (1973). Schmitthoff, C M and Horn, I N (eds), *The Transnational Law of International Commercial Transactions* (1982).

3 See Schmitthoff, C M, "The unification of international trade law" in Cheng, C-J (ed), *Clive M Schmitthoff's Select Essays on International Trade Law* (1988) at 220.

body of law but was an emerging set of common principles adopted by various trading guilds and used for private dispute resolution. The second stage involved the growth of national sovereigns and municipal laws which affected all commercial transactions relating to the relevant jurisdiction, including those of an international nature. All international transactions needed to find their legal base in some municipal system. Conceptual and practical differences were found between civil law and common law countries, Asian and Islamic systems, capitalist and centrally planned economies, and developed and developing countries.

In addition to the differences between these systems, there was the problem of determining which legal regime applied to an international transaction, given that more than one country was involved. Private international trade laws, dealing with such conflicts of laws, developed to resolve potential disputes between differing legal systems. Even these rules were national in origin, being the rules that different legal systems developed to indicate how they themselves would resolve such conflicts. Again there were potential conflicts of approach and the inevitable lack of certainty for traders that this engendered.

At the trade regulation level, this phase, which culminated in the depression of the 1930s, saw governments using numerous import restrictions to try and protect employment levels. Thus the twentieth century trading world developed from a strongly municipal legal base, coupled with a parochial and protectionist set of political philosophies.

The third stage, the post World War II period, has seen increasing convergence and harmonisation of international trade law. Some key international treaties have been successfully established in this period. Where Australia is concerned, this involved a concurrent shift in emphasis away from a purely British focus. Prior to this period, Commonwealth countries, which had each inherited British common law principles, also invariably utilised English models for legislation dealing with sale of goods and related aspects of trade.

In questioning the current level of internationalisation of Australia's trade laws, the analysis requires us to consider two bodies of law. First, we look at private commercial laws that apply to international trade transactions. Second, we are concerned with international rules and treaties that provide parameters for governmental trade regulation.[4]

Before surveying the current scene, it is worth considering the general desirability of harmonisation in the trade and economic field and some of the more important impediments to it. Convergence of international trade rules and regimes is seen by most as a desirable phenomenon for various reasons. International trade is seen as having both an economic and political importance. From the economic perspective, without international trade, most countries are unable to overcome the relative scarcity of certain natural resource endowments and are unable to attract the benefit of economies of scale of production or the efficiencies that evolve from reliance on those areas of production where they have the greatest comparative advantage. Because the aim of trade is to provide greatest consumer satisfaction at the lowest cost, and because

4 While these categories have different immediate constituents, they are not mutually exclusive as international treaties are now an important stimulus to the development of private law principles.

free trade will allow production to move to the area of lowest cost, including labour costs, free trade should in theory increase individual welfare and help eliminate poverty in the developing world. Some value free trade on a lower level because of beliefs in other values such as self-sufficiency and cultural privity or because they see social and commercial benefits in controls and restrictions.

Thus the desirability of trade liberalising laws is subsumed into the debate about trade liberalisation as an economic goal. Here there is no consensus or ever likely to be. The differences in views about the economic returns from free trade explain in part why many governments are reluctant to unilaterally adopt such a model and in turn help explain the difficulty in achieving the development of fair, efficient and uniform international rules and regimes. For example, the history of the General Agreement on Tariffs and Trade (GATT), the international organisation which promotes trade liberalising rules, shows the constant tension between global liberalisation ideals and the parochial aspirations and philosophical differences of various governments from time to time.

A second limitation on the promotion of trade liberalising rules and regimes is caused by the ability of vested interest groups to capture the political process. It is a basic premise of political science that rational beings will devote effort in any venture in proportion to their likely returns. Domestic industries which expect to be harmed from free trade thus have a great incentive to lobby politicians for protection. Consumers who would benefit from free trade are often unaware of the likely gains and in any event would benefit to a lower absolute level. Thus consumers are generally unlikely to actively involve themselves in combating protectionist forces. This explains to a great degree the protectionist policies in even the most advanced democratic capitalist economies and in turn places a great limitation on the reform process. On the other hand, this phenomenon also explains why international regimes are so important and why some powerful governments are willing to promote such regimes even though they appear to curtail their sovereignty. It is easier for politicians to deal with a vested interest group that is advocating an inefficient policy by asserting that the government is bound to reject the submission on the basis of international obligations rather than by a discretionary denial of their requests.[5] Not all governments are subject to the same pressures nor do they respond in identical ways. This imposes a further limitation on the harmonisation process.

Nevertheless, where the political dimension of trade is concerned, there is the widespread perception that in the extreme, protectionism is a potential cause of international conflict. If powerful countries are unable to obtain natural resources through trade, they may consider conquest. Where a political association is sought between different States, freedom of trade is perceived as being an important way of developing a unified identity. The requirement of free trade between the Australian states in section 92 of the Commonwealth Constitution is an example. Free trade among members of the European Union is similarly seen as being the prime means of fostering greater acceptance of a more unified political identity.

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5 This is generally considered to be of significant value to the US President in dealing with a Congress that is particularly subject to vested interest lobbying because of the complete separation of powers in the American system.

Thus there are a number of benefits, both economic and political, that are widely expected to flow from greater convergence of international trade rules. A more uniform legal system assists these goals in a number of ways. First, public international trade law rules promote freer trade and provide obligations to remove legal and administrative trade barriers. Second, because disputes and uncertainty add to the dead weight costs of trade transactions, any increase in similarity of laws throughout the world should enhance understanding and confidence and hence the overall level of trading transactions. The business community is often heard to call for greater certainty in regulations, and will even argue that a quick and consistent solution is to be preferred to a more drawn out analysis that seeks to find the most desirable policy prescription.

Yet international trade rules have remained relatively undeveloped until recently. This is primarily because international law has had little to say about economic law and international economic relations. There are a number of reasons for this. First, international law has traditionally been directed at the rights and obligations of States and not individuals. Where such rights are concerned, it has largely been built on the principle of State sovereignty, particularly where economic issues are concerned. It is only relatively recently that the negative externalities of certain forms of sovereign economic behaviour are seen as a significant global concern. Even so, it remains the case that economic issues raise many philosophical questions that are usually not as straightforward as the issues that arise when we are considering issues such as human rights as a basis for international law norms.

Because State sovereignty is a key aspect of international law principles, it is also a general principle that nation States will not be compelled to behave in ways that they have not consented to. As a result, the key sources of international law are treaties and custom. International law norms develop through nation States expressly agreeing to them through treaties, or alternatively through a sufficient number of nation States following a particular principle to allow for a conclusion that it has become a customary norm of international law. Because there have been such diverse political economic systems throughout the world, the breeding ground did not exist for a common set of customary commercial practices. Those differences also make it harder to develop treaties which promote harmonised economic rules. The emphasis of international law on nation States as opposed to individuals also explains why international economic law has had little to say about the private rights and obligations of international traders.

In addition to the rules themselves, the processes of development and openness of commercial policy-making vary considerably from jurisdiction to jurisdiction, as do the systems of administrative law and review of bureaucratic decision-making. Thus treaties that deal only with substantive issues and not processes may be unsuccessful. Different political and legal structures can affect both the type of treaties that may be negotiated and also the way they are implemented domestically. For example, in the United States the federal system, and the more limited appellate role of the Supreme Court, imposed limits on harmonisation in areas such as contract law which are essentially state-based.[6] Thus com-

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6 Priestley, L J, "A guide to a comparison of Australian and United States contract law"

parative analysis will often show that fundamental differences in philosophy or structures will impose the most severe limitation on harmonisation.

One problem with harmonisation, if it relates to international transactions alone, is that it might lead to a bifurcated system of law, one in relation to international and another in relation to domestic transactions. Overall levels of efficiency could be adversely affected as a result. If this arises, there will at times be a difficult preliminary question as to whether a transaction is truly international. Importation and exportation of physical goods is easy to define as international in nature, but legal contracts for services, arising as they often do between multinational corporations and utilising electronic means of communication, are more difficult to categorise.[7]

It is also important to be aware that the mere development of an international treaty does not guarantee that there has been a clear agreement on comprehensive and objective principles. In some instances, international treaties use vague language to hide a lack of meaningful agreement.

Where private law is concerned, the single most important development has been the establishment of key international agencies with aims to promote harmonisation, primarily through the preparation of model laws which parties are free to adopt. The best example is the Vienna Convention on the International Sale of Goods 1980 (Vienna Sales Convention) promoted by the United Nations Commission on International Trade Law (UNCITRAL).

International traders have also been involved in developing their own customary usages. The most significant body is the International Chamber of Commerce (ICC) which, among other things, has promoted the use of commonly accepted trading terms known as INCOTERMS. Industry bodies have also developed standard form contracts in many fields. Key bodies relevant to Australia's trade include the British Wool Confederation, the International Wool Textile Organisation, the London Metal Exchange and the Refined Sugar Association.[8]

Regardless of the exact nature of the international rules and standard contracts that are developed, the value and effectiveness of harmonisation will depend significantly upon the way disputes are settled and the consistency or otherwise of interpretation of those primary documents by adjudicatory bodies throughout the world. Here there are also a number of key developments promoting uniformity. The first is the greater trend towards the use of international arbitration to resolve commercial disputes. Allied to this is the greater acceptance of the Vienna Sales Convention as the relevant law governing the substance of international sales contracts.

International arbitration rules, whether through the UNCITRAL Model Law and Arbitration Rules or the ICC Rules, also seek to promote uniformity of interpretation. Divergent interpretation, particularly traditional divergences between common law and civil law countries, was seen to be a particular

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(1989) 12 (1) *UNSWLJ* 4 at 5.

7 Allan, D E and Hiscock, M E, *Law of Contract in Australia* (2nd edn, 1992), par 102 and A201–3.

8 Schmitthoff, C M, "The unification or harmonisation of law by means of standard contracts and general conditions" (1968) 17 *ICLQ* 551.

problem when disputes were resolved through the court processes. Yet there has been a greater move to commonality of approach and a growing awareness by judges of the importance of an international focus to their decision-making.[9] There are numerous examples. Kirby P in the New South Wales Court of Appeal in *Brown Boveri (Australia) Pty Ltd v Baltic Shipping Co (The Nadezhda Krupskaya)*[10] considered that because of the international nature of the transport rules that applied to the case before him, "a parochial or chauvinistic" approach to interpretation was to be avoided. Similar comments have been made by McHugh J in *Thiel v Federal Commission of Taxation*[11] and Mason and Wilson JJ in *The Shipping Corporation of India Ltd v Gamlen Chemical Co (A/asia) Pty Ltd.*[12]

A related factor is the shift by Anglo-Australian judges to a more policy oriented and conceptual basis of decision-making at least in certain key cases. which brings the judges closer in intellectual approach to American and European judges. This obviously does not guarantee similarity of outcome, but such an outcome is always more likely if a similar methodology is adopted.

For these reasons, there has been a growing use of foreign authorities as persuasive tools in resolving commercial disputes.[13] The traditional approach in the Australian common law system was to primarily look to English authorities. At the same time as English cases have been downgraded in importance, greater resort has been made to American and to a lesser extent other non-British European cases. While it is not the norm to cite foreign authorities in the majority of cases, in the most significant High Court appeals it would be rare for the court not to consider the foreign and comparative perspective. The court looks for persuasive arguments to support a particular approach to the development of the law and it is often also mindful of the desirability of greater uniformity on a worldwide basis. On the other hand there are still instances where English authorities are resorted to even where this is inappropriate given the different nature of Australian legislation. Examples can be found in the areas of labour law[14] and income taxation.[15]

In addition, the influences on English common law that arise from Britain's membership of the European Union should not be lost sight of. Modern British statutes are modelled more and more on European laws as part of the general Treaty of Rome harmonisation principles.[16]

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9 Such an approach is not guaranteed however. In certain cases a court may hold that a convention can be seen to have adopted a settled local meaning. At other times courts have considered that the particular terminology used by a domestic parliament demands a more restrictive interpretation.

10 [1989] 1 Lloyd's Rep 518; (1989) 94 *FLR* 425.

11 (1990) 64 ALJR 516 at 523.

12 (1980) 147 CLR 142 at 159.

13 Useful survey articles are von Nessen, P E, "The use of American precedents by the High Court of Australia, 1901–1987" (1992) 14 (2) *Adel LR* 181 and Vranken, M, "The relevance of European Community Law in Australian courts" (1993) 19 (2) *MULR* 431. A more general analysis of the developments and influences on Australian law is contained in Ellinghaus, M P, Bradbrook, A J and Duggan, A J (eds), *The Emergence of Australian Law* (1989).

14 Vranken, id at 434.

15 Waincymer, J, *Australian Income Tax: Principles and Policy* (2nd edn, 1993) at 86.

16 It has been suggested that this relates to principles of interpretation as well as substantive

Another factor promoting uniform interpretation of international treaties and model laws is the tendency to include an interpretation section within such documents. Article 7 of the Vienna Sales Convention is an example. Article 31 of the Vienna Convention on the Law of Treaties 1969[17] also requires all subsequent treaties between its signatories to be interpreted in good faith based on the ordinary meaning of the terms used in their context and in the light of their object and purpose. Allied to this is a trend to greater use of extrinsic aids to interpretation. Leading British and Australian examples include *Fothergill v Monarch Airlines Ltd*[18] and *Commonwealth v Tasmania* respectively.[19]

One traditional barrier to the use of foreign precedents, particularly in the field of arbitration, has been the difficulty of accessing relevant material. A number of research tools have developed to overcome this. For example, UNCITRAL has recently established a database of case law on UNCITRAL texts (CLOUT).[20] The ICC publishes extracts of its arbitration awards from its Court of Arbitration.[21]

A further stimulus to the convergence of rules are the various law reform bodies and publications which can provide models for adoption in other jurisdictions. It would be a rare case indeed for any law reform proposal in the commercial law area to fail to analyse legislative models in other key jurisdictions, particularly the United States and Europe. Leading academics have also been heavily involved in certain harmonising initiatives and in promoting or analysing the trends.[22] While leading comparativists have rightly pointed to the dangers of transplanting legal texts and presuming they will automatically give rise to the same result,[23] for the purposes of this article this is obviously a trend that has the potential to promote greater similarity and harmonisation of legal principles. Resort by a court to the Law Reform Commission report as an aid to interpretation can in turn draw particular attention to foreign legal principles where these were directly considered by the reform body.[24]

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rules. Usher, J A, "The impact of EEC legislation on the United Kingdom courts" (1989) 10 *Statute LR* 95 at 108.

17 *Australian Treaty Series* (*ATS*) 1974 No 2.

18 [1981] AC 251.

19 (1983) 158 CLR 1.

20 The CLOUT database has developed by having designated national correspondents from States that have adopted UNCITRAL conventions or model laws, prepare abstracts of relevant judicial decisions and arbitral awards dealing with UNCITRAL texts. At this stage, CLOUT covers the Vienna Sales Convention, the United Nations Convention on the Limitation Period in the International Sale of Goods 1974, the Protocol to it of 1980, and the UNCITRAL Model Law on International Commercial Arbitration 1985. Australia has adopted the Vienna Sales Convention and the Model Arbitration Law, but is still considering whether it will adopt the Limitation Convention. The intention is to extend the CLOUT extracts to include the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules), United Nations Convention on International Bills of Exchange and International Promissory Notes 1988, United Nations Convention on the Liability of Operators of Transport Terminals in International Trade 1991 and the UNCITRAL Model Law on International Credit Transfers 1991.

21 Jarvin, S and Derains, Y (eds), *Collection of ICC Arbitral Awards: 1974–1985* (1990).

22 See eg Wiseman, Z B, "The limits of vision: Karl Llewellyn and the Merchant Rules" (1987) 100 Harv LR 465; Goode, R, "The codification of commercial law" (1988) 14 *Mon ULR* 1 35.

23 Kahn-Freund, O, "On uses and misuses of comparative law" (1974) *Mod LR* 1.

24 See eg Kirby P in *Commercial Union Assurance Company of Australia Ltd v Ferrcom Pty*

Computerised legal research techniques also allow law reformers and academics to have greater awareness of foreign models and proposals. Britain's inclusion in the European Union, which made English one of the official languages, has led to reporting services and official records that overcome the language barriers traditionally found between civil law and common law systems.

An integrated world economy not only leads to the development of similar trade rules but also trade techniques. Novel transactions will then tend to foster similar legal principles as they tend to follow the needs of the modern commercial environment, with less deference to traditional methods and rules. For example, specialised trade techniques have developed to accommodate the differences in nature of certain traders or economic systems. We have seen the growth of countertrade, export finance and insurance regimes to promote trade with developing and centrally planned economies and the establishment of the International Centre for the Settlement of Investment Disputes (ICSID) which aims to provide a forum for the settlement of disputes between States and nationals of other States, a development which acknowledges the growing importance of State trading in the world economy.

Another stimulus is the role of the legal profession and its more global focus in recent years. An important body is the International Bar Association, particularly through the educational and networking functions of its biannual conferences. As international commercial transactions have developed, so has the need for international legal practice. We find major law firms establishing branches in key Asian centres, London and New York. Commercial law firms seek to develop expertise in international contract negotiation, transport law, international banking and finance, international dispute resolution including arbitration, international tax planning, import and export law and foreign investment. University curricula follow the trend, albeit slowly.

Clients also play a key role. Increased export orientation demands outward looking lawyers. Multinational corporations, in the role of litigants or lobbyists, also promote standardisation by forcing current issues to be considered in numerous jurisdictions at around the same time. For example, French wine companies have made a concerted litigation effort world-wide to prevent the use of geographical appellations on wine. The Apple Computer company has been a consistent litigant world-wide in relation to software protection.

At the public law level the most important body is the General Agreement on Tariffs and Trade (negotiated in 1947) and its replacement, the Agreement establishing the World Trade Organisation completed in 1994. This grew out of the belief that a liberal trading system is an important means of preventing further world wars, which in turn led to the Bretton Woods system of trade and monetary regulatory regimes.

Another impetus has been the growth of regional harmonisation and unification, although this is more contentious as regional developments can come at the expense of multilateral ones. Nevertheless regionalism has been responsible for significant degrees of harmonisation at both national and international levels. National initiatives are relevant in federal systems. For example,

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Ltd (1991) 22 NSWLR 389 dealing with the Australian Law Reform Commission Report No 20 on Insurance Contracts (1982).

Australia's corporations legislation is a common code adopted by all the states. In the United States, the Uniform Commercial Code is a similar model law.

At the multinational level, regionalism is a crucial area for analysis as the world is arguably moving towards a collection of various economic groupings. The European Union with its completed single market and proposal for a European Economic Area encompassing the Union and the European Free Trade Area (EFTA) countries is the leading example. The North American Free Trade Agreement (NAFTA) bringing together the United States, Canada and Mexico is of similar importance. Closer to home there is the Association of South East Asian Nations (ASEAN) Free Trade Agreement (AFTA) and the Asia-Pacific Economic Co-operation Forum (APEC), an Australian initiative that has not yet reached any binding status. Australia and New Zealand have long had a free trade agreement, the current version being the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). Australia is involved in a process of seeking to harmonise business laws with New Zealand as part of ANZCERTA. Other regional initiatives can be found in Africa and Latin America.[25] Regardless of the problems that regionalism may pose for the development of a truly multilateral system, its relevance to the harmonisation of laws is, in some regions at least, self evident.

Thus we can conclude that while the world trading system started from a base of divergent rules and principles flowing from individual party and sovereign autonomy, there is now a strong and consistent set of stimuli to convergence and harmonisation of those rules and techniques. The greater tendency of international traders to use standard contracts, to accept the Vienna Sales Convention, to utilise international commercial arbitration and conflicts avoidance clauses dealing with choice of law and choice of forum issues, all help to promote common practices and legal principles applying to trading transactions.

The next sections begin the analysis of the outcomes of the above stimuli in the various substantive areas. We begin with a brief overview of the key international agencies that are assisting in the promotion of harmonised legal principles. A discussion of the content of particular initiatives in substantive areas is left to the following section. In each case the discussion is highly selective as there are literally hundreds of organisations and agreements that have some impact on Australia's commercial laws.

2. *International Agencies*

Where private trade law is concerned, the single most important agency has been the UN Commission on International Trade Law (UNCITRAL). UNCITRAL was established on 17 December 1966 and became operative on 1 January 1968. Its aim is to further "the progressive harmonisation and unification of the law of international trade".[26]

UNCITRAL's work involves the preparation of model laws, model contract clauses and legal guides. The two most important achievements have

25 See eg, Ndulo, M, "Harmonisation of trade laws in the African Economic Community" (1993) 42 *UICLQ* 101.

26 Article 8 of the Statute of UNCITRAL, UNGA Res 2205(XXI).

been in the areas of international sale of goods and commercial arbitration. The Vienna Sales Convention entered into force in Australia on 1 April 1989 through various items of state legislation. Other areas of UNCITRAL activity include limitation periods, international payments, electronic funds transfers and shipping.

The International Institute for the Unification of Private Law (UNIDROIT) is an independent agency performing similar work to UNCITRAL. Originally established in 1926 and reorganised in 1940, its aim is to "examine ways of harmonising and co-ordinating the private law of States and of groups of States and to prepare gradually for the adoption by the various states of uniform rules of private law".[27] Australia joined UNIDROIT in 1973.

In the area of commercial law, UNIDROIT developed two conventions on sale of goods which were influential in the preparation of the Vienna Sales Convention.[28] Other relevant conventions are the 1983 Convention on Agency in the International Sale of Goods (Geneva), the 1988 UNIDROIT Convention on International Financial Leasing (Ottawa) and the 1988 UNIDROIT Convention on International Factoring (Ottawa), although these are not yet operative. Other areas of current work include international protection of cultural property, international aspects of security interests in mobile equipment, international franchising, inspection agency contracts, legal issues connected with software and organisation of an information system or data bank on uniform law.

UNIDROIT has also recently adopted principles of international commercial contracts which aim to be a restatement of common principles of contract law. The principles can be used in a number of ways. They could provide a model for legislators, a guide for contract drafters, a body of substantive principles to be chosen as the applicable law of the contract and an analytical tool for understanding and interpreting contractual documents.[29]

Another relevant body is The Hague Conference on Private International Law. Early conferences operated on an ad hoc basis from the first conference in 1893 until the post World War II period when they were given ongoing status.[30] Australia is a member of the Conference. The Conference's aim is the unification of the rules of private international law: included in its work have been a number of Conventions on procedure[31] and in the contract

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27 Article 1 UNIDROIT Statute, *ATS* 1973 No 10.

28 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS); 1964 Convention relating to a Uniform Law on the International Sale of Goods.

29 Bonell, M J, "Unification of law by non-legislative means: the UNIDROIT Draft Principles for International Commercial Contracts" (1992) 40(3) *AJCL* 617.

30 220 *UNTS* 123, 226 *UNTS* 384, 510 *UNTS* 317.

31 Convention relating to Civil Procedure 286 *UNTS* 265 No 4173. Opened for signature at The Hague on 1 March 1954. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 658 *UNTS* 163 No 9432. Opened for signature at The Hague on 15 November 1965. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 737 *UNTS* 408 No 9432. Opened for signature at The Hague on 15 November 1965. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters 847 *UNTS* 231 No 12140. Opened for signature at The Hague on 18 March 1970.

area.[32] Australia has ratified the Convention on the Law applicable to Trusts and on Their Recognition and has acceded to the Convention on Taking Evidence Abroad in Civil and Commercial Matters.[33]

Governmental rules dealing with import and export trade are primarily the concern of two organisations, GATT/WTO and the Customs Co-operation Council. GATT, now subsumed into the Agreement Establishing the World Trade Organisation (WTO), is the most important of these bodies.

It is important to be aware of the unusual origins of the organisation and the limitations this has imposed on its ability to promote uniformity and liberalised trading relationships. After protectionism between the wars was seen as a cause of conflict, the feeling among post World War II politicians was that international organisations and rules would foster peace. This in turn led to the establishment of the United Nations and the development of the Bretton Woods System. The Bretton Woods System comprised the International Monetary Fund, the World Bank and the International Trade Organisation (ITO). Only the first two were ever established. ITO, promoted by the United States in the early stages, eventually floundered when it became clear that the United States Congress would not approve its establishment.[34]

While the negotiations for the establishment of the ITO were proceeding, a number of countries were anxious to start the task of tariff reduction. GATT was intended as an interim agreement supporting certain tariff reductions, with some general anti-avoidance and safeguarding provisions. It was never intended to last beyond the establishment of ITO, yet when the latter organisation did not eventuate, proponents of the GATT, including the United States President, saw the continuance of the GATT as a back door means of establishing an International Trade Organisation.

As an interim document, it obviously was not very comprehensive and was ill designed for a permanent role. It was essentially a document containing certain agreements for tariff bindings by member countries.[35] Other provisions protected those bindings by ensuring that tariff promises made would not be undermined in other ways. The essential features of the GATT were: non-discrimination between different trading partners as to trade regulations, national treatment, whereby foreign traders are not to be treated less favourably than domestic traders except through tariff imposition, the utilisation of tariffs for protection purposes rather than non-tariff barriers, reciprocity of promises and binding of tariff reductions.

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32 International Sale of Goods 510 *UNTS* 147 (15 June 1958); Law Applicable to Agency (1978) 26 *AJ Comp L* 438; Law Applicable to Trusts and on their Recognition (1984) 23 *ILM* 1389 (20 October 1984); Contracts for the International Sale of Goods (1985) 24 *ILM* 1573.

33 For a fuller analysis of the work of The Hague Conferences see Lipstein, K, "One hundred years of Hague Conferences on Private International Law" (1993) 42(3) *ICLQ* 553.

34 This was partly because the negotiations for the establishment of the ITO did not go the way various American politicians had hoped. In the end, an insufficient number saw net benefit to the United States out of the development. One key concern, for example, was the requirement by Commonwealth nations that the Commonwealth preference system should remain.

35 A tariff binding is a promise of a maximum ceiling on the tariff level for a particular product.

Because the temporary document was not comprehensive and dynamic, the contracting parties began the process of negotiating rounds to advance trade liberalisation. Early rounds were for tariff reduction purposes only. Later rounds also sought changes to the substantive law of GATT. Thus GATT became a rudimentary system for the establishment of international legal norms. The establishment of a more formalised WTO aimed to overcome some of the problems posed by GATT's humble origins.

The workings of the Customs Co-operation Council (CCC) overlap to some degree with the workings of GATT. CCC is a body dealing with customs issues,[36] concerned to promote harmonisation of the specific technical rules and practices of customs law. Greatest attention has focused on customs classification and valuation rules.

Harmonisation of classification principles has been promoted through two Conventions. The Convention on the Nomenclature for the Classification of Goods in Customs Tariffs[37] was drafted at the same time as the CCC was established. The basic aim of the Nomenclature was to ensure that the customs tariffs of all member countries use the same divisions and means of describing goods. Each country can impose whatever tariff level it likes, subject to GATT obligations. The aim of the harmonisation exercise was merely to ensure that common descriptions and interpretative principles are utilised. The Council also published Explanatory Notes to the Convention which aimed at being a practical guide to the ambit of various categories and an indication of how particular goods ought to be classified. In due course the first convention has been replaced by the International Convention on the Harmonised Commodity Description and Coding System.[38]

Where valuation is concerned, the work of the Council depends on the work in GATT in relation to its valuation rules and agreements. The GATT/WTO agreements in the valuation area are the primary international rules setting out proper methodologies for valuing imported goods for customs purposes.[39]

Another important agreement promoted by the Council is the Kyoto Convention on the Simplification and Harmonisation of Customs Procedures dealing with a number of administrative and procedural matters.[40]

These are the major organisations that operate generally in the fields of public and private international trade law. Some other key organisations are specific to a particular field. For example, the World Intellectual Property Organisation

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36 Convention Establishing a Customs Co-operation Council 15 December 1950, in force 4 November 1952, 157 *UNTS* 129. It was formed in 1950 as a result of post World War II discussions among European governments about the possibility of establishing a customs union.

37 Concluded 15 December 1950, in force 11 September 1959, 347 *UNTS* 142.

38 Concluded 14 June 1983, in force 1 January 1988, *ATS* 1988 no 30.

39 The Council also administers the Brussels Valuation Convention of 1950 which still applies for some countries. (The Convention on the Valuation of Goods for Customs Purposes, Brussels 15 December 1950, in force 28 July 1953, 171 *UNTS* 305.)

40 The International Convention on the Simplification and Harmonisation of Customs Procedures, Kyoto, concluded 18 May 1973, in force 25 September 1974, 950 *UNTS* 269. The Council also promotes other advances in customs rules and practices. A group of conventions deal with temporary admission free of duty for various kinds of goods.

(WIPO) was established on 14 July 1967 to coordinate and promote protection of intellectual property. It works closely with the specific conventions in the intellectual property area, but membership is technically distinct. Altogether some 29 separate agreements are coordinated by WIPO. The key conventions are the Paris Convention for the Protection of Industrial Property[41] and the Berne Convention for the Protection of Literary and Artistic Works.[42] The work of WIPO on these conventions now has to be looked at alongside the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) negotiated during the Uruguay Round of GATT negotiations.

Some key organisations have only a lesser range of coverage. The Organisation for Economic Co-operation and Development (OECD) is a grouping of the major developed capitalist economies; Australia is a member. OECD has no direct legislative function but seeks to be a forum where policies can be considered and coordinated. For example, it has adopted guidelines on capital movements and multinational enterprises. In addition, rigorous evaluations of the domestic economic policies of member countries are made leading to the publication of annual reports. While these have no binding effect, they nevertheless encourage the adoption of economic policies that are perceived by international capital and financial markets to be reasonable, as an unfavourable report invariably leads to unfavourable responses from those markets. In turn this promotes convergence, as OECD and markets obviously will promote common or at least similar policies.

The normative effectiveness of an organisation will usually depend upon the political slant that it displays and whether it is perceived to be biased towards a particular group of countries. Perceived biases in one organisation may also lead to the establishment of competing institutions. The first United Nations Conference on Trade and Development (UNCTAD) was held in Geneva in 1964. UNCTAD's brief is to consider and make proposals in relation to international trade and economic development issues. It has no formal rule-making power but merely works by publicising issues of concern to developing countries and seeking to influence the development of appropriate rules within other international organisations. The principal achievement of UNCTAD was the establishment of a Generalised System of Preferences under which developed countries are encouraged to provide preferential duty treatment to imports from developing countries.

Other significant aspirations have had more limited practical effect. One such initiative was the adoption at the Nairobi UNCTAD Conference in 1976 of an Integrated Program for Commodities. This aimed to improve and stabilise the markets for primary commodities. UNCTAD has also been a forum within which to promote the debate about a new international economic order which aims to establish economic norms in international law that give particular emphasis to the rights of developing countries. Here there is the potential impact of the Charter of Economic Rights and Duties of States[43] and the Declaration on the Establishment of a New International Economic Order.[44] While

41 Concluded 20 March 1883, in force 6 July 1884.
42 Concluded 9 September 1886, in force 5/12/1887, 828 *UNTS* 221.
43 General Assembly Resolution 3281(XXIX).
44 General Assembly Resolution 3201(F-VI) and 3202(F-VI).

these developments do not have any real normative effect at this stage, certain key principles are considered to underlie this evolving body of "soft law" which may in turn act as guides in future trade rules or relationships.[45]

There are many other organisations and conventions that have varying levels of importance to international trade and trade harmonisation. There are transport associations such as the International Air Transport Association, a non-government association of international airlines established in 1945, the International Civil Aviation Organisation and the International Maritime Organisation established in 1958 to promote safety at sea. In the finance field there is the Bank for International Settlements established in 1930 which now acts to foster cooperation between central banks. The International Labour Organisation was established in 1919. It is primarily research-oriented, but has established conventions on labour standards. Commodity or transaction specific bodies also exist. For example, the Food and Agriculture Organisation (FAO) is a specialist agency of the United Nations whose aim is to increase the efficiency of production and distribution of food, improve levels of nutrition and thereby decrease world hunger. FAO has drawn up a number of treaties that promote product standards. A number of international institutions are involved in the regulation of international securities trade. The most important of these is the International Organisation of Security Commissions (IOSCO). The Organisation was established as a non-governmental body in 1974 and is involved in promoting cooperation and the development of appropriate common standards. No major agreements have been reached but the Organisation is working to develop rules for common prospectus requirements for international capital raisings through harmonising disclosure standards and common minimum capital adequacy requirements.

Numerous other organisations have a lesser degree of influence on world trade and harmonisation initiatives. While the importance of all these institutions varies significantly, this survey at least shows that a significant number exist as stimuli to harmonisation and allows for the hypothesis that harmonisation initiatives may depend very much on the extent to which these organisations are encouraged and are able to flourish. We turn now to look at some of the key substantive areas and primary harmonising documents in order to pursue that hypothesis.

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45 The United Nations Institute for Training and Research (UNITAR) was commissioned to do an analytical study on the principles of the new international economic order and identified the following: "(a) the preferential treatment of developing countries; (b) the stabilisation of the export earnings of these countries; (c) permanent sovereignty over natural wealth; (d) the right of every State to benefit from science and technology; (e) the entitlement of developing countries to development assistance; (f) the right of equal participation of the developing countries in international commercial relations; (g) the common heritage of mankind; (h) the principle of free choice of economic system". Makarczyk, J, *Principles of a new international economic order: a study of international law in the making* (1988).

3. *Sale of Goods*

Probably the single most important private law harmonisation development has been the adoption of the Vienna Sales Convention. It was also the single area where the greatest efforts over time have been made. This is only right as most commercial law builds on contract principles. Because of this, any attempt to unify the law in specific contract areas without having a common understanding of basic contract norms and principles would provide for illusory standardisation.

In Australia it has been adopted through various state sale of goods Acts.[46] The Convention applies if the parties have places of business in different States and both States are contracting States, or alternatively if the rules of private international law lead to the application of the law of a contracting State.[47] The Convention only deals with sales of goods and does not include consumer sales.[48] Parties may exclude the operation of the Convention.[49] Questions of validity of the contract are left for the domestic law.[50]

The Vienna Sales Convention largely clarifies principles rather than seek to make major changes to the traditional Australian common law of contract. Some changes have, however, been made by the Convention. Allowance is made for the notion of a firm or irrevocable offer.[51] An acceptance can be valid even if it does not strictly comply with the terms of the offer, if the variation is not material or if the offeror does not object.[52] Acceptance is made by personal communication or communication to a business or mailing address.[53] There are greater rights to demand performance than is traditional under common law approaches.[54] Damages are based on the consequential loss, subject to a ceiling based on its foreseeability.[55] Rather than a doctrine of frustration, Article 79 deals with events occurring beyond the control of either party which could not have been reasonably expected to have been taken into account.[56]

Because the Convention applies automatically unless excluded, many transactions will be covered by its provisions regardless of whether the parties have considered its application or not. Section 66A of the *Trade Practices Act* 1974 (Cth) also indicates that the Convention takes precedence over the Act.

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46 *Sale of Goods (Vienna Convention) Act* 1986 (ACT), (NSW), (Qld), (SA), (WA). *Sale of Goods (Vienna Convention) Act* 1987 (NT), (Tas), (Vic).

47 Article 1.

48 Article 2.

49 Article 6.

50 Article 4.

51 Article 16.

52 Article 19.

53 Article 19.

54 Articles 46–8.

55 Articles 74–7.

56 In addition to academic commentaries and *travaux preparatoires* that could be used to expand on the meaning of the expressions in the Convention, an unrelated but nevertheless useful guide and a further pointer towards the convergence of legal principles, is the text of the Principles of International Commercial Contracts published by UNIDROIT and mentioned above. The principles aim to identify those features of contract law common to both common law and civil law jurisdictions and are acknowledged by some as a type of *ius commune* or *lex mercatoria*.

Another influence on harmonisation of contract law has been the Uniform Commercial Code in the United States. It has obviously been a harmonising influence where it applies by law, but some American cases have adopted a UCC solution even where the Code was not binding in the relevant State.[57] In addition it is invariably examined when law reform proposals are being considered in Australia.

4. *Transport*

In the transport area, both common law and statutory developments display significant levels of harmonisation.[58] In the area of international transport of goods, marine cargo liability is governed by international rules. The three sets of rules have been The Hague Rules, The Hague-Visby Rules, and now the Hamburg Rules. The Hague-Visby Rules currently apply in Australia but a mechanism is in place to introduce the Hamburg Rules.[59]

The Hamburg Rules, whose full title is the United Nations Convention on the Carriage of Goods by Sea, was prepared by UNCITRAL, adopted at a diplomatic conference in 1978 and came into force on 1 November 1992. The aim of the Hamburg Rules is to increase liability on carriers and ensure greater protection for shippers. The Australian Government decided on 12 October 1994 to defer implementation of the Hamburg Rules for a further three year period.[60]

Monopoly rules relating to liner conferences were also under review, with Cabinet deciding on 12 October 1994 to retain Part X of the *Trade Practices Act* subject to minor modifications.

Air cargo liability is covered under the *Civil Aviation (Carriers Liability) Act* 1959 (Cth) which incorporates the Warsaw Convention of 1929, The Hague Protocol of 1955 and the Guadalajara Convention of 1961. In 1989 the International Maritime Organisation (IMO) adopted an international convention on salvage, aimed at replacing the Convention for the Unification of Certain Rules of Law relating to Assistance and Salvage at Sea 1910. After consultation, the government has decided to amend the *Navigation Act* 1912 to implement the 1989 Convention. IMO is also working on the adoption of a Hazardous and Noxious Substances Convention.

The Attorney-General's Department and the Department of Transport are also reviewing the law dealing with bills of lading. This work is also being influenced by comparative models and reform exercises.

Transport issues are also covered to some extent under the United Nations Convention on the Law of the Sea.[61] The Convention also deals with the important issue of maritime zones.

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57 *Williams v Walker-Thomas Furniture Co* 350 F 2d 445 (DC Cir 1965).

58 Mansfield LJ in *Luke v Lyde* (1759) 2 Burr 882; 97 ER 614 at 887 said "the maritime law is not the law of a particular country but the general law of nations".

59 *Carriage of Goods by Sea Act* 1991 (Cth) (as amended). Part 3 — Application of the Hamburg Rules s12–6 specifically applied by s13.

60 "Review of Developments in International Trade Law" *Int'l L News* No 25 (January 1995) at 10.

61 (1982) 21 *ILM* 1261

5. *Finance and Payments*

International trade is very much dependent on a reliable method of payment that provides guarantees to both buyer and seller. The use of documentary letters of credit, whereby payment is only made in return for documents of title, ensures that the seller does not have to ship without knowing whether it will be paid and the buyer does not have to pay without knowing whether it will receive delivery. In order for traders throughout the world to have confidence in such documents, it is desirable that there be the greatest consistency in the relevant legal principles. This is the role taken by the Uniform Customs and Practice of Commercial Documentary Credits (UCP) initially drafted in 1933 and revised in 1962, 1974 and 1983 under the auspices of the International Chamber of Commerce. UCP, unlike the Vienna Sales Convention, does not constitute enacted law but are incorporated by reference into virtually all letters of credit and hence are part of the contractual terms binding on the parties.

UNCITRAL has also done considerable work in the finance area, although the relevant Conventions have not been adopted as yet. Australia and other countries are considering their position on the Model Law on International Credit Transfers, the Convention on International Bills of Exchange and International Promissory Notes. UNCITRAL is currently working on a Draft Convention on Independent Guarantees and Standby Letters of Credit.

A certain amount of harmonisation already exists in the common law world. Bills of Exchange legislation in most common law countries was based on the codified *Bills of Exchange Act* 1882 (UK).[62] Civil law countries have followed the Geneva Conventions of the 1930s.[63]

The growth of importance of cheques led to the enactment in England of the *Cheques Act* 1992 (UK) and similar legislation in Australia. The Manning Committee Review of the *Bills of Exchange Act* which was undertaken between 1962 and 1964, recommended a separate Cheques Act to facilitate uniformity in the law of bills of exchange while at the same time allowing for more flexibility where the law of cheques was concerned.[64]

Some of UNCITRAL's work in the finance area has been particularly influenced by provisions in the United States Uniform Commercial Code. That Code has also been influential in law reform initiatives in Australia, Canada and New Zealand where secured transactions are concerned. Foreign principles have also been considered by our courts in a number of cases.[65]

An indirect cause of convergence of legal principles in the finance area is the importance of the United States dollar in international trade transactions. Because many payment arrangements must operate through the United States, they become subject to United States legal principles in relation to money dealings and hence become common elements of those international transactions.

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62 The draftsperson Chalmers, M D, wrote of the process in "Codification of Mercantile Law" (1903) 19 *LQR* 10.

63 Above n7 at para A204.

64 Everett, D and McCracken, S, *Banking and Financial Institutions Law*, (3rd edn, 1992) at 193.

65 See eg *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* [1985] 1 NSWLR 545.

6. *Dispute Resolution*

The most important developments in the area of dispute resolution have related to the growing use and formalisation of international commercial arbitration. Allied to this is a growing use of conciliation and mediation where contract disputes are concerned.

International commercial arbitration builds on the presence of a valid arbitration agreement which in turn allows the parties to set their own means of dispute settlement. Such autonomy would not of itself lead to convergence of approaches and harmonisation. That process is supported instead by the important work undertaken by international organisations to provide standardised rules and procedures for the arbitration of disputes. In addition, the growth of a pool of international arbitration experts who are concerned not to adopt a parochial approach to their role, have made for the growth of this form of dispute settlement and common attitudes and rules.

The most important development was the adoption through UNCITRAL of its Model Law on International Commercial Arbitration and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UNCITRAL Model Law and the principles of the New York Convention have been adopted in Australia.[66]

The Model Law applies to international commercial arbitration where parties have their places of business in different States and where there is a written arbitration clause. The parties may agree on the place of arbitration and the rules of procedure. UNCITRAL has also provided arbitration rules that may be adopted by the parties. The Model Law and the Arbitration Rules allow the arbitrator to find the proper law of the contract through choosing whichever conflict of law rules the arbitrator deems appropriate with the overriding direction to prefer any choice made by the parties themselves. In 1994 UNCITRAL also prepared draft guidelines for preparatory conferences in relation to arbitral proceedings. This was to be considered at the 28th Annual Session of UNCITRAL in May 1995.

The New York Convention allows arbitration to be effective by providing a mechanism for the enforcement of such awards. Because arbitrators have no practical enforcement powers, and because arbitration awards are made outside the court system, for international arbitration to be effective, there is a need for a legislative scheme to facilitate the enforcement of such awards.[67]

The most important institution conducting international commercial arbitrations is the ICC International Court of Arbitration. ICC adopted revised rules of conciliation and arbitration in January 1988.[68] The International Court of Arbitration does not sit as a separate court but instead acts as an organising authority in relation to arbitrations referred to it. A number of countries including Australia have established arbitration centres that aim to attract work in the field of international alternative dispute resolution. After the ICC

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66 *International Arbitration Act* 1974 (Cth).

67 Certain limitations are found in the Convention in relation to public policy and questions of reciprocal rights with particular parties.

68 (1989) 28 *ILM* 231.

Court, the most important are the London Court of International Arbitration, the American Arbitration Association in New York and the China International and Economic Trade Arbitration Commission. Local institutions are the Australian Centre for International Commercial Arbitration and the Australian Commercial Disputes Centre.

Developments in relation to international litigation and execution of judgments have been less advanced. The Hague Conference on Private International Law led to a Convention on Taking of Evidence Abroad in Civil or Commercial Matters 1970. This Convention entered into force for Australia on 22 December 1992. It provides a procedure in relation to the taking of evidence in civil or commercial judicial actions. Contracting States designate central authorities to receive requests for taking evidence and allows for additional authorities for such purposes.[69] Bilateral arrangements with New Zealand have been established under the *Evidence and Procedure (New Zealand) Act* 1994.

The Hague Conference also developed a Convention Abolishing the Requirement of Legalisation of Foreign Public Documents 1961. This was acceded to by Australia on 11 July 1994 and was to come into effect in March 1995. Enacting legislation is contained in the *Foreign Evidence Act* 1994 (Cth).

The *Foreign Judgments Act* 1991 (Cth) allows for enforcement of foreign judgments where there is substantial reciprocity of rights to enforce Australian judgments. A more extensive bilateral agreement is the Australia/United Kingdom Agreement providing for Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters which came into force on 1 September 1994 through regulations under the *Foreign Judgments Act* 1991. Other reciprocal arrangements have been entered into under the Act and include Japan, Germany and France. No arrangement exists with the United States.

Another development in the field of dispute resolution was the establishment of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID)[70] adopted in 1965 through the work of the World Bank. The Convention was ratified by Australia in 1991. As the title implies, the Convention allows for a standard methodology and venue for the settlement of investment disputes between States and nationals of other States, thus protecting individuals where State trading is concerned. In 1978, a decision was reached to allow the centre to be used where one of the parties is not a contracting State or a national of a contracting State.

7. *Antitrust and Trade Practices Law*

There are a number of problems with harmonisation of competition policy. First, many countries do not even have competition laws. Second, there are

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69 In Australia's case, the designated parties are the Secretary of the Commonwealth Attorney-General's Department and the Registrars of the State and Territory Supreme Courts. The Convention applies between Australia and those parties that have accepted our accession. There are currently eleven contracting States who have done so, including Great Britain, USA and the Federal Republic of Germany. The enacting legislation is contained in the Commonwealth and State Evidence Acts. A more elaborate agreement with New Zealand is contained in the *Evidence and Procedure (New Zealand) Act* 1994.

70 (1965) 4 *ILM* 532.

quite significant conceptual differences between different regimes. The private nature of the relevant behaviour, the difficulty of finding information and the role of multi-national corporations also make it particularly difficult to administer such systems even if common principles can be agreed upon.

Nevertheless, Australia's trade practices legislation owes much to foreign models. Anti-monopoly laws can be traced back to the British Statute of Monopolies and even to Islamic and other early legal systems. Antitrust law and analysis took a quantum leap, however, with the enactment of the *Sherman Act* 1890 (US). Australia's current legislation was initially inspired by United States laws. Policy makers also proceeded with comparative analysis of the European perspective, and the final model adopted was a combination of the prohibitions of the United States model and the authorisation and exemption system to be found in the British and European Union approach.[71]

Numerous antitrust cases in Australia have also looked at foreign authorities to help determine the meaning of key concepts in the legislation.[72] For example, American and European cases, texts and journal articles were referred to by the High Court in the leading market power case of *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd.*[73]

Parliament has also drawn attention to comparative models in ways which will influence judges in there approaches to interpretation. For example, the Explanatory Memorandum to the Trade Practices Revision Bill 1986 (Cth) indicates that section 46(3) of the Australian legislation is aimed at achieving a similar approach to the one adopted by the European Court of Justice in dealing with market power under Article 86 of the European provisions. This is a strong directive to judges as to the purpose of the legislation and as to sources of persuasive authority.

At the international convention level, antitrust law has been one of the least successful areas for treaty development. While the Uruguay Round of GATT negotiations moved out into a number of new trade related areas, no work was done in the field of competition law and policy.[74]

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71 Brunt, M, "The Use of Economic Evidence in Antitrust Litigation: Australia" (1986) 14 *ABLR* 261 at 265. In some specific areas a choice has been made to follow a particular system. For example, the resale price maintenance provisions are modelled on the British legislation.

72 Sheppard J in *O'Brien Glass Industries Ltd v Cool & Sons Pty Ltd* (1983) ATPR 40–376 at 44–471.

73 (1988) 83 ALR 577. Where dominance is concerned for the merger provisions, Northrop J in *TPC v Ansett Transport Industries (Operations) Pty Ltd* (1978) 20 ALR 31 relied significantly on the ECJ case of *United Brands Co v Commission of the European Communities* [1978] 1 ECR 207, 1 CMLR 429. Where price fixing is concerned, Lockhart J in *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1982) 44 ALR 557 indicated that his approach to the interpretation of s45A was consistent to the approach taken by the US courts under the *Sherman Act*.

74 Coverage of competition policy had been considered in the lead up to the establishment of the GATT in 1947, with anti-trust provisions being included in the Havana Charter that formed the basis for the proposed but never established International Trade Organisation. Further consideration was given to this issue by GATT in 1960. (*Restrictive Business Practices: Arrangements for Consultations.* Report of Group of Experts, adopted 2 June 1960 (I/1015), GATT BISD 9th Supplement at 170–9).

Some preliminary work has been undertaken in other institutions. In 1980 the United Nations General Assembly adopted a set of Multilaterally Agreed Principles and Rules for the Control of Restrictive Business Practices. OECD has also been involved and has prepared Guidelines for Multilateral Enterprises (1976), a Council recommendation concerning Co-operation between Member Countries on Restrictive Business Practices Affecting International Trade (1986) and a Council recommendation for Cooperation in Areas of Potential Conflict Between Competition and Trade Policies (1986).

In some areas harmonisation in one field can lead to harmonisation in another. For example, the New Zealand *Commerce Act* 1986 provisions were largely modelled on Australian trade practices legislation, which in turn facilitated the agreement to remove anti-dumping duties from trade between the two countries and instead rely on competition law for that purpose. Dumping complaints are now handled by the misuse of market power provisions in the legislation.

8. *Foreign Investments*

While foreign investment regulation was traditionally seen as a key aspect of sovereign autonomy, it eventually became obvious that certain standards needed to be developed to inspire confidence in international investors. Bilateral investment protection agreements have been entered into by the government with a number of key trading partners with a view to providing guarantees to investors in relation to certain political risks. Commercial risks are not covered.[75]

At the administrative level, the approach that the Foreign Investment Review Board and Federal Treasurer take to investment and takeover decisions seeks to be consistent with guidelines contained in the OECD Declaration on International Investment and Multinational Enterprises, originally drafted in 1976 and modified in 1979 and 1984. In a Ministerial Statement of 22 June 1976 the then Treasurer announced that Australia was associating itself with the OECD Declaration and the three associated decisions, being the Decision of the Council on Intergovernmental Consultation Procedures on the Guidelines for Multinational Enterprises, Decision of the Council on National Treatment and the Decision of the Council on International Investment Incentives and Disincentives.[76] The Declaration and related Decisions call for treatment consistent with international law and no less favourable than that accorded to domestic enterprises in like situations, namely, a national treatment obligation. There is a reservation in relation to regulations covering entry of foreign investment and establishment of foreign enterprises.[77]

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75 Investment agreements have been entered into with China (1988), Papua New Guinea (1991), Vietnam (1991), Poland (1992), Hungary (1992), Indonesia (1993), Hong Kong (1993), the Czech Republic (1994) and Romania (1994). A number of others are currently in the stage of being negotiated or implemented.

76 Press Release of the Treasurer, 22 June 1976, No 114/1976 cited in Flint, D, *Foreign Investment Law in Australia* (1985) at 146.

77 Such guidelines can be considered by the administrators even though not expressly contained within the legislation if they are within the constitutional powers of the Common-

9. *Miscellaneous*

A number of other areas display similar tendencies. While Australia's consumer credit legislation was originally modelled on English legislation, after government reports in Australia and England, a decision was made to refer reform to a committee chaired by Professor Arthur Rogerson of the Adelaide Law School whose proposal mirrored the approach then being propounded for the United States in the Uniform Consumer Credit Code.[78] This was particularly influential on recent reforms.

Insurance law has been traced back to ancient times with the modern insurance contract being seen as founded on the commercial practices of 14th century Italian merchants.[79] Common law marine insurance principles were codified in the *Marine Insurance Act* 1906 (UK) which in turn was the model for the *Marine Insurance Act* 1909 (Cth).[80] Mutual insurance is the norm for the bulk of the worlds sea vessels through mutual insurance organisations known as clubs.[81] Private bodies such as Lloyd's of London have also been influential in standardising contractual terms.

Historically, international conventions dealing with intellectual property issues have been developed through the auspices of the World Intellectual Property Organisation (WIPO). In the Uruguay Round of GATT negotiations, a separate negotiation was held on Trade-related Aspects of Intellectual Property Rights leading to a final agreement on this matter. The results are discussed below when the outcome of the Uruguay Round is examined in more detail. Bilateral copyright agreements have been entered into recently with Singapore and Indonesia.

Where litigation is concerned, as in other fields, foreign judgments are becoming increasingly important in domestic litigation. For example, the European case of *Centrafarm BV and Adriaan der Peijper v Winthrop BV*[82] was cited with approval by the *Federal Court in Fender Australia Pty Ltd v Bevk.*[83]

In the field of technology, there are the United Nations Rules for Electronic Data Interchange for Administration, Commerce and Transport (EDIFACT) dealing with international data standards and the CMI rules for electronic bills of lading.

Product liability principles around the world have traditionally followed domestic contract and tort law. Nevertheless there is now a growing trend towards stricter forms of product liability on manufacturers. New Zealand operates a comprehensive no fault scheme under the *Accident Compensation Act*

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wealth. *Murphyores Inc Pty Ltd v Commonwealth* (1975–76) 136 CLR 1.

78 Duggan, A J, Begg, S W and Lanyon, E V, *Regulated Credit: The Credit and Security Aspects* (1989) at 20.

79 Tarr, A A, Liew, K-L and Holligan, W, *Australian Insurance Law*, (2nd edn, 1991) at 1.

80 Kelly, D St L and Ball, M L, *Principles of Insurance Law in Australia and New Zealand* (1991) at 13.

81 Above n79 at 411.

82 [1974] ECR 1183; [1974] 2 CMLR 480.

83 (1989) 25 FCR 161.

1982 (NZ). United States tort law imposes strict liability where products are "defective" which in turn is held to mean "unreasonably dangerous".[84]

In 1985 the Commission of the European Communities issued a directive on product liability. Article 1 indicates that the producer is liable for damage caused by defects in its products. The claimant must prove defect and damage. The main fault type defence is if the state of scientific or technical knowledge at the time the goods were put into circulation was not such as to allow the existence of the defect to be discovered.[85] After a Law Reform Commission and Industry Commission analysis of the question of product liability, Australia has now adopted rules based on the European Union approach. These provisions are contained in the *Trade Practices Act*. [For further discussion see Harland below at 336.]

The area of company law is one where there are only select converging developments. Section 1022 of the *Corporations Law* dealing with disclosure requirements for prospectuses is seen as having been influenced by the *Financial Services Act* 1986 (UK).[86] There is mutual recognition of prospectuses for equity issues between Australia and New Zealand operative from September 1987.[87] There is also the work of IOSCO, the international organisation of securities commissions mentioned in the previous section. Memoranda of Understanding have also been entered into on a bilateral basis with securities regulators from the United Kingdom, United States, Hong Kong and New Zealand. United States organisations have also sought to promote harmonisation. For example, the United States Securities Exchange Commission has published papers identifying ways of promoting uniform disclosure standards.[88]

In the tax arena, there has been little in the way of harmonisation that affects Australia, although considerable work is being done within the European Union. The only significant international development has been the proliferation of double tax agreements whereby jurisdictions which each may prima facie wish to tax a particular international transaction, agree on a common basis for selecting only one taxing jurisdiction in those circumstances. Most double taxation agreements are based on the OECD Model Double Tax Convention. This is not really a harmonisation initiative but rather one of conflict resolution and demarcation.

10. Procurement

Government procurement of goods and services is an important feature of the modern economy. It can only serve to promote efficiency in government procurement if there are clear and consistent rules adopted by all countries. In addition, government procurement practices can display protectionist biases.

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84 Goldring, J, "Australia and the World of Product Liability" in Beerworth, E (ed), *Contemporary Issues in Product Liability Law* (1991) at 57.

85 British provisions are contained in the *Consumer Protection Act* 1987 and were subject to challenge by the Commission before the European Court of Justice.

86 Vodicka, M, *International Securities Trading* (1992) at 36.

87 NCSC Policy Statement Release 146, September 1987.

88 SEC Release No 33–6568.

In 1993, UNCITRAL adopted a Model Law on Procurement of Goods and Construction and a Guide to Enactment of that Model Law. A working group was asked to consider the inclusion of services in the Model Law which in turn led to the adoption of the Model Law on Procurement of Goods, Construction and Services by the Commission in May 1994. At this stage no Australian government action on the Model Law has been signalled.

In addition to the UNCITRAL Model Law dealing at the private level, GATT/WTO contains an agreement on government procurement seeking to guarantee a more open and non-protectionist approach to procurement decision-making. Countries around the world have also moved to more limited grounds for immunity by State traders, which adds further stimulus to State trading.[89]

11. *Domestic Customs Disputes*

As pointed out above, Australia's import and export laws are almost entirely derived from treaties entered into through GATT and the Customs Co-operation Council. Recent changes following the conclusion of the Uruguay Round of GATT negotiations are examined in the balance of this article. At this stage it is merely worth pointing out the importance of foreign authorities in customs litigation. Customs cases in Australia have consistently referred to American and European cases. For example, in *Re Gissing and Collector of Customs* [90] the Administrative Appeals Tribunal looked at the American doctrine of entireties in considering how sets of goods were to be classified. In *Rheem Australia Ltd v Collector of Customs (NSW)*[91] the Federal Court looked at the ECJ case of *Baupla GmbH v Oberfinanzdirektion Köln*[92] on a question of tariff classification. In *McDowall and Partners Pty Ltd v Button*[93] the Federal Court considered the European case of *NTN Toyo Bearing Company Ltd v EC Council*[94] in relation to anti-dumping law.

The balance of this article addresses Australia's import and export laws and other government regulations and considers on a selective basis, the degree to which these have been affected by international treaties. In particular, it addresses the likely future impact on Australia's trade laws of the recently concluded Uruguay Round of GATT negotiations which has led to the establishment of a World Trade Organisation. In this article, rather than analyse the results per se, we consider the question of the extent to which the GATT/WTO system has stimulated convergence of international trade regulations.

A general limitation is that while the Agreement is common, it does allow for differential treatment of developing countries and provides certain exemptions such as those which can be utilised by countries with balance of payments difficulties. Centrally planned economies have also been treated

89 *Foreign States Immunities Act* 1985 (Cth).
90 (1977) 1 ALD 144.
91 (1988) 78 ALR 285.
92 [1975] ECR 989.
93 (1983) 79 FLR 166.
94 (1979) 2 CMLR 257.

differently at the time of their accession, as the extent of State trading makes general prescriptions of free trade relatively meaningless.

A particular difficulty in promoting uniformity through international economic organisations is that the ultimate effect of GATT norms depends on the domestic legal and administrative system in each country. Here there may be differences in constitutional law principles as to the immediate effect or otherwise of the international treaty, the approach to treaty interpretation, the right of individuals to challenge administrative decision-making, the right of individuals to argue that legislation is unconstitutional and the practical likelihood of any such arguments being successful. Problems of implementation are exacerbated in federations such as Australia where the Commonwealth Government has sole power to negotiate treaties but where many areas of commercial regulation are predominantly found at the state level.

We also need to be aware that significant gaps still exist, both within the agreements and generally in international economic law. Some key economic issues are not being addressed by any international treaty or organisation. For example, we have said that there is no comprehensive international agreement on taxation or competition law to stand alongside the agreements on foreign exchange and trade through the IMF and GATT/WTO respectively. International environmental law issues are also being seen as more important, with some pundits suggesting that we might even have a GATT/WTO "Green Round" in the future. We therefore need to consider whether a regime that seeks to promote fair and efficient trade regulation rules but which does not cover some significant areas affecting such trade, might be flawed to some significant degree at least.

A further conceptual problem worth raising before analysing the specific agreements is the relationship between drafting and adjudication in the international arena. Like any international treaty, the GATT agreement is essentially contractual in nature rather than legislative. Members only wish to be bound by what they have agreed to. This encourages greater specificity in drafting as most members do not concede to an adjudicatory body, the same law-making powers as are found in domestic legal systems. That specificity and arbitral restraint can, however, encourage loophole spotting and avoidance techniques. Such avoidance techniques put greater strain on adjudicators and the adjudicatory mechanism which in turn can devalue the system in the eyes of its participants.

These and other problems led a number of countries to consider that a new round of trade talks was vital.[95] Tariff levels world-wide were relatively low

95 The round started on 20 September 1986 in Punta del Este, Uruguay. It was due to end in December 1990. This did not happen. Final agreement was reached on 15 December 1993 when the Trade Negotiations Committee adopted the draft final act and schedules. Minister then met in Marrakesh on 15 April and signed the agreement. The WTO Agreement was contained in a Final Act signed by the parties. Under the Final Act, the parties have agreed to submit the document for consideration by their respective competent authorities and to adopt the ministerial declarations and decisions. The WTO Agreement is to be open for acceptance as a whole. Parties who are not Contracting Parties to GATT must first conclude negotiations for accession to the General Agreement. In doing so, they must complete separate schedules of tariff bindings. The aim was to implement the proposals and have the new World Trade Organisation established by 1 January 1995.

but there was a great need to revitalise the organisational and dispute settlement function and in addition, to broaden the substantive rules in particular areas. A further reason was the recognition that for industrialised countries, there was a glaring gap, namely, that the GATT Agreement only dealt with trade in goods. Yet in most industrialised countries, more than 50 per cent of the workforce is involved in services sectors such as banking and finance, law, accounting, medicine, engineering, tourism and transport. These services are also sought to be traded internationally but often in the face of significant government barriers and, at times, outright prohibitions.

A key problem often found in international treaty negotiations is that in many instances, the words chosen may hide a failure to fully agree, or at least are intentionally vague so as to allow the parties to come away with different views as the normative effect of the agreement and still publicly claim that a valuable and worthwhile agreement was reached. Here it is much harder to assert when this was the case although the writings of insiders are a valuable guide.

We turn now to an examination of the key features of the new agreements. We concentrate primarily on those aspects of the agreements that relate to the theme of this article, namely the effect on Australian economic law of international norms and developments.

12. *Agreement Establishing the World Trade Organisation (WTO Agreement)*

Article I formally establishes the World Trade Organisation. Article II.1 indicates that WTO provides the common institutional framework in matters relating to the Agreements and associated legal instruments in the annexes. Those instruments, known as "Multilateral Trade Agreements", are integrated with the WTO Agreement.[96]

Article III sets out the functions of WTO. These are to implement and foster the objectives of the Agreement, provide a forum for negotiations, administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) contained in Annex 2, administer the Trade Policy Review Mechanism (TPRM) and cooperate with the IMF and the World Bank.

Article IV sets out the structure of WTO. There is to be a Ministerial Conference at least once every two years. Between meetings of the Ministerial Conference, its functions are conducted by a General Council. The General Council also carries out the functions assigned to it by the Agreement and establishes rules of procedure for itself and committees. It convenes to discharge the responsibilities of the Dispute Settlement Body (DSB) and the Trade Policy Review Body provided for in the TPRM.

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96 A number of Plurilateral Trade Agreements, namely the Agreement on Trade in Civil Aircraft, the Agreement on Government Procurement, the International Dairy Agreement and the International Bovine Meat Agreement are only to bind those members that have accepted them.

Other councils are established for Trade in Goods, Trade in Services and for Trade-related Aspects of Intellectual Property Rights (TRIPS) which operate under the guidance of the General Council. The Council for Trade in Goods oversees the Multilateral Trade Agreements in Annex 1A. The Council for Trade in Services oversees the functions of the General Agreement on Trade in Services (GATS). The Council for TRIPS oversees the Agreement on TRIPS.

Article V allows for relations with other organisations. Article VI establishes a Secretariat of WTO headed by a director-general. The Ministerial Conference appoints the director-general who in turn appoints members of the staff of the secretariat.

Decision-making is a major issue in the design of any international organisation and has obvious implications for the likelihood that further harmonisation and liberalisation may ensue. Should voting power be provided on a one country one vote basis or should voting be in proportion to size? Should majority rule apply? Such an approach may have negative implications as the more powerful parties would be easily out-voted if majority rule always applied and they would as a result be less likely to support such a system.

Article IX indicates that WTO will continue the practice of decision-making by consensus followed under GATT 1947. A decision will be taken to be by consensus if no member present formally objects to the proposed decision. If a decision cannot be arrived at by consensus, the matter shall be decided by voting. In theory this means that anyone can call for a vote, but the practice may be different, with consensus remaining the overwhelming norm. In the case of a vote each member has one vote. Decisions are by majority unless otherwise provided in the Agreement. A consensus model ensures restraint in development of principles but at least ensures optimal harmonisation when new agreements are reached.

The governing bodies also have an interpretative function. Article IX.2 indicates that the Ministerial Conference and General Council have the exclusive authority to adopt "interpretations" of the WTO Agreement and the MTAs. A decision to adopt an interpretation shall be taken by a three-fourths majority of the members. It goes on to indicate that the paragraph should not be used to undermine the amendment provisions in Article X.

There are many unanswered issues in this clause. How binding are such interpretations? Could a minority voter assert a contrary position before a panel? Is it possible to provide an interpretation on a matter on which the agreement is silent or is this more than an interpretation? While these are relevant academic questions, experienced GATT officials are not likely to launch into adventurous interpretation mode and one can presume that the consensus mode will remain the norm. In turn this means that the interpretation power is unlikely to be a key means of advancing the development of WTO principles.

More important is the power of amendment although the consensus model again provides a strong braking force on any reform initiative. Article X now provides that at least a two-thirds majority is needed merely to submit proposals for change. Amendments to certain Articles require unanimity. These are Article IX of the WTO Agreement dealing with decision-making, Articles I and II of GATT 1994, Article II.1 of GATT and Article 4 of the Agreement on TRIPS. Other amendments require a two-thirds majority but are only binding

on those that accept them. The Ministerial Conference can also decide by a three-fourths majority that certain amendments are of such a nature that members who do not accept them within a specified period are free to withdraw from WTO or remain with the consent of Ministerial Conference. This relates to those changes that would affect the rights and obligations of members. For those that do not alter rights and obligations, a simple two-thirds majority is required to make them effective for all members. Amendments to the Understanding on Dispute Settlement and TPRM require consensus.

It is consistent with the history and flavour of the GATT system that amendments remain difficult under the new system. In any event, the main legislative task ahead is to fill the gaps that are in the agreements and which expressly call for further negotiation.

We have previously said that effective harmonisation depends heavily on the way the obligations are implemented domestically. Article XVI.4 indicates that members shall ensure the conformity of their laws, regulations and administrative procedures with their obligations as provided in the agreements. This is seen by many academics of late as a high priority issue, particularly as the system does not have binding domestic effect in most countries.[97]

13. *Multilateral Agreement on Trade in Goods*

The WTO Agreement has four annexes. Annex 1A is the Multilateral Agreement on Trade in Goods. It in turn contains 13 separate agreements, including the General Agreement on Tariffs and Trade 1994, revised forms of the Tokyo Round Codes which modified and elaborated on earlier GATT provisions and the agreements in new areas such as services and intellectual property.

14. *The General Agreement on Tariffs and Trade 1994*

GATT 1947 is stated to consist of the original agreement, namely GATT 1947 as amended, protocols and certifications relating to tariff concessions, protocols of accession, waiver decisions and other decisions of the contracting parties to GATT 1947, plus seven Understandings and a Protocol.[98]

The fact that there are numerous complex documents in an organisation with a loose and evolving character raises interesting questions of law as to the exact source and nature of its legal obligations. In addition, there are the

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97 Historically, there was some international debate about whether the GATT was self executing or not. The same question arises with the WTO. This will depend on the constitutional structure of each country. One of the leading GATT scholars, J H Jackson has asserted that GATT was not intended to operate in this way, a view supported by the US courts and the European Court of Justice. Where the European Union is concerned, however, other academic scholars assert that it is self executing, notwithstanding the ECJ's attitude and has, through the constitutional structure of the Union, a status higher than any domestic legislation. Where Australia is concerned, it has long been an accepted proposition that with the rarest of exceptions, no international Treaty is self executing.

98 The Marrakesh Protocol to GATT 1994 indicates when tariff schedules become operative and other matters relating to those schedules. The Understandings relate to Article II:1(b), Article XVII, Article XXIV, Article XXVIII, Article XXXV, balance of payments provisions and waivers, all under GATT 1994.

decisions of the contracting parties to the GATT Agreement either generally, or through the dispute settlement process. While these are highly relevant in practice, there is no consensus as to whether these have a legislative or common law function. If the sources of legal norms are less clear, the ultimate harmonising effect of such norms is likely to be reduced. The Uruguay Round agreements aim to resolve more carefully the status of the various primary documents, although the questions still remain to some degree at least. First one needs to recall that GATT 1994 is defined to include GATT 1947 and other documents in force plus agreed Understandings. Article XVI.3 of the WTO Agreement indicates that its provisions prevail over the provisions of any MTAs in the event of a conflict. The general interpretative note to Annex 1A to the WTO Agreement indicates that if there is a conflict between GATT 1994 and one of the other agreements in Annex 1A, then the provision in the other agreement shall prevail.

Article XVI.1 is an interesting provision from a legal obligation point of view because it indicates that, except as otherwise provided, the WTO shall be guided by the decisions, procedures and customary practices followed by the contracting parties to GATT 1947 and the bodies established within that framework. This does not deal with the arguments that would inevitably arise as to how to identify and prove those practices and what to do if they conflict with an element of the new agreement.

15. *The Substantive Agreements*

For the purposes of this article, we concentrate on those areas where new rules will over time have the greatest impact on domestic rules of particular interest to legal advisers. The areas selected are services trade and intellectual property.

A. *Services*

Annex IB to the WTO Agreement contains a General Agreement on Trade in Services (GATS Agreement) that was successfully negotiated in the Uruguay Round. The GATS Agreement is particularly important as there is no private law agreement in the services area that corresponds to the Vienna Sales Convention.

One major difficulty in the services area that is a major barrier to harmonisation is the clear distinction between the aims of the developing countries and the aims of the developed countries. Developed countries are very keen to export their services such as banking and insurance without government restrictions in the host country. Developing countries, on the other hand, aim to establish these key industries and feel that some levels of protection are needed to develop what they believe to be the necessary infrastructure elements in their domestic economies.[99]

A further problem facing harmonisation in this area is that if all service transactions with some international element were dealt with under a trade liberalising

99 Another political impediment was that services has been the weakest element of European integration. Free movement of goods has largely been achieved but similar obligations for services are a long way behind. It is hard to get a meaningful change in GATT/WTO without European support.

agreement, this would take the jurisdiction of the document far beyond the initial GATT Agreement. It would cover labour movements, capital movements and investment rights. While there is nothing conceptually wrong with this, it does make it far less likely that such a comprehensive agreement could be negotiated.

A further drafting problem is that all services issues are not tariff barrier issues. There are simply no tariffs on services. There is no border inspection as there is with customs administration thus there is no obvious means to offer acceptable protection or vet services trade. Instead of border laws affecting such trade, we have domestic laws affecting most services trade. These laws generally apply to all services trade and hence cannot readily distinguish international trade from domestic trade. Furthermore, domestic laws covering services trade tend to be highly restrictive even for local suppliers and even in the more open economies. We find government-owned banks, government licensing of professional bodies such as doctors and lawyers, government airlines, strict controls on migration laws (relevant for trade in labour services), national shipping lines, shipping cartels and tight controls on the waterfront. Thus even in the more open market economies, many of these industries are simply not run on free market lines domestically.

Another significant problem is that many of the barriers in the services industry are not directly imposed by governments but by the suppliers themselves. Service industries have particular monopoly and oligopoly problems — there is a need to impose some obligation on those entities but GATT/WTO is merely a regime of agreements between national governments. It cannot readily bind multinationals or monopolists. Yet if it is only limited to national governments it will have little ultimate effect on some key parts of the services sector.

A further jurisdictional problem arises in federations such as Australia. Many regulations covering the service sector are state government administered. For example, there is not even free trade in legal services in Australia among the various states. It is difficult to get agreement at the international level if state governments need to be involved. Furthermore, there is no direct binding obligation on states. Article I defines the scope of the GATS Agreement. For reasons outlined above, it would be unsatisfactory if it only applied to national laws, particularly in federations. The Agreement consequently deals with measures by central, regional or local governments, and authorities and non-governmental bodies dealing with delegated powers from those governments. While the Agreement wishes to regulate these other bodies, only the member national governments are bound. Thus the obligation is placed on each member under Article I.3(a) to take "such reasonable measures as may be available to it to ensure their observance by regional and local governments and authorities and non-governmental bodies within its territory".

Another problem is that services trade usually involves a different style of regulation. Trade in goods is regulated by looking at the output of production, the goods themselves. Services are not usually regulated by output. For example, we do not generally say that legal advice has to conform to particular specifications, although it is true that there are consumer protection standards. Instead, we more commonly say that lawyers need to have prescribed qualifications, thus we find many input regulations. Once again this is not a barrier issue.

Another problem is that it is harder to treat questions of liberalisation separately from questions of harmonisation in the services sector. Where trade in

goods is concerned, GATT has traditionally only been interested in removing barriers, not harmonising exact levels of rules, although one obviously affects the other. Where services are concerned, it would be particularly hard to have parties free up trade without having an agreement on harmonisation. For example, if two countries cannot agree on minimum standards for medical qualifications, would they be expected to allow each other's doctors to operate in their own country?

The key drafting issue that faced the Uruguay Round negotiators was to see which GATT norms should apply and what new ones needed to be added. Given that non-discrimination is so central to the original aims of GATT, the first question was to see how a most favoured nation (MFN) obligation would apply in the services sector. While MFN and national treatment are important elements of any international trade treaty, of themselves they do not promote liberalisation of trade in services because most services trade requires movement of factors of production or rights of establishment. While norms of MFN and national treatment are desirable, negotiating parties could not be expected to free up services trade overnight. The question then becomes how to promote those goals and at the same time develop exemptions that are practical but do not undermine the entire objective. Article II provides for immediate and unconditional most favoured nation treatment. Inconsistencies can be maintained provided they are listed in and meet the conditions of the Annex on Article II Exemptions.[100] In the short term, such lists are elaborate.[101]

Specific commitments are contained in Part III. Article XVI indicates that treatment shall be no less favourable than that provided for under the terms, limitations and conditions agreed and specified in each country's Schedule. This makes it clear that the GATS Agreement is merely a framework. In the short term, the essence of the results is the promises made in the various Schedules.

Article XVI.2 lists the type of limitations that are proscribed unless specified in the Schedule. These relate to limitations on the number of service suppliers, on the value of service transactions or assets, on the number of service operations or quantity of service outputs, on the number of natural persons that may be employed, on the participation of foreign capital in terms of maximum percentage limits and on the types of legal entity through which a service supplier may supply a service.[102]

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100 There is a further limited exemption for "advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed" Article II.3.

101 Another important limitation is contained in Article XIII which exempts government procurement for governmental purposes as long as they are not with a view to commercial resale or with a view to use in the supply of services for commercial sale. This leaves a significant gap as governments procure a significant percentage of services trade. Article XIII.2 provides a commitment to negotiate on government procurement within two years of the date of entry into force of the WTO Agreement.

102 Where national treatment is concerned, fully national treatment would mean giving rights of establishment to foreign suppliers. If a services agreement is negotiated on a conditional MFN basis, that is, only promising non-discrimination for others who adopt similar obligations, which could only be expected given that it is not an elaboration of GATT norms but an entirely new agreement, and given the need to consider which foreign suppliers would be given domestic establishment rights, services negotiations display a strong bilat-

Article XVII, which contains the national treatment obligation, requires treatment no less favourable in respect of the sectors inscribed in the Schedule. The treatment can be different. Article XVII.3 indicates that different treatment will be considered to be less favourable if it modifies the conditions of competition in favour of local services.

Article XX indicates that members shall set out their specific commitments in terms of market access, national treatment, time frames, entry into force and additional undertakings. Schedules inconsistent with the market access and national treatment requirements are to be clearly specified. Thus for each service sector included, members must say how each of the various commitments will apply.

Article XXI indicates that Schedules may be modified after three years have elapsed. Negotiations are to ensue on any necessary compensatory adjustment, are to be made on an MFN basis. If no agreement is reached there is an option for arbitration. If there is no compliance with the arbitration findings, the member affected may withdraw substantially equivalent benefits. These may be on a discriminatory basis.

A services agreement also needs to have strong transparency obligations because there is no single Act of Parliament such as a customs tariff that sets out the total regulatory regime. Article III provides for general transparency, notifications to the Council for Trade in Services on an annual basis, prompt responses to requests by other members for specific information and the establishment of one or more enquiry points.[103] Article III bis indicates that confidential information which would be contrary to the public interest or would prejudice legitimate commercial interests need not be disclosed.

Article VI calls for domestic administration in a "reasonable, objective and impartial manner" and provides for the establishment of judicial, arbitral or administrative tribunals or procedures and notification of authorisations within a reasonable period of time. Where domestic tribunals are concerned, these rights are unlikely to be very controlling as many of the rules will be government policy initiatives not open to challenge. The Article also allows the Council for Trade in Services to establish appropriate bodies to develop disciplines to determine whether qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade, are based on objective and transparent criteria and are not more burdensome than necessary. Article VII allows for members to recognise the education or experience and licences or certifications granted in a particular country. While this suggests some bilateral approach, Article VII.3 indicates that recognition shall not be accorded in a manner which constitutes discrimination between countries or a disguised restriction on trade in services.[104]

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eral focus within a multilateral framework. Oxley has pointed to the risk that service traders would merely give each other access under such a framework for negotiations, which is a typical oligopoly practice and not real liberalisation. Oxley, A, *The Challenge of Free Trade* (1990) at 189.

103 Such enquiry points were to be established within two years of the date of entry of the WTO Agreement.

104 Article VIII deals with the requirement that Members should ensure that monopoly suppliers do not act in a manner inconsistent with that Member's obligations under Article II and

Article XIV deals with general exceptions. Restrictive measures are allowed to protect public morals or maintain public order, protect human, animal or plant life or health, prevent deceptive or fraudulent practices and protect privacy and safety. There are also exemptions for certain tax measures. Article XIV bis deals with security exemptions. Earlier drafts had also considered the possibility of exempting restrictions for cultural reasons. This is of particular interest in the entertainment industry and the media. Article XII allows for restrictions to safeguard balance of payments. These are to be non-discriminatory, shall avoid unnecessary damage and shall be temporary. There is an obligation to consult and analyse the nature of the restriction but no direct decision as to whether the measure is appropriate or not.

These are just some of a myriad of issues and questions that faced the negotiators. Many of these questions do not have final solutions as yet. The main point to note is that the GATS is a very primitive document that sets a framework for future developments but which does not as yet display major consensus and achievements in the field. Most commitments are of a "standstill" nature, that is countries agree not to impose new barriers to services trade. The Agreement also provides for an ongoing program of negotiations to fill the gaps and increase market access commitments.

B. *Intellectual Property and International Trade*

One trade issue that traverses both the services and goods fields is the operation of international trade law on the transfer and protection of technology, ideas and knowledge. At one level, the question of protection of such property and knowledge has a philosophical element, particularly where international organisations seek to become involved in promoting levels of protection. It is common to hear industrialised countries call for tougher foreign laws so that their exported goods are protected from illegal copying. On the other hand, developing countries argue that knowledge, particularly where it is beneficial to the health and well-being of the world at large, should be seen as communal property and freely available to all. Because of the fundamental philosophical question and the strong division of interests between developing and developed countries, it is understandable that international rules for the protection of intellectual property have lagged behind the international rules for the protection of trade in goods.

A second difficulty is that there has not been any single organisation or agreement that deals with these issues comprehensively. Intellectual property

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any specific commitments. Articles IX and X deal with business practices and emergency safeguard measures. Article XV deals with subsidies. There was no provision included dealing with dumping of services. Article IX merely recognises that certain business practices of suppliers may restrain competition. Members will enter into consultations to eliminate such practices and "accord full and sympathetic consideration to such a request". No decision was taken on emergency safeguard measures. Multilateral safeguard negotiations on the basis of non-discrimination were to be completed within three years of the date of entry into force of the WTO Agreement. Until that time, Article X.2 allows for modification of commitments after a one year notice period. Again where subsidies are concerned, the only promise is to enter into negotiations which would consider the appropriateness of countervailing procedures. There is a similar obligation to consult and accord sympathetic consideration, but no further commitment.

protection is a complex amalgam of various international conventions, domestic laws and domestic enforcement regimes. Intellectual property is also not covered by one type of law. Any invention or process may have to be covered by patent law, trademarks law, copyright, designs legislation or some indirect means of protecting the knowhow, trade secrets or confidential material.

The Uruguay Round resulted in a new Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The TRIPS Agreement has both widened and deepened the coverage of the existing intellectual property conventions. The contracting parties are to comply with Articles I to XXI and the Appendix to the Berne Convention 1971.[105] The Berne Convention is an author-based copyright convention. Because GATT has a bigger membership than Berne, the latter now becomes significantly extended. The Berne Convention excludes moral rights which the United States and Australia do not adequately recognise. TRIPS does not include coverage for moral rights because of United States' lobbying.

The new agreement expressly calls for computer programs to be protected as literary works as is already the case in Australia's domestic legislation. It does not fully clarify the nature and extent of this protection which is a vexed question world-wide. Copyright in computer software will relate to object code and source code form. Copyright protection is to be 50 years from the date of publication if not based on the natural life of the author. The Agreement gives members the freedom to set out exemptions to copyright entitlement; an example is the United States' fair dealing defence. These must not be unreasonable in nature. Protection is given to performers and broadcasters in relation to piracy. The TRIPS Agreement also calls for protection for compilations of data which Berne did not cover. Databases are protected as compilations if they are intellectual creations.

Where trademarks are concerned, contracting parties are to comply with Articles I to XII and XIX of the Paris Convention.[106] This is the international trade marks convention. It defines a trademark as any sign capable of distinguishing the goods and services of one undertaking from those of other undertakings. These will cover names, shapes, combinations of colours and shapes of containers.

One issue was to determine how important prior use was to be. The final position was a compromise between those who thought prior use should be a necessary precondition and those who did not. Under the Agreement, there is no need to use the mark to file an application, but registrability can be based on use. With well known marks, it will not be possible to register similar marks — the test of how well known they are is based on general knowledge of them. Three years non-use is needed to cancel a registration. Trademark rights may be renewable indefinitely for at least seven years at a time.

Geographical appellations are not allowed to be used for products not coming from those regions. This has had an immediate impact on the Australian

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105 The Universal Copyright Convention, administered by UNESCO, is an alternative for non-members of Berne.

106 Convention for the Protection of Industrial Property (Paris Convention).

wine industry where French geographical names such as Champagne and Burgundy can no longer be used.

Where industrial designs are concerned, Australia is currently reviewing its domestic legislation. The TRIPS Agreement calls for protection of independently created industrial designs that are new or original for at least 10 years. Some negotiators wanted the test to be both new and original. Protection is to be for at least 10 years. There is an exclusion of protection for designs dictated by functional considerations only. This is important to the spare parts industry. The contracting parties may hold that a design is not new if it does not significantly differ from known design features.

Where patents are concerned, the criteria for patentability is that the invention must be new, involve an inventive step and be capable of industrial application. The new rules allow exemptions for biological and certain health-oriented products. Protection is to be for a 20 year period, a change from the existing Australian position. The TRIPS Agreement does not choose the basis of registrability between either the first to invent or the first to file. Differences are found world-wide in domestic patent regimes on this question and thus the current Australian position will remain as is. One issue is that of compulsory licences where the patent owner does not fully exploit the product and the government wishes to ensure that the benefits are available widely. No rules were agreed on compulsory licences, only on the procedures for granting them.

The TRIPS Agreement promotes national treatment for intellectual property rights generally, not just the matters specifically mandated in the Agreement. A most favoured nation obligation is also included subject to grandfather rights. Transparency is promoted as well as enforcement through prompt access to judicial procedures. Where trade secrets are concerned, the Agreement protects against uses contrary to honest commercial practices. The Agreement also provides limits on anti-competitive licensing and timeframes for implementation which depend upon whether a country is a developed or developing country. Developing countries are given extra time to comply with the requirements.

The dispute settlement understanding also applies to the TRIPS Agreement. An important aspect of the new Agreement is stronger enforcement powers. The TRIPS Agreement provides for ex parte emergency remedies, and wide remedies in appropriate fora.

C. *Other Agreements*

There are a host of other Agreements that were negotiated as part of the Uruguay Round package. While these have major importance for world trade and Australia's export industries, they will have a lesser effect on our domestic laws.

The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade and the Agreement on Subsidies and Countervailing Measures concentrate primarily on providing more detailed procedures for applying anti-dumping and countervailing duty measures rather than any change to the substantive basis for such duties. This was necessary in order to promote consistency and certainty in all member countries and to ensure that these regimes are not used as protectionist measures. In the early stages of any regime, greater attention is given to the general rules and principles to apply

in a particular area. Procedural matters are commonly left to be dealt with under the particular jurisdiction's administrative structure. This leads to problems, however, as the ultimate operation of the various regimes can be quite different even though they all begin from the same international agreement. In addition, administrators can be captured by particular vested interest groups and interpret the legislation in a biased way. Where dumping and subsidisation are concerned, biases will tend to be of a protectionist nature.

Another reason to devise more elaborate procedural rules in these areas is that the rules raise complex questions of law and economics, accounting and proof. The essence of anti-dumping rules is to allow for anti-dumping duties where goods are sold for export below their domestic price and where that leads to actual or threatened material injury to a foreign industry. Determining price differentials requires a careful analysis of cost accounting methodologies. Particular problems are faced where goods are exported from centrally planned economies without a western-style price system and where international trade occurs between related parties. Where causation of injury is concerned, which is also relevant for countervailing duties, there is the difficulty of determining how such an assessment is to be made given that there are so many variables in the economy that affect the viability of any domestic industry.

Where subsidies are concerned, the difficulty with earlier provisions was a lack of a clear definition of what constituted a subsidy. It is particularly difficult to formulate such a definition. Most government spending initiatives can be argued to constitute some form of indirect subsidy to most commercial endeavours. Education and transport infrastructure are examples. On the one hand, GATT/WTO would not wish to be trying to counteract normal government spending initiatives. On the other hand, too lax a definition of subsidies would allow for significant government manipulation of export markets. United States courts developed a specificity test which identified a countervailable subsidy as one specific to a particular industry. New provisions seeking to provide guidance on the notion of a subsidy follow such a model.

The Agreement on Technical Barriers to Trade deals with standards and seeks to prevent governmental regulations of standards to be used as hidden non-tariff barriers to trade. Obviously governments wish to promote safety and product quality, but at times have used standards merely as a way to make it difficult for foreign exports to compete. The new Agreement is an improvement of the Tokyo Round Agreement but does not seek to establish the standards themselves. As such it is unlikely to have a major effect on Australia's existing domestic product standards. Customs valuation rules have been elaborated through the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994. The Agreement on Rules of Origin was unable to find real consensus and will not affect our domestic regime at this stage.

16. *Conclusion*

This article has provided a broad survey of private and organisational stimuli to international convergence and harmonisation of economic laws, principles and practices. I have said at the outset that this analysis can be subsumed into the question of whether there is an emerging new *lex mercatoria*. In one sense the debate is irreconcilable because its resolution involves jurisprudential issues.

A legal positivist would deny the emergence of a new *lex mercatoria* that cannot be related back to any particular national system of law.[107] To some commentators the question is a sociological one involving an identification and analysis of the globalisation of law.[108]

Even if this debate is overcome, there are specific questions as to the sources and content of the new *lex mercatoria.* Where sources are concerned, proponents have suggested public international law, uniform laws, general principles of law, customs and usage, standard form contracts and arbitral awards as the key sources.[109] This itself is contentious and there is certainly no consensus where content is concerned. It was not the purpose of this article to enter that debate but rather to merely note that even though contentious, the presence of such a debate is itself support for the hypothesis that the trend is towards convergence of law.

Perhaps the most telling aspect is the use of the concept of a new *lex mercatoria* in a number of practical settings. Because party autonomy is considered paramount in most national conflict of laws systems, parties may thus choose to apply *lex mercatoria* to their contracts through direct reference or through expressions relating to general principles of international law or the like. The power given to arbitrators to select the appropriate conflict of law rules through Article 13(3) of the ICC Arbitration Rules and Article 28(2) of the UNCITRAL Model Law has also led arbitrators to apply what they identify as internationally accepted principles of law in some cases at least.[110] This has also been the case when arbitrators have been directed to decide as *amiables compositeurs.*[111] In some jurisdictions, the law has gone further and allows arbitrators to directly select the applicable substantive law without reference to any conflict of laws rules.[112]

Where public law is concerned, the survival of GATT and the successful negotiations leading to the establishment of the WTO has gone a long way towards ensuring common principles and rules circumscribing the actions of governments where trade regulation is concerned. The process is, however,

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107 Medwig, M T, "The new law merchant: legal rhetoric and commercial reality" (1993) 24 *L and Policy Int'l Business* 589.

108 Nimmer, A and Krauthaus, P A, "Globalisation of Law in Intellectual Property and Related Commercial Contexts" (1992) *Law in Context* at 80. Albrow, M and King, E (eds), *Globalisation, Knowledge and Society: Readings from International Sociology* (1990). Keohane, R O, "International institutions: two approaches" (1988) 32 *Int'l Studies Q* 379.

109 Lando, O, "The lex mercatoria in international commercial arbitration" (1985) 34 *ICLQ* 747.

110 *Deutsche Schachtbau-und Tiefbohrgesellschaft mb v Ras al Khaimah National Oil Co and Shell International Petroleum Co Ltd* [1987] 2 Lloyd's Rep 246; *Tabalk Picaret Ltd Sirketi v Norsolor SA* (1984) Ybk Commercial Arbitration 109

111 *Mechema Ltd v SA Minerais et Metaux* (1982) Ybk Commercial Arbitration 77.

112 Brazil cites three examples, the French New Code of Civil Procedure, Art. 1496(2), the 1986 Amendments to the Portuguese Arbitration Law (Lei) No 31/86 of 29 August 1986, Diario da Assembleia da Republica, Il serie, No 83, 2 June 1986 reproduced in 1991 Review de L'arbitrage 487 (1991), Art 33.2 and the Mexican Commercial Code, Art. 1445 as amended by Decreeo 22 July 1993 Viario Oficial 22 July 1993. Brazil, P, "UNIDROIT principles of international commercial contracts in the context of international commercial arbitration" paper presented at International Bar Association 25th Biennial Conference, Melb, 11 October 1994.

relatively new and further significant advances can be expected in the coming decade.

In spite of uncertainty about the exact nature and status of the new *lex mercatoria* and gaps that remain in the field of public international trade law, the sheer body of international initiatives and the amount of time and energy devoted to such endeavours, readily supports the conclusion that Australian commercial law is heavily influenced by and dependent upon international developments. This article has not sought to assess whether developments in particular areas are apt to enhance the efficiency and equity of our legal system. An intuitively appealing starting point is to assert that law reform initiatives and judicial decisions built on the widest examination of international materials, coupled with the academic and diplomatic comparative law process, should all tend to enhance the quality, consistency and certainty of international legal principles. Where our commercial law system is concerned, we have long ceased to be an island.