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Jurnal haqqında

Bakı Dövlət Universiteti Tələbə Hüquq Jurnalı BDU Hüquq fakültəsi Tələbə Elmi Cəmiyyətinin nəşri olmaqla tələbələr tərəfindən təşkil olunan və müvafiq akademik yoxlama qaydası ilə redaktə edilən ilk və tək jurnal olub milli, beynəlxalq və müqayisəli hüquqda mövcud olan müasir hüquq problemlərinə akademik səviyyədə peşəkar yanaşmanı təbliğ edir. Jurnalın əsası 2014-cü ilin noyabr ayında qoyulmuşdur. Nəzəri fikirləri, dünya dövlətlərinin məhkəmə və qanunvericilik təcrübəsini ümumiləşdirərək mübahisəli məqamlara aydınlıq gətirmək, hüquq cəmiyyətinə həm elmi, həm də praktiki müstəvidə yaradıcı düşüncə və hüquqi tənqid qabiliyyətini, hüquq mədəniyyətini aşılamaq Jurnalın əsas prinsipidir. Jurnal tərkibindəki məqalələr vasitəsilə aktual məsələlərə hüquqi əsaslandırmaya istinad etməklə mümkün həllərin irəli sürülməsini və yenilikçiliyi prioritet məqsəd kimi müəyyənləşdirir. Hüquq tələbələrinin hüquqi yazı və hüquqi düşüncə bacarıqlarını üzə çıxararaq inkişaf etdirməklə onları akademik araşdırmaya həvəsləndirmək və bunu sağlam elmi rəqabət ənənəsinə çevirmək Jurnalın daimi məramını təşkil edir.

About the Review

Baku State University Law Review is the first and only student-run and peer-reviewed academic journal in Azerbaijan and a publication of Student Academic Society of Baku State University Law School. It was founded in November 2014. The Review promotes academic and professional approach to contemporary legal issues which exist in national, international and comparative law. Clarification of debatable issues with induction of theoretical concepts, judicial and legislation practice of foreign countries, foster legal criticism skills, creative thinking, and legal culture on both academic and practical sphere are basic principles of the Review. With its published articles, the Law Review promotes possible solutions to actual legal issues with reference to legal reasoning and opportunities given by legal scholarship and determines avoiding repetition as prior purposes of Review. Encouraging law students to academic research with making them improve their legal writing and legal thinking skills and make this as a fair competition are permanent goals of the Review.

Eustace Chikere Azubuike*

The Participation of Developing Countries in The World Trade Organization (WTO)

Abstract

The World Trade Organization (WTO) regulates trade between states. Its membership cuts across two major groups of states: developed and developing states, each striving to get as much trade benefit to itself as possible. The relations of developed and developing countries under the WTO and indeed under other platforms, have been complex. Due to obvious reasons, including developing countries' poor finance and the lopsided power balance in favor of developed states, developed states have often had an edge over developing states in their trade dealings. Thus, developing states have been grappling with a system that heavily leans against them. Some of the factors that hindered the effective participation of developing countries in the General Agreement on Tariffs and Trade (GATT) are still present under WTO, and efforts made so far to address the concerns and challenges of developing countries under the WTO have yielded little or no result. Consequently, there is the need to strengthen developing countries' capacities in order to ensure a greater participation by developing under the WTO.

Annotasiya

Ümumdünya Ticarət Təşkilatı dövlətlərarası ticarəti tənzimləməkdədir. Təşkilatın üzvlüyü hər biri daha çox ticari xeyir əldə etməyə çalışan inkişaf etmiş və inkişaf etməkdə olan dövlətlərdən ibarət iki əsas qrupa bölünür. İnkişaf etmiş və inkişaf etməkdə olan dövlətlərin ÜTT, həmçinin digər platformalar nəzdində münasibətləri həmişə mürəkkəb olmuşdur. İnkişaf etməkdə olan ölkələrin zəif maliyyə vəziyyəti, qüvvələr balansının uyğunsuz şəkildə inkişaf etmiş ölkələrin tərəfində olması kimi aşkar səbəblərə görə inkişaf etmiş ölkələr inkişaf etməkdə olan ölkələrin ticarət münasibətlərin üzərində təsirə malik olmuşdur. Buna görə də, inkişaf etməkdə olan ölkələr özlərinə qarşı olan sistemlə mübarizə aparmaqdadırlar. İnkişaf etməkdə olan ölkələrin Tariflər və Ticarət üzrə Baş Sazişdə effektiv iştirakına maneçilik törədən faktorların bəziləri ÜTT ilə də qalmaqdadır və bu manеələri aradan qaldırmaq üçün həyata keçirilən tədbirlər çox zəif nəticə göstərmiş və ya ümumiyyətlə nəticəsiz qalmışdır. Nəticə etibarilə, inkişaf etməkdə olan ölkələrin ÜTT-də iştirakını təmin etmək üçün onların imkanlarını gücləndirilməsinə ciddi ehtiyac göz önündədir.

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* SJD, International Law; formerly, Research Assistant, Golden Gate University School of Law, San Francisco. I acknowledge, in a special way, the assistance of my brothers - Paschal Azubuike and Dr. Lawrence Azubuike who funded my Master's and Doctoral programs.

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Introduction

The explosion of the world population has increased the need for international trade and economic development that would cater to the varying needs of the teeming population. The WTO is essentially, or rather theoretically, established to regulate the conduct of trade between states. It is made up of two major groups of states, each striving to get as much trade benefit to itself as possible. Developing states, being the weaker of these two groups have been grappling with a trade regime that leans heavily against them. This paper examines the participation of developing countries in the WTO. It explores the difficulties encountered by developing states in their relations with the industrialized nations, and the ways in which the WTO has been able to cater to the needs of developing states.

The paper is divided into four parts. Part 1 offers a general introduction to the work. Part 2 gives a history of the WTO: the period predating General Agreement on Tariffs and Trade (GATT); the GATT period; and then the creation of the WTO. This part also gives a narrative of the obstacles encountered by developing states within these periods. In addition, it explores the role of developing countries in the establishment of both the GATT and the WTO. Part 3 discusses the impact of the current WTO regime on developing states. It is a general discussion on how developing states have related with their developed counterparts under the WTO, and an assessment of the adequacy of the provisions of the WTO agreements that are said to be especially for the interests of developing states. Part 3 also lays bare the problems militating against the participation of developing states in the WTO dispute settlement system. Part 4 renders a conclusion to the work. The paper finds that the problems that militated against a greater participation by developing countries under GATT still exist under the current WTO regime.

I. The WTO in a Historical Context

A. The Period before GATT

For a very long time, mercantilism formed the basis of the trade practices of states. This was not generally healthy for international trade as

mercantilists leaned towards policies that favored national economies, and ensured that adequate trade controls were put in place in order to boost domestic supply of goods.[1] During this era, states were bent on obtaining a favorable balance of trade at all cost. States' practice of mercantilism was at different levels. For, example, it has been observed that England was less rigorous in its mercantilist position than some of the Continental states, while France exhibited a more rigorous mercantilism.[2] Although some trade liberalization was achieved some time in the 19th century, it was short-lived, leading to a relapse to mercantilism[3], which was characterized by protectionism. The foregoing was to herald a series of worldwide financial crises that ultimately resulted in the Great Depression[4] , which was both an American experience and an international one.[5] This and the protectionism produced a convolution that contributed to World War II.

B. The Period from the Establishment of GATT to the Formation of the WTO

The World War II - partly caused by economic isolationism and protectionism - left a great deal of economic depression on states. And as states strove to extricate themselves from the grips of the economic depression, a lot of economic and trade policies were employed by them, many of which affected trade relationships. There was thus an urgent need to look for a way to repair the broken economic structure. This led to the Bretton Woods Conference in New Hampshire, United States in 1944, which facilitated the establishment of the International Bank for Reconstruction and Development (World Bank) and the International Monetary Fund (IMF).[6] The Bretton Woods Conference was originally aimed at ensuring trade liberalization and multilateral economic cooperation, and was restricted in its scope as it did not discuss the issue of agreement that would regulate international trade. It was not too long before the United States, in 1945, spearheaded the initiatives for the establishment of the International Trade Organization[7], which would have been based on the Havana Charter[8]- a document that was intended to be comprehensive in

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[1] See S. Javed Maswood, *International Political Economy and Globalization* 21 (2nd ed. 2008), available at http://www.worldscibooks.com/etextbook/6889/6889_chap02.pdf.
[2] *Ibid.*
[3] *Ibid.*
[4] See John C. Thomure, Jr., *The Uneasy Case for the North American Free Trade Agreement*, 21 Syracuse J. Int'l L. & Com. 181, 185 (1995).
[5] See Darren M. Springer, *Re-imaging the WTO: Applications of the New Deal as a Means of Remedying Emerging Global Issues*, 29 Vt. L. Rev. 1067, 1075 (2005).
[6] See David Palmeter & Petros C. Mavroidis, *Dispute Settlement in the World Trade Organization: Practice and Procedure* 1 (2nd ed. 2004).
[7] Hereinafter ITO.
[8] Havana Charter for International Trade Organization, Mar. 24, 1948.

regulating global trade.[9] Before the Great Depression, the United States had not been at the forefront of international trade matters due to a seeming constitutional constraint.[10] However, the move to establish the ITO was not successful as the United States refused[11] to sign its charter, and other states toed the line of the United States.[12] This brought the demise of the ITO.[13] But within this period, the General Agreement on Tariffs and Trade 1947[14] had already attained some distinct status, and by some default therefore had to regulate some aspects of trade.[15] GATT was originally conceived as a temporary system for the negotiation of tariff until such time the Havana Charter of 1948 would enter into force[16]. Not only has GATT been perceived as a club[17], but also as a

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[9] See Kele Onyejekwe, *GATT, Agriculture, and Developing Countries*, 17 Hamline L. Rev. 77, 83 (1993).
[10] See Susan Ariel Aaronson, *From GATT to WTO: The Evolution of an Obscure Agency to One Perceived as Obstructing Democracy*, available at http://eh.net/encyclopedia/article/aaronson.gatt (stating that this was because under the United States Constitution, the promotion and regulation of commerce is the function of Congress, while the Executive is in charge of foreign policy. Trade policies which presented a hybrid situation were keenly contested between the two branches).
[11] In fact, it is thought that President Truman did not submit the Charter to the Senate for ratification because there was little indication that the creation of the ITO had the support of States. See C.O'Neal Taylor, *The Limits of Economic Power: Section 301 and the World Trade Organization Dispute Settlement System*, 30 Vand. J. Transnat'l L. 209, 243 (1997). On the other hand, Feddersen posits that President Truman did actually submit the text of the Charter to both houses of Congress, which failed to ratify the Charter. See Christoph T. Feddersen, *Focusing on Substantive Law in International Economic Relations: The Public Morals of GATT's Article XX(a) and "Conventional" Rules of Interpretation*, 7 Minn. J. Global Trade 75, 80- 81 (1998).
[12] See Robert E. Hudec, *The GATT Legal System and World Trade Diplomacy* 38 (2nd ed. 1990); generally, John Jackson, *The World Trading System*, (2nd ed. 1997).
[13] The factor that led to the failure of the ITO has been considered as similar to that which caused the failure of the League of Nations, namely: the refusal of the United States to ratify the Havana Charter. See Timothy Stostad, *Trappings of Legality: Judicialization of Dispute Settlement in the WTO, and Its Impact on Developing Countries*, 39 Cornell Int'l L. J. 811, 815 (2006).
[14] GATT, *Legal Texts: GATT 1947*, available on http://www.wto.org/english/docs_e/legal_e/gatt47.pdf (Hereinafter GATT).
[15] See Daniel C. Chow, *A New Era of Dispute Settlement Under the WTO*, 16 Ohio St. J. on Disp. Resol. 447, 450 (2001); Demeret, *The Metamorphoses of the GATT: From the Havana Charter to the World Trade Organization*, 34 Columbia J. Transnat'l L. 123 (1995), reprinted in Ralph H. Folsom et al, *International Business Transactions: A Problem-Oriented Coursebook* 421, (10th ed. 2009). Zheng sees the creation of GATT as a reaction to the causes of the Great Depression. See Henry R. Zheng, *Defining Relationships and Resolving Conflicts Between Interrelated Multinational Trade Agreements: The Experience of the MFA and the GATT*, 25 Stan. J. Int'l L. 45, 50-51 (1988).
[16] See *Free Trade and Preferential Tariffs: The Evolution of International Trade Regulation in GATT and UNCTAD*, Harv. L. Rev. Ass., 81 Harv. L. Rev. 1806 (1968) (hereinafter Free Trade).
[17] See Aaronson, supra, note 10; Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 Minn. J. Global Trade 1, 5-6 (1999), (describing GATT in

rich man's club that was not envisaged to be an organization.[18]. The forgoing explains why GATT lacked mechanisms that would ensure its effective functioning.[19] It was essentially a contractual agreement by the Contracting Parties.

The formation of GATT was mainly the affairs of developed countries[20], with little or no participation by developing states[21]. Third world countries were hampered by colonialism from taking part in establishing GATT, and when GATT was finally formed, it did not adequately address their concerns.[22] In fact, during the cradle of GATT, there were no provisions specifically targeted at the developing countries[23]. It was therefore not surprising that agitations would soon emerge from developing states. Even if developing countries could have

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its early stage as: "... essentially a small 'club' of like-minded trade officials who had been working together since the ... ITO negotiations").

[18] See Ruth Gordon, *Sub-Saharan Africa and the Brave New World of the WTO Multilateral Trade Regime*, 8 Berkeley J. Afr.-Am. L. & Pol'y 79, 82-85 (2006) (hereinafter, Ruth Gordon, Sub-Saharan Africa).

[19] Ibid. See Thomas J. Dillon, Jr, *The World Trade Organization: A New Legal Order for World Trade?*, 16 Mich. J. Int'l L. 349, 354 (1995), (arguing that from the outset, it was clear that the GATT "was ill-equipped to handle the broader task of regulating world trade relations without some fundamental improvements".).

[20] The original GATT members were: "The Governments of the Commonwealth of Australia, the Kingdom of Belgium, the United States of Brazil, Burma, Canada, Ceylon, the Republic of Chile, the Republic of China, the Republic of Cuba, the Czechoslovak Republic, the French Republic, India, Lebanon, the Grand-Duchy of Luxemburg, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, Pakistan, Southern Rhodesia, Syria, the Union of South Africa, the United Kingdom of Great Britain and Northern Ireland, and the United States of America". See Legal Texts: GATT 1947, available at http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm . It has been contended that among these countries, Brazil, Burma, Ceylon, Chile, China, Cuba, India, Lebanon, Pakistan, Rhodesia, and Syria would have been considered developing countries at the formation of GATT although there was no such formal classification. See Constantine Michalopoulos, *Trade and Development in the GATT and WTO: The Role of Special and Differential Treatment for Developing Countries*, Working Draft, Feb. 28, 2000, page 2, available at http://siteresources.worldbank.org/INTARD/825826-1111405593654/20432097/TradeanddevelopmentintheGATTandWTO.pdf.

[21] Although there has been no consensus as to what constitutes a developing country, both under the WTO and elsewhere, there are certain common features which run like a thread through all developing states. Thus developing countries are usually victims of colonization, and are dependent on mineral or primary product exports for survival; they possess weak economies. See Onyejekwe, *supra* note 9, at 93-94 . The author also gives other models that have been used to categorize world economies. *Ibid*, 94-96. Throughout this paper, "developing countries" and "third world countries" are used interchangeably to mean relatively poor countries. The terms also include "least-developed countries" as used under GATT/WTO Agreements.

[22] See Gordon, Sub-Saharan Africa, supra, note 18, at 87, (stating that "of GATT's thirty-five original articles, only one addressed the declared needs of Third World countries, and obtaining this article was not only a struggle, but it's ultimate contents were disappointing").

[23] See Michalopoulos, *supra* note 20, at 3.

influenced the formation of GATT, they would not have done so as they lacked faith in the institutions of GATT. It was a case of apathy. The underlying tenet of GATT was the Most Favored Nation, requiring that a country gives every GATT member the same treatment it would give to its most favored trading partner[24]. For example, any tariff concession granted to one party should also be extended to all parties[25]. Closely related to the Most Favored Nation principle is the National Treatment obligation espoused under Article III GATT to the effect that: "the product of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products."[26] These were all geared towards trade liberalization. To developing countries, the purported trade liberalization and other promises by GATT were a mirage, "contradictory, confusing, and possibly inaccurate."[27] For instance, the precept of comparative advantage, one of the tenets of GATT, was not favorable to developing states. This stemmed from the fact that the goods most needed by third world countries and in which they had a comparative advantage, were subject to tariffs and other protections[28]. As a 'rich man's club', GATT did not cater to the needs of developing countries. Article XVIII of GATT[29], which was designed to protect infant industries, could only operate on a consensual basis. This is to say that the contracting parties involved had to come to a mutual agreement before Article XVIII would apply. A developed country could grant a developing country a reduction in tariff only if it could get a reciprocal treatment from the latter. This was unrealizable owing to the poor import markets of the developing countries, which had little or nothing to offer in return[30]. Agriculture had always constituted the mainstay of the economies of developing countries. Despite this, the goods produced by the third world countries did not have impact on the global market, considering their low price and income elasticities of demand, not to mention their insufficiency for large export. These developing states therefore had to fall back on imports - a situation that triggered balance of payment problems.[31] There was also the problem of asymmetry of bargaining power between developed countries and third world countries, which always ensured that the former prevailed in every tariff negotiation.

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[24] See Art. I GATT.

[25] See Gordon, Sub-Saharan Africa, *supra* note 18, at 84.

[26] See Art. III GATT.

[27] See Onyejekwe, *supra* note 9, at 129.

[28] *Ibid*.

[29] See Art XVIII GATT.

[30] See Free Trade, *supra* note 16, at 1808.

[31] See Kele Onyejekwe, *supra* note 9, at 80- 81.

The principles originally adopted in the GATT system were based on the presumption of equality of states. But the reality of the differences, in wealth and development, between the developed states and developing states had not disappeared. It was felt that developing states needed industrialization, and that this could not be achieved with liberalization in place.[32] Developing states could not keep quiet and pretend that all was well with them in the GATT system. The agitations for their interests to be protected continued, thus creating a need to strike a balance between two conflicting goals: "1) to promote free trade; and 2) to protect and help developing countries."[33] Developing countries were able to secure, at least in principle, an amendment to Article XVIII, which introduced a provision permitting developing countries to protect their infant industries through increase in tariffs.[34] This provision however, contained a caveat, namely that the developing states should compensate any country harmed in the exercise of this right. It is doubtful, however, if developing countries did apply this provision and that could have owed to the burden placed on them by the compensation requirement.[35] In 1958, a Panel of Experts appointed by GATT, among other conclusions, made findings linking the economic policies of the developed countries to the economic woes of developing countries.[36] Preceding the report was the setting up of three committees charged with different functions, all aimed at improving international trade and addressing the problems of developing countries, such as their difficulty in negotiating tariff reductions with developed states.[37] A proposal of action was submitted to the third committee with a recommendation that developed countries should remove tariffs on tropical and primary products from developing countries, and that tariffs on manufactured and semi-manufactured goods from developing countries be reduced and eliminated.[38] However, the recommendation remained largely on paper, with little or no implementation.[39] By the end of the Kennedy Round of negotiation, much progress had not been achieved regarding the agitations of the developing countries. Third world countries were therefore to await the United Nations Conference on Trade and Development to further voice their dissatisfaction with the GATT regime.[40]

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[32] See Michalopoulos, *supra* note 20, at 3.

[33] See Jeremy B. Rosen, *China, Emerging Economies, and the World Trade Order*, 46 Duke L. J. 1519, 1527 (1997).

[34] See Free Trade, *supra* note 16, at 1809; Rosen, supra, note 33, at 1528.

[35] *Ibid*.

[36] See Onyejekwe, *supra* note 9, at100-101.

[37] *Ibid*.

[38] The recommendation also called for the elimination of quotas and discriminatory internal taxes on the exports of developing countries. See Free Trade, supra, note 16, at 1809-1810.

[39].

[40] Hereinafter UNCTAD. See Gordon, Sub-Saharan Africa, *supra* note 18, at 89.

UNCTAD is a product of a coalition of developing states to press for changes in the functioning of the international economic regime in general, and the GATT system in particular.[41] It was part of the campaign for a New International Economic Order and a Charter of Economic Rights and Duties of States.[42] Some of the areas of interests of the developing states which GATT had not addressed were restrictive business practices, agreements relating to commodities; and foreign investment and preferential trading systems. With the arrival of UNCTAD between 1964 and 1965, the GATT provisions were increased with the addition of three Articles to cater to the needs of developing countries. Article XXXVI noted the existence of much disparity in the standards of living of developing states and industrialized states,[43] and that GATT members may place at the disposal of developing states special measures that would promote their trade and development.[44] Article XXXVI therefore called on developed states to not demand reciprocal tariff reduction from developing states in the course of trade negotiations.[45] Article XXXVII, entitled "Commitments", called on developed countries to as far as practicable, reduce and eliminate all barriers to the exports of developing countries, be they in the form of tariff, non-tariff, or fiscal measures.[46] Article XXXVIII called for concerted action among contracting parties to achieve the objectives enumerated in Article XXXVI.[47] These provisions seemed to be mere aspirations, and, considering the way in which they were couched, were largely laudatory.[48] By the end of the Kennedy Round in 1967, the tariff model adopted in respect of industrial goodsfavored developed states more than developing states, to the extent that while developed states got an average tariff reduction of 36 percent on exports, developing states could boast of only an average of 26 percent tariff reduction on goods that were of export interest to them.[49] A similar disparity followed the Tokyo Round, with developed states having a 36 percent tax reduction against the 26 percent given to developing states.[50]

[41] See The UNCTAD secretariat, *UNCTAD: A Brief Historical Overview*, available on http://www.unctad.org/en/docs/gds20061_en.pdf.

[42] See Declaration on the Establishment of a New International Economic Order, G.A. Res. 3201, Supp. No. 1, at 3, U.N. Doc A/9559 (1974); Charter of Economic Rights and Duties of States, G.A. Res. 3281, Supp. No. 31, at 50, U.N. Doc. A/9631 (1974);

[43] See Art. XXXVI:I (c) GATT.

[44] See Art. XXXVI:I (f) GATT.

[45] Art. XXXVI:I (8) provided that: "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties". See Art. XXXVI:I (8) GATT. This Article also called for cooperation between GATT members and intergovernmental bodies and United Nations organs to assist developing states. See Art. XXXVI:I (7) GATT.

[46] See Art. XXXVII, GATT.

[47] See Art XXXVIII, GATT.

[48] See Onyejekwe, *supra* note 9, at 88.

[49] See Michalopoulos, *supra* note 20, at 7.

[50] *Ibid*.

Developing states still looked forward to more beneficial provisions under the GATT system.

In 1972, the Generalized System of Preferences[51], which allowed developed states to grant non-reciprocal preferences to third world countries, was adopted.[52] Under the GSP, developed countries could remove all tariffs on the importation of certain products from developing countries. It meant a modification of the Most Favored Nation Principle since developed states were free to treat the goods originating from developing states more favorably than like goods of other contracting states.[53] It is doubtful if the GSP had meaningful impact on developing countries. The benefits of the GSP to developing states may have been exaggerated considering its implications. One, the GSP was a voluntary scheme, rather than a contractual one. Second, many of the goods that were of export value to developing countries, for example textiles, were either excluded from the scope of GSP, or to a large extent restricted.[54] GSP appeared to have benefited only the developed states by giving their manufacturing firms access to cheaper parts.[55] In this context, the GSP provisions have been viewed as inadequate and unacceptable.[56]

Developing states were not favorably disposed to the dispute settlement system of GATT owing to the nature of the system itself, which was mainly rudimentary, lacking in definite rules, and was considered to be of weak legal character.[57] Resolution of disputes under GATT lacked any formal mechanism, and largely rested on conciliation, the aim of which was to reach a consensus among parties to comply with the agreements, rather than to impose sanctions for non-compliance.[58] It meant that, and did happen that, power play was the dominant feature of the GATT dispute settlement system. Thus, developing

[51] See GATT Decision Establishing the Generalized System of Preferences, Jun. 25, 1971, GATT B.I.S.D, 18th Supp., at 24 (1972) (hereinafter GSP).

[52] See Ruth Gordon, *Contemplating the WTO from the Margins*, 17 Berkeley La Raza L. J. 95, 99 (2006) (hereinafter Gordon, Margins), (observing that the GSP is still retained under the WTO regime, and that other preferences, alongside the GSP are no more than "soft law", that cannot be enforced by developing states).

[53] See Rosen, *supra* note 33, at 1528-1529.

[54] See Constantine Michalopoulos, *supra* note 20, at 10.

[55] See Gordon, Sub-Saharan Africa, *supra* note 18, at 91, citing D. Robert Webster & Christopher P. Bussert, *The Revised Generalized System of Preferences: "Instant Replay" or a Real Change?*, 6 Nw. J. Int'l L. & Bus. 1035, 1048 (1985).

[56] *Ibid*.

[57] See Feddersen, *supra* note 11, at 82. It is further observed that the GATT dispute resolution system did not mention the words "dispute settlement". See Ernst-Urich Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* 70 (1997).

[58] See Alban Freneau, *WTO Dispute Settlement System and Implementation of Decisions: A Developing Country Perspective*, 5, being a thesis submitted to the University of Manchester for the degree of LLM in International Business Law 2000- 2001, available at http://lafrique.free.fr/memoires/pdf/200107AF.pdf.

states were at the receiving end of GATT consultation procedure due to their weak bargaining power. The system was characterized by a display of raw power.[59] The fate of developing countries in the dispute settlement system of GATT has been captured in the following words:

Regarding the specific situation of developing countries, it is self-evident that the GATT 1947 procedure did not serve their interests: the economic weight of the parties to the disputes had a significant bearing on the negotiation process. This emphasis on negotiation was likely to lead economically strong members of the GATT to use- or abuse of- their political and economic strength to take advantage of developing countries. This resulted in a lack of trust of developing members in the GATT DSM and, as K. O. Kufuor notes, they filed only ten out of fifty-eight complaints from 1948-1966.[60]

Dispute settlement under GATT revolved around Articles XXII and XXIII, which provided for consultation, and nullification or impairment respectively. The first layer of the procedure involved the disputing parties only. It was in situations where consultation proved ineffective that disputes could be referred to the Contracting Parties for consideration through investigation and recommendation or ruling.[61] This formed the second layer, and usually involved serious issues, such as disputes or complaints involving a nullification or impairment of a benefit arising directly or indirectly from the GATT. The duty to investigate and make recommendations was originally entrusted to a working party, then to a standing panel of experts[62], and then to a panel chosen on a case-by-case basis. Under certain circumstances, the Contracting Parties, in their recommendations, could rule that the complaining party withdraw or suspend tariff concessions or other benefits to the party being complained about, especially where the conduct of such party was inconsistent with GATT obligations. A major problem that dominated the GATT dispute settlement was that the system was based on the consensus principle which required that a decision reached in any dispute could be adopted as binding only with the consent of the parties to the dispute. This implied that a party could always block the adoption of a decision that was not in its favor by withholding its consent.[63] The above procedure clearly depicts a system in which the success of a party depended much on its negotiation power. Accordingly, developing states could not grapple with such a procedure that was heavily tilted against them. This explains their low participation in the dispute settlement procedure

[59] See Gordon, Margins, *supra* note 52, at 97.

[60] *Ibid*.

[61] Art. XXIII:2, GATT; Amelia Porges, *The New Dispute Settlement: From the GATT to the WTO*,1075 PLI/Corp 1095, 1098 (1998).

[62] These panels were predominantly diplomats, and were therefore, not skilled in law. They were concerned with reaching a consensual resolution between the parties, and not arriving at a decision over a legal dispute. See DAVID Palmeter & Mavroidis, supra, note 6, at 7.

[63] See Chow, *supra* note 15, 452.

of GATT. For example, during the GATT period, South Africa was the only African Country that was a principal party in a trade dispute.[64]

It was under the foregoing state of affairs that the developing states continued to mount pressures and to press home their point that the entire GATT system was unfair to them. A series of forums and Negotiation Rounds were held with a view to improving the GATT system and perhaps making it accessible to developing states. The last of these efforts was the Uruguay Round[65], which culminated in the birth of the WTO in 1994 under the Marrakesh Agreement Establishing the World Trade Organization.[66] The new agreement brought in new provisions, and retained majority of the provisions of GATT 1947.[67]

C. Developing States' Role in the Evolution of WTO

The discussion so far has shown that as the days of GATT went by, the agitations of developing countries increased. Thus, while the early stage of GATT did not witness significant participation by developing countries, this was to change during the period leading to the creation of the WTO. Developing countries made important contributions to the formation of the WTO. The participation of developing countries in the creation of the WTO has a connection to their independence. It is argued that at the birth of the WTO, many developing countries that were hitherto under colonization had become self-governing and were thus found worthy to sit at the negotiation table where

[64] *Canada, Sale of Gold Coins*. In that dispute, South Africa, brought a complaint against Canada following the latter's amendment to its provincial Retail Sales Tax Act, which amendment sought to exempt from the tax "Maple Leaf Gold Coins struck by the Canadian Mint and such other gold coins as are prescribed by regulation". The amendment also led to the removal of the retail sales tax on Maple Leaf gold coins in Ontario, which had stood at 7 percent. The new law did not affect any other gold coins, whether produced in Canada or abroad. South Africa contended that this violated Articles II and III of GATT which provided for Schedules of Concessions and National Treatment Principle respectively. It further argued that the action of Canada had nullified or impaired or nullified the benefits that accrued to it under Articles II and III. Canada's defense was based on Article XXIV: 12 GATT. The panel upheld the contention of South Africa, and held Canada to be in breach of Articles II and III GATT. Canada was asked to offer South Africa compensation. See *Canada, Measures Affecting the Sale of Gold Coins,* Report of the Panel (GATT Doc. L/5863), Sept. 17, 1985, available at http://www.worldtradelaw.net/reports/gattpanels/goldcoins.pdf ; Victor Mosoti, *Africa in the First Decade of WTO Dispute Settlement,* 9 J. In'l Econ. L. 427, 433 (2006).

[65] See Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Dec. 15, 1993, Part II, ann. 1A, § 1, GATT Doc. No. MTN/FA, U.S.T., 33 I.L.M 1130, 1145 (1994)

[66] See Agreement Establishing the World Trade Organization, available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm#finalact.

[67] Even though the WTO emerged out of the need to improve GATT, it has been considered not to be a successor to GATT. See Andrew S. Bishop, *The Second Legal Revolution in International Trade Law: Ecuador Goes Ape in Banana Trade War With European Union*, 12 Int'l Legal Persp. 1,8 (2001/2002).

the issue of the creation of the WTO was discussed.[68] It should be noted however that developing states were not quick at welcoming and accepting to participate in the Uruguay Round. They were skeptical about the Round, especially regarding United States' bid for negotiation in services- a move they feared would not pay attention to their unresolved issues.[69] Perhaps, their fears were somehow allayed when the Uruguay Round program came out with its subjects for negotiation, which included the interests of developing countries, some of which had not been previously discussed under GATT.[70] It was thus imperative for them to take part in the Round. A wide range of issues was debated, for example whether developing countries would continue to be entitled to the GSP or to revert to MFN for purposes of the Uruguay negotiation.[71] Even in the preparatory work to the Uruguay negotiation, developing states had demanded for improvements in the dispute resolution system. For instance, Jamaica proposed that third parties to a dispute be granted the right of full participation in the panel process. Hong Kong called for a new dispute settlement body, while Australia pressed for the non-involvement of parties to a dispute in the decision of whether or not the ruling of the panel should be adopted.[72] Brazil, speaking the mind of developing countries, later reinforced the call for third party participation in the dispute settlement procedure, alongside a suggestion that developing states should be given preferential treatment in the scheme of things.[73] It was during the Uruguay Round that the Voluntary Export Restraint, which had not been in the interest of developing states, was removed by virtue of the Agreement on Safeguards.[74] This gave developing countries more market access. Moreover,

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[68] See Gordon, Sub-Saharan Africa, *supra* note 18, at 93. The author however, notes that the actual participation and influence of developing countries in the Uruguay Round, and in the entire WTO system has been enmeshed in doubts.

[69] See Onyejekwe, *supra* note 9, at 133.

[70] The subjects included tariffs, non tariff measures, tropical products, natural resource-based products, textile and clothing, agriculture, GATT Articles, safeguards, MTN agreements and arrangements, subsidies and countervailing measures, dispute settlement, trade related aspects of intellectual property rights, including trade in counterfeit goods; and trade-related investment measures. See Ministerial Declaration on the Uruguay Round, Declaration of September 20 1986, available at http://www.jus.uio.no/lm/wto.gatt.ministerial.declaration.uruguay.round.1986/ (hereinafter Ministerial Declaration); Onyejekwe, ibid. Among these subjects, agriculture and textile and clothing were not within the purview of GATT in the period preceding the Uruguay Round. See Hakan Nordstrom, *Participation of Developing Countries in the WTO: New Evidence Based on the 2003 Official Records*, 2, National Board of Trade, Stockholm, Sweden, available at http://www.noits.org/noits06/Final_Pap/Hakan_Nordstrom.pdf.

[71] *Id*, 138-141.

[72] See Kendall W. Stiles, *The New WTO Regime: The Victory of Pragmatism*, 4 J. Int'l L. & Prac. 3, 15 (1995).

[73] *Id*, 20.

[74] See Michalopoulos, supra note 20, at 13.

the tariff negotiations achieved under this Round is reported to have, on the average, led to a 34 percent reduction in tariffs on industrial imports from developing countries.[75] In the area of tropical products, developing countries, amidst the opposition of developed countries, agitated for complete liberalization of trade.[76] It is doubtful if the compromise finally reached by the developed and developing countries in this regard favored the latter. The gains of the Uruguay Round seemed to have accrued to the Latin American and East Asian countries, with little or nothing going in the way of the African countries. This has been hinged on the fact that the African countries allowed less trade liberalization.[77] On the other hand, there is a view that despite the extent of the involvement of developing countries in the Uruguay negotiation, the agreements reached under the Round were generally in favor of developed states, and the implementation of those agreements was lopsided against developing countries.[78]

India, however, did not take active participation in the Uruguay Round although it was one of the architects of the GATT in 1947.[79] India was tricked into accepting trade liberalization in preference to its preexisting economic policy, which was dominated by regulation. India was still grappling with this adjustment and trying to understand the working of the prescriptions of the Uruguay Round, and had to wait for the next Round: Doha.[80] On the whole, compared to the extent of their participation in the formation of GATT, developing states had a greater involvement in the talks that led to the emergence of the WTO.

II. Developing States and the Current Regime of WTO

A. Trade Relations with Developed Countries

One would have expected that with the consistency of the developing countries in their demand for a reform in global trade, they would have achieved a favorable trading climate in their relations with industrialized

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[75] *Ibid*.

[76] In fact this featured in the Ministerial Declaration when it stated that: "Negotiations shall aim at the fullest liberalization of trade in tropical products, including in their processed and semi-processed forms and shall cover both tariff and all non- tariff measures affecting trade in these products. The CONTRACTING PARTIES recognize the importance of trade in tropical products to a large number of less-developed contracting parties and agree that negotiations in this area shall receive special attention..." See Ministerial Declaration, Part 1(D), *supra* note 70.

[77] Michalopoulos, *supra* note 20, at 13.

[78] See Hansel T. Pham, *Developing Countries and the WTO: The Need for More Mediation in the DSU*, 9 Harv. Negot. L. Rev. 331, 336 (2004).

[79] See Dongsheng Zang, *Divided by Common Language: 'Capture' Theories in GATT/WTO and the Communicative Impasse*, 32 Hastings Int'l & Comp. L. Rev. 423, 461- 462 (2009).

[80] Ibid.

nations. However, an assessment of the fate of developing countries in the current WTO seems to give the lie to that thinking, even with the portions of WTO agreements meant to serve the interest of third world states. There are provisions in the various agreements that constitute the WTO calling for special and differential treatment of the developing states.[81] Even the Agreement that establishes the WTO and other constituent agreements contain preambular statements recognizing the special needs of developing countries in the WTO regime.[82] The rationales for these provisions are no different from those given in support of the special provisions for developing states under GATT.[83] The Agreement on Trade-Related Investment Measures (TRIMs)[84] was created to prevent non-tariff barriers to trade, for example domestic local content requirement laws which require foreign investors in a host state to purchase a prescribed quantity of goods manufactured in the host state. An aspect of the special treatment given to developing states under the TRIMs is that, while developed states had two years from the coming into force of WTO within which to eliminate all TRIMs, developing states had up to five years to do same, and may temporarily deviate from the requirement.[85] However, TRIMs has the effect of limiting the power of the host nation to regulate foreign investments. This is by virtue of the fact that TRIMs is based on the national treatment principle requiring every country to give the same treatment to both foreign capital and local capital.[86] This may not be in the interest of developing states.

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[81] There are about One Hundred and Forty Five of such provisions in the WTO agreements, Understandings, and GATT provisions. See WTO, Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions — Note by Secretariat, WTO Doc. WT/COMTD/W/77 (25 October 2000).

[82] For example, the preamble to the Agreement on Agriculture, in part provides that :"*Having agreed* that in implementing their commitments on market access, developed country Members would take fully into account the particular needs and conditions of developing country Members by providing for a greater improvement of opportunities and terms of access for agricultural products of particular interest to these Members, including the fullest liberalization of trade in tropical agricultural products as agreed at the Mid-Term Review, and for products of particular importance to the diversification of production from the growing of illicit narcotic crops". See Preamble to the Agreement on Agriculture, Uruguay Round Agreement, available at http://www.wto.org/english/docs_e/legal_e/14-ag_01_e.htm The preamble to the Agreement on Import Licensing Procedure takes "into account the particular trade, development and financial needs of developing country Members...". See Preamble to the Agreement on Import Licensing Procedure, Uruguay Round Agreement, available at http://www.wto.org/english/docs_e/legal_e/23-lic_e.htm.

[83] For the justifications for these special treatment, see Michalopoulos, supra, note 20, at 15.

[84] Agreement on Trade-Related Investment Measures, Apr. 15, 1994, Agreement Establishing the World Trade Organization, supra, note 66.

[85] See Rosen, supra, note 33, at 1530.

[86] See Gordon, Sub-Saharan Africa, *supra* note 18, at 97, (arguing that TRIMs was introduced by developed countries).

In the same vein, the General Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) purports to have accorded developing countries some preferential treatment, in that under its provision developing states had a period of four years from the creation of WTO within which to implement the Agreement[87], and additional five years to implement the rules on product patents.[88] Under TRIPs, there are minimum standards for the protection of intellectual property, but the espoused protections do not benefit many developing states owing to the fact that some of the products that are of importance to developing countries are not covered by the Agreement.[89] TRIPS has generated a lot of health issues since its inception. Given the inadequate access developing countries have to pharmaceuticals, the question has been to what extent developing countries can strive to protect the health of their citizens without violating their forced commitments under TRIMs Agreement which require the patent protection of pharmaceuticals. The TRIPs Agreement tends to repose too much protection on patent in the area of pharmaceuticals. This has a negative impact on the access of developing states to life saving medicine. A case has been made for a flexible interpretation of the TRIPs Agreement to cater to the health needs of developing countries, especially in light of the prevalence of HIV-AIDS and other diseases in developing countries.[90] The South African case is instructive on the implications of the TRIPS Agreements on the health needs of developing countries. In 1997 the South African government enacted the Medicines and Related Substances Control Amendment Act, which, inter alia, allowed drugs that could be manufactured at cheaper cost abroad to be imported into South Africa. The law was a reaction to the Human Immune Virus (HIV) scourge, and the need to provide antiretroviral drugs to people suffering from Acquired Immuno Deficiency Syndrome (AIDS). The South African Pharmaceutical Manufacturers Association instituted a suit against the Government of South Africa alleging that the Act contravened the TRIPS Agreement, as well as the South African Constitution. The suit could not proceed to judgment stage following its withdrawal by the plaintiff.[91] The issue of public health was top in the agenda of the Doha Round.[92]

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[87] See Art. 65(2) Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Agreement Establishing the World Trade Organization, *supra* note 66.
[88] Art. 65(4) TRIPs.
[89] See Gordon, Sub-Saharan Africa, *supra* note 18, at 98.
[90] See James Thuo Gathii, *The High Stakes of WTO Reform*, 104 Mich. L. Rev. 1361,1372-1373 (2006).
[91] See Detlev F. Vagts et al, *Transactional Business Problems* 367-368 (4th ed. 2008), citing also the complaint filed by the United States against Brazil before the WTO Dispute Settlement Body alleging that Brazil's industrial property law of 1996 was in violation of the TRIPS Agreement-a complaint that was later withdrawn by the United States.
[92] *Id*, 269.

The Agreement on Safeguards[93] is also part of the current regime of WTO. It seeks to provide a kind of 'shock absorber' to specific domestic industries by the use of temporary and limited safeguards. Thus, a member country can employ some measures to protect a particular industry that may be prone to unfavorable foreign competition. Under Article 9(1), developing countries may impose a safeguard measure for up to two years, while developed states may not impose a safeguard measure against products originating from developing countries, without first complying with certain requirements, and may only impose such safeguard for not more than 200 days.[94] The exemption from safeguards of imports originating in a developing country is limited to situations where the volume of such imports is not more than three percent, "provided that developing country members with less than 3 per cent import share collectively account for not more than 9 per cent of total imports of the product concerned". This limitation has been criticized as too tight.[95]

The inclusion of the General Agreement on Trade in Services (GATS)[96] into the WTO jurisprudence was championed by developed states against the wishes of developing states, and when it did come, it touted liberalization, and is likely to continue the dominance of western corporations over developing countries.[97] GATS has added internationally traded services under the purview of WTO, an area that was absent under GATT 1947. A seeming special provision for developing countries under GATS is that couched as aspirational, calling on developed countries to recognize the "needs of … developing country members, for flexibility in this area."[98] In addition, there is no duty on the part of developing states to open as many services sectors to competition as developed countries[99].

There are other provisions that harp on the need for developed states to offer technical assistance to developing states[100], and to implement the agreements in ways that are beneficial or least damaging to developing

[93] Agreement on Safeguards, Apr. 15, 1994, Agreement Establishing the World Trade Organization, *supra* note 66.

[94] See Arts. 6, 9 (2) Agreement on Safeguards ibid; Rosen, *supra* note 33, at 1532.

[95] See Yong-Shik Lee, *Facilitating Development in the World Trade Organization: A Proposal for the Council for Trade and Development and the Agreement on Development Facilitation (ADF)*, 6 Asper Rev. Int'l Bus. & Trade L. 177, 185 (2006).

[96] General Agreement on Trade in Services, Apr. 15, 1994, Agreement Establishing the World Trade Organization, *supra* note 66.

[97] See Gordon, Sub-Saharan Africa, *supra* note 18, at 96.

[98] See Art XV(1) GATS.

[99] See Art. XIX(2) GATS, which provides that: "There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation...". See Rosen, *supra* note 33, at 1534.

[100] See generally, Committee on Trade and Development, A Description of the Provisions Relating to Developing Countries in the Uruguay Round Agreements, Legal Instruments and Ministerial Decisions, COM.TD/W/10 (Nov. 2, 1994).

countries. These implementation concessions may be in the form of a general aspiration, or explicit provisions directing how developing states are to be given more favorable treatment.[101]

These special provisions for the benefits of developing states under the WTO agreements are merely aspirational, and do not create enforceable positive obligations. Perhaps, this explains why developed states have not adhered to their commitments in this regard. They are inadequate, and as stated elsewhere, they do not give significant protection to developing countries in trade areas that are of utmost concern to them. The claim is that the provisions that grant developing countries longer transitional time frame within which to comply with the various WTO agreements would help in strengthening their institutions to enable them implement the agreements.[102] This argument is not convincing when it is obvious that the longer transitional periods given as a preference to developing states would expire, assuming they have not expired, while the developmental need for such preferential treatments would remain. Even in cases of permanent exemption, only few developing countries qualify for such treatment.[103] Take as an illustration the TRIPS Agreement; it is clear that although the Agreement affords developing countries a larger time frame for compliance, but at the expiration of the period, these countries must fully implement the Agreement.[104] The special provisions are at most commitments that are made on paper without a follow-up structure for implementation.[105]

Developing states have therefore not discarded their belief that the trade regime is essentially that of the rich industrialized countries such as the United States, the European Union, and Japan.[106] It is this attitude that developing states displayed at the failed Ministerial Meeting in Seattle - another forum for them to demonstrate "their conviction that the WTO system was inequitable and steadily becoming more unfair and irrelevant to their development needs."[107] It may be tempting to confuse the actions of the developing countries in Seattle with participation. Rather than constituting participation, it was a protest to show their lack of involvement in the decision-making of WTO. The complaints of developing states were both procedural and substantive. They felt their participation in the WTO affairs had been from the margin, and that the trade agenda had focused on the concerns of advanced countries. Developing states were therefore not

[101] See Michalopoulos, *supra* note 20, at 17.
[102] See Michalopoulos, *supra* note 20, at 21.
[103] See Lee, *supra* note 95, at 185.
[104] See Gathii, *supra* note 90, at 1373.
[105] Michalopoulos, *supra* note 20, at 23.
[106] See Pham, *supra* note 335.
[107] See Gordon, Sub-Saharan Africa, *supra* note 18, at 104.

prepared for a forum that would be no different from the extant regime.[108] They wanted to actually participate in the decision- making of the WTO. The unity and resoluteness with which developing states opposed the Seattle proceedings could not escape the attention of the then WTO Director-General, Supachai Panitchpakdi.[109] The events of Seattle were unprecedented, and have been described as the "most visible and memorable manifestation of popular discontent" exhibited toward the WTO.[110] There was a permutation that the resistance would somehow shape the Fourth Ministerial Conference at the Doha Round, and bring greater democracy to the WTO.[111]

The Doha Round kicked off in November 2001 in Doha, Qatar, with a recognition that "the majority of WTO members are developing countries...", and a promise to "seek to place their needs and interests at the heart of the Work Programme adopted in this Declaration."[112] The Conference was tentatively intended to terminate in January 2005- an ambition that was not achieved, leading to the adjustment of the time line, which also met similar fate.[113] The Round saw the passive involvement of the developing countries, after they were lured into the agenda by promises to be contained in the Declaration. These promises by the developed states were made to the third world countries during an all night meeting, after the departure of some developing countries' delegations.[114] Because of these promises, the Round, at the beginning, appeared to have paid more attention to the development needs of developing countries, presumably because the West did not want a repeat of the Seattle debacle. Hence the wide range of issues embraced by the Declaration. For instance, there was a promise to remedy the disparities that had existed between developed countries and developing countries under the Uruguay Round agreements which had agitated the minds of developing countries. Included in the Doha agenda were other concerns of developing countries such as special and differential treatment in the area of agriculture

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[108] *Id,* at 105.

[109] See H.E. Dr. Supachai Panitchpakdi, *Keynote Address: The Evolving Multilateral Trade System in the New Millennium*, 33 Geo. Wash. Int'l L. Rev. 419, 429 (2001), cited in Pham, *supra* note 78, at 337.

[110] *Id*, 334-335.

[111] See B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 Eur. J. Int'l L. I, 20, 2004).

[112] See Paragraph 2, World Trade Organization, Doha Ministerial Declaration, Nov. 20, 2001, WT/MIN(01)/DEC/1 available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm (hereinafter Doha Ministerial Declaration).

[113] See Sungjoon Cho, *The Demise of Development in the Doha Round Negotiations*, 45 Tex. Int'l L.J. 573, 577, 580 (2010).

[114] See Gathii, *supra* note 90, at 1361, 1365.

and as contained in other WTO agreements;[115] negotiations of trade in services in a manner that would benefit developing countries;[116] the provision of market access for non-agricultural products;[117] intellectual property right and access to medicine;[118] enhanced support for technical assistance and capacity building;[119] trade and competition policy;[120] trade facilitation;[121] WTO rules;[122] environment; trade and environment;[123] debt and finance;[124] and technical co-operation and capacity building.[125] There were also provisions for the "least-developed countries."[126] The lofty aspirations contained in the Declaration earned the Round the name: "Doha Development Round."[127] However, negotiations during the Ministerial Conference were filled with little transparency, with heavy manipulations by the developed states, to the extent that only a handful of developing countries took active part in the process.[128]

In subsequent years, developed countries almost forgot the original philosophy of the Round and abandoned its objectives. The promises, which attracted the developing states to the negotiations, faded away, leaving the same lopsided structure that had long existed. This triggered other factors that led to the failure of the Doha Round. An example of this would be the unwillingness of the bigger countries to grant a reduction of subsidies to developing states, except on reciprocal basis - a position that developing

[115] Paragraph 13, in part, provided that : "special and differential treatment for developing countries shall be an integral part of all elements of the negotiations and shall be embodied in the schedules of concessions and commitments and as appropriate in the rules and disciplines to be negotiated, so as to be operationally effective and to enable developing countries to effectively take account of their development needs, including food security and rural development" See Para 13, Doha Ministerial Declaration, supra, note112. See also §. 44.
[116] Id, §. 15.
[117] Id, §. 16.
[118] Id, §. 17.
[119] *Id*, §. 21.
[120] *Id*, §. 25.
[121] *Id*, §27.
[122] Paragraph 28 contained the agreement of members "...to negotiations aimed at clarifying and improving disciplines under the Agreements on Implementation of Article VI of the GATT1994 and on Subsidies and Countervailing Measures, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives, and taking into account the needs of developing and least-developed participants." See Ibid, §. 28.
[123] *Id*, §. 32-33.
[124] *Id*, §. 36.
[125] *Id*, §. 38.
[126] *Id*, §. 42- 43.
[127] See Gordon, Sub-Saharan Africa, supra, note 18, at 107.
[128] See Chimni, supra, note 111, at 20 (highlighting the experiences of developing countries at the Doha Ministerial Conference).

countries were not eager to take.[129] The above demonstrates that in fact, developed states and the third world countries had conflicting agenda at the Fourth Ministerial Conference in Doha. The mercantilist inclination of the developed states sat uneasily with the development bids of third world countries.[130]

Interestingly, the then Commissioner of European Communities, Pascal Lamy, would seem to have agreed that the Doha Ministerial Conference did not succeed in addressing the concerns of developing countries.[131] In the view of India, represented by its trade official, Bhagirath Lal Das:

For several years, the developing countries have been drawing attention to the severe imbalances and inequities in the WTO agreements. The [Declaration], instead of eliminating the imbalance, has in fact enhanced it by giving special treatment to the areas of interest to the major developed countries and ignoring the areas of interest to the developing countries. [132]

The failure of a scheme that enumerated ambitious assistance programs for third world countries, without matching them with provisions on how they would be funded[133], was certain. In recent years, it has been argued that developing countries are losing their homogeneity, and are now singing discordant tones in matters of trade. Their needs seem now to vary since some are poorer than others. This comes at a time when the industrialized states are pulling themselves together and acting as a cohesive force.[134] This is sure to affect the already jeopardized position of developing states in world trade. The view that developing states have wittingly relinquished their economic, political, and social relevance to international organizations, such as the WTO, is evidence of developing states' lack of effective participation under the WTO.[135]

With the failure of the Doha Round negotiation, it was almost certain that the Cancun Ministerial Conference would not be successful. At the Conference, convened with a view to implementing the Doha agenda, the ension that had formed part of the Doha Round was still in place. A seeming

[129] See Cho, supra, note 113, at 583- 584 (stating that "... the United States conditioned the reduction of its farm subsidies firmly on other members' concessions, not only on the EU's reduction of farm tariffs but also on developing countries' (such as China and India) disarmament of special protection for their crops …).

[130] *Ibid.*

[131] See European Communities Commission Statement by Mr Pascal Lamy, Commissioner for Trade, WT/MIN(01)/ST3, Nov. 10, 2001).

[132] See Bhagirath lal Das, *WTO: The DOHA Agenda- The New Negotiations on World Trade* 3-4 (2003).

[133] See Sungjoon Cho, *A Bridge Too Far: The Fall of the Fifth WTO Ministerial Conference in Cancún and the Future of Trade Constitution*, 7 J. Int'l Econ. L. 219, 226 (2004) (hereinafter Cho, Bridge).

[134] See Ruth Gordon, Sub-Saharan Africa, supra, note 18, at 109, 118.

[135] See Chimni, *supra* note 111, at 25.

concession given to developingcountries by developed states, especially the United States, which concession was to allow developing states that did not have the capacity to manufacture medicine to import cheaper generics at cheaper prices, turned out to have a negative impact on other compromise at the Conference.[136] At the Cancun Conference, four cotton- producing states from the West and Central Africa: Benin, Burkina Faso, Chad, and Mali, pressed for Sectoral Initiative in Favor of Cotton[137] calling on developed states, especially the United States to eliminate subsidies on cotton. The Sectoral Initiative also demanded that due compensation be paid these West and Central African countries to offset their lost income occasioned by the subsidies.[138] One of the pros of the Initiative was that the elimination of subsidies on cotton would lead to a reduction of poverty as cotton production would be raised.[139] However, there was no consensus as to the acceptance of the Initiative. The United States opposed the Initiative, and rather called on the affected countries to diversify their production areas so that they could benefit from the United States' African Growth and Opportunity Act.[140] It is commendable that the then WTO Director-General Supachai, identified with the Initiative.[141]

A group of developing states like Brazil, India, and China, spoke with a united voice against developed states on trade areas such as agriculture. These states were able to win the heart of other third world countries with whom they formed the "G-21" alliance. This gave them a common front to challenge the policies of the United States and the EU and to demand for the removal of all export subsidies on agriculture.[142] The coalition was strong enough to check the economic excesses of the developed states.

At the Sixth Ministerial Conference in Hong Kong, which opened in July, 2005, the problems confronting developing states remained largely unattended. This was also the case with the tension between the North and the South, and the lack of commitment on the part of developed states toward the development concerns of third world countries. The fate of developing countries under the WTO is largely uncertain.

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[136] See Cho, Bridge *supra* note 133, at 226.

[137] See WTO, Committee on Agriculture, Special Session, WTO Negotiations on Agriculture, Poverty Reduction: Sectoral Initiative in Favour of Cotton, Joint Proposal by Benin, Burkina Faso, Chad, and Mali, TN/AG/GEN/4 (May 16, 2003) (hereinafter Sectoral Initiative).

[138] See Cho, Bridge, *supra* note 133, at 230; Ruth Gordon, Sub-Saharan Africa, *supra* note 18, at 113-114.

[139] *Ibid*.

[140] *Ibid*.

[141] *Ibid*.

[142] See Gordon, Sub-Saharan Africa, *supra* note 18, at 111-112.

B. Developing States and WTO Dispute Settlement System

There has been much literature on the functioning of the WTO dispute settlement system, a great deal of which suggests that the system has a lot of merits. For example, it is seen as a new development in international economic relations in which law, more than power, might reign.[143] Dillon has identified three major areas in respect of which the WTO dispute settlement system constitutes an improvement on GATT's system of resolving disputes.[144] The Dispute Settlement Understanding (DSU) is a hybrid of the codification of early measures on dispute settlement, institutional reform and new stipulation, which ensure that the interest of developing states are given attention to.[145] As noted earlier, the GATT dispute settlement system was mainly formal and lacked a detailed procedure. So with the establishment of the DSU under the WTO Agreement, it was thought that it had created a unified system of dispute settlement, with a stronger judicial nature.[146] With some evidence[147] that developing countries' use of the dispute settlement

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[143] See Gregory Shaffer, *How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Countries Strategies*, 5, ICTSD Resource Paper No. 5.(2003), citing Julio Lacarte-Muro & Petina Gappah, *Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench*, 4 J. Int'l Econ. L. 395, 401 (2001). For a similar view, see Hunter Nottage, *Developing Countries in the World Trade Organization Dispute Settlement System*, GEG Working Paper, 2009/47 (2009), available at http://www.globaleconomicgovernance.org/wp-content/uploads/nottage-working-paper-final1.pdf (stating that " One of the most noteworthy achievements of the establishment of the WTO in 1995 was the introduction of its binding dispute settlement system. Building upon GATT dispute settlement practice, the Understanding on the Rules and Procedures Governing the Settlement of Disputes ('DSU') contains innovations that resulted in a paradigm shift from a system based on economic power and politics to one based on the rule of law").

[144] The first is that, the DSU has a unified dispute settlement system, which has solved the problem of uncertainty in the determination of the particular procedure that should apply. The second improvement is the creation of the Appellate Body, which was absent from the GATT. The third is that the system ensures the establishment of the the Panel and the Appellate Body and the adoption of their rulings. See Dillon, *supra* note 19, at 373.

[145] See Freneau, *supra* note 58, at 22.

[146] See Pham, *supra* note 78, at 346 (stating that "As opposed to much of the more fluid diplomatic forms of GATT dispute settlement, the DSU prescribed a more rigid and systematic procedure for handling trade disputes, and established 'stricter time limits, automatic establishment of panels, automatic adoption of panel reports, appellate review, limits on unilateral action, automatic authorization for suspension of concessions, and separate treatment of non-violation complaints'").

[147] See Pham, *supra* note 78, at 349- 350 (supplying some statistical information on the trend of developing countries' participation in the WTO dispute settlement system); There is a record that "A cursory analysis of the WTO Secretariat data for the first ten years of dispute settlement activity provides a relatively positive picture. 127 of the 335 consultations requests made during that period were from developing countries, 40 of the 96 panel proceedings completed involved developing-country complainants, and 33 of the 56 appearances before the Appellate Body in 2007 were from developing countries". See Nottage, *supra* note 143.

process has increased since the creation of the DSU it would appear that the system has brought some gains to developing countries. However, there is counter index showing that developing countries' relative participation in the international trade dispute settlement system in complaints against developed countries has declined since the advent of the WTO.[148] One thing that is clear is that despite the perceived merits of the WTO dispute settlement system, there is a concern that the system has created some unresolved problems for developing countries.[149] This is due to the general implication of the DSU, as it has been observed thus:

By adding 26,000 pages of new treaty text, not to mention a rapidly burgeoning case law; by imposing several new stages of legal activity per dispute, such as appeals, compliance reviews, and compensation arbitration; by judicializing proceedings and thus putting a premium on sophisticated legal argumentation as opposed to informal negotiation; and by adding a potential two years or more to defendants' legally permissible delays in complying with adverse rulings, the WTO reforms have raised the hurdles facing [developing countries] contemplating litigation.[150]

Some specific factors have been identified as affecting the participation of developing countries in the WTO dispute settlement system. First, developing states do not possess sufficient resources, in terms of both finance and personnel to maximize the use of the dispute settlement system. The importance of cost as a major factor militating against developing states' participation in the WTO dispute settlement system should not be underestimated.[151] The cost of litigation before the dispute settlement body is expensive and therefore cannot be afforded by many developing states.[152] Thus developing countries exercise some restraint in bringing complaints before the DSU, to the extent that they miss the opportunity to litigate cases beneficial to them. Moreover, developing states lack trained personnel that are versed in the procedure of the dispute settlement system. It is almost axiomatic that developed states enjoy an advantage or edge over developing states in terms of legal personnel and expertise. This disparity continues to affect the number of cases developing states bring against developed states under the dispute settlement system. Even though the DSU contains certain provisions designed to address the problems of developing states identified

[148] See Shaffer, *supra* note 143, at 14.
[149] *Ibid*.
[150] See Freneau, supra, note 58, at 10, citing Marc Busch & Eric Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement*, in Daniel Kennedy & James Southwick, eds, *The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec* 457, 467 (2002).
[151] See Freneau, *supra* note 58, at 31.
[152] See Pham *supra* note 78, at 354. For instance, representation of a party before the panel proceedings can cost more than US$10 Million. See Nottage, *supra* note 143.

here,[153] the provisions have not been particularly helpful to developing states. This may be because the assistance offered by these provisions is largely limited. For instance, the experts may only assist in respect of disputes that have already been initiated, and may not provide legal assistance prior to the initiation of complaints.[154] In order to ensure the continued impartiality of the Secretariat, as is required under the provision,[155] the Secretariat cannot act as an advocate in a dispute. Even if developing countries decide to use outside legal personnel, the cost implication is still much, and as it has been rightly observed, this solves only the legal personnel problem, and does not resolve the issue of financial resources.[156]

Another obstacle that stands in the way of developing countries' use of the WTO dispute settlement system is the problem of enforcing the rulings of the Panel and the Appellate body. Notwithstanding the judicial nature of the dispute settlement procedure, the rules do not ensure certainty in implementing the decisions of the dispute settlement body. In other words, the system lacks a mechanism that can compel a losing party to comply with the outcome of a dispute. This has made the implementation to be dependent on the willingness of the unsuccessful party.[157] This negatively impacts developing countries. Although it appears the major objective of the WTO dispute settlement is to ensure that the offending party complies with the ruling of the Dispute Settlement Body (DSB) and remove the measure that is in violation of its WTO obligations, in practice the remedy that is immediately available to the complaining party, which has obtained a favorable decision from the DSB, is retaliation through suspension of concessions as the Panel or Appellate Body cannot compel the offending party to remove the inconsistent measure or to compensate the prevailing party. Retaliation is not a satisfactory measure since it does not remove the trade barrier suffered by the complaining party. Moreover, the remedy of retaliation may prove elusive to developing countries, which may have little or no trade areas that can provide retaliatory countermeasures against developed states. Even where there exist such countermeasures in terms of export restriction, they would be counterproductive on developing countries, considering the small nature of their economies,[158] as they cannot sustain the impact created on them by a

[153] Article 27.1 DSU provides that "The Secretariat shall have the responsibility of assisting panels, especially on the legal, historical and procedural aspects of the matters dealt with, and of providing secretarial and technical support". Section 27.2 calls for "additional legal advice and assistance in respect of dispute settlement to developing country Members".
[154] See Hunter Nottage *supra* note 143.
[155] Article 27.2 DSU in part provides that: "...This expert shall assist the developing country Member in a manner ensuring the continued impartiality of the Secretariat".
[156] See Pham, *supra* note 78, at 356.
[157] See Frenean, *supra* note 58, at 35.
[158] See Proposal by the African Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/15, 2, Sept. 25, 2002.

suspension of trade with a developed country. The result is that a developed state has the capacity of absorbing any trade retaliation from a developing country, and may continue in the breach of its obligation under WTO agreements. This has made the WTO retaliation rules to be meaningless.[159] It is on the basis of this observation that it is advocated that monetary compensation be adopted as a better remedy for a violation of a WTO obligation. This will encourage developing states to participate fully in the dispute settlement system.

The more adjudicatory trappings possessed by the WTO dispute settlement procedure have an impact on the power structure of the WTO. While not calling for a return to the GATT days of dispute settlement, developing states tend to prefer more use of Alternative Dispute Resolution (ADR). There have been calls, especially from developing countries, for the strengthening of the ADR mechanisms in the DSU. For example, during the Doha Round, Jamaica urged members to honor their commitment to strengthen the consultation stage as provided for in Article 4.1 DSU.[160] Some developing countries[161], alongside the European Communities,[162] emphasized the use of good offices, conciliation, and mediation to mutually resolve disputes between states. Paraguay,[163] Haiti,[164] Jordan,[165] and the Least Developed Countries Group[166] made a proposal that mediation should be made mandatory in disputes involving developing or least developed countries. At the moment, good offices, conciliation and mediation are rarely utilized in the WTO dispute settlement system. A negotiated or mediated settlement, being mutual in nature, would enhance the voluntary enforcement of agreements between the parties. This would remove the difficulties encountered by developing countries to enforce panel and

[159] See Nottage supra, note 143, citing M. Footer, *Developing Country Practice in the Matter of WTO Dispute Settlement*, 35(1) Journal of World Trade 55, 94 (2001).
[160] See Communication from Jamaica, Contribution by Jamaica to the Doha Mandated Review of the Dispute Settlement Understanding ("DSU"), TN/DS/W/21, 2 (Oct. 10, 2002) (hereinafter Jamaica Proposal).
[161] See Communication from Haiti, Text for LDC Proposal on Dispute Settlement Understanding Negotiations, TN/DS/W/37, 4 (hereinafter Haiti Proposal); Proposal by the LDC Group, Negotiations on the Dispute Settlement Understanding, TN/DS/W/17, 4 (Sept. 19, 2002) (hereinafter LDC Proposal); Jamaica Proposal, supra, note 160, at 1; Communication from Paraguay, Negotiations on Improvements on Clarifications of the Dispute Settlement Understanding, TN/DS/W/16, 2 (Sept. 25, 2002) (hereinafter Paraguay Proposal).
[162] Communication from the European Communities, Contribution of the European Communities and Its Members States to the Improvement of the WTO Dispute Settlement Understanding, TN/DS/W/1, 4 (Mar. 13, 2002) (hereinafter European Communities Proposal).
[163] See Paraguay Proposal, *supra* note 161, at 2.
[164] Haiti Proposal, *supra* note 161, at 4.
[165] See Communication from Jordan, Jordan's Contribution Towards the Improvement and Clarification of the WTO Dispute Settlement Understanding, TN/DS/W/43, 2 (Jan. 28, 2003) (hereinafter Jordan Proposal).
[166] LDC Proposal, *supra* note 161, at 4.

appellate decisions. The increased use of ADR in the DSU would be favorable to the developing countries, which lack the resources to effectively take part in the WTO dispute settlement process. Legal disputes, dealt with through adjudication are won and lost, and not settled, leading to notions of "victory" and "defeat."[167]

The use by developing countries of the WTO dispute settlement system is also marked by fear of threat of retaliation by the advanced countries. The possibility, or rather reality, that developed states would withdraw trade concessions they had given a developing state greatly curtails the number of complaints a developing state may initiate against developed states.[168]

Conclusion

At this stage, it remains to evaluate what the WTO really holds for developing countries. It took about 47 years for the original GATT to metamorphose into the WTO, and it is up to two decades since this metamorphosis took place. It is doubtful if in the real sense, the participation of developing countries under the WTO regime is different from what it was at the GATT period. The fact that the agitations of developing countries under the two regimes of international trade have remained the same seems to confirm this doubt. Developing countries may have increased in number, and one might have envisaged that this would give them more voice in the trade regime. However, this permutation has not turned out to be real. Rather, the voice of developing countries is asphyxiated in a system of WTO that is power-based. Thus, the success of developing countries in the WTO lies not in their number, but in the impact their voice would exert on the trade system. There is almost the temptation to argue that the WTO agreements have sufficiently addressed the concerns of developing states through the inclusion of many provisions that are specifically targeted at these countries. And perhaps, many academic writings have fallen into this temptation. As stated elsewhere, these provisions do not give rise to any obligations on the part of developed states. This much has even been corroborated by one of the decision- making bodies of the WTO. As an illustration, Articles 4.10, 12.11, and 21.2 DSU call for "special attention to the particular problems and interests of developing country Members" in consultations, panel reports, and in the surveillance of implementation of recommendations and rulings, respectively. However, in *EC - Bed Linen,* a request by India to the European Communities to put into consideration a provision requiring that the peculiar situation of developing countries should be accorded recognition in the application of anti-dumping measures, was disregarded. The Panel held that the provision does not impose any obligation

[167] See J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of the WTO Dispute Settlement* 7 (2000).
[168] See Nottage, *supra* note 143.

to provide or accept any constructive remedy that may be identified and or offered. In effect, the so called special provisions are merely hortatory. Thus, developing countries continue to be affected by the asymmetry in their trade relations with developed states. This imbalance has to be addressed for the system to be able to serve the needs of both developed and developing members. It should be observed that the power play that resides in the WTO is just an aspect of the disparity that exists in the larger international relations. It is found in international investment relations, where the developed states virtually dictate what is to be included in the investment treaties they conclude with developing states. It is also not absent in international financial institutions. Developing states may also be contributing to the fate which they face in the WTO. With some of their original common interests now diverging, it may be difficult for them to make consistent claims from their developed states counterparts.

This paper suggests that more efforts be geared toward strengthening the institutional capacities of developing states. In addition, the special provisions for developing countries should be couched in a way that would make them enforceable by the acclaimed beneficiaries- the developing states. This entails a greater commitment from the developed states. Some of the provisions have become inoperative due to effluxion of time; for instance, the ones providing a longer time within which developing countries are to implement WTO agreements. These provisions have to be reviewed. One hopes that developed states would relax some of their dominating tendencies under the trade system. Only time would tell.

*Michael Vacca**

Natural Law as Guardian of the Human Person

Abstract

Natural law "manifests as a duty the natural demands of man's being, which are summed up, in short, in obtaining his natural ends." These ends are the fulfillment of natural inclinations, i.e., the inclination towards preserving one's life, the inclination towards the "conjugal union of man and woman," the inclination towards union with God, the inclinations towards "political society" and association, and the inclination towards knowledge. Thus, the fulfillment of the inclination to preserve one's life is to preserve one's life. Natural law is a then a rational rule of natural inclinations that (1) prescribes that these inclinations need to be fulfilled, and (2) indicates the measures necessary to fulfill these inclinations. Human nature is not then static, but dynamic—a constant striving after the fulfillment of man's inclinations, and ultimately, a striving after man's ultimate end, God himself.

Annotasiya

Təbii hüquq insanın varlığının öz təbii tələblərini həyata keçirməsi, qısaca, öz təbii sonluqlarına çatması ilə bağlı vəzifə kimi əks olunur. Bu sonluqlar təbii meyillərin həyata keçirilməsinə söykənir, məsələn, fərdin həyatını qorumağa meyili, fərdin qadın və kişinin mədəni birliyinə meyili, tanrı ilə birləşməyə meyil, siyasi cəmiyyət və birləşməyə meyil, biliyə olan meyil. Beləliklə, fərdin həyatını qorumağa olan meylinin həaya keçməsi ilə hasil olan nəticə bir insanın həyatını qorumaqdır. Təbii hüquq (1) həyata keçirilməsi gərəkli olan meyilləri göstərən və (2) meyilləri həaya keçirmək üçün əhəmiyyət ölçülərini müəyyən edən təbii meyillərin rasional qaydasıdır. İnsan təbiəti static deyil, dinamik olduğundan xaraktercə meyillərini həyata keçirdikdən sonar yenilərinə çalışır.

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Introduction

The relevance of natural law for human relations is a frequent subject of debate within the legal community. This paper will argue that natural law protects the dignity of the human person in the various dimensions of his or

her life.[1] To this end, this paper is divided into four sections that detail how the natural law functions to protect the human person. Preceding these sections is a brief description of the natural law. Section I then discusses natural law in relation to modern science, section II discusses the natural law's application to the relationship between the individual and society, section III discusses natural law as it pertains to faith and reason in the public debate, and section IV discusses natural law's relation to human law.[2]

I. What Is Natural Law and Why Does It Matter

Natural law "manifests as a duty the natural demands of man's being, which are summed up, in short, in obtaining his natural ends."[3] These ends are the fulfillment of natural inclinations,[4] i.e., the inclination towards preserving one's life, the inclination towards the "conjugal union of man and woman," the inclination towards union with God, the inclinations towards "political society" and association, and the inclination towards knowledge.[5] Thus, the fulfillment of the inclination to preserve one's life is to preserve one's life. Natural law is a then a rational rule of natural inclinations that (1) prescribes that these inclinations need to be fulfilled, and (2) indicates the measures necessary to fulfill these inclinations.[6] Human nature is not then static, but dynamic[7]—a constant striving after the fulfillment of man's inclinations, and ultimately, a striving after man's ultimate end, God himself.[8]

This summary of natural law also serves to show the relevance of natural law in society. Above all, the relevance of natural law emerges from the critical recognition that the natural law is not a rule of reason detached from the human person, but a rule of reason that begins with the human person.[9] The natural law's prescription that natural human inclinations must be fulfilled, and its indication of certain measures necessary to fulfill these inclinations build upon human nature itself. This fact is critically important because when a concern for the human person is removed from law, the law

[1] The human person is a body/soul unity, *Compendium of the Social Doctrine of the Church*, § 127, that has various dimensions, *id.* at 124. The two dimensions that are most significant for this paper are the rational and relational dimensions.
[2] *International Theological Commission, The Search for Universal Ethics: A New Look at the Natural Law* § 35.
[3] Javier Hervada, *Critical Introduction to Natural law*, 129 (Trans. Mindy Emmons. Wilson & Lafleur 2006).
[4] *See* Jacques Maritain, *Natural Law: Reflections on Theory and Practice*, 43 (St. Augustine's Press 2001).
[5] Hervada, *supra* note 3, at 131.
[6] *Id.* at 132.
[7] *See* International Theological Commission, *The Search for Universal Ethics: A New Look at Natural Law*, § 64.
[8] "*Catechism of the Catholic Church*, § 1.
[9] *See* Hervada, *supra* note 3, at 129.

becomes dehumanizing. Thus, natural law functions to protect the human person by recognizing the obligations that proceed from human nature.[10]

A. Natural Law and the Modern Sciences

Challenges to natural law often begin with the assertion that human reason can only grasp certain conclusions derived from empirical observation performed using the scientific method, and certain abstract mathematical truths.[11] The natural law is neither a scientific truth, nor abstract mathematic truth, so human reason cannot grasp it, even assuming that is exists.

The attractiveness of this position is the certainty that it provides. Also, the admission that one does not know the truth can be a form of humility. But in reality, there is no certainty that comes from reducing all truth to scientific and mathematical truth. And while it may be humble to recognize that there is a truth one does not know, there is still a need to remain open to truth at all times.[12] Most importantly, the reduction of all truth to scientific and mathematic truth is very consequential to the human person, and to the diminished regard for his dignity.

B. The Dependency of Modern Science on Philosophy

The first problem with this belief reducing all truth to scientific and mathematical truth is that scientists and scholars develop a propensity to "think that the modern sciences[13] are a closed system sufficient unto themselves and exclusive of all else."[14] This thinking sidelines philosophy as "vague, feeling-oriented, and subjective."[15] But a brief example can demonstrate that scientists presuppose certain philosophical distinctions that are necessary for them to arrive at scientific conclusions.

Suppose that a scientist tests a chemical solution to determine whether or not it is acidic. Based upon certain calculations, he concludes that it is acidic. Moreover, he affirms that the acidity off the solution is a scientific truth. But without the principle of non-contradiction,[16] there is no basis to conclude that merely because something is acidic, it cannot also be non-acidic at the same time. Thus, the scientist relies upon a philosophical, metaphysical principle

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[10] *See Compendium of the Social Doctrine of the Church*, § 140.

[11] David Hume, *An Enquiry Concerning Human Understanding*, Harvard Classics Volume 37 (Collier and Son, 1910).

[12] *See* John Paul II, *Fides et Ratio*, § 44: "Whatever its source, truth is of the Holy Spirit."

[13] Note that modern sciences refer to empirical, verifiable sciences such as chemistry, biology, and physics.

[14] Anthony Rizzi, *The Science Before Science: A Guide to Thinking in the 21st Century*, 19-20 (IAP Press 2004).

[15] *Id.* at 18.

[16] A commonly recognized metaphysical principle that a thing cannot both be and not be at the same time.

to reach "scientific truth." Philosophy is truly the science behind modern science.[17]

Consequentially, refusal to recognize philosophical, metaphysical truths impoverishes the human person in multiple ways. Firstly, as briefly mentioned, people are encouraged to acknowledge "scientific truths" that are merely beliefs. Man desires to know the Truth, and such misrepresentations cannot satisfy the genuine search for Truth. Moreover, denying the human being access to philosophical, religious, and historical truth[18] impedes the search of men for the Truth that will set them free.[19] Secondly, people become moral relativists because any attempt to philosophically reason to a correct resolution of a moral problem is impossible if all truth is scientific and mathematical truth. Moral decisions about whether to harm another human being or engage in sexual activity become matters of preference, instead of right and wrong.

C. The Science of Law

The second problem is particular to law. If all truth is scientific and mathematical truth, then law must be taught as science since it does not concern abstract, mathematical reasoning. And if law is taught as science, the methods of science will be applied. Thus, Langdell devised the case method to study law scientifically.[20] According to the case method, by studying the cases in a given area of law, a limited number of pre-existing legal principles can provide an answer to a legal problem.[21] The critical thing to notice about the case method is that the task of discovering the law is limited to pre-existing principles that may not be in accord with human nature. The case method leaves no room for the application of legal principles to human nature once such principles have been deduced from prior cases. Consequently, the human person becomes part of a legal experiment, rather than the center of legal analysis.

For example, *Garrett v. Arkansas Power & Light Co*[22] applies a common law analysis to determine the duty owed by an electric company to a 17-year old boy, Tommy Garrett, who was injured while coming into contact with a live electric wire as he was climbing a light pole owned by the electric company. The court uses a common law distinction with significant implications for the

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[17] Rizzi, *supra* note 14, at 18.
[18] The birth, life, death, and resurrection of Jesus Christ are historical truths. *See* Stanley L. Jaki, *The Savior of Science*, 186 (Regnery Gateway 1988).
[19] *John* 8:32 (Catholic Revised Standard Version).
[20] Edmund M. Morgan, *The Case Method*, 4 Journal of Legal Education 379, 379 (No. 4) (Summer, 1952).
[21] *See* Anthony T. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* in JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 369 (Gottlieb et al., LexisNexis 2006).
[22] 218 Ark. 575; 237 S.W.2d 895 (Ark 1951).

human person: the invitee/licensee distinction. A licensee, unlike an invitee, "is not entitled to any affirmative act of protection."[23] Consequently, concluding that a person is a licensee significantly lessens the duty owed to him. Because the companies were uninterested in Tommy's presence on the land, the court thus determined that he was a licensee, and not an invitee.[24] Therefore, under common law, neither the electric company nor the company that owned the land had any affirmative duty to remove the live wire to prevent Tommy's injury.

Applying the case method, roughly analogous to the scientific method, the Supreme Court of Arkansas described the common law, and then applied that law to the facts of this case. But it is critical to notice that neither the common law nor the application of the law to the facts involved any discussion about the dignity of Tommy as a human person. The very distinction between licensees and invitees turns upon factors such as business motivation that completely ignore the equal dignity of all persons, whether they intend to engage in a business transaction or not. The court as a matter of common law uncritically accepts this distinction, far removed from the reality of the human person. From this point forward, Tommy's status as a licensee determines the duty or lack of duty owed him, rather than his status as a human person. Insofar as the Supreme Court of Arkansas did not consider Tommy's humanity, its decision is dehumanizing.

D. The Human Person's Capacity to Know the Natural Law

But the human person necessarily knows the essential content of the natural law. "He discovers that he is fundamentally a moral being, capable of perceiving and of expressing the call that . . . is found within all cultures: 'to do good and avoid evil.'"[25] This precept is the foundation for all other precepts of natural law.[26] The subsidiary precepts simply identify particular goods as part of the overall good of the human person.[27] The overall good of the human person is not, however, apprehended solely by the mind, but also by the heart, the spirit,[28] and the affectivity of the human person.[29] Accordingly, the person formulates precepts that are morally binding because they allow him to actualize certain goods and attain to happiness.[30] Therefore, the natural law is not an external law that forces one to conform to the demands of the social order, but an internal law that allows one to fulfill the

[23] *Id.* at 586.
[24] *Id.*
[25] International Theological Commission, The Search for Universal Ethics: A New Look at Natural Law, § 39.
[26] Maritain, *supra* note 5, at 62.
[27] *The Search for Universal Ethics*, § 41.
[28] For practical purposes, "spirit" means "soul."
[29] *The Search for Universal Ethics*, § 44.
[30] *Id.*, § 45.

interior demands of one's own nature.[31] This is why obeying the natural law leads to freedom, and not slavery.

E. Why Knowledge of the Natural Law Matters and How Natural Law Harmonizes with Scientific Truths

Consequently, the human person's capacity to know the natural law is the capacity to know what is good for the human person. This means that the authentic good of the human person can be the basis for all law. Moreover, the authentic good of the human person can only be ensured by a society that acts in accord with the natural law, thus respecting the dignity of the human person. Moreover, this knowledge of natural law does not render scientific and mathematical truths superfluous, but allows them to become part of the integral good of the human person. For example, the statistical evidence[32] demonstrating that children function better in marriage as opposed to single sex households or unstable mother/father households[33] further substantiates the natural law truth that the good of procreation requires the prior good of marriage between a man and a woman.

II. The Individual in Relationship with Society: A Practical Application of Natural Law

The second challenge to natural law identified by the International Theological Commission concerns the relationship between the individual and society. Certain conceptions of this relationship prevalent in modern society contradict natural law and violate the dignity of the human person.

A. What Does It Mean to Call a Human Person an "Individual"?

The human person is social by nature and even more, has a relational dimension that is "capable of communion with [others] on the level of knowledge and love."[34] In fact, the self-realization of the human person depends upon this communion.[35] If then the term "individual" merely refers to a single person in relationship with others, this definition is in harmony with the nature of the human person, and consequently, in harmony with natural law. But if "individual" refers to a completely autonomous subject that only has relationships with others to the extent that he/she consents to

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[31] *Id.*, § 59.

[32] The presumption here is that statistical evidence is typically generated using a scientific methodology.

[33] Pitirim Sorokin, founder and first chair of the Sociology Department at Harvard, "From remotest past, married parents have been the most effective teachers of their children."

[34] *Compendium of the Social Doctrine of the Church*, § 149.

[35] *Id.*, § 149.

those relationships, and if man is merely sociable instead of social and relational, then the "individual" ceases to be a human person.[36]

But the autonomous view of the individual is, nonetheless, attractive because a person is seemingly enabled to control every facet of their life, including their relationships. This control appears to be a means of attaining happiness. But happiness, the complete actualization of the human person, cannot be attained through controlling one's own life, but only through the sincere gift of self to others and to God.[37]

1. *The Social Contract and the Ensuing Violation of Human Dignity*

Social contract theorists have shifted the focus of political philosophy from the nature of the human person to the origin of the human person. For Rousseau, the state of nature was "simple, uniform and solitary."[38] For Hobbes, it was "solitary, poor . . . nasty, brutish, and short."[39] In either case, the individual in the state of nature is the fully autonomous individual that enters into relationship with others only by consent. Consequently, the creation of civil society involves a group of autonomous individuals agreeing to give up certain rights in exchange for the benefits of civil society.[40] For Rousseau, in particular, the individual will is completely submerged in the will of the collective society—the general will.[41] Paradoxically, the social contract theory, by disregarding the nature of the human person, oscillates between extreme individualism where autonomous individuals create their own moral code and collectivism, or the complete absorption of the individual in the society.[42] Both extremes violate human dignity.

2. *Why Radical Individualism Leads to a Violation Human Dignity*

When men are isolated from others and from God, they become the arbiters of what is right and what is wrong.[43] For instance, the pro-choice mentality has its foundation in social contract theory.[44] The mother is necessarily in a relation with her child, but this relation is contingent on her consent to continue that relation because the mother can abort her child at any time.[45]

[36] Charles Rice, *50 Questions on the Natural Law*, 266 (Ignatius Press 1999).
[37] *See Compendium of the Social Doctrine of the Church*, § 34. *See also Luke* 17:33.
[38] Rousseau, *Discourse on the Origin and the Foundations of Inequality among Men*, from The Discourses and Other Early Political Writing, 137-38 (Ed. Victor Gourevitch, Cambridge University Press 1997).
[39] Thomas Hobbes, *Leviathan* 92 (Barnes and Noble 2004).
[40] Eg., Rousseau, *supra* note 38, at 173.
[41] Michel Schooyans, *Democracy in the Teaching of the Popes: Preliminary Report*, 32.
[42] Not all social contact theories contradict Catholic social doctrine, but only those theories that claim that the authority to rule comes from the people, as opposed to claiming that while political authority itself comes from God, it is the people that decide who exercises that authority. Leo XIII, *Diuturnum*, § 6.
[43] *See Genesis* 3:22.
[44] Rice, *supra* note 36, at 266.
[45] *Id.*

But not all human relationships are predicated on consent. A child, for example, does not choose his/her parents. Relationships are part of human nature itself.[46] To make interpersonal relationships *subject* to individual consent is to deny the human person the right to be a human person—that is, the right to be in relation with others. The self-realization of the human person is impossible in a society governed by radical individualism.[47]

B. Why Collectivism Leads to a Violation of Human Dignity

When the human person is completely subsumed into society, he/she loses his personality and becomes "nothing more than an individual part" of society or the state.[48] Under this formulation, the person is a means to serve the common good of society. One does not have any rights vis-à-vis society, and countless numbers of human persons can be exploited in the name of the "common good." Even the killing of persons can be justified as a means of pursuing the "common good." Yet the common good of society only exists for the sake of the human person.[49] And the end of every person is God, so he transcends the state and society.[50] Consequently, under collectivism, the person's freedom to seek God is compromised by his complete allegiance to the state. Just as the self-realization of the person was impossible in a society governed by radical individualism, so it is impossible in a collectivist society.

C. The Preeminent Example of Individualism in Modern Society

The pre-eminent example of individualism in society is a kind of moral relativism known as ethical subjectivism—this philosophical position holds that morality is relative to individuals." There is no objective moral truth. Any reference to objective truth is immediately countered with the assertion: "Stop trying to impose your morality on me." But this statement itself imposes a particular morality on a person—a relativistic worldview that renders all moral discussions a matter of opinion.[51] There is no neutrality with respect to moral issues. Applying the metaphysical principle of non-contradiction, a moral opinion is either right or wrong; it cannot be both right and wrong at the same time. There may be elements of truth in wrong opinions, but the opinion itself, when considered in its totality, either reflects the truth about the human person and is right, or mischaracterizes the human person in some particular and is wrong.

[46] *Id.* at 267.
[47] *Compendium of the Social Doctrine of the Church*, § 149.
[48] Hervada, *supra* note 3, at 41.
[49] *Compendium of the Social Doctrine of the Church*, § 170.
[50] *Id.*, § 47.
[51] *See The Search for Universal Ethics*, § 8.

Given that ethical subjectivism is prevalent in society, there appears to be a real contradiction between the position that morality is relative to individuals and the moral presuppositions that are necessary to create a society. A society can be defined as a group of persons bound "by a principle of unity."[52] And yet, ethical subjectivism makes it impossible for a society to agree upon a moral principle of unity because such a principle presupposes an objective source of morality.

The criminal code of our society, for example, punishes rape and murder. In a society governed by ethical subjectivism, the punishment of these crimes is completely arbitrary and it would be equally permissible to reward men for raping women and killing other men. The very moral foundations of society, that it is wrong to take innocent human life and sexually violate other persons, are denied by moral relativists. Moreover, any principle of unity that is significant enough to hold society together has moral implications that require individuals to accept an objective source of morality. The very idea of a humane society that protects the life, liberty, and property of men[53] is impossible when ethical subjectivism is the guiding principle for society.

D. The Preeminent Example of Collectivism in Modern Society

With reference to collectivism, the most pre-eminent contemporary form in the United States disguises itself as "democracy." After delivering an address at the Gregorian University in Rome, Justice Antonin Scalia said, "The whole theory of democracy . . . Is that the majority rules; that is the whole theory of it. You protect minorities only because the majority determines, that there are certain minority positions that deserve protection."[54] This statement embodies the collectivist form of "democracy." Under Justice Scalia's formulation, persons who are in the minority become simply part of the larger society. Their rights are not unalienable rights that derive from God, but contingent rights that derive from the will of the majority. Thus, "democracy can vote itself into tyranny."[55] Thomas Jefferson had a very different understanding of the republican form of government the Founders of America sought to secure.[56]

As a result of the collectivist form of "democracy," the killing of unborn human beings is a policy judgment made by the legislature, which presumably reflects the will of the majority. As Justice Scalia affirms, "If the people, for example, want abortion the state should permit abortion. If the

[52] *Compendium of the Social Doctrine of the Church*, § 149.

[53] *The Declaration of Independence*, *available at* http://www.ushistory.org/declaration/document/index.htm (last visited 2 March 2018).

[54] Harry Jaffa, *Storm over the Constitution*, 115 (Lexington Books 1999).

[55] *Id.* at 116.

[56] Thomas Jefferson, *Notes on the State of Virginia*, 160 (Bedford/St. Martin's 2002).

people do not want it, the state should be able to prohibit it."[57] But if the state can pass a law allowing for the killing of unborn babies provided that the majority consents, there is no right to life. In order for any right to exist, there must be a duty upon all persons to protect that right, including the majority.[58] Thus, the killing of an entire class of human beings is justified under "democracy." And "democracy," as Justice Scalia understands it, also justifies the decision of the majority of the German people that "Hitler would be the voice of the people."[59] A collectivist form of democracy poses a grave risk to the lives of all people in the state that adopts it.[60]

E. Natural law Applied: How The Proper Relationship between the Individual and Society Protects the Dignity of the Human Person

To arrive at the proper relationship between the individual and society, the analysis must begin with the human person. In particular, the relationship between the individual and the state does not completely express the relational nature of the human person. In fact, there are several social relationships such as that between the individual and the family that "respond more immediately to the intimate nature of man."[61] To prevent the individual human person from being submerged in the state, there must be autonomous, intermediate social groups between the individual and the state.[62] The family or a civic organization, for example, has a proper autonomy that the state should respect.[63]

Thus, a multiplicity of social groups prevents any single group from submerging the individual, and allows the human person to relate with others in a rich variety of ways, as a lover, a father, a mother, an instructor, a friend, an advisor, a counselor, a citizen, and a co-worker. The proper relationship between the individual and society is then based on a "healthy social pluralism."[64] This "social pluralism" is in accord with the nature of the human person who has various needs and various means of relating with others to fulfill those needs. Consequently, the relationship between the individual and society that is mediated through various social groups is a natural law principle. The human person is fulfilled because, unlike individualism, he

[57] Jaffa, *supra* note 54, at 115.
[58] *Compendium of the Social Doctrine of the Church*, § 156.
[59] Jaffa, *supra* note 54, at 116.
[60] *See* Schooyans, *supra* note 41, at 22, 30.
[61] *Compendium of the Social Doctrine of the Church*, § 151.
[62] *Id.*
[63] *Id.*, § 214.
[64] Social pluralism refers to a multiplicity of social groups that intervene between the individual and the state.

can engage in relationships with others, and unlike collectivism, he does not lose his autonomy.

III. Faith and Reason in the Public Debate: What We Can Learn from the Natural Law

The third challenge to natural law is the exclusion of faith from the public debate. Central to the resolution of legal problems within a society are the antecedent beliefs about how society should decide moral issues. This is because law and morals are inextricably intertwined.[65] Frequently, rational approaches to moral issues are contrasted with faith-based approaches. But this distinction wrongly presupposes that faith-based approaches are not rational. Although natural law is a rule of reason, a proper application of natural law does not exclude faith from the public debate over moral issues. By accommodating faith and reason, the natural law protects the human person from the errors of rationalism, reason alone, and fideism, faith alone.

However, there are benefits to rationalism and fideism that should be recognized. Rationalism allows the human person to search for the truth through the intellect. This is a noble and worthy endeavor. Rationalism also provides a seemingly objective means of searching for the truth that does not depend on a privileged experience of faith. Consequently, it appeals to the human desire for certainty. Fideism, in contrast to rationalism, grants the human person the freedom to act in accordance with what he/she believes is true. Fideism involves a distrust of human reason, and prefers to seek the Truth by trusting God and others. This simple way of approaching God avoids the pitfall of intellectual pride—an excessive confidence in human reason.

A. Faith is Rational, and a Necessary Part of Living in This World

As easily demonstrated by common examples, people act on faith everyday of their lives.[66] When a person wakes up in the morning, he sometimes jumps out of bed trusting that the floor is still there. Again, many people have never seen the Indian Ocean, but they are so convinced that it exists that it would require a great deal of work to persuade them otherwise. Neither of these common examples of trust or faith is considered irrational.[67] Faith is part of

[65] Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart"* IN JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 211 (Gottlieb et al., LexisNexis 2006).

[66] John Henry Newman, *Sermon 15: Religious Faith Rational* IN PAROCHIAL AND PLAIN SERMONS, 125 (Ignatius Press 1997).

[67] *See Id.* at 126.

everyday life that does not become irrational merely because religion is involved.[68]

B. Rationalism: The Harmful Consequences of Excluding Faith

The necessity of faith can be deduced from a common human experience: the person whose conscience tells them something is wrong, but has difficulty explaining why it is wrong to another person. If that person is required to act on strictly rational grounds that can be explained to another person, he or she will violate their conscience. This is the first harmful consequence resulting from rationalism.

Suppose Luke is a farmer without any formal education. His conscience tells him that using contraception with his wife is wrong, but because he has not been trained to reason properly, he cannot rationally explain why contraception is wrong to his wife. He is a devout Catholic and accepts that contraception is wrong because that is what the Roman Catholic Church teaches. Should Luke use contraception and violate his conscience merely because he cannot rationally explain his position to his wife? The very nature of conscience requires Luke to obey his conscience.

Essentially, conscience is binding because it is God's messenger instructing a person how to act rightly.[69] Therefore, a person must be free to act in accordance with their conscience, even if their conscience is informed more by faith than by reason. This does not deny that the faculty of conscience involves the use of reason, but only asserts that the moral authority of conscience is not contingent upon the ability to explain moral issues in strictly rational terms. Rationalism, the exclusion of faith as a basis for acting in society, carries the inherent risk that a person will not be able to act in accordance with their conscience.[70] Rationalism thus compromises human freedom—the unimpeded search for Truth.[71]

The second harmful consequence resulting from rationalism is that even if the human person discovers that a given principle is true through mere reason, there is no encouragement to act in accord with that principle. As Father Wojciech Giertych explains, "The reason may see, even clearly, the truth of a moral challenge, and yet the person may refrain from adhering to

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[68] *Id.*

[69] John Paul II, *Veritatis Splendor*, § 58, *available at* http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_06081993_veritatis-splendor_en.html (last visited April 30, 2010).

[70] E.g., John Rawl's theory of public reason is a rationalist approach that denies freedom of conscience. Kent Greenawalt, *Private Conscience and Public Reasons*, 108 (Oxford University Press 1995).

[71] Human freedom has an "essential and constitutive relationship to truth." John Paul II, *Veritatis Splendor*, § 4.

it, precisely because what is missing is the moral stamina that would permit the creative and mature free choice of the *verum bonum* [true good]."[72] The only thing that can provide this moral stamina or encouragement is faith. The spiritual life "illuminates the mind, opening it to the mysterious perspective of encountering God and it strengthens the will enabling it to persevere in its attachment to the true good."[73] Moreover, the spiritual life can move the heart to express love for God and others in conformity with the truth. In effect, rationalism excludes the one thing necessary to act in accord with the truth, God's grace. Since rationalism does not allow a person to act in accord with the Truth, it prevents the human person from flourishing.[74]

C. Fideism: The Harmful Consequences of Excluding Reason

While rationalism is not fully consistent with human nature because it ignores critical aspects of the human person, i.e., the conscience, the will, and the heart, fideism also ignores critical aspects of the human person, including the faculty of reason. A particular type of fideism called voluntarism recognizes only the will. "God is understood to be only power or a will that transcends reason."[75] Consequently, under voluntarism, "reason is subservient to will" and "total obedience becomes the highest virtue."[76]

For example, some Muslims which believe that the will of Allah is supreme whether or not it is rational adhere to a form of voluntarism.[77] Moreover, because these Muslims believe that Allah is the only God,[78] everyone must obey the will of Allah. No one can object that it is more rational to allow people freedom of religion or that using violence to enforce the will of Allah is irrational. Since Allah's will is supreme, there is no clear right and wrong because everything is potentially right if Allah wills it.[79] Thus, the mere proclamation that this or that is the will of Allah can lead to the most abhorrent violations of human dignity, i.e., terrorist acts that kill innocent lives. So it is not religion that leads to violence, but only exclusivist religions that adhere to voluntarism by recognizing only the will.

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[72] Father Wojciech Giertych, *Lateran University Conference: Legge Morale Naturale: problemi e prospettive*, 9.

[73] *Id.* at 10.

[74] *See* John Paul II, *Veritatis Splendor*, § 87.

[75] James V. Schall, *The Regensburg Lecture*, 47 (St. Augustine's Press 2007).

[76] *Id.*

[77] Not all Muslims subscribe to voluntarism.

[78] *The Koran*, Sura XL—The Believer, *available at* http://books.google.com/books?id=QB_gAAAAMAAJ&printsec=frontcover&dq=Koran&source=bll&ots=BSlEBLE8ZT&sig=2TNbCqwJ4Mp_eED_Aipzf5u8SF8&hl=en&ei=CnnUS9SfNYOI8wTL7pyFDw&sa=X&oi=book_result&ct=result&resnum=16&ved=0CFUQ6AEwDw#v=onepage&q=one%20God&f=false (last visited 2 March 2018).

[79] Schall, *supra* note 76, at 48.

D. The Contribution of Natural Law: How the Compatibility between Faith and Reason Protects the Human Person

To demonstrate how the compatibility between faith and reason protects the human person, the example of marriage suffices. By looking at the biology of men and women, it is evident that there are sexual differences between the two. Moreover, the "sexual difference renders union possible."[80] It is, therefore, reasonable to assert that "same-sex marriage" does not exist because there can be no sexual union between a man and a man or a woman and a woman. If some contend that while there is no sexual union between two men, there is, nevertheless, a possibility of union on a deeper level, the obvious response is that any such union between a man and a man is impoverished because it cannot physically express itself through sexual union. The union between a man and a woman is manifested in their sexual union, and that is a visible sign that there is, in fact, a real union present. For same-sex partners, the impossibility of sexual union is a clear indication that there is no real union present. Thus, strictly viewing marriage from a rational point of view, "same-sex marriage" is a legal or social construction that does not actually exist.

This rational understanding of marriage does not, however, exclude faith. The Catholic faith confirms that marriage only exists between a man and a woman.[81] What is knowable through reason is confirmed by faith in Christ and His Church. Even more, the Church teaches that the "sacramentality of marriage originates" in the "spousal love of Christ for the Church, which shows its fullness in the offering made on the cross."[82] So marriage is a reflection of Christ's union with the Church. Just as Christ is faithful to his Church, so a husband must be faithful to his wife, and she to him. This adds new meaning to marriage because, through the eyes of faith, marriage becomes a cooperation in the saving work of Christ. So faith enriches reason, and gives what is knowable through reason a deeper meaning. Moreover, by exercising faith in Christ, the human person draws strength and refreshment to be a better husband or a better wife. Thus, faith gives the human person the strength to act in accordance with their marriage vows. This then is how faith and reason work together to benefit the human person.

As Pope John Paul II relates, "Faith and reason are like two wings on which the human spirit rises to the contemplation of truth."[83] "Grace does not destroy nature but heals it, strengthens it, and leads it to its full realization. For this reason, even if the natural law is an expression of reason common to

[80] Jane Adolphe, *St. Paul in Dialogue with Modern Day Pagans: "Same-Sex Marriage" and World Peace*, 3.
[81] *Compendium of the Social Doctrine of the Church*, § 219.
[82] *Id.*
[83] John Paul II, *Fides et Ratio*, preface.

all men . . . it is not external to the order of grace."[84] In fact, the natural law confirms what is knowable through faith in Christ, thus providing the human person with reasons for his or her faith. There is, then, a sense in which the natural law as a rule of reason can help to build one's faith in Christ. This faith is necessary for the human person to live in accordance with the truth—Christ Himself.[85] Reason, however, checks this faith to ensure that it is compatible with the human person. In particular, the human person, through reason, recognizes that human nature is the "bearer of an ethical message," that it "establishes an implicit moral norm."[86] Reason then "actualizes" this norm to ensure that what is known through faith does not violate the very nature of the human person.[87] Thus, the natural law as a rule of reason works together with faith for the protection of the human person.

IV. Natural Law and Human Law

The fourth challenge to natural law identified by the International Theological Commission is the abuse of power "which juridical positivism conceals."[88] Legal positivism draws a distinction between what law is and what law ought to be. The classic formulation by John Austin relates, "The existence of law is one thing; its merit or demerit is another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry."[89] The "assumed standard" to which Austin refers could hypothetically refer to any higher law, but it certainly includes natural law. Thus, the claim of legal positivism is that positive laws are valid because they are posited by humans, irrespective of whether they conform to natural law. Tyranny and the worst forms of human exploitation can thrive under this conception of law.

However, there are several characteristics of legal positivism good for human beings. Firstly, legal positivism encourages respect for the law. This respect for law is necessary to have order and peace in society. Legal positivism also provides certainty regarding what conduct is permissible under the law, at least in theory. Even if a person believes that a law is unjust, he or she knows the essential content of the law, and can be certain a given action will not cause him or her to violate that law. The reason this certainty is merely theoretical is precisely because the composition of courts change, and this can cause an ideological shift in the court's jurisprudence.

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[84] International Theological Commission, *The Search for Universal Ethics: A New Look at the Natural Law*, § 101.
[85] *John* 14:6.
[86] *Supra* note 84, 23.
[87] *See Id.*
[88] *Id.*, § 35.
[89] John Austin, *The Province of Jurisprudence Determined*, Lecture V, 157 (W.E. Rumble ed. 1995) (1832).

Nevertheless, the relative certainty legal positivism provides helps to ensure that law does not become capricious. Finally, legal positivism recognizes that laws need to be formulated by human persons, that people have a vital role in legal systems. Natural law theorists can agree with this proposition because the belief that human law derives from a higher authority is fully compatible with the belief that human laws must be mediated through human institutions. Legal positivism is right to recognize that laws are formulated by human persons, and the recognition of this relation between law and the human person may help to keep the law focused on the person, so that the law will hopefully remain fully human.

A. Why Legal Positivism Does Not Adequately Protect the Human Person from Harm, and the Need for Positive Law to Reflect the Natural Law

However, legal positivism does not ensure that the human person remains at the center of law. The rulers who make the law may exploit the people, or in the case of a democracy, the majority may oppress the minority. Because fallen human beings can create inhuman laws, there is need for a law of the human person—a law that necessarily reflects human nature. The only such law is natural law. But in order for natural law to be effective, positive laws must be in accord with natural law. The way to keep the human person at the center of law is to ensure that positive law is in conformity with the law that perfectly reflects the human person—the natural law.

Consequently, positive laws not in conformity with natural law do not have the nature of law. Instead of being a "dictate of reason for the common good,"[90] such "laws" are, in actuality, the mere exercise of power. When positive law ceases to be in accord with the natural law—when positive law ceases to be moral—it becomes a power game because the quest for power is all that remains.[91] So a positive "law" not in accord with natural law is not a bad law; it is no law at all.

B. How Positive Law Reflects the Natural Law, and the Difference Between Positive and Human Law

Although the protection of the human person requires that positive law reflect natural law, there are two primary ways in which this can occur. "The first way is as conclusions are derived from [p]rinciples. The second way is through determination of certain generalities . . . ."[92] To illustrate the distinction, the natural law principle that innocent human life is to protected

[90] St. Thomas Aquinas, *Summa Theologiae*, Qu. 90, Art. 4, c. IN JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 183 (Gottlieb et al., LexisNexis 2006).
[91] *See Id.*, Qu. 95, Art. 2, c., at 185.
[92] *Id.*

can be manifested in human positive law as a conclusion that necessarily follows this principle, or as a specific determination prudentially designed to give effect to the natural law principle. A law that prohibits murder, the intentional killing of innocent human life, is a conclusion from the natural law principle because murder, by definition, violates the natural law principle, and so it must be prohibited by positive law. In contrast, a law that sets the speed limit on a road at 50 miles per hour is not a direct conclusion from the natural law principle that innocent human life deserves protection. Instead, it is a prudential judgment that a speed limit of 50 miles per hour will give effect to the natural law principle. This is what Aquinas means when he writes that the positive law can reflect the natural law as a "determination of certain generalities."[93]

Since positive law sometimes reflects natural law, there is a distinction between positive law and human law. Aquinas himself suggests that there is such a distinction when he uses the phrase "human positive law."[94] The phrase implies that human law encompasses more than positive law. In particular, human law encompasses positive and natural law. The manifestation of natural law in positive law means that natural law and positive law are interrelated. Human law in the United States, for example, is one system of law, positive and natural.

C. The Harmful Consequences of Legal Positivism for the Human Person

If one accepts the proposition that positive laws not in conformity with natural law are valid laws, and that valid laws must be obeyed, then any valid law harmful to human beings must be obeyed. A law that provides for the torture of seven year-old children must be obeyed because it was posited as a law by the appropriate human institution. So too, the Nazis who operated the concentration camps were merely acting in accordance with the law, so they should not be punished for killing millions of innocent people. It thus emerges that anything can be done to the human person so long as it is posited by the appropriate institution as a law.

D. The Natural Law's Protection of the Human Person: What Can Be Learned from the International Military Tribunal at Nuremberg

If, however, the only valid positive laws are those that reflect natural law, the human person is protected from any harm. This is best evidenced by the Trial of the Major War Criminals Before the International Military Tribunal at Nuremberg. The defendants charged with various human rights violations

[93] *Id.*
[94] *Id.*

argued that "there can be no punishment of crime without a pre-existing law."[95] The Tribunal responded with this language: "[T]he attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."[96] Since then human beings can be punished for violating the natural law, the fact that they were acting pursuant to positive law does not absolve them of responsibility for their actions. The Nuremberg Trial clearly evidences the proposition that positive law should not be obeyed unless it is in accord with natural law, because this is the only way to protect the human person from being exploited.

Conclusion

As evidenced by the various facets of natural law examined throughout this paper, the natural law offers comprehensive protection to the human person. Through seeking the natural law, we discover the various dimensions of the human person, and the legal, social, political, psychological, and economic conditions needed for the human person to flourish. There can be no substitute for well-reasoned discussions about the nature of the human person and the corresponding content of natural law. Until judges, lawyers, and legal scholars recognize that law cannot simply avoid philosophical and religious discussions about the human person, the dignity of the human person will never be secured by the rule of law

[95] *Trial of the Major War Criminals Before the International Military Tribunal*, Nuremberg (14 November 1945-1 October 1946) IN JURISPRUDENCE CASES AND MATERIALS: AN INTRODUCTION TO THE PHILOSOPHY OF LAW AND ITS APPLICATIONS, 865.

[96] *Id.*

*Araz Babazadeh**

Safe port clauses: A comparison of English law and Azerbaijani Law

Abstract

Safe port clauses stated under charterparties have own weight in calling a port weather it is safe or not for a particular ship. In this regard, the parties of business might be interested in how to state the clauses properly for not being burdened with financial troubles. Considering the above, the article will try to take a look at safe port clauses which should be and are a part of charterparties while entering business relations. The article will also analyse the clauses through English and Azerbaijani law and will try to identify comparative points between them.

Annotasiya

Çarter müqavilələri ilə müəyyən edilən təhlükəsiz liman qeyd-şərtlərinin limanın spesifik gəmi üçün təhlükəli hesab edilib-edilməməsi baxımından xüsusi çəkisi var. Bu mənada, biznes münasibətlərinin tərəfləri maliyyə çətinlikləri ilə üzləşməmək üçün bu qeyd-şərtlərin necə düzgün olaraq göstərilməsində maraqlı ola bilərlər. Deyilənləri nəzərə alaraq, məqalə biznes münasibətlərinə girərkən çarter müqavilələrinin bir parçası olan və olmalı olan təhlükəsiz liman qeyd-şərtlərinə bir nəzər salacaq. Məqalə həmçinin bu qeyd-şərtləri İngilis və Azərbaycan hüququ vasitəsilə analiz edərək, onlar arasındakı müqayisəli məqamları ortaya çıxarmağa çalışacaq.

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Introduction

There has always been a matter in respect of ensuring safety in ports, since over 90% of the world trade has being carried out by sea[1] and that becomes a larger scale day by day. Considering potential and various technical problems might occurred in ships, unwelcomed warlike activities, bad weather conditions, etc., there will oftentimes be an issue regarding cargo loss or damages to vessels which leads to liability among the parties of vessel. In order to take precautionary measures, it has been a matter to assure safety in ports by parties of a vessel for all along the years. In the light of that, ensuring safety in ports has appeared through legislations and case law. But to what extent it can be reflected by law? Is there always a need to develop clauses that stated under law?

In addition, it paves the way to further disputes amongst the parties of a vessel, if they fail to define safe port clauses under a charterparty. Safe port clauses under charterparties should clearly be stated under not only legislative acts but also should be developed through the case law so as to avoid undesired corollaries might happen. Besides, two laws belonging two different legal systems reflect the safe port clauses slightly different. Through the article, it will be shown how they treat the matter and which different views that the laws have with respect to safe port clauses.

I. The Parties May Involve

In general, a ship could be entitled to numerous and several owners/holders/hirers. For instance, if the vessel is under mortgage there would probably be a bank that has a right to demand its funding, or if charterer and carrier are not the same person, there would be carrier liable for cargo being lost and charterer liable for the vessel got damaged. Although it is possible to prolong this list, but we will focus on three of them in this article: ship owner, charterer and carrier. That is because they are in the middle of matters concerning a vessel. The brief explanation of parties is as follows:

- Ship owner - a legal/natural person who has an entitlement over the vessel, unless there is mortgagor on the vessel or encumbrance, and generally, ship owner is responsible for the vessel and her crew (depending on type of charterparties);
- Charterer - a natural/legal person acting like a "merchant", and entering into charterparties with a ship owner (or another charterer who bareboat chartered the vessel) and generally, is responsible for safety in ports and

[1] International Maritime Organization, brochure: IMO's contribution to sustainable maritime development, 3. Look at here: http://www.imo.org/en/OurWork/TechnicalCooperation/Documents/Brochure/English.pdf [last visited on 26.04.2018].

berths while entering or getting out, and decides where the vessel should steer to;

- Carrier - a person who enters into a bailment relationship with charterer in terms of carrying cargo.

Now, we have another question that who should take the risk for damage or (maybe) loss due to various dangers encountered in port/berth where the vessel under charterparty got damaged or lost her cargo. The issue will be tried to elucidate from the perspective of two laws: English and Azerbaijani.

II. Point of the English law

Firstly, the cause of choosing English law in this article is that English law has a broad insight into the maritime law and in our case, into port-related matters. English law regulates almost all clauses and provisions stated under charterparties for ensuring safety in ports. Under English law, safety clauses are most-likely determined between a ship owner and charterer. Generally those clauses are known as warranties which a charterer undertakes under the charterparty.

A. Warranties

For purposes of safety in ports, warranties are the main figure that should be taken into account by not only ship owners, but also charterers. Warranty clauses are in general granted by charterers while chartering the vessel.

Many charterparties, and especially time charters have provisions requiring nomination of safe ports; however, in most charterparties there are only a few words with regard to that, hence courts have developed several rules regarding the obligation imposed upon charterers to nominate a safe port under the charterparty.[2]

In this regard, the wording of warranties has much weight for the parties and depending on how it is stated liability the liability can be shifted from one side to another on the basis of wording and considering the particular situation.

Warranty appears when the charterparty names a port and at the same time, uses the word "safe" or alike to describe the port. In the "Archimidis" the charterparty stated "one safe port Ventspils"[3] and this was considered a warranty by the charterer as to the safety of the named port. It means that even if the charterparty does not specify separately that the charterer warrants a safe port or berth to load or discharge, but the charterer indicates "one of the safe ports", it might consider the charterer as a liable person for damage.

[2] Choi Wai Bridget Yim, *Safe Port Promise by Charterers: Rethinking Outstanding Complications,* (2016) 30 ANZ Mar LJ 1, 5 (2016).

[3] AIC Ltd v. Marine Pilot Ltd (The "Archimidis"), 1 Lloyds Rep 597 (2008).

In a similar case, The "Livanita",[4] the wording "one time charter trip via St Petersburg…" combined with "trading to be worldwide between safe ports, safe berths and anchorages and places…" contained an express warranty about the safety of St Petersburg.

The safety warranty in this context might also cover safe port when the charterparty shows "a safe port or a safe berth, even if the port is not listed".[5] It means that if the charterparty does not state any named port/berth should be safe, the charterer should proceed the vessel to any named or nominated port afterwards by him/her which should be safe.

For example, in the court case, The "Ternauzen"[6] the vessel was damaged due to grounding during loading operations. The charterparty specified that the vessel should be steered to a port "where she can lie safely afloat or safe aground where steamers of similar size and draft are accustomed to lie aground in safety". The provision is considered as a warranty, and despite the fact it said that the vessel could lie aground, the judge stated that the berth in question was not one which the vessel could lie safely while loading the designated cargo.

B. Charterparties

Charterparty is a contract between a ship owner and charterer or hirer through which the rights over the ship depending on type of charterparty fully or partly, are entitled to the charterer. In English law, there are three main types of charterparty: time, voyage and bareboat charterparties. In general, safe port clauses become one of the main parts of charterparties that it is worth mentioning some of examples through charterparties which have been accepted in the international law. Although the safe port clauses enumerated from different type of charterparties are not formally passed as a law, they are frequently confronted in practice.

1. Time charter:

Time charter is one type of charterparties that allows charterer to voyage under the time period stated in the charterparty. The charterer has, hence, quite extensive options in regards to where he or she may send the vessel and what to transport, even though sometimes the charterparty can stipulate restriction of the area.

For instance, under *Gentime*[7] in clause 2 of the charterparty the trading limits indicate an express warranty, namely "The vessel shall be employed in lawful trades…between safe ports or safe places where she can safely enter,

[4] STX Pan Ocean Co Limited v. Ugland Bulk Transport AS (The "Livanita").

[5] G.W. Grace & Co. Ltd. v. General Steam Navigation Company. Ltd. (The "Sussex Oak"), 83 Lloyds Rep 297 (1950).

[6] Lensen Shipping Ltd. v. Anglo-Soviet Shipping Co. Ltd (The "Terneuzen"), 52 Lloyds Rep 141 (1935).

[7] The Bimco General Time Charterparty, Issued 1999 (Gentime).

lie always afloat, and depart". The charterer in this regard cannot name safe port by virtue of nature of time charter. Consequently, expressing a general wording might be considered the right thing to do.

Another example is quite similar to Gentime clause which implied through *Baltime*[8] such as - "The vessel to be employed in lawful trades…only between good and safe ports or places where she can safely lie afloat". However, it is possible for the parties to agree with changes in the standard clauses.

For example, in the court case of "Dagmar"[9], the charterparty was based on a Baltime wording with the following amendments:

> *The vessel to be employed in lawful trades for the carriage of lawful merchandise only between good and safe ports or places where she can safely lie always afloat or safe aground where vessels of similar size and draft are accustomed to lie in safety.*

The wording still indicates an express warranty; however, it has been extended to also include "lying safely aground", hence, the vessel must not always bbe afloat.

2. Voyage Charter

Under a voyage charter, ship owner and charterer agree upon that the vessel shall carry a specified cargo to the designated point beforehand and the ship owner should grant the charterer with the seaworthy and properly equipped vessel in exchange of stated freight under the voyage charter of which the charterer should pay to the ship owner. Through the following type of voyage charter we will have a look at safe port warranty.

For instance, under the *Gasvoy*[10]:

Vessel shall proceed…to a safe berth, dock, anchorage, submarine line, alongside a vessel or vessels or lighter or lighters or any other place whatsoever as ordered by Charterers within the limits [specified in Box 19] or so near thereto as she may safely get, lie and depart from, always afloat...

In contrast to the time charter, voyage charter allows the parties to point exact port or place where the vessel should be steered to. With that, ship owner may assure himself by naming the port beforehand that the vessel can stand out of the danger.

3. Bareboat charter

It is worth mentioning that the bareboat charterer is, in comparison with the voyage and time charterer, taking more control of the vessel as he or she equips, crews and trades the vessel for his own account. Just as the common border between ship owner and charterer is set aside, almost all functions over the vessel have been taken over by the charterer. In terms of safe port,

[8] The Bimco Uniform Time Charterparty Box Layout 1974 (Baltime).

[9] Tage Bergland v. Montoro Shipping Corporation Ltd (The "Dagmar"), 1968, 2 Lloyds Rep 563.

[10] The Bimco Gas Voyage Charterparty, Issued 1972 (Gasvoy).

some of bareboat charters cover safety in ports whilst "hand-over" of the vessel is being conducted.

For example, under in clause of 3 of *Barecon 2001*[11], it is stated that:

The vessel shall be delivered by the Owners and taken over by the Charterers at the port or place indicated [in Box 13] in such ready safe berth as the Charterers may direct.

II. Point of the Azerbaijani law

In contrast to English law, Azerbaijani law approaches the safe port clauses in a slight different way. First and foremost, Azerbaijani law belongs to the civil law system in which the maritime legislation regulates almost all maritime-related matters, even though the international conventions become a part of national legislation after having ratified by relevant state authorities. Notwithstanding almost all rules are regulated under the law, the Azerbaijani Merchant Shipping Code ("MSC") – the main legislative code in Azerbaijani maritime law allows parties to regulate their own business (for instance, carriage of goods) by themselves, of course if that is not against rules of the MSC.

Under Azerbaijani law, the title of the article can be found mainly through the legislation. Other provisions or rules might be defined by the parties of current business relations. Those rules can differ depending on nature of interactions.

Under the MSC, there are two types of charterparties:

1. Time charter;
2. Bareboat charter.

The definition of *time charter* is more or less similar to the general definition of time charter. As known, the crew of vessel is peculiar to ship owner and hired by himself/herself. In this regard, the MSC defines that the crew shall obey to ship owner in the sense of operating vessel and with respect to internal rules of the vessel.[12] On top of that, charterer's orders are also mandatory which are given with regard to commercial purposes.[13] For example, oftentimes laytime and demurrage serve to business goals of ship holders regardless of it is charterer or ship owner, and if charterer is a holder of ship at the moment when orders should be given in respect of staying or getting out of the port/berth, the crew should obey to those orders, as failure in time arrangement might damage the charterer's business.

As regards the *bareboat charter*, the MSC implicitly defines that the charterer should ensure seaworthy of the vessel during the term of charterparty[14]. That

[11] The Bimco Standard Bareboat Charter (Barecon 2001), revised 2001.

[12] MSC, Article 159.1.

[13] *Id.* at art. 159.2.

[14] *Id.* at art. 167.2.

means, the charterer should prevent possible damages to the vessel including ones might be occurred by virtue of unsafe ports/berths.

As it can be seen, there are no other provisions related to the safe port under the charter-related paragraphs of the MSC.

From practical standpoint, there is a workable charterparty - *Asbatankvoy*[15] wherein the safe port warranty is clearly stated:

The vessel shall load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighter age being at the expense, risk and peril of the Charterer.

According to other provisions of *Asbatankvoy,* the master is in charge of defining the port whether it is safe or unsafe in the conditions of warlike activities or perils to vessel, if the charterer could not name or nominate a safe one. Considering that the master is a part of crew under voyage charterparty whom the ship owner hires, we may think of that the ship owner in this context defines a safe port.

III. When Safety Comes?

According to the MSC, the charter[16] should cover the matters such as: the place where the vessel is about to steer or the place nominated[17]. As a general rule, a charter should cover a nominated port or the place where a vessel steers to and also the name of loading and discharging place[18].

Under the MSC, the carrier should proceed the vessel to the port which is stated under the charterparty. In this regard, the charterer has an obligation to name or nominate a safe port.[19] That is the main clause under the MSC in relation to the safe port clause. Through this provision, the law impose on the charterer to name or nominate port which is safe at the moment of entering/staying/getting out of the port/berth and in this sense the carrier is obliged to proceed the ship to the safe port.

According to the MSC, should the charterer does not name or nominate a safe port, or fail to name or nominate properly, the carrier may terminate the charter (i.e. contract of carriage) and may demand for loss, if any.[20] Through this provision, it is obvious that the carrier has privilege to decide, in case the charterer does not introduce safe port/berth.

Under the MSC, if the carrier cannot enter the port nominated or named by the charterer on account of natural occurrences, bans or prohibitions applied

[15] Asbatankvoy. Association of Ship Brokers & Agents (U.S.A.), Inc. October 1977.
[16] Known as a charterparty.
[17] *Supra* note art. 95.
[18] *Id.* at art. 90.
[19] *Id.* at art. 95.1.
[20] *Id.* at art .95.2.

by the relevant state or other causes that the carrier is not liable for, the carrier should inform the cargo owner, charterer or other persons who have an entitlement over the cargo pieces[21]. This provision allows carrier (in case bareboat chartered) or ship owner to decide by his own.

According to the MSC, there would be two conditions about the vessel by which cargo is carried:

a) If the vessel is wholly entitled to carry the cargo, the carrier, in a reasonable time after informing charterer and cargo owner, should discharge the cargo at the nearest safe port or may send back the cargo to where it is departed, unless the charterer or cargo owner does not require or request upon what measures should be taken.[22] With this provision, the legislation, as likely as not, states dissent wording from English law and binds the safe port matters to the cargo carried by the vessel, not to the vessel itself.

b) There would also be partially entitlement of vessel through which the carrier may carry cargos belonging to shippers more than one. In that case, the carrier may discharge the cargo in one of the safe port by his choice, if shipper or charterer have not made a decision regarding where the cargo should be discharged to. In this sense, the carrier has 72 hours awaiting time after informing shipper and charterer accordingly[23]. Under this provision, the legislation gives a carrier more privileges rather than grants to the charterer.

Conclusion

Through the above-mentioned, we may conclude the following comparative points between English and Azerbaijani law:

1. As a general view, English law may be deemed more specific and in detail rather than Azerbaijani law. Although the main cause for that has been the case law through which English law has been enhanced, Azerbaijani law seems to lack of the case law which caused the law to be within a "frame" and could not cross the line;

2. English law opted to regulate safe port clauses under charterparty conception and it is enlarged by the case law. In other words, if a ship is chartered (most-likely by time- and voyage-chartering) the clauses for safe port should be indicated under that charterparty no matter this ship is about to carry passenger or cargo. For instance, each "activity" of a ship associated with entering/staying/getting out of the port is stated under charterparties. But Azerbaijani law seems to suffice by stating only general rules for safe port concept and it is more likely linked to carriage of cargo;

3. Azerbaijani law considers the parties of safe port clauses as a carrier and charterer/shipper, while English law draws attention to a charterer and ship owner. It means that English law regulates safe port matters "one click"

[21] *Id.* at art. 118.1.
[22] *Id.* at art. 118.2.
[23] *Id.* at art. 118.3.

before than Azerbaijani law, namely whether the ship is or is not a subject to carriage of cargo, safe port clauses should be undertaken by the charterer under English law. However, Azerbaijani law seems to allow parties of a vessel to "prolong" the time for defining legal statements with respect to safe port clauses until the vessel is intended for carrying a cargo;

4. English law in most cases imposes liability on charterer because of that he should name or nominate the port where the ship will be in safety. Plus, as mentioned previously, there are various warranties which charterer make ship owner assured that the ship will be steered to only safe ports. From perspective of Azerbaijani law, the matter appears differently. We may feel by analysing Azerbaijani law that the law imposes liability for unsafe port on a carrier. Although it is not explicitly defined, liability for unsafe port falls into scope of carrier's work which is conducted at the end of "process". It means that Azerbaijani law firstly states: *"the carrier should proceed the ship to safe port"*, then expresses that *"charterer should name or nominate a safe port"*.

5. It seems that two laws defines the accidents arisen out of being in unsafe port differently. English law ascribes unsafe port matters to the damages a ship got. The very point here is also bound with the parties of safe port clauses. As such, English law describes the parties as a charterer and ship owner whose main interests have concentrated on the ship. Whereas Azerbaijani law states carrier and charterer/shipper as the parties who should specify safe port clauses or abide by the rules defined under the MSC. Here it seems that Azerbaijani law sees the safe port clauses in the context of carriage of goods, namely the interaction between carrier and charterer whose main interests are a cargo.[24] In this context, under Azerbaijani law, ship as an interest between carrier and charterer is not an exception.

To sum up, the safe port clauses might be regulated differently under different laws. In this sense, English law demonstrates more detailed position, while Azerbaijani law treats the safe port clauses more conservatively. It will be beneficial for ship owners, legal/natural persons who intend to be a charterer and other related persons to look through safe port clauses carefully while entering into charterparty. Here, choosing of law is worth mentioning.

[24] Views has been retrieved by an implicit standpoint of Azerbaijani law.

Marcy J. Robles[*]

The Level of Severity Needed for Humanitarian Asylum: A Comparative Study of Canadian and American Immigration Laws

Abstract

What is humanitarian asylum? This principle emerged as a way to prevent victims who suffered severe persecution while living in their home country from being forced to return. International law reasons that even if a victim had no rational reason to fear persecution again, forcibly removing that victim to the origin country of persecution would be inhumane. The United States and Canada are two countries that endorse this principle and implement this belief in their immigration laws. However, both countries differ in their interpretation and implementation of humanitarian asylum.

In comparing the United States' Immigration and Nationality Act to Canada's Immigration and Refugee Protection Act, it is clear that there are major differences in terms of each country's standard and approach to humanitarian asylum. The threshold question in determining whether humanitarian asylum is granted to a refugee is whether the infliction suffered constitutes persecution in the first place. If deemed persecution, then one must determine if the persecution is severe enough to warrant humanitarian asylum. In comparing the United States and Canada, it is clear that Canada's approach is more restrictive and strict, focusing on appalling and atrocious physical harm and only considering psychological harm when a refugee provides sufficient physical, objective documentation. The United States, on the other hand, attempts to broaden the scope of its immigration laws by considering harm other than persecution and allowing testimony as a means to demonstrate psychological harm.

Annotasiya

Humanitar sığınacaq nədir? Bu prinsip şəxsin qaytarılmalı olduğu ölkədə ağır əziyyətlə üzləşəcəyi halda onu qorumaq üçün meydana gəlmişdir. Beynəlxalq hüququn mövqeyinə görə şəxsin ağır əziyyətə məruz qalacağından qorxmaq üçün rasional səbəb olmasa belə, şəxsi məcburi şəkildə əzab-əziyyət çəkdiyi ölkəyə göndərmək insani deyildir. ABŞ və Kanada bu prinsipi dəstəkləyən və öz immiqrasiya hüquqlarına tətbiq edən ölkələrdir. Lakin bu ölkələr prinsipi bir-birlərindən fərqli təfsir və tətbiq etməkdədirlər. ABŞ-ın İmmiqrasiya və Vətəndaşlıq Aktını Kanadanın İmmiqrasiya və Qaçqınların Müdafiəsi Aktı ilə müqayisə etdikdə humanitar sığınacağa ölkələrin müəyyən etdiyi standart və yanaşmalar arasında böyük fərqlər olduğu aydın olur. Burada həlledici sual əzab-əziyyətin səviyyəsinin dözülməzliyindən, yaxud sığınacaq verilməsi üçün kifayət etməsindən ibarətdir. Müqayisələr göstərir ki, Kanadanın yanaşması daha ciddidir və şəxsin göndəriləcəyi ölkədə ağır əzab-əziyyətin gözlədiyini sübut etməsi üçün əsaslı sənədlər tələb olunmaqdadır. ABŞ isə immiqrasiya qanunlarında genişləndirmə apararaq ziyanı əziyyət, igəncədən ayırmağa və şahidlik institutu vasitəsilə psixoloji ziyanın göstərilməsini tətbiq etməyə çalışır.

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Introduction

In 1951, the United Nations ("UN") outlined and implemented a way in which refugees who feared persecution could be granted sanctuary in another country.[1] This "post-Second World War instrument" and "centerpiece of international refugee protection" became known as the United Nations Convention relating to the Status of Refugees ("1951 Convention").[2] One of the core principles at the center of the 1951 Convention was that of *non-refoulement*, which specifies that "no one shall expel or return a refugee against his or her will, in any manner whatsoever, to a territory where he or she fears threats to life or freedom."[3] According to the 1951 Convention, a "refugee" is referred to as someone who is "unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."[4] In other words, in order to be granted asylum, an applicant needed to prove a well-founded fear of future persecution based on one of the five

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[1] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

[2] United Nations Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, 19 U.S.T. 6223 (entered into force Oct. 4, 1967). *See also* U.N.G.A. Res. 2198 (XXI), Convention and Protocol Relating to the Status of Refugees, at 2 (Dec. 16, 1966), http://www.unhcr.org/3b66c2aa10.html.

[3] U.N.G.A. Res. 2198, *supra* note 1, at 3.

[4] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, art. 1(A)(2). *See also* U.N.G.A. Res. 2198, *Supra* note 2, at 14-16.

particular social groups ("PSGs").[5]

However, in cases of particularly severe past persecution, the UN incorporated an exception – initially only intended for Holocaust survivors[6]: the well-founded fear of future persecution element did not need to be proven if the applicant suffered severe past persecution.[7] In other words, the requirement of demonstrating a well-founded fear of future prosecution would essentially be waived.[8] In implementing this exception, the UN reasoned that forcing victims who suffered severe persecution to return to their home country – the origin of such harsh persecution – would be inhumane even if the victim had no rational reason to fear persecution again.[9] The 1992 United Nations High Commissioner for Refugees ("UNHCR") handbook ("UN Handbook") states:

It is frequently recognized that a person who—or whose family—has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.[10]

This exception – referred to as "humanitarian asylum" – initially pertained to only "persons fleeing events occurring before January 1, 1951 and within Europe."[11] However, the UNHCR removed these limitations in the Protocol Relating to the Status of Refugees ("1967 Protocol"), allowing a more broad and universal coverage to any victim of severe and extreme persecution.[12]

This general humanitarian principle was recognized and adopted by many

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[5] *Id.*

[6] Karen Musalo et al., Refugee Law And Policy: A Comparative And International Approach 788, 204-05 (2d ed. 2002).

[7] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, art. 1(C)(5) (exception for applicants "who [are] able to invoke compelling reasons arising out of previous persecution for refusing to avail himself [or herself] of the protection of the country of nationality"). *See also* U.N.G.A. Res. 2198, *supra* note 2 at 16.

[8] *Id.*

[9] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, para. 136, U.N. Doc. HCR/IP/4/Eng/REV.1 (1992), http://www.unhcr.org/4d93528a9.pdf.

[10] *Id. See also* United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 16, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html (although the exact wording referenced was removed in the newer version of the Handbook, the United Nations still recognizes that humanitarian asylum should be granted to those who are able to invoke compelling reasons).

[11] United Nations Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, art. 1(B)(1). *See also* U.N.G.A. Res. 2198, *supra* note 2 at 14-15.

[12] *Id.*

signatories of the 1951 Convention and/or the 1967 Protocol.[13] The United States- a signatory to the 1967 Protocol,[14] and Canada - a signatory to both the 1951 Convention and the 1967 Protocol,[15] are two countries that follow this humanitarian belief. Although both countries endorse the idea laid out in this international agreement, Canada and the United States differ in the interpretation and implementation of humanitarian asylum.

Part I of this note provides a brief comparison and overview of the Canadian and American standards for humanitarian asylum, as adopted from international law. Part II of this note discusses what Canada and the United States perceives to be persecution, which is the threshold inquiry in determining whether the past persecution experienced by a refugee was severe. Part II of this note will also compare the level of severity needed in both countries in order to be granted humanitarian asylum on the basis of past persecution. Part III of this note will highlight the main difference between the Canadian and American humanitarian asylum standard: The United States' implementation of the "other serious harm" provision. Lastly, this note will conclude with a summary of findings and highlight that Canada is stricter than the United States in its immigration laws.

I. Standard for Humanitarian Asylum

A. United States

The Immigration and Nationality Act ("INA"), created in 1952, is the "basic body of immigration law" in the United States.[16] Derived from and similar to that of the 1951 Convention and 1967 Protocol definition, the INA defines a refugee[17] as any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person habitually resided, and who is unable or unwilling to avail himself or herself of the protection of that country because

[13] U.N.G.A. Res. 2198, *supra* note 2 at 6.

[14] *Id. See also* 8 C.F.R. § 208.13(b)(1)(iii)(A) (2005) (noting that a claimant may be granted asylum in the absence of a well-founded fear of persecution if "the applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of the past persecution") and United Nations High Commissioner for Refugees, State Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, (Apr. 2015), http://www.unhcr.org/en- us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html.

[15] *Id.*

[16] U.S. Citizenship and Immigration Services, *Immigration and Nationality Act* (Sept. 10, 2013), https://www.uscis.gov/laws/immigration-and-nationality-act.

[17] *See* Komarenko v. INS, 35 F.3d 432, 436 (9th Cir. 1994) (noting that humanitarian asylum is a "broad delegation of power, which restricts the Attorney General's discretion to grant asylum only by requiring the Attorney General to first determine that the asylum applicant is a 'refugee'").

of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[18]

In other words, asylum is granted if an applicant can prove a well- founded fear of future persecution based on one of the five PSGs listed.[19] The well-founded fear element is satisfied if the applicant fulfills both the objective and subjective prong[20] of the INA[21]. In other words, the applicant must have a subjective, genuine fear of persecution that when viewed objectively, it is logical to believe that a reasonable person in similar circumstances would also fear persecution.[22] One of the ways an applicant can establish a well-founded fear of future persecution, is by demonstrating past persecution.[23] When showing past persecution, a rebuttable presumption of a well-founded fear of future persecution is created.[24] However, the government can rebut this presumption via preponderance of the evidence by demonstrating that the applicant could reasonably relocate to another part of their country of origin and avoid persecution, or by demonstrating that circumstances causing the well-founded fear no longer exists and/or have fundamentally changed.[25] Nevertheless, even if this presumption is rebutted, an applicant may still have a chance of getting asylum if they can demonstrate that the severity of the past persecution is a "compelling" enough reason for the applicant to be unable or unwilling to return to his or her country of origin and thus asylum is warranted, or arguably necessary.[26] If the applicant's reason is found "compelling," the applicant would be granted asylum on a humanitarian

[18] 8 U.S.C. § 1101(a)(42)(A)(2005).

[19] *Id.*

[20] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 11, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html ("The term 'well-founded fear' contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration").

[21] *See* INS v. Cardoza-Fonseca, 480 U.S. 421 (1987) (demonstrating that in order to establish a well-founded fear of return, an asylum claimant must illustrate a subjective and objective fear of returning to their country of origin).

[22] *Supra* note 14, § 1208.13(b)(1). *See also Singh v. INS,* 63 F.3d 1501, 1508-10 (9th Cir. 1995).

[23] *Id.. See also Singh v. INS,* 63 F.3d 1501, 1508-10 (9th Cir. 1995).

[24] *Id.* § 208.13(b)(1) (2005).

[25] *Id.* § 208.13(b)(1)(i)(A)-(B) (2005).

[26] *Id.* § 1208.13(b)(1)(iii) ("Grant in the absence of well-founded fear of persecution. An applicant may be granted asylum in the exercise of the decision-maker's discretion, if: (A) The applicant has demonstrated compelling reasons for being unwilling or unable to return to the country arising out of the severity of past persecution; or (B) The applicant has established that there is a reasonable possibility that he or she may suffer other serious harm upon removal to that country").

ground – hence humanitarian asylum.[27]

Accordingly, humanitarian asylum can be granted if the applicant can demonstrate: "compelling reasons for being unable or unwilling to return to his or her country of origin due to the severity of the past persecution."[28] However, this is not the only way in which humanitarian asylum can be granted. A second way in which an applicant can receive asylum on humanitarian grounds is if the applicant can demonstrate "a reasonable possibility that he or she may suffer serious harm if removed to that country."[29] According to the Board of Immigration Appeals ("BIA"),[30] "other serious harm" does not need to be based on one of the five protected grounds, but must be serious or severe enough to amount to persecution.[31] Usually, "other serious harm" derives from one of the four categories: "(1) economic deprivation; (2) civil strife; (3) emotional harm; and (4) mental/physical health."[32]

B. Canada

The Immigration and Refugee Protection Act ("IRPA"), enacted in 2001, is the center of immigration law in Canada.[33] As the United States, Canada derives its refugee definition from the 1951 Convention and 1967 Protocol.[34] The IRPA defines a refugee as a person who by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, is unwilling to avail themselves of the protection of each

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[27] 8 C.F.R. § 1208.13(b)(1)(iii).

[28] ILRC STAFF ATTORNEYS, A GUIDE FOR IMMIGRATION ADVOCATES, at 14-14 (20th ed. 2016).

[29] *Id.* See also 8 C.F.R. § 1208.13(b)(1)(ii)(B).

[30] The United States Department of Justice, *Board of Immigration Appeals* (Oct. 2, 2017), https://www.justice.gov/eoir/board-of-immigration-appeals ("The Board of Immigration Appeals (BIA) is the highest administrative body for interpreting and applying immigration laws").

[31] ILRC STAFF ATTORNEYS, A GUIDE FOR IMMIGRATION ADVOCATES, at 14-14 (20th ed. 2016).

[32] U.S. Department of Homeland Security, *Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm* (Aug. 24, 2015), https://www.dhs.gov/hot-topics-asylum-examination-particular-social-group-and-other-serious-harm.

[33] Immigration and Refugee Protection Act, R.S.C., ch. 27 (2001) (Can.). The IRPA replaced Canada's previous immigration act. *See* Immigration Act, R.S.C., ch. 1-2. (1985) (repealed 2001) (Can.).

[34] Immigration and Refugee Protection Act, R.S.C., ch. 27, s. 96 (2001) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 1.3 Convention Refugee Definition (Jan. 7, 2016), http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef01.aspx#n13.

of those countries, or

(ii) not having a country of nationality, is outside their country of former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.[35]

As the United States, Canada also adopts UN's interpretation of "well-founded" fear to include an objective and subjective prong to determine if the claimant has good grounds for fearing prosecution in the future.[36] However, unlike the United States, Canada's test[37] to determine if a fear is well-founded is more "forward looking."[38] What this means is that past persecution in and of itself is not sufficient to establish a fear of future persecution.[39] In *Fernandopulle, Eomal v. M.C.I.*, the court rejected the argument that there is a rebuttable presumption under Canadian law that a person who has been the victim of persecution in the past has a well-founded fear of persecution.[40] The test Canadian law follows asks if there is "a reasonable chance that persecution would take place were the applicant returned to his country of origin?"[41] Thus, unlike the United States, the humanitarian asylum analysis does not potentially come up in this particular line of inquiry. Since the United States accepts the notion of a "rebuttable presumption," the humanitarian asylum inquiry would arise as a defense if the presumption of a well-founded fear of future persecution based on past persecution is rebutted.

Being that Canada does not follow this exact line of analysis, it is unlikely that humanitarian asylum would arise in this particular regard. However, the IRPA allows for humanitarian asylum to surface in another way. Section 108

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[35] Immigration and Refugee Protection Act, R.S.C., ch. 27, s. 96 (2001) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 1.3 Convention Refugee Definition (Jan. 7, 2016), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef01.aspx#n13.

[36] Immigration and Refugee Board of Canada, *Legal References*, ch. 5.3.1 Establishing the Subjective and Objective Elements (Nov. 23, 2015), http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx#n531.

[37] *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680 (Can. C.A.).

[38] Immigration and Refugee Board of Canada, *Legal References*, ch. 5.1 Well-Founded Fear Generally (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx#n51.

[39] *Id.*

[40] *Fernandopulle, Eomal v. M.C.I.* (F.C., no. IMM-3069-03), Campbell, [2004] FC 415, at para. 10 (Can. C.A.). The ruling was confirmed by the Federal Court of Appeal in *Fernandopulle, Eomal v. M.C.I.* (F.C.A., no. A-217-04), Sharlow, Nadon, Malone, [2005] FCA 91 (Can. C.A.).

[41] Immigration and Refugee Board of Canada, *Legal References*, ch. 5.2 Test – Standard of Proof (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef05.aspx#n52. *See also Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680, 683 (Can. C.A.).

of the IRPA lays out the circumstances in which a claim for refugee protection will be rejected under the test, one of which, under paragraph (1)(e) is: "the reasons for which the person sought refugee protection have ceased to exist."[42] This ties into the "well-founded fear" element in regards to the fact that an objective prong is used in determining if the applicant has a "well-founded fear." Logically, a well-founded fear does not exist if changed circumstances do not warrant such a fear. Canada carves out a humanitarian exception to this in section 108(4) of the IRPA:

Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of any previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.[43] Such a provision is interpreted as requiring the Canadian government to recognize refugee status on humanitarian grounds.[44] In other words, humanitarian asylum can be granted to "those who have suffered such appalling persecution that their experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution."[45] So, in the Canadian analysis, the compelling reasons inquiry arises only when the reasons for which the person has sought refugee status has ceased to exist, in which case courts are automatically obligated –unlike the United States which allows the inquiry to be raised as a defense – to consider these reasons and determine if they are compelling when there is a change in country conditions and past persecution was suffered.[46] Accordingly, depending on the severity of past persecution and whether the persecution arises to the level of compelling, an applicant may be granted humanitarian asylum. Unlike the United States, Canada's statutory law does not further expand this provision to allow for the approval of humanitarian asylum on the basis of "other

[42] Immigration and Refugee Protection Act, R.S.C., ch. 27, s. 108(1) (2001) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 1.3 Convention Refugee Definition (Jan. 7, 2016), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef01.aspx#n13.

[43] *Id.* at 108(4).

[44] Legal Services Immigration And Refugee Board, Consolidated Grounds In The Immigration And Refugee Protection Act, at 56 (May 15, 2002), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Documents/ProtectTorture_e.pdf.

[45] *Id. See also Canada (Minister of Employment and Immigration) v. Obstoj,* [1992] 2 F.C. 739, 748 (Can. C.A.) (in considering "compelling," one may analyze the word in conjunction with case law that interpreted the previously repealed Immigration Act. "Given substantially similar language used, no substantial change to the interpretation of the provisions is envisaged").

[46] Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721.

serious harm" unrelated to persecution.[47]

Canada instead focuses on persecution, torture, mistreatment, etc.[48]

II. Severity of Past Persecution

A. Is it Persecution?

Before one can determine if the past persecution is severe enough to invoke humanitarian asylum, one must first establish that the origin of the applicant's suffering even constitutes persecution to begin with. Thus, the threshold question of humanitarian asylum is whether the mistreatment suffered is regarded as persecution.

According to the UN Handbook, "there is no universally accepted definition of persecution."[49] However, it is inferred that serious violations of human rights or a threat to life or freedom on account of one of the PSGs is always persecution.[50] Prejudicial actions or threats could be considered persecution depending on the circumstances.[51] Furthermore, an applicant can claim persecution on cumulative grounds if he or she has been subjected to multiple measures not in themselves amounting to persecution.[52] In such situations, other adverse factors may also be considered.[53]

1. United States

Like the UNHCR, the United States does not specifically define persecution in the INA. However, as endorsed in the UN Handbook, United States courts have held that a threat to life or freedom on account of one of the five protected grounds is always persecution.[54] Also, violations of fundamental human rights, such as rape[55], torture/inhuman treatment, etc. can constitute

[47] Legal Services Immigration And Refugee Board, Consolidated Grounds In The Immigration And Refugee Protection Act, at 56 (May 15, 2002), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Documents/ProtectTorture_e.pdf.

[48] *Id.*

[49] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html.

[50] *Id.*

[51] United Nations High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status, at 51-53, U.N. Doc. HCR/1P/4/ENG/REV. 3 (2011), http://www.unhcr.org/3d58e13b4.html.

[52] *Id.*

[53] *Id.*

[54] *See Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983).

[55] *See* Hernandez-Montiel v. INS, 225 F.3d 1084, 1097-98 (9th Cir. 2000) (finding that an applicant who was sodomized and forced to perform oral sex suffered harm rising to the level of persecution.

persecution if connected to one of the five PSGs.[56] Recurrently, many U.S. courts have interpreted persecution as "the infliction of suffering or harm upon those who differ in a way regarded as offensive"[57] or "objectively serious harm or suffering that is inflicted because of a characteristic (or perceived characteristic) of the victim, regardless of whether the persecutor intends the victim to experience the harm as harm."[58] Usually, persecution is perceived as physical harm, but can also include emotional or psychological injury.[59] However, courts consider the absence of physical harm as relevant in considering if a harm suffered rises to the level of persecution.[60] Purposefully imposing severe economic disadvantage on a person or depriving an individual of food, housing, employment, liberty, or other life essentials can be considered persecution as well.[61] The actions in which amount to persecution do not necessarily always have to be categorized as threats to life or freedom and may include less stricter treatment.[62] However, the "actions must rise above the level of mere 'harassment' to constitute persecution."[63] The Third Circuit held that "the concept of persecution does not encompass

[56] U.S. Citizenship and immigration services – raio – asylum division, asylum officer basic training course asylum eligibility part i: definition of refugee; definition of persecution; eligibility based on past persecution, at 55-56 (Mar. 6, 2009), http://www.hanoverlawpc.com/class/Asylum%20officer%27s%20Guide%20to%20Approving%20Asylum%20applications.pdf.

[57] *See Korablina v. INS*, 158 F.3d 1038, 1043 (9th Cir. 1998) and *Miranda v. INS*, 139 F.3d 624, 626 (8th Cir. 1998).

[58] *Supra* note 56, 16.

[59] *See Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (the emotional trauma suffered by a native of Afghanistan living in Germany, was sufficiently severe so as to amount to persecution. The cumulative harm resulted from watching as a neighborhood foreign-owned store burned, finding her home vandalized and ransacked, running from a violent mob that attacked foreigners in her neighborhood, reading in the newspaper about a man who lived along her son's path to school who shot over the heads of two Afghan children, and witnessing the result of beatings her husband and children); Khup v. Ashcroft, 376 F.3d 898, 904 (9th Cir. 2004)(finding that a Burmese Christian preacher suffered past persecution based on death threats and anguish caused when a similarly-situated fellow minister was tortured, killed, and dragged through the streets of the town); and Mame Fatou Niang v. Alberto R. Gonzales, 492 F.3d 505 (4th Cir. 2007) ("persecution cannot be based on a fear of [potential] psychological harm alone," in fact, it must be accompanied by physical harm).

[60] *See* Ruis v. Mukasey, 526 F. 3d 31, 37 (1st Cir. 2008) (the BIA can properly consider the absence of physical harm as a factor in determining whether the level of harm the applicant suffered was serious).

[61] *Supra* note 56.

[62] *Id.* at 17.

[63] *Id. See also* Tamas-Mercea v. Reno, 222 F.3D 417, 424, 426 (7th Cir. 2000) (holding that tapping phone lines, questioning ones wife, and opening one's mail is not persecution); *But see* Rios v. Ashcroft, 287 F.3d 895, 900 (9th Cir. 2002) (holding that death threats by anonymous callers were sufficient to find persecution).

all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional."[64]

Identifying persecution is exceedingly dependent on the factual circumstances and is determined on a case by case basis.[65] Recognizing persecution is arguably just one of those things in which "[You] know it when [you] see it."[66] Although vague in definition, U.S. courts have consistently recognized certain types of conduct as persecution: (1) serious physical harm;

(2) coercive medical or psychological treatment; (3) invidious prosecution or disproportionate punishment for a criminal offense; (4) severe discrimination and economic persecution, and (5) severe criminal extortion or robbery.[67]

For example, the court in *Mihalev v. Ashcroft*, determined that Plaintiff Mihalev, an individual of Gypsy decent, did indeed incur harm that amounted to persecution on account of his ethnicity.[68] Mihalev was detained for a period of ten days by local Bulgarian police for "instigating Gypsy gatherings."[69] During those ten days, the police beat Mihalev daily with sand bags and purposely avoided hitting Mihalev in the face.[70] Furthermore, the police obligated Mihalev to perform hard labor at a construction site.[71] Even though Mihalev did not suffer serious bodily injury, the court found that his experience was enough to constitute persecution.[72]

2. Canada

Like the UNHCR and the United States, the term "persecution" is not expressly defined in Canada's IRPA.[73] However, Canadian courts have recognized that for a particular mistreatment to amount to persecution, such a mistreatment must be serious.[74] The courts examine two factors in order to determine whether the harm suffered qualifies as serious: "(1) what interest

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[64] Fatin v. I.N.S., 12 F.3d 1233, 1240-1241 (3rd Cir. 1993).

[65] Immigration Equality, Immigration Equality Asylum Manual at 15 (Oct. 21, 2014), http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf.

[66] Jacobellis v. Ohio, 378 U.S. 184 (1964) (The phrase "I know it when I see it" is an idiomatic expression by which an individual attempts to categorize an observable fact or event, although the category is subjective or lacks clearly defined parameters. United States Supreme Court Justice Potter Stewart used the phrase in *Jacobellis* to describe his threshold test for obscenity.)

[67] *Supra* note 65, at 15-16.

[68] Mihalev v. Ashcroft, 388 F.3d 722, 730 (9th Cir. 2004).

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Immigration and Refugee Board of Canada, *Legal References*, ch. 3 Persecution (Nov. 24, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef03.aspx.

[74] *Id.*

of the claimant might be harmed; and (2) to what extent the subsistence, enjoyment, expression or exercise of that interest might be compromised."[75] This approach views "serious" as a grave compromising of interest intertwined with the crucial rejection of a fundamental human right.[76] In other words, in analyzing a refugee claim, the persecution evaluation must consider whether there was a violation of an essential human right. Such an idea was expressed and affirmed in many cases,[77] including *Canada (Attorney General) v. Ward*.[78] The court in *Ward* recognized that the Convention demonstrated an international commitment to the idea that all individuals are entitled to fundamental rights and freedoms without discrimination.[79] This recognition led Canadian courts to focus on "actions which deny human dignity."[80]

Thus, the accepted meaning of persecution is the "sustained or systemic[81] violation of basic human rights demonstrative of a failure of state protection."[82] This repetitious requirement approved in *Ward* was derived from *Rajudeen v. Canada*, which considered an ordinary dictionary definition of persecution since persecution was not defined in Canada's Immigration Act.[83] The dictionary defined persecution as "systematic infliction of punishment," "repeated acts of cruelty or annoyance," and "persistent injury."[84] Therefore, an isolated punishment "can only in very exceptional cases satisfy the element of repetition and relentlessness found at the heat of persecution."[85] Such an

[75] *Id.*

[76] Immigration and Refugee Board of Canada, *Legal References*, ch. 3 Persecution (Nov. 24, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef03.aspx#31.

[77] *See e.g.*, *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593, 635 (Can.) ("[t]he essential question is whether the persecution alleged by the claimant threatens his or her basic human rights in a fundamental way").

[78] *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85 (Can.).

[79] *Id.*

[80] *Id.*

[81] United States courts at one point suggested a similar definition for persecution in regards to Humanitarian Asylum. *See* Maradiaga v. INS, No. 95-70238, 1996 WL 473789, at *4 (9th Cir. Aug. 20, 1996) (suggesting that in order to qualify for humanitarian asylum, "systematic and continuous torture" was necessary). However, generally, U.S. courts refuse to "define 'the minimum showing of "atrocity" necessary to warrant a discretionary grant of asylum based on past persecution alone.'" Lopez-Galarza v. INS, 99 F.3d 954, 963 (9th Cir. 1996) (quoting Kaslauskas v. INS, 46 F.3d 902, 907 (9th Cir. 1995).

[82] *Canada (Attorney General) v. Ward,* [1993] 2 S.C.R. 689, 20 Imm. L.R. (2d) 85.

[83] *Rajudeen, Zahirdeen v. M.E.I.* (F.C.A., no. A-1779-83), [1984] (Can.). Reported: *Rajudeen v. Canada (Minister of Employment and Immigration)* [1984], 55 N.R. 129 (Can. F.C.A.).

[84] *Id.*

[85] *Valentin v. Canada (Minister of Employment and Immigration),* [1991] 3 F.C. 390, 396 (Can. C.A.).

exceptional case could, for instance, include female genital mutilation[86] – as this type of injury is unlikely to be repeated.[87] An example of another exceptional case could involve a persecutor killing an individual's family as a form of revenge against said individual – as this type of injury is a damage that cannot be repeated.[88] Regardless of the fact that both of these examples do not contain a repetitious element, the severity and atrocity of such an experience undisputedly can only be branded as persecution.[89]

Additionally, in requiring that the alleged mistreatment or harm suffered meet the "serious" standard, courts have differentiated between persecution and mere discrimination or harassment – with persecution considered the grimmer level of mistreatment.[90] Simply put, in order to distinguish persecution from sheer unfairness or unkindness, the degree of the seriousness of harm must be considered.[91] However, an act not normally considered persecutory may transform into an act of persecution depending on the circumstances – that is if the persecutor, in causing harm, abuses the fact that the targeted person suffers from a particular feebleness or ailment.[92] Also, like the United States, Canada recognizes that psychological violence may be considered persecution in some instances.[93]

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[86] *Annan v. Canada (Minister of Citizenship and Immigration),* [1995] 3 F.C. 25 (Can.) (describing female circumcision as a "cruel and barbaric practice," an "atrocious mutilation," and a "horrific torture").

[87] *See Murugiah, Rahjendran v. M.E.I.* (F.C.T.D., no. 92-A-6788) [1993], Noël, at 6 (Can.) and *Rajah, Jeyadevan v. M.E.I.* (F.C.T.D., no. 92-A-7341) [1993], Joyal, at 5-6(Can.).
See also Muthuthevar, Muthiah v. M.C.I. (F.C.T.D., no. IMM-2095-95), [1996], Cullen, at 5 (Can.) ("I think it is settled law that, in some instances, even a single transgression of the applicant's human rights would amount to persecution") and *Ranjha, Muhammad Zulfiq v. M.C.I.* (F.C.T.D., no. IMM-5566-01), [2003], Lemieux, FCT 637 at para. 42 (Can.) (commenting that the focus should be on whether an act is "a fundamental violation of human dignity" as opposed to an "exaggerated emphasis" on the repetitious element).

[88] *Id. See also* Immigration and Refugee Board of Canada, *Legal References,* ch. 3 Persecution (Nov. 24, 2015),
http://www.irb- cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef03.aspx#31.

[89] *Id.*

[90] *Naikar, Muni Umesh v. M.E.I.* (F.C.T.D., no. 93-A-120), [1993], Joyal, at 2 (Can.).

[91] *Id.*

[92] *Nejad, Hossein Hamedi v. M.C.I.* (F.C.T.D., no. IMM-2687-96), [1997], Muldoon, at 2 (Can.).
See also Canada (Attorney General) v. Ward, [1993] 2 S.C.R. 689, 747, 20 Imm.
L.R. (2d) 85 (Can.) ("[t]he examination of the circumstances should be approached from the perspective of the persecutor") and *Liang, Hanquan v. M.C.I.* (F.C. no. IMM-3342-07), [2008], Tremblay-Lamer, FC 450 (Can.) (affirming that cumulative discrimination and harassment can be considered persecution in light of considerations such as a claimant's vulnerabilities – ex. health, age, finances – or personal circumstances).

[93] *Bragagnini-Ore, Gianina Evelyn v. S.S.C.* (F.C.T.D., no. IMM-2243-93) [1994], Pinard, at 2 (Can.).

B. Is it Severe?

Once the threshold question of whether the mistreatment suffered constitutes persecution is answered, one can move on to the next inquiry for humanitarian asylum – that is, whether the alleged past persecution is severe enough to waive the well-founded fear requirement and invoke refugee status on humanitarian grounds.

1. United States

A noteworthy case that set forth a standard for granting humanitarian asylum is *Haregwoin Abrha v. Gonzales*.[94] The claimant in this case, Abrha, was a native of Ethiopia and a member of the Tigre ethnic group.[95] She alleged that the Mengistu regime, which was in power while she was in Ethiopia, persecuted her.[96] Abrha testified that her business in Ethiopia was closed by the Mengistu regime.[97] The Mengistu regime alleged that Abrha's shop was copying antigovernment pamphlets.[98] When Abrha attempted to reopen her establishment, the Mengistu authorities demanded information regarding her husband, who was a former Ethiopian army colonel and at the time imprisoned.[99] Abrha was detained for about two months on suspicions that Abrha, like her husband, was involved in a failed 1989 coup.[100] Abrha claimed she had been beaten and tortured.[101] Furthermore, after Abrha was released, she was ordered to report every three days and not to travel without government permission.[102]

In analyzing Abrha's claim, the court found that Abrha was unable to show a well-founded fear of future persecution since the Mengistu regime was no longer in power and was overthrown shortly after Abrha's departure.[103] However, the court stated that "Abrha might obtain a discretionary grant of asylum if she could demonstrate that the past persecution was so severe that repatriation would be inhumane."[104] In other words, if Abrha could demonstrate severe past persecution, the court could potentially grant Abrha humanitarian asylum.[105] The court further stated that in evaluating whether to provide a discretionary grant of humanitarian asylum, "factors which should be considered" - in determining severity – "include the degree of harm

[94] Haregwoin Abrha v. Gonzales, 433 F.3d 1072 (8th Cir. 2006).
[95] *Id.* at 1074.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.* at 1076.
[105] *Id.*

suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma resulting from the harm."[106] In considering these factors, the court found that Abrha's past persecution did not meet the level of severity needed for humanitarian asylum.[107] Although Abrha was detained for a period of two months and was abused at times during those months, Abrha did not provide any evidence to demonstrate that she suffered any physical or psychological damage as a result of her detainment and/or treatment.[108]

The court in *Brucaj v. Ashcroft* shed light on what evidence is sufficient in determining lasting effects.[109] The court stated that precedent "did not set forth specific types of evidence necessary to substantiate a humanitarian asylum claim."[110] Furthermore, the court recognized that although the INA does not explicitly state that only certain types of evidence can be used, it strongly suggests that "objective or expert evidence is not necessary."[111] Testimony, if deemed credible, may be sufficient.[112]

Such a case is distinguished from *In re Chen*, where the court granted humanitarian asylum after finding that the past persecution was severe enough to allow for this discretionary act.[113] Chen's family was persecuted during the Chinese Cultural Revolution.[114] Because Chen's father was a Christian minister, Chen's family became a target of the Red Guards.[115] Chen's father was forbidden from continuing his ministry and as a result his income was terminated.[116] The Red Guards ransacked Chen's home when Chen was only eight years old.[117] The Red Guards destroyed Chen's property such as walls and furniture.[118] They also confiscated personal effects.[119] Chen's father was taken prisoner where the Red Guards abused him, burned him, and

[106] *Id. See also* Brucaj v. Ashcroft, 381 F.3d 602, 609 (7th Cir. 2004) (in addition to severe harm and long-lasting effects, BIA also considers variety of discretionary factors once these elements are met, including age, health, and family ties).

[107] *Ibid.*

[108] *Ibid.*

[109] *Ibid.*

[110] *Ibid.*

[111] *Ibid.*

[112] *Ibid.*

[113] In re Chen, 20 I&N Dec. 16, 18 (BIA 1989), https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3104.pdf.

[114] *Id.* at 19-20.

[115] *Ibid.*

[116] *Ibid.*

[117] *Ibid.*

[118] *Ibid.*

[119] *Ibid.*

dragged him through the streets over fifty times.[120] Chen's father died at the age of 46 while still enduring harsh treatment from the Red Guards.[121] Because of Chen's family connection, Chen was also atrociously abused and denied medical treatment.[122] At one point, Chen was locked in a room for six months with his grandmother where he was deprived of food and education.[123] During this time, the Red Guards bit him and kicked him whenever Chen cried.[124] When Chen was released and finally permitted to attend school, the abuse and humiliation continued.[125] On one occasion, rocks were thrown at Chen, causing long lasting detrimental injuries to his head that resulted in Chen wearing a hearing aid.[126] For years, starting from adolescence and continuing to adulthood, Chen endured a number of forced exiles designed to reeducate him.[127] Chen's experience resulted in Chen acquiring long term psychological issues, in which Chen was always fearful and anxious, as well as often suicidal.[128] Chen testified that if forced to return, he would kill himself.[129]

In considering Chen's horrific experience, the court granted Chen humanitarian asylum.[130] In its reasoning, the court stated that "while conditions in China have changed since [Chen's] persecute[ion], the basic form of government there has not changed, human rights are still sometimes abused, and there is little religious freedom".[131] Furthermore, the court indicated that although the regime in China is now different, the chance of persecution has not been completely eliminated.[132] Being that Chen suffered persecution for almost the full duration of his living in China, Chen's fear of returning was understandable.[133] Lastly, the court refused to define circumstances in which a humanitarian asylum claim should or should not be granted, indicating that Chen was to serve as guidance for future decisions as

[120] *Ibid.*

[121] *Ibid.*

[122] *Ibid.*

[123] *Ibid.*

[124] *Ibid.*

[125] *Ibid.*

[126] *Ibid.*

[127] *Ibid.*

[128] *Ibid.*

[129] *Ibid.*

[130] *Id.* at 12.

[131] *Ibid.*

[132] *Ibid.*

[133] In re Chen, 20 I&N Dec. 16, 19-20 (BIA 1989), https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3104.pdf.

opposed to a minimum threshold.[134]

Consider also *In re N-M-A*, where the Afghani Applicant claimed to have suffered severe past persecution.[135] While living in Afghanistan, the communist secret police ("KHAD") kidnapped the Applicant's father in the middle of the night from his very home.[136] The Applicant had not seen his father since then and assumed that his father was dead.[137] Two weeks after his father's kidnapping, the KHAD returned in the middle of the night.[138] The KHAD told Applicant that they needed to search the residence as per routine.[139] However, Applicant discovered the next day that no other homes in the neighborhood had been searched.[140] The KHAD conducted another search sometime after and discovered an anti-communist flyer that the Applicant had been distributing.[141] Because of this, Applicant was "detained for approximately one month and was beaten periodically by the KHAD," resulting in bruises and a deep wound on his leg.[142] Furthermore, Applicant was deprived of food for three days at one point.[143] Because of the abuse, Applicant lost consciousness and was hospitalized.[144] He escaped from the hospital and fled to Pakistan, where he spent 6 weeks healing from his injuries before coming to the United States.[145] Applicant testified that he was "afraid to return to Afghanistan because of the ongoing fighting and because he is now culturally different from his fellow Afghans."[146] The court held:

given the degree of harm suffered by the applicant, the length of time over which the harm was inflicted, and the lack of evidence of severe psychological trauma stemming from the harm, we conclude that the applicant has not shown compelling reasons arising out of the severity of the past persecution for being unable or unwilling to return to Afghanistan.[147]

In its reasoning, the court distinguished the Applicant's persecution from that of the claimant in *In Matter of B-*,[148] where the claimant had suffered three

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[134] *Id.* at 22.
[135] *Ibid.*
[136] *Ibid.*
[137] *Ibid.*
[138] *Ibid.*
[139] *Ibid.*
[140] *Ibid.*
[141] *Ibid.*
[142] *Ibid.*
[143] *Ibid.*
[144] *Ibid.*
[145] *Ibid.*
[146] *Ibid.*
[147] *Ibid.*
[148] Matter of B-, Interim Decision 3251, at 10 (BIA 1995).

months' detention in KHAD facilities, ten months' detention in prison, and four months' involuntary military service.[149] Furthermore, the claimant in *In Matter of B-* suffered sleep deprivation, beatings, electric shocks, and the routine use of physical torture and psychological abuse.[150] There, the court granted humanitarian asylum even though there was a change of circumstances in Afghanistan.[151] However, the court in *In re N-M-A* found that although the facts vastly similar – both claimants were kept from the knowledge of their father's wellbeing and were beaten while being held captive – several factors differentiated them: the length of time detained and the fact that the applicant in *In re N-M-A* suffered no long term physical and/or psychological effects. In fact, the applicant was more so concerned with the fear of civil strife than being persecuted if he were to return to his country.

In considering the aforementioned cases, it is clear that for the most part United States courts consider the degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma/ physical damage resulting from the harm when determining the severity of persecution. The length of time needs to be adequate in comparison to the harm endured, the harm endured must be substantial and examples of substantial include intense beatings, deprivation of food, etc., and lastly there must be some type of long term effect[152] – such as depression, anxiety, physical impairment, etc. The fear of returning to one's country due to civil strife as opposed to fearing for one's own well-being due to past persecution can demonstrate that there has not been a long-term effect which would warrant humanitarian asylum. Once all elements are met, the court may consider other discretionary factors independently, such as age, family ties, etc. in determining whether to grant humanitarian asylum.[153]

2. Canada

In determining the severity of past persecution and whether such past persecution is a compelling enough reason to warrant humanitarian asylum, Canadian courts have held that one must "consider the level of atrocity of the

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[149] In re N-M-A, 22 I& N Dec. 312, 324 (B.I.A. Oct. 21, 1998).

[150] *Id.*

[151] *Id.*

[152] *See e.g.*, In *Matter of S-A-K- & H-A-H-*, 24 I&N Dec. 464 (BIA 2008) (The BIA found that a mother and daughter who had been subjected to female genital mutilation - as well as rape - had severe and lasting health consequences that warranted asylum based on humanitarian grounds), https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3602.pdf. *See also* Lopez-Galarza v. INS, 99 F.3d 954 (BIA 1996) (recognizing that the severe and long-lasting psychological effects of rape are well-documented and are similar to those experienced by torture victims).

[153] *Supra* note 106.

acts included upon the applicant [and] the repercussions upon his physical and mental state.[154] This is similar to U.S.'s "degree of harm suffered" and "long term effects" requirement. Generally, the most well-known Canadian standard to determine severity is the "appalling and atrocious" test.[155] This test was described in *Alfaka Alharazim, Suleyman v. M.C.I.*, where it was stressed that humanitarian asylum should be confined to a "category of situations to those that in which there is prima facie evidence of 'appalling' or 'atrocious' past persecution."[156] If the past persecution is on its face characterized as such, a decision-maker is obligated to conduct the analysis; otherwise the decision-maker may exercise discretion in deciding to perform the assessment.[157] Courts have accepted the ordinary dictionary definitions of "atrocious" and "appalling," attributing these words to mean "an extremely wicked or cruel act, [especially] one involving physical violence or injury," unpleasant, shocking, savage, etc.[158] However, the "appalling and atrocious" test does not need to be used in every case and acts more of an interpretive aid.[159]

Various Canadian court decisions implement this idea one way or another. Consider *Arguello-Garcia, Jacobo Ignacio v. M.E.I.*[160] In this case, the applicant was in detention for forty-five days.[161] During his detention, he had suffered

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[154] *Shahid, Iqbal v. M.C.I.* (F.C.T.D., no. IMM-6907-93) [1995], Noël, (Can.). Reported: *Shahid v. Canada (Minister of Citizenship and Immigration)* (1995), 28 Imm. L.R. (2d) 130 (F.C.T.D.) (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721.

[155] *Alfaka Alharazim, Suleyman v. M.C.I.* (F.C., no. IMM-1828-09), [2010], Crampton, FC 1044 (Can.). *See also* Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721.

[156] *Ibid.*

[157] *Ibid.*

[158] *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), [1993], McKeown, (Can.). Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.) (Can.).

[159] *Adjibi, Marcelle v. M.C.I.* (F.C.T.D., no. IMM-2580-01), [2002] Dawson, FCT 525 (Can.). See also *Suleiman, Juma Khamis v. M.C.I.* (F.C., no. IMM-1439-03), (2004), Martineau, FC 1125. Reported: *Suleiman v. Canada (Minister of Citizenship and Immigration),* [2005] 2 F.C.R. 26 (F.C.) (Can.) ("The issue is whether, considering the totality of the situation, i.e., humanitarian grounds, unusual or exceptional circumstances, it would be wrong to reject the claim in the wake of a change of circumstances. Consideration should be given to the claimant's age, cultural background and previous social experiences").

[160] *Arguello-Garcia, Jacobo Ignacio v. M.E.I.* (F.C.T.D., no. 92-A-7335), [1993], McKeown, (Can.). Reported: *Arguello-Garcia v. Canada (Minister of Employment and Immigration)* (1993), 21 Imm. L.R. (2d) 285 (F.C.T.D.) (Can.).

[161] *Ibid.*

serious physical and sexual abuse.[162] Furthermore, his relatives had been killed.[163] The court found that his circumstances were severe and compelling enough to warrant humanitarian asylum.[164] In *Lawani, Mathew v. M.C.I.*,[165] the applicant, while in detention, was brutally and severely mistreated. He was frequently hung upside down for long periods of time, burned, and whipped.[166] Furthermore, he was forced to expose his genitalia – in which the persecutors inserted broom sticks and needles.[167] This treatment was found to be sufficiently appalling and atrocious to warrant humanitarian asylum.[168] In contrast, the court in *Siddique, Ashadur Rahman v. M.C.I.* found that torture experienced during a fifteen-day detention during the early 1980s, did not constitute atrocious persecution.[169] Such a holding indicates that in order for persecution to be characterized as atrocious enough to be compelling, long term physical and mental repercussions must be considered – especially considering more than a decade has passed since the persecution. This, coupled with the observation that a fifteen-day detention – as opposed to a forty-five-day detention as seen in *Arguello-Garcia, demonstrates the Canada's analysis for humanitarian law, although on its face different, may not be as different from the U.S. analysis as it first appears.* However, the decision in many Canadian cases reveals that Canada may be less inclined to grant humanitarian asylum than the United States, seeing asscircumstances rejected as not meeting the high standard of "atrocious and appalling" would probably survive a U.S. analysis as demonstrated by the U.S. cases previously discussed.[170]

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[162] *Ibid.*

[163] *Ibid.*

[164] *Ibid.*

[165] *Lawani, Mathew v. M.C.I.* (F.C.T.D., no. IMM-1963-99), [2000], Haneghan, (Can.).

[166] *Ibid.*

[167] *Ibid.*

[168] *Ibid.*

[169] *Siddique, Ashadur Rahman v. M.C.I.* (F.C.T.D., no. IMM-4838-93), [1994], Pinard (Can.) (although the court recognized that the torture suffered was abhorrent, the court found it was not sufficient to grant humanitarian asylum).

[170] See *R.E.D.G. v. M.C.I.* (F.C.T.D., no. IMM-2523-95), [1996] F.C.J. No. 631 (Can.) (claim rejected for applicant who had been abducted, beaten and raped); *Nallbani, Ilir, v. M.C.I.* (F.C.T.D., no. IMM-5935-98), [1999], MacKay (Can.) (claim rejected for applicant who had been detained on five occasions, beaten, tortured, deprived of food and drink, and his life threatened); *Nwaozor, Justin Sunday v. M.C.I.* (F.C.T.D., no. IMM-4501-00), [2001] FCT 517 (Can.) (claim rejected for applicant whose father was killed not in applicant's presence, his brother shot by unknown persons, and the applicant plus other family members had been beaten and harassed by the Nigerian army on three occasions over a 6-month period). *But see* Matter of B-, Interim Decision 3251, at 10 (BIA 1995) (claim granted for applicant who

Like the United States, Canada considers psychological harm in its humanitarian asylum analysis. However, Canada differs in its burden to produce evidence indicating such harm. As discussed previously, the United States generally finds that testimony is enough to sustain an alleged psychological harm.[171] Canada on the other hand, requires more in-depth evidence and documentation – usually in the form of a medical report or psychological assessment.[172] In order to fulfill the atrocity and appalling burden, the applicant must demonstrate present psychological and emotional suffering.[173] Such a demonstration shows that the past persecution had long lasting effects, as the applicant still continues to suffer.[174] Evidence of such, or evidence of its absence, is significant in determining if the applicant maintains compelling reasons for seeking humanitarian asylum. For example, in *Hitimana, Gustave v. M.C.I.*,[175] the applicant was not granted humanitarian asylum.[176] Although he alleged that his experiences of witnessing the murder and disappearances of close family members resulted in trauma, neither the applicant nor an expert authenticated this claim.[177] Furthermore, the court found that the applicant demonstrated that he could adapt well and was resourceful.[178] Because of this, it was not unreasonable for them to conclude that the applicant was not suffering from any psychological trauma that amounted to a compelling reason.[179]

III. Severity of Other Serious Harm

As mentioned previously, the United States, unlike Canada, has a statutory provision that allows an applicant to get humanitarian asylum on the basis of other serious harm.[180] Such a relatively new provision – added in 2001 – allowed an individual to get humanitarian asylum another way instead of

presumed his father murdered, suffered sleep deprivation, beatings, electric shocks, and the routine use of physical torture and psychological abuse).

[171] *Supra* note 106, at 609-610.

[172] Immigration and Refugee Board of Canada, *Legal References*, ch. 7 Change of Circumstances and Compelling Reasons (Nov. 23, 2015), http://www.irb-cisr.gc.ca/Eng/BoaCom/references/LegJur/Pages/RefDef07.aspx#n721. *See also Mongo, Parfait v. M.C.I.* (F.C.T.D., no. IMM-1005-98), [1999], Tremblay-Lamer (Can.).

[173] *Ibid.*

[174] *Ibid.*

[175] *Ibid.*

[176] *Hitimana, Gustave v. M.C.I.* (F.C.T.D., no. IMM-5804-01), [2003] Pinard, (Can.).

[177] *Ibid.*

[178] *Ibid.*

[179] *Ibid.*

[180] *Supra* note 14.

being limited to the restrictive "compelling reasons" standard.[181] This standard is forward looking, rather than backwards looking and the serious harm does need not be inflicted on account of one of the five PSGs – race, religion, nationality, membership in a particular social group, or political opinion.[182] Furthermore, there is no requirement that the other serious harm even be in connection with the past persecution; however, it must be so serious that it equals the severity of persecution.[183] Although what constitutes "other serious harm" is made on a case-by-case basis, the BIA decision in *Matter of L-S-* provides a series of examples of circumstances that might suffice.[184] Also, in 2005, the Ninth Circuit held that internal relocation was not available to a gay Mexican man living with HIV who would face "unemployment, a lack of health insurance, and the unavailability of necessary medications in Mexico to treat his disease," because he would likely experience other serious harm.[185]

Conclusion

As one can clearly see, although both Canada and the United States endorse the idea laid out in the 1951 Convention, both differ in some retrospect in the interpretation and implementation of humanitarian asylum. Particularly, Canada's approach is more restrictive and strict. Whereas the United States incorporates a provision allowing for an applicant to obtain humanitarian asylum on the basis of "other serious harm," Canada does not, and instead is limited to severe past persecution that is particularly focused on torture and other physical harm. Furthermore, after an analysis of United States and Canadian case law, it appears that Canada's "appalling and atrocious" test is a more higher and difficult burden for applicants than factors used by the United States – degree of harm suffered, the length of time over which the harm was inflicted, and evidence of psychological trauma resulting from the

[181] Immigration Equality, Immigration Equality Asylum Manual at 25 (Oct. 21, 2014), http://www.immigrationequality.org/wp-content/uploads/2014/10/Immigration-Equality_Asylum_Manual.pdf. *See also* Executive Office for Immigration Review; New Rules Regarding Procedures for Asylum and Withholding of Removal, 63 Fed. Reg. 31,945, 31,947 (proposed Jun. 11, 1998) (Supplementary Information).
[182] *Id.*
[183] *Id.*
[184] Matter of L-S-, 25 I&N Dec. 705, 710 (BIA 2012),https://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3742.pdf, stating examples: (extreme circumstances of inadequate health care. *Pllumi v. Att'y Gen. of U.S.*, 642 F.3d 155, 162 (3d Cir. 2011)); (mental anguish of a mother who was a victim of female genital mutilation having to choose between abandoning her child or seeing the child suffer the same fate. *Kone v. Holder,* 596 F.3d 141, 152-53 (2d Cir. 2010)); or (unavailability of psychiatric medication necessary for the applicant to function. *Kholyavskiy v. Mukasey*, 540 F.3d 555, 577 (7th Cir. 2008)).
[185] Boer-Sedano v. Gonzales, 418 F.3d 1082, 1090-91 (9th Cir. 2005).

harm – to establish whether the past persecution suffered was severe enough to arise to a level of compelling reasons in granting humanitarian asylum. Lastly, Canada has stricter requirements in regards to demonstrating psychological harm suffered. Whereas the United States generally deems testimony as sufficient, Canada requires documentation or more tangible and objective evidence – such as a psychological evaluation or certification by a professional regarding an applicant's mental state. In considering all of these factors, it is rational to conclude that Canada is stricter in granting humanitarian asylum to an applicant while the United States for the most part attempts to broaden its applicability.

*Cavid Dəmirov**

Almaniya və Azərbaycan Vergitutma Sistemlərində Yer Alan Gəlir Vergisinin Hüquqi Prinsiplərinin Müqayisəli Analizi və Vahid Vergi Prinsiplərinin Tətbiqi

Annotasiya
Məqalədə Almaniya Federativ Respublikası və Azərbaycan Respublikasının gəlir vergisi sahəsində istifadə olunan hüquqi prinsiplərin geniş təsviri verilmiş, onların funksional cəhətdən vergi sistemi üçün mahiyyəti araşdırılmış, habelə, onların bir-biri ilə korrelasiyası müqayisəli hüquq prizmasından təhlil olunmuşdur. Bundan əlavə aktual beynəlxalq vergi hüququnda universal xarakterli prinsiplərin rolu tədqiq olunaraq, onların vergitutma prosesinə təsiri araşdırılmışdır.

Abstract
In this article, an extended description of principles of German and Azerbaijani income tax law had been given by author. Moreover, author raises issues about the functional impact of principles for the general system of taxation in both countries, as well as their correlation level with each other through the prism of comparative law. Furthermore, in addition to main research question, the author analyzes the role of common tax law principles in modern international tax law system and their possible influence on taxation procedure.

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Giriş

Müasir dövrdə vergi ödəyiciləri və vergi orqanları arasında qurulan əlaqələrə önəmli təsir gücünə malik olan faktorlardan biri vergi qanunvericiliyi tərəfindən bərqərar olunmuş vergitutmanın əsas prinsipləridir. Bu prinsiplərin əsas məqsədi kimi həm vergi orqanlarının fəaliyyətinin vahid standartlara gətirilməsi, həm də vergi ödəyiciləri ilə münasibətlərdə göstərilən xidmətlərin keyfiyyət səviyəsinin artırılmasını qeyd etmək olar. Buna baxmayaraq, hazırki dünya vergi praktikasında universal xarakterli vergi prinsiplərinin (xüsusən də gəlir vergisinin prinsiplərinin) ərsəyə gətirilməsi prosesi nə İqtisadi Əməkdaşlıq və İnkişaf Təşkilatının,[1] nə də inkişaf etmiş ölkələrin maraq dairəsində deyil. Nəticə baxımından hətta morfoloji cəhətdən oxşar olan prinsiplər mənaca bir-birindən kifayət qədər fərqlənirlər. Bu isə, faktiki olaraq, sözügedən vergi fenomeninin desentralizasiya yolu ilə inkişafına və inkişaf edən ölkələrin investisiya potensialının azalmasına təkamül verən başlıca amil kimi qələmə alına bilər. Bəhs olunan paradoksun bariz nümunəsi kimi Almaniya və Azərbaycan gəlir vergisi sistemlərində yer tutan prinsiplərin bir-biri ilə korrelasiyasını göstərmək olar.

I. Almaniya Federativ Respublikasının Gəlir Vergisinin Hüquqi Prinsipləri

Uzun müddətdən bəri formalaşıb, ərsəyə gələn Almaniya Federativ Respublikasının *(bundan sonra AFR)* vergi sisteminin başlıca özəlliyi gəlir vergisinin prinsiplərinin iqtisadi və hüquqi prinsiplərə bölünməsindən və onların müxtəlif elm sahələri tərəfindən tədqiq olunmasından ibarətdir. Belə ki, vergitutmanın iqtisadi prinsiplərinin öyrənilməsi iqtisadi nəzəriyyənin, hüquqi prinsiplərinin araşdırılması isə sırf vergi hüququnun predmetidir. Maraqlısı odur ki, əksər hüquqi prinsiplər nəzəri baxımdan AFR-nın Əsas Qanununda (*Konstitusiyasında*) qeyd olunan prinsiplərin törəməsi kimi

[1] *İngiliscə:* Organisation for Economic Co-operation and Development (OECD).

qələmə alına bilər.[2] Qeyd olunan elmi yanaşma praktiki cəhətdən vergi və konstitusiya hüququnun prinsiplərinin kolliziyasının qarşısını almaqla yanaşı, həm də ölkədaxili miqyasda şaxələnmiş vergitutma sistemi üçün universal xarakterli prinsiplərin tətbiqinə təkamül verir.

A. Vergitutmanın ədalətlilik prinsipi (*Das Prinzip der Steuergerechtigkeit*)

Gəlir vergisinin ədalətlilik (alman ədəbiyyatında bəzən *bərabərlik* prinsipi kimi də adlandırılan) prinsipi 1776-ci ildə A. Smit tərəfindən irəli sürülən[3] ədalətlilik tezisinin və AFR-nın Əsas Qanunun 3-cü maddəsinin 1-ci bəndindən irəli çıxan tələblərin simbiozundan ərsəyə gələn törəmə xarakterli vergi postulatıdır.[4] Material formada Gəlir Vergi Məcəlləsində öz əksini tapmayan bu prinsip, buna rəğmən, AFR-nın Federal Konstitusiya Məhkəməsi,[5] habelə, elmi ədəbiyyat tərəfindən[6] uzun müddətdən bəri tanınmışdır. Qeyd olunan vergi doqması struktur baxımından iki böyük şaxəyə bölünür. Bunlar hüquq yaradıcılığı və hüquq tənzimləməsi zamanı məcburi xarakter daşıyan bərabərliklərdir.[7] Hüquq yaradıcılığından irəli gələn bərabərlik tələbi qanunverici orqandan eyni məzmunlu işlər zamanı müvafiq ədalətlilik konsepsiyasına uyğun olaraq analoji qərar çıxarılmasını,[8] bir-birindən fərqlənən vergi halları üçün isə individual qiymətləndirilmənin təminatını tələb edir.[9] Öz sırasında hüquq tənzimlənməsi bərabərliyi vergi qanunvericiliyinin hər bir vergi subyekti üçün bərabər əsaslarla şamil olunmasını və subyektiv faktorlardan aslı olan vergi imtiyazlarının qadağasını tələb edir.[10]

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[2] *Cf.* Bundesverfassungsgericht v. 03.11.1982 - 1 BvR 620/78, BVerfGE 61, 319, 343 – 345; Bundesverfassungsgericht v. 22.02.1984 - 1 BvL 10/80, BVerGE 66, 214, 223; Bundesverfassungsgericht v. 29.05.1990 - 1 BvL 20, 26, 184, BVerGE 82, 60, 86 - 87.

[3] Adam Smith, The Wealth of Nations, 703 – 705 (1789).

[4] Bundesverfassungsgericht v. 17.01.1957 - 1 BvL 4/54, BVerfGE 6, 55, 70; Bundesverfassungsgericht v. 03.07.1973 - 1 BvR 368/65, 1 BvR 369/65, BVerfGE 35, 324; Bundesverfassungsgericht v. 22.02.1984 - 1 BvL 10/80, BVerfGE 66, 214, 223; Bundesverfassungsgericht v. 10.03.1998 - 1 BvR 178/97, BVerfGE 97, 332, 346; Stefan Huster, Rechte und Ziele.: Zur Dogmatik des Allgemeinen Gleichheitssatzes, 29 – 30. (1992); Tim Jesgarzewski and Jens M. Schmittmann, Steuerrecht, 17 (2nd ed. 2016); Volker Beeck, Grundlagen der Steuerlehre, 7 (2001).

[5] Bundesverfassungsgericht v. 15.06.1999 - 2 BvR 544/97, NVwZ 1999, 1328.

[6] Joachim Englisch, Festschrift für Joachim Lang, 167 – 169 (2010); Klaus-Dieter Drüen, in: Klaus Tipke, Heinrich Wilheim Kruse, Abgabenordnung, § 3, 41 - 42 (2010).

[7] Oliver Fehrenbacher, Steuerrecht, §1.9 (2015).

[8] Bundesverfassungsgericht v. 17.12.1953 - 1 BvR 147/52, BVerfGE 3, 58, 135; Bundesverfassungsgericht v. 09.12.2008 - 2 BvL 1/07, 2 BvL 2/07, 2 BvL 1/08, 2 BvL 2/08, DStR 2008, 2460.

[9] Bundesfinanzhof v. 12.10.2000 - V B 66/00, BFH/NV 2001, 296; Walter Pauly, *Gleichheit im Unrecht als Rechtsproblem*, 52. Jahrgang, №13 Juristen Zeitung, 647, 648. (1997).

[10] Klaus Tipke und Joachim Lang, Steuerrecht, § 3.111. (2013).

Vergitutmanın ədalətlilik postulatı, həmçinin, alman gəlir vergisində proqressiv vergi dərəcəsinin tətbiq edilməsi üçün müstəsna rol oynayır. Belə ki, məhz ədalətlilik prinsipinin təsiri nəticəsində proqressiv vergi dərəcəsi iqtisadi baxımdan iki mühüm bərabərlik parametrlərini özündə cəmləşdirərək, şəffaf və əlaqəli vergitutma sisteminin yaranmasına təkan verir. Qeyd olunan bərabərlik konstantı nəzəri baxımından alman vergitutma sistemində "şaquli" və "üfüqi" vergi bərabərlik formalarında öz əksini tapmışdır. "*Şaquli bərabərlik*" termini vergitutma prosesi zamanı fərqli gəlirləri olan vergi subyektləri üçün fərqli, diversifikasiyalanmış vergi dərəcəsinin tətbiqini tələb edir.[11] Bu tələb həm ədalətlilik prinsipindən, həm də iqtisadi qurban nəzəriyyəsindən irəli gələn doqmadır.[12] Öz növbəsində "*üfüqi bərabərlik*" dedikdə yaxın gəlirli vergi subyektlərinin eyni vergi dərəcəsi ilə vergiyə cəlb edilməsi nəzərdə tutulur.[13]

Praktiki cəhətdən böyük məna kəsb edən ədalətlilik postulatının vergi münasibətlərində tətbiqi və vergitutma obyektlərinin analizinin subyektiv faktor üzərində qurulmuş *tertium comparationis* metodu üzərində aparılması[14] bu prinsipin şəffaflıq səviyyəsinə inamı azaldan faktor kimi qələmə alına bilər. Bu səbəbdən adı çəkilən institutun hərtərəfli inkişafının qanunverici orqanın nəzər nöqtəsi altında olması böyük önəm daşıyır.

B. Vergitutmanın ödəmə qabiliyyəti prinsipi (*Das Prinzip der Leistungsfähigkeit*)

Bir çox inkişaf etmiş ölkələr tərəfindən tanınan[15] vergitutmanın ödəmə qabiliyyəti prinsipinin başlıca məqsədi vergi subyektinin faktiki əldə etdiyi gəlirin proporsional şəkildə dövlət tərəfindən vergiyə cəlb edilməsindən ibarətdir.[16] AFR-nın Əsas Qanununun 3-cü maddəsinin 1-ci bəndindən irəli

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[11] Bundesverfassungsgericht v. 24.06.1958 - 2 BvF 1/57, BVerfG 8, 51, 58 - 59; Bundesverfassungsgericht v. 09.12.2008 - 2 BvL 1/07, 2 BvL 2/07, 2 BvL 1/08, 2 BvL 2/08, DStR 2008, 2460; BFH v. 27.09.2012 - II R 9/11, BStBl II 2012, 899.

[12] John Stuart Mill, Principles of Political Economy, 804 (1987).

[13] Bundesfinanzhof v. 27.09.2012 - II R 9/11, BStBl. II 2012, 899.

[14] Tipke, Lang, yuxarıda istinad 10, § 3.117.

[15] Klaus Tipke, Die Steuerrechtsordnung, 479 – 480 (2012).

[16] Bundesverfassungsgericht v. 03.11.1982 - 1 BvR 620/78, BVerfGE 61, 319; Bundesverfassungsgericht v. 22.6.1995 - 2 BvL 37/91, BStBl 1995, 655; Bundesverfassungsgericht v. 16.03.2005 – 2 BvL 7/00, DStR 2005, 958.

çıxan[17] və ədalətlilik prinsipi ilə sıx doqmatik əlaqədə olan bu ümumi[18] xarakterli fundamental[19] vergi postulatının alman gəlir vergi sisteminin sosial yönümlü inkişafında rolu danılmazdır.

Prinsipin başlıca cəhətlərindən biri proqressiv vergi dərəcəsinin vergi hüququndakı mövqeyinin bərkidilməsi[20] və mümkün qədər şəffaf və dürüst formada[21] vergi subyektinin qazanc mənbəyindən əldə olunan gəlirin müəyyənləşdirilməsidir. Buna rəğmən, hər bir vergi münasibətinin individual qiymətləndirilməsi praktiki cəhətdən ağlabatan sayıla bilməz. Bu metod vergi orqanlarının fəaliyyətinin səmərəli şəkildə təşkilini şübhə altına atır. Məhz bu səbəbdən qanunvericilik tərəfindən şablon xarakterli vergi münasibətləri üçün xüsusi, əvvəlcədən müəyyən edilmiş normaların tətbiqi nəzərdə tutulmuşdur.[22] Bu cür standartlaşdırma prosesinin bariz nümunəsi kimi vergi orqanları tərəfindən vergi subyektlərinin iş yerinə gediş-gəliş xərclərinin də nəzərə alınmasını göstərmək olar.[23] Gəlir Vergi Məcəlləsinin 9-cu paraqrafının 1-ci abzasının 3-cü sətrinin 4-cü nömrəsinə əsasən, bu cür yol məsrəfinin hər kilometrinə görə vergiyə cəlb olunan məbləğdən 30 sent çıxılır. Bununla da vergi orqanlarının üzərinə düşən yük azaldılmış olur. Nəticə baxımından isə dövlət orqanları və vergi subyektləri arasında qanuni kompromis yolu ilə vergitutmanın ödəmə qabiliyyəti prinsipinə riayət olunur və vergi sisteminin effektivliyi keyfiyyət baxımından yeni səviyyəyə çatdırılır.

C. Vergitutmanın netto prinsipi (*Das Prinzip der Nettobesteuerung*)

Alman gəlir vergisinin əsas cəhətlərindən biri kimi vergi subyektləri tərəfindən əldə olunan gəlirin yalnız müəyyən hissəsinin vergiyə cəlb olunmasını göstərmək olar. Vergi bazasından çıxılan məbləğ dedikdə vergi

[17] Bundesverfassungsgericht v. 3.11. 1982 – 1 BvR 620/78, BVerfGE 61, 319 (351); Bundesverfassungsgericht v. 22.02.1984 – 1 BvL 10/80, BVerfGE 66, 214, 223; Bundesverfassungsgericht v. 29.05.1990 – 1 BvL 20/84, BVerfGE 82, 60, 86; Bundesverfassungsgericht v. 22.06.1995 – 2 BvL 37/91, BVerfGE 93, 121, 135; Bundesverfassungsgericht v. 4.12.2002 – 2 BvR 400/98, BVerfGE 107, 27, 46 - 47; Paul Kirchhof, Hartmut Söhn und Rudolf Mellinghoff, Einkommensteuergesetz: Kommentar, § 1, A 142 – 143 (10/2016); Eva-Maria Gersch, in: Franz Klein, Abgabenordnung, §3, 14 (13th ed. 2016).

[18] *Cf.* Bundesverfassungsgericht v. 22.06.1995 - 2 BvL 37/91, BStBl II 1995, 655, 660.

[19] Tipke, yuxarıda istinad 15, 479.

[20] *Cf.* Bundesverfassungsgericht v. 29.05.1990 - 1 BvL 20/84, 1 BvL 26/84, 1 BvL 4/86, BVerfGE 82, 60, 86 - 87; Bundesverfassungsgericht v. 10.11.1998 - 2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91, BVerfGE 99, 216, 231 – 232.

[21] *Cf.* Wolfgang Kessler, Michael Kröner and Stefan Köhler, Konzernsteuerrecht, §11, 5 (2nd ed. 2008).

[22] Dieter Birk, Mark Desens und Henning Tappe, Steuerrecht, 172, 218 (2016).

[23] Bundesverfassungsgericht v. 09.12.2008 - 2 BvL 1/07, 2 BvL 2/07, 2 BvL 1/08, 2 BvL 2/08, DStR 2008, 2460.

ödəyicisi tərəfindən *gəlirin əldə olunması ilə əlaqədar xərclər*, habelə, vergi ödəyicisinin *yaşayışı üçün tələb olunan minimal maddi baza* başa düşülür.[24] Alman praktikasında vergitutmanın netto prinsipi kimi tanınan bu postulat vergi ödəyicilərinin həm sosial rifahına, həm də gəlir vergitutmasının ədalətli şəkildə aparılmasına təkan verir. Bu postulatın tətbiq olunması nəticəsində gəlir anlayışı faktiki olaraq xalis gəlir anlayışı ilə əvəz olunur. Hüquq ədəbiyyatı tərəfindən bu prinsip struktur baxımından iki böyük hissəyə bölünüb. Bunlar obyektiv və subyektiv netto prinsipləridir.

1. Obyektiv netto prinsipi *(Objektives Nettoprinzip)*

Alman gəlir vergi məcəlləsinin 2-ci paraqrafının 2-ci bəndində öz material-hüquqi təzahürünü tapan[25] obyektiv netto prinsipinin başlıca məqsədi kimi, gəlir vergisi ödəyiciləri tərəfindən gəlirin əldə edilməsi ilə əlaqədar çəkilən maddi xərclərin vergitutma bazasından çıxılması göstərilə bilər.[26] Bir növ ümumi vergi imtiyazı kimi qələmə alına bilən bu yanaşma vergitutmanın ödəmə qabiliyyəti prinsipindən irəli çıxan tələblər üzərində qurulmuşdur. Yuxarıda qeyd olunan xərclər müxtəlif formalarda özünü büruzə verə bilər. Praktiki cəhətdən geniş yayılan xərclər kimi vergi subyektinin iş yeri üçün gediş-gəliş xərcləri; vergi subyektlərinin öz peşəkar fəaliyyəti ilə əlaqədar əldə etdikləri elmi nəşrlərlərin (tematik kitabların, qəzetlərin, jurnalların) məbləği, habelə, vergi subyektləri tərəfindən öz peşəkar fəalliyyətləri üçün əldə etdikləri elektron avadanlıqların (noutbukların, planşetlərin və s.) ümumi məbləği göstərilə bilər.

Göründüyü kimi, real həyatda gəlirin əldə olunması ilə əlaqədar rast gəlinən bir çox xərcləri nəzərə alan obyektiv netto prinsipi nəticəsində vergitutma zamanı başlıca rol "brutto" gəlirdən "netto" vergi gəlirinə keçmiş olur.[27] Obyektiv netto prinsipinin vergi ödəyiciləri üçün praktiki cəhətdən daha bir əhəmiyyəti kimi hər hansı gəlir mənbəyində vergi xərclərinin vergi gəlirlərindən çox olmasından irəli gələn vergi zərərinin digər, positiv balanslı vergi mənbəyi ilə bərabərləşdirilməsini *(Verlustausgleich)* göstərmək olar.[28] Müəyyən vergi ili üçün vergi bərabərləşdirilməsinin mümkün olmadığı halda, qanunvericilik tərəfindən vergi ziyanının keçmiş *(Verlustrücktrag)* yaxud gələcək illər ilə (*Verlustvortrag*) bərabərləşdirilməsi imkanı yaradılmışdır. Vergi ödəyiciləri üçün yaradılan bu cür münasib fürsətdən sui-istifadə hallarının qarşısını almaq məqsədi ilə gəlir vergi məcəlləsi tərəfindən periodik bərəbərləşdirilmə imkanı yalnız 7 illik müddət üçün

[24] Yuxarıda istinad 7, §2.6.
[25] Tipke, Lang, yuxarıda istinad 10, § 9.54.
[26] Bundesfinanzhof v. 04.02.2010 - X R 10/08, BStBl 2003, 179; BFH v. 8. 10 2003 - II R 27/02, BFHE 204, 306, BStBl II 2004, 179; Roger Görke, *Einkommensteuer und objektives Nettoprinzip*, 34 Beihefter zu DStR 2009, 106 (107).
[27] Birk, Desens, Tappe, yuxarıda istinad 22, 615.
[28] Yenə orada, 616.

məhdudlaşdırılmışdır.[29] Bundan savayı, AFR-nın Federal Konstitusiya Məhkəməsi tərəfindən vergi zərərinin periodik formada bərabərləşdirilməsi yalnız eyni gəlir mənbələri üçün şamil olunması qərara alınmışdır.[30] Bu cür vergi subyektlərinin hüquqlarını məhdudlaşdıran, imperativ xarakterli norma və qərarın obyektiv netto prinsipinə zidd çıxması nəzəri baxımdan sual doğuran məqamlardan biri kimi qələmə alına bilər.

2. Subyektiv netto prinsipi (*Subjektives Nettoprinzip*)

Subyektiv netto prinsipi AFR-nın Əsas Qanunun 20-ci paraqrafın 1-ci bəndində bərkidilmiş *"sosial dövlət"* prinsipi ilə sıx doqmatik nisbətdə olan paradiqma kimi qələmə alına bilər. Gəlir Vergisi Məcəlləsinin 2-ci paraqrafın 4-cü bəndində yer tapan bu prinsipə əsasən vergi ödəyicilərinin *yaşayışı üçün tələb olunan minimal məbləğ* vergitutma bazasından çıxılır.[31] Sözügedən vergi güzəştinin baisi kimi vergi ödəyicilərinin minimal yaşayışını təmin edən pul kütləsinə faktiki olaraq malik olmamasını göstərmək olar.[32] Bundan əlavə həmin məbləğin *"hər bir fərdi şəxsin layiqli həyat tərzi sürməsi üçün"* nəzərdə tutulması faktı AFR-nın Federal Konstitusiya Məhkəməsi tərəfindən də qeyd olunmuşdur.[33] Vergi ödəyiciləri üçün yaranan bu vergi imtiyazı həm subyektiv netto prinsipindən, həm də Əsas Qanunun 20-ci maddəsinin 1-ci bəndindən irəli çıxan sosial dövlət prinsipindən irəli gələn tələbdir.[34] Yaşayış üçün tələb olunan minimal məbləğ qanunverici orqan tərəfindən hər vergi ili üçün ayrıca təyin olunur. Hazırki, 2018-ci vergi ili üçün bu məbləğ 9000 avro ətrafında müəyyən edilmişdir (gəlir vergisi məcəlləsi, §32a, bənd 1, 2-ci cümlənin 1-ci nömrəsi).

Bundan əlavə vergi ödəyicilərinə, həmçinin, yaşayış minimumunu təmin edən və, xüsusilə, layiqli həyat tərzi sürülməsinə müstəsna təsir göstərən digər xərclərin vergitutma bazasından çıxılması hüququ verilir. Bu cür maddi məsrəflərə həm fors major hallardan irəli gələn xərclər (*außergewöhnliche Belastung*),[35] həm də digər yaşayış funksiyalarına birbaşa təsir gücünə malik

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[29] Bundesfinanzhof v. 13.1.2015- IX R 22/14, Ubg 2015, 313 №.5.

[30] Bundesverfassungsgericht v. 30.09.1998 - 2 BvR 1818/91, BVerfGE 99, 88.

[31] Bundesfinanzhof v. 8. 11. 2006, X R 45/02, BFHE 216, 47, DStR 2007, 147; Bundesfinanzhof v. 17.07.2014 - VI R 8/12, BFHE 247, 64, BFH/NV 2014, 1970.

[32] Sözü gedən hərclərin bariz nümunəsi kimi Gəlir Vergi Məcəlləsinin 10-cu paraqrafın 1-ci bəndinin 3-cü nömrəsində gələmə alınan sağlamlıq sığortası ilə əlaqədar hərcləri qeyd etmək olar, daha ətraflı: Bundesverfassungsgericht v. 13. 2. 2008 - 2 BvL 1/06, BVerfGE 120, 125, DStR 2008, 604.

[33] Bundesverfassungsgericht v. 13.02.2008 - 2 BvL 1/06, BVerfGE 120, 125.

[34] *Cf.* Bundesverfassungsgericht v. 29.05.1990 - 1 BvL 20, 26, 184, BVerGE 82, 60; Bundesverfassungsgericht v. 10.11.1998 - 2 BvR 1057/91, 2 BvR 1226/91, 2 BvR 980/91, BVerfGE 99, 216, 233; Bundesverfassungsgericht v. 10.11.1998 - 2 BvL 42/93, BVerfGE 99, 246, 259.

[35] Yenə orada, 24.

olan xərclər *(Sonderausgaben)* əlavə edilir.[36] Birinci qrupa aid olunan məsrəfların praktikada ən çox rast gəlinən forması kimi vergi ödəyicilərinin təbii fəlakət zamanı çəkdiyi material zərər ilə əlaqədar olan xərcləri göstərmək olar. Öz növbəsində digər xərclər definisiyası altında praktiki cəhətdən tez-tez rast gəlinən material məsrəf kimi vergi ödəyicilərinin dövlət yaxud özəl sığorta kassalarına ödədikləri pul kütləsini adlandırmaq olar. Eyni zamanda alman qanunvericiliyi tərəfindən sırf şəxsi, yaşayış minimumu ilə birbaşa əlaqədə olmayan xərclərin vergitutma bazasından çıxarılması Gəlir Vergisi Məcəlləsinin 12-ci paraqrafının 1-ci bəndinə əsasən qadağan olunmuşdur. Vergi məsrəflərinin minimal yaşayış şəraitinə təsir göstərib-göstərməməsi haqqında son qərar birbaşa olaraq vergi orqanları tərəfindən bütün aidiyyatı sənədlərin araşdırılmasından sonra verilir. Vergi ödəyicilərinin bu qərarla razılaşmadığı halda vergi mübahisəsi müvafiq məhkəmə instansiyasında öz həllini tapır.

II. Azərbaycan Respublikasında Gəlir Vergisinin Hüquqi Prinsipləri

21-ci əsrə yeni vergi qanunvericiliyi ilə qədəm qoyan Azərbaycan Respublikasının *(bundan sonra AR)* vergitutma əsasları öz material əksini Vergi Məcəlləsinin 3-cü maddəsində tapmışdır. Struktur baxımından bu əsaslar hüquqi və iqtisadi prinsiplərin imperativ xarakterli inzibati qadağalar ilə cəmini əks etdirir.[37] Alman qanunvericiliyindən fərqli olaraq milli gəlir vergisi üçün ümumi vergi hüququnun prinsipləri tətbiq olunur. Maraqlısı odur ki, həmin prinsiplər, xüsusilə, hüquqi prinsiplər birbaşa olaraq AR-nın Konstitusiyasının 73-cü maddəsinin 2-ci bəndindən irəli gələn qanunluq postulatının törəmələri kimi qələmə alına bilərlər. Beləliklə, AR vergi hüququndaki prinsiplər nəzəri baxımdan iki pilləli təsnifata malik olduğu aydın olur; ilk öncə konstitusional qanunluq prinsipi öz inikasını cari vergi hüquqi sistemi üçün ərsəyə gətirilmiş prinsiplərdə taparaq, daha sonra öz təzahürünü milli gəlir vergisi sistemində tapır.

Qeyd etmək lazımdır ki, AR-nın ümumi vergi prinsipləri alman analoqları ilə müqayisədə daha şaxələnmiş və punktual formada olması ilə səciyyələnirlər. Praktiki cəhətdən yalnız müsbət qiymətləndirilə bilən bu hal nəzəri baxımdan prinsiplərin sistemdaxili qarışıqlığını üzə çıxarır. Bu, Vergi Məcəlləsinin 3-cü maddəsində hüquqi və iqtisadi əsasların bahəm qeyd edilməsindən, həmçinin, prinsiplərin və imperativ qadağaların birgə

[36] Daha ətraflı: Rainer Wernsmann, *Die Verfassungsrechtliche Rechtfertigung der Abzugsfähigkeit von Vorsorgeaufwendungen*, Steuer und Wirtschaft, 317, 322 (1998).

[37] Akif Musayev, Yavər Kəlbiyev və Zaur Rzayev, Vergilər və Vergitutma, 57 (2005). Obyektiv tənqid: Afət Mirzəyeva, Azərbaycan Respublikasinin Vergi Hüququ, 117 (2007); eləcədə Yasəmən Balakişiyeva, İlqar Rəfibəyli, Emin İmanov və Elnur Qarabalov, Vergi Hüququ, 75 (2003).

vurğulanmasından irəli gələn tezisdir. Bu xüsusiyyət milli vergitutma əsaslarının alman prinsiplərindən fərqləndirən daha bir cəhət kimi qeyd oluna bilər.

Vergi Məcəlləsinin 3-cü maddəsinin birinci bəndinə əsasən, milli vergi hüququnun, xüsusilə, gəlir vergisinin hüquqi əsasları kimi *ümumi, bərabər və ədalətli* formada həyata keçirilmiş vergitutma prosesi nəzərdə tutulub.

A. Vergitutmanın ümumilik postulatı

Gəlir vergisinin ümumilik prinsipinə əsasən hər bir fərdi şəxs tərəfindən gəlir vergisinin ödənilməsi məcburi xarakter daşıyır.[38] Fərdi şəxs dedikdə həm rezident, həm də qeyri-rezident vergi ödəyiciləri nəzərdə tutulur. Sözügedən paradiqmanın fundamental bazası kimi AR-nın Konstitusiyasının 25-ci maddəsinin 1-ci bəndindən irəli çıxan bərabərlik prinsipini qeyd etmək olar. Faktiki olaraq, hazırki milli gəlir vergisi üçün ümumilik postulatı hüquqi cəhətdən iki mühüm məqsədin həyata keçirilməsinə təkamül verir. Bu, ilk öncə, dövlətin gəlir vergisi sahəsində mümkün qədər çox vergi subyektinin vergitutma prosesinə cəlb olunması, habelə, müəyyən vergi ödəyici qrupunun başqa qruplar ilə müqayisədə iqtisadi diskriminasiyaya uğramamasıdır.

Azərbaycan vergi hüququ tərəfindən tanınan gəlir vergitutmasının ümumilik prinsipi alman vergi qanunvericiliyində öz material əksini tapmamışdır. Buna rəğmən, onun funksional elementlərinə AFR-nın gəlir vergi hüququnda rast gəlmək olar. Vergitutmanın ümumiləşdirilməsi prosesi alman gəlir vergisi hüququnda rezidentlər ilə yanaşı, həmçinin, qeyri-rezident fərdi şəxslərin vergiyə cəlb olunması ilə nəticələnmişdir. Bu isə, faktiki olaraq, milli vergi hüququ tərəfindən ərsəyə gətirilən vergi prinsipinin struktur baxımından həm də alman gəlir vergitutması prosedurunda müstəsna rol oynayan vahid olduğu deməkdir. Beləliklə, hər iki vergi sistemlərində faktiki olaraq yer alan prinsip, praktiki cəhətdən AR-nın Vergi Məcəlləsində öz material təzahürünü tapsa da, AFR-nın Gəlir Vergi Məcəlləsində öz yerini tapmamışdır. Sözügedən fenomen, desentralizasiyalanmış beynəlxalq vergi hüququnun bariz nümunəsi olaraq, gəlir vergisi prinsiplərinin vahid standartlara gətirilməsi prosesinin vacibliyini ön plana çəkir.

B. Vergitutmanın bərabərlik prinsipi

Demokratik cəmiyyətin danılmaz atributlarından biri olan bərabərlik faktoru öz mücəssəməsini eləcədə milli gəlir vergisində tapmışdır. Belə ki, Vergi Məcəlləsinin 3-cü maddəsinin birinci bəndinə əsasən, vergitutma prosesi bərabər şəkildə (vergi subyektlərinə heç bir qeyri-qanuni vergi

[38] Акиф Мусаев, Мирдамед Садыгов, Рамиз Магеррамов и Рауф Салаев, Налоги и Налогообложение в Азербайджане, 53 (2005).

güzəştləri təqdim olunmadan)[39] aparılmalıdır. Bir sıra nəzəriyyəçilər tərəfindən bərabərlik prinsipi eyni zamanda vergi subyektlərinin ödəmə qabiliyyətini mültəfil edən vergi doqması kimi qələmə alınmışdır.[40] Gəlir vergitutmasında bərabərlik anlayışı ikili nəzəri məna kəsb edən fenomen kimi adlandırıla bilər. Bərabərliyin ilk təcəssümü kimi qanunsuz vergi imtiyazlarının qadağan olunmasını, digər forması kimi isə vergi subyektləri ilə əlaqədar qəbul edilən diskriminativ xarakterli qərarların qanunvericilik tərəfindən mənfi qiymətləndirilməsini qeyd etmək olar.[41] Bununla yanaşı, bərabərlik prinsipi vergidən yayınma hallarının qarşısının alınması prosesi üçün başlanğıc nöqtəsi kimi göstərilə bilər. Bu tezis özünü *"argumento a contrario"* metodu prizmasından aydın şəkildə büruzə verir. Belə ki, nəzəri baxımdan, hər kəsin bərabər vergi yükü daşıdığı cəmiyyətdə, vergidən yayınma hallarını həyata keçirən bir qrup vergi ödəyicisinin başqa qruplar ilə müqayisədə daha münasib vergitutma rejimi ilə vergiyə cəlb olunması sosial disbalansa gətirib çıxardır. Bu isə ümumi vergi yükünün bölüşdürülməsinə mənfi təsir göstərərək, vergi bərabərliyini şübhə altına qoyur. Nəhayət, gəlir vergisinin bərabərlik prinsipindən irəli gələn vergi spesifikası kimi, həmçinin, gəlir vergitutması zamanı proporsional vergi dərəcəsinin tətbiqi qeyd oluna bilər. Nəzəri cəhətdən bu cür yanaşma bərabər və şəffaf vergitutma prosesinin təməli kimi qiymətləndirilsə də, praktiki cəhətdən proporsional vergi dərəcəsinin tətbiqi dövlətin vergi gəlirlərinin bəri-başdan təsbit olunmuş rəqəmdən artıq olmaması ilə nəticələnir. Eyni zamanda, proporsional vergi dərəcəsinin vergi subyektləri üçün faktiki olaraq yaratdığı bərabərlik effektini şübhə altına almaq olar. Bu cür yanaşma yüksək qazanca malik vergi subyektlərinin faktiki əldə etdiyi gəlirlərin qeyri-səmərəli formada vergiyə cəlb olunması ilə nəticələnir. Nəticə baxımından varlılar və orta təbəqə nümayəndələri üçün eyni vergi dərəcəsinin tətbiqinə baxmayaraq, onların gəlirləri dövlət tərəfindən mütənasib şəkildə vergiyə cəlb olunmur.

Bərabərlik postulatı öz strukturu və gəlir vergitutmasına göstərdiyi təsirə görə AFR-nın gəlir vergisinin ədalətlilik prinsipi ilə müqayisə oluna bilər. Xüsusilə, ədalətlilik prinsipinin nəzəriyyə tərəfindən ərsəyə gətirilən "üfüqi" bərabərlik ideyası AR-nın Vergi Məcəlləsində öz yerini almış bərabərlik prinsipi ilə müəyyən oxşarlığa malikdir. Vergitutmanın ümumilik prinsipində olduğu kimi, bərabərlik prinsipi də alman qanunvericiliyində öz

[39] Yenə orada, 38.
[40] Afət Mirzəyeva, Azərbaycan Respublikasinin Vergi Hüququ, 117. (2007); Yasəmən Balakişiyeva, İlqar Rəfibəyli, Emin İmanov və Elnur Qarabalov, Vergi Hüququ, 59 (2003); eləcədə qismən: İlqar Seyfullayev, *Fiziki Şəxslərin 10gisində Bərabərlik və Ədalətlilik Prinziplərinin Tətbiqi Məsələləri,* №5 Azərbaycan Vergi Jurnalı, 79, 83 (2013); obyektiv tənqid: Ramiz Məhərrəmov, *Gəlir Vergisi; Nəzəriyyə və Praktika,* №3 Azərbaycan Vergi Jurnalı, 23, 28 (2011).
[41] Afət Mirzəyeva, yenə orada, 122 (2007).

yerini dolayı formada almışdır. Lakin ədalətlilik doqmasından fərqli olaraq, bu prinsip əcnəbi gəlir vergisi hüququnda fərqli anlayış altında öz yerini tapmışdır.

C. Vergitutmanın ədalətlilik prinsipi

Alman gəlir vergisi sistemində olduğu kimi, AR-nın vergi sistemi tərəfindəndə ədalətlilik prinsipi tanınmışdır. Vergi Məcəlləsinin 3-cü maddəsinin birinci bəndindən, habelə, AR-nın Konstitusiyasının 73-cü maddəsinin ikinci bəndindən irəli çıxan bu prinsipə əsasən, gəlir vergisi yalnız qanunvericilik tərəfindən müəyyən olunmuş vergi dərəcəsi əsasında və heç bir qeyri-qanuni əlavə vergi tutulmadan ödənilməlidir.[42] Məzmunca bərabərlik prinsipi ilə funksional baxımdan bir çox oxşarlıqlara malik olmasına baxmayaraq, sözügedən doqma nəzəri baxımdan həmin prinsip ilə vahid birlik yaratmır və qanunverici orqan tərəfindən müstəqil prinsip kimi tanınılır. Ədalətlilik tezisi nəzəri cəhətdən Vergi Məcəlləsinin 3-cü maddəsində qeyd olunan bir çox imperativ qadağaların bünövrəsi kimi qələmə alına bilər. Bərabərlik prinsipi kimi, bu postulat vergi ödəyicilərinə qarşı diskriminativ qərarların qarşısını almağa yönəlib.

Sözügedən vergi anlayışı alman və milli vergi sistemlərində məna baxımından kifayət qədər fərqlənməsə də, alman gəlir vergisindəki ədalətlilik anlayışı daha dolğun və konkret şəkildə izah olunması diqqət çəkir. Bu hal alman vergi nəzəriyyəsi tərəfindən qeyd olunan prinsipin uzun müddətdən bəri tədqiq olunması ilə əsaslandırıla bilər. Ümumilikdə isə hər iki vergi sistemindəki ədalətlilik anlayışı morfoloji cəhətdən eyni xarakteristikalara malik olsa da, konkret vergi halı üçün hər iki dövlət tərəfindən diferent şəkildə şərh olunurlar.

III. Vahid Vergi Prinsiplərinin Tətbiqi

A. Universal xarakterli vergi prinsipinin anlayışı

Bir sıra hüquq şaxələrindən fərqli olaraq, vergi hüququ uzun müddətdən bəri sırf "ölkədaxili" hüquq elmi kimi qiymətləndirilib, beynəlxalq səviyyədə iri miqyaslı konsolidasiyaya uğramamışdır. Yalnız ötən əsrin əvvəllərindən başlayan və qlobalizasiya prosesləri nəticəsində surətli şəkildə davam edən beynəlxalq vergi hüququnun formalaşması bu elm sahəsinin vahid standartlar əsasında inkişafına təkamül göstərmişdir. Bu standartlar əsasında ərsəyə gələn vergi elementləri kimi həm ikiqat vergitutmanın aradan qaldırılmasına dair beynəlxalq sazişləri,[43] həm də İqtisadi Əməkdaşlıq və

[42] Akif Musayev, Yavər Kəlbiyev və Zaur Rzayev, Vergilər və Vergitutma, 61 (2005).
[43] 2018-ci il üçün Azərbaycan Respublikası tərəfindən bağlanılar ikiqat vergitutmanın aradan qaldırılmasına dair beynəlxalq sazişlərin sayı 53-ə bərabərdir, *bax*: http://www.taxes.gov.az/modul.php?name=beynelxalq&cat=54 (Son dəfə ziyarət olunub: 07.04.2018). Eyni zamanda, AFR-sı tərəfindən bağlanan analoji sazişlərin sayı 100-dən çoxdur, *bax*:

İnkişaf Təşkilatının təşəbbüsü ilə BEPS-Proyekti çərçivəsində hazırlanan ikiqat vergitutmanın aradan qaldırılmasına dair beynəlxalq sazişlərdən irəli çıxan vergidən yayınma hallarının qarşısının alınması ilə əlaqədar çoxtərəfli müqaviləni[44] qeyd etmək lazımdır. Bir sıra mühüm suallarda beynəlxalq səviyyədə konsensunsun nail olunmasına baxmayaraq,[45] beynəlxalq vergi hüququnda mərkəzləşmiş və universal xarakterli prinsiplərin ərsəyə gətirilməsi ideyası hələ də öz material təcəssümünü tapmamışdır.

Universal vergi prinsipi deyəndə, hər bir ölkənin vergi sistemi tərəfindən tanınan və riayət olunan vergi doqmaları nəzərdə tutulur. Bu prinsiplərin tətbiqi ölkələrin vergi sistemlərinin vahid bir standart əsasında inkişafına təkamül göstərə bilər. İlk baxışdan qəliz bir dillema kimi qələmə alına bilən bu tezis, praktiki cəhətdən reallıqdan o qədər də uzaq deyil. Çünki bir çox vergi sistemlərində yer tutan vergi ədalətliliyi prinsipi struktur və özü-özlüyündə daşıdığı doqmatik məna baxımından inkişaf etmiş ölkələrin hüquq sistemlərində başlıca və danılmaz rol oynayır.[46] Məhz bu prinsipin əsasında müvafiq törəmə və ya fakultativ xarakterli prosessual prinsiplərin ərsəyə gətirilməsi inkişaf etmiş ölkələrin vergitutma prosesini daha da şəffaf və qeyri-rezidentlər üçün anlaşıqlı etməyə qadirdir.

Sözügedən universal xarakterli vergi prinsiplərinin nəzəri tətbiqi onların müsbət və mənfi cəhətlərin obyektiv tədqiq olunması sualını ön plana çəkir. Belə ki, vahid vergi prinsiplərinin tətbiqi, xüsusilə, gəlir vergitutması zamanı ölkələrin investisiya potensialının artırılmasına təkamül göstərən faktor kimi qiymətləndirilə bilər. Bundan savayı, vahid prinsip sisteminin tətbiqi vergidən yayınma hallarının sayının hiss olunacaq dərəcədə azalmasına səbəb olaraq, vergi imtiyazlarının qanunsuz yollar ilə əldə olunmasına qarşı mübarizənin bir neçə ölkə tərəfindən birgə şəkildə aparılmasına imkan verəcək. Sadalanan müsbət faktorlarla yanaşı, göstərilən planın mənfi cəhəti kimi onun yerinə yetirilməsi ilə əlaqədar çətinlikləri də qeyd etmək vacibdir. Praktiki cəhətdən həm inkişaf etmiş, həm də inkişaf edən ölkələr üçün ümumi xarakterli vergi prinsiplərinin ərsəyə gətirilib, tətbiq olunması bütün dünya ölkələrinin dəstəyini və kooperativ əməkdaşlığını tələb edən bir dilemmadır. Hal-hazırki desentralizasiyalaşmış beynəlxalq vergi hüququnda bu cür unifikasiya prosesi effektiv şəkildə yalnız beynəlxalq təşkilatlar tərəfində, və,

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http://www.bundesfinanzministerium.de/Web/DE/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/staatenbezogene_info.html (Son dəfə ziyarət olunub: 07.04.2018).

[44] *Bax*: http://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm (Son dəfə ziyarət olunub: 07.04.2018).

[45] Misal kimi müxtəlif ölkələrin vergi orqanları tərəfindən vergitutma üçün əhəmiyyətli olan məlumatların vahid, standartlaşmış şəkildə bir-birinə ötürülməsi sistemi (*ingiliscə*: Common Reporting Standard) çəkilə bilər, *bax*: http://www.oecd.org/tax/automatic-exchange/common-reporting-standard/ (Son dəfə ziyarət olunub: 07.04.2018).

[46] Peggy B. Musgrave, United States Taxation of Foreign Investment Income, Issues and Arguments, 28 (1969).

ələlxüsus da, İqtisadi Əməkdaşlıq və İnkişaf Təşkilatı tərəfindən aparıla bilər. Təəssüflər olsun ki, çağdaş qlobal vergi sistemində prinsiplərin nə regional, nə də kontinental miqyasda unifikasiyası İqtisadi Əməkdaşlıq və İnkişaf Təşkilatı tərəfindən nəzərdə tutulmamışdır. Halbuki, İqtisadi Əməkdaşlıq və İnkişaf Təşkilatının BEPS layihəsindən sonra[47] prinsiplərin ümumiləşmə prosesi adı çəkilən layihənin məntiqi sonluğu kimi qələmə alına bilərdi.

B. Beynəlxalq vergi hüququnda universal xarakterli prinsiplərin praktiki tətbiqi

Vahid xarakterli vergi prinsiplərin tətbiqi məsələsi indiyə qədər nə beynəlxalq, nə də avropa vergi hüququ səviyyəsində geniş müzakirə predmeti olmamışdır. Buna baxmayaraq, praktiki cəhətdən adı çəkilən hər iki sistemdə universal vergi prinsiplərin elementlərinə rast gəlmək mümkündür. Belə ki, beynəlxalq vergi hüququnun dayağı funksiyasını daşıyan ikiqat vergitutmanın aradan qaldırılmasına dair sazişlərdə uzun müddətdən bəri vergi subyektlərinin diskriminasiyasına yol verilməməsi ilə əlaqədar müddəa yer almışdır.[48] Bu qaydaya əsasən, bir tərəfdaş ölkənin vergi subyekti tərəfindən digər tərəfdaş ölkədə apardığı kommersiya fəaliyyəti vergi dərəcəsinin tətbiqi baxımından və yaxud vergi imtiyazlarının təmin olunması baxımından hər hansı bir üçüncü ölkə vətəndaşları ilə müqayisədə məhdudlaşdırıla və diskriminasiya oluna bilinməzdi.[49] Öz doqmatik təbiəti və sistemdaxili funksiyası baxımından bu postulat lokal vergi ədalətliliyi ideyasının qlobal vergi hüququndaki əksi kimi qələmə alına bilər.

Beynəlxalq vergi hüququ ilə yanaşı, universal xarakterli vergi prinsiplərin elementləri, həmçinin Avropa İttifaqının (*bundan sonra Aİ)* vergi sistemində öz latent əksini tapmışdır. Aİ vergi sistemi dedikdə sırf Avropa Komissiyasının direktivləri və Avropa İcmalarının Ədalət Məhkəməsinin qərarları nəticəsində tənzim olunan vergi münasibətlər dairəsi nəzərdə tutulur.[50] Qeyd olunan hüquqi instrumentlərin sayəsində birlik ölkələrinin dolayı vergilərinin hərtərəfli harmonizasiyası həyata keçirilir.[51] Birbaşa

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[47] Daha ətraflı: Çufarov İqor, *Vergilərə Açıq Olan Dünya Beynəlxalq Vergitutma Sistemi Üzrə Qlobal İslahatlar Necə Aparılır?,* 6 Baku Law Journal, 6 (04. 2016).

[48] Almaniya və Azərbaycan arasında bağlanan ikiqat vergitutmanın aradan qaldırılmasına dair sazişdə bu qayda öz material əksini 24-cü maddədə tapmışdır, *bax*: https://www.bundesfinanzministerium.de/Content/DE/Standardartikel/Themen/Steuern/Internationales_Steuerrecht/Staatenbezogene_Informationen/Laender_A_Z/Aserbaidschan/2005-10-19-Aserbaidschan-Abkommen-DBA-Gesetz.pdf?__blob=publicationFile&v=3 (Son dəfə ziyarət olunub: 07.04.2018).

[49] *Bax*: http://www.oecd.org/ctp/treaties/model-tax-convention-on-income-and-on-capital-condensed-version-20745419.htm (Son dəfə ziyarət olunub: 07.04.2018).

[50] Cf. Heinrich Weber-Grellet, Europäisches Steuerrecht, § 1, 4 (2016).

[51] Hans von der Groeben, Jürgen Schwarze and Armin Hatje, Europäisches Unionsrecht, Art. 113, 30 (7th ed. 2015).

vergilər üçün isə bu proses yalnız məhdud formada öz əksini tapmışdır.[52] Buna baxmayaraq, son illər aktiv müzakirə predmetinə çevrilmiş Avropa Komissiyasının "ümumi, konsolidasiya olunmuş korporativ vergi bazası" direktiv layihəsi[53] sözügedən qaydadan istisna hal kimi, birlik ölkələrində fəaliyyət göstərən transmilli şirkətlər üçün alternativ xarakterli korporativ vergitutma sisteminin tətbiqini nəzərdə tutmuşdur.[54] Uzun müddətdən bəri diskusiya predmeti olan bu layihənin həyata keçməyi bütün Aİ üzvlərinin vergi sistemində universal xarakterli vergi prinsiplərin yeridilməsi prosesi ilə nəticələnə bilər. Sözügedən vahid prinsiplər arasında bir sıra prosessual prinsiplər ilə yanaşı (məsələn: vergitutmanın transparentlik, sadəlik və dəqiqlik prinsipləri) həmçinin vergi ədalətliliyi prinsipinə də rast gəlmək olar.[55]

Azərbaycan və Alman gəlir vergisi sisteminə nəzər yetirsək, burada da bir sıra oxşarlıqlara rast gələ bilərik. Hər iki sistemdə yer alan vergitutma prinsipləri faktiki olaraq eyni məntiqi yükə malik olaraq ədalətli və qərəzsiz vergi sisteminin inkişafına təkamül göstərirlər. Bu baxımdan, milli vergi sistemində ədalətlilik və bərabərlik prinsiplərinin simbiozu nəzəri baxımdan AFR-nın vergi sistemində yer alan ədalətlilik prinsipi ilə birlikdə vahid, standart xarakterli vergi postulatının yaranmasına səbəb ola bilər.

Nəticə

Göründüyü kimi, Alman və Azərbaycan gəlir hüququnda istifadə olunan prinsiplər öz struktur quruluşu və daşıdığı funksiyalarına görə müəyyən dərəcədə bir-birini təkrarlayaraq, hər iki vergi sisteminin inkişafına təkamül verirlər. Buna baxmayaraq, sözügedən prinsiplərin araşdırılan vergi sistemlərində daşıdığı müxtəlif morfoloji cəhətlər paralel olaraq onları bir-birindən ayıran faktor kimi qələmə alına bilər. Bu differensiasiyanın bariz nümunəsi kimi ədalətlilik postulatının hər iki dövlətin vergi orqanları və elmi ədəbiyyat tərəfindən müxtəlif formada şərh edilməsini göstərmək olar. Maraqlısı odur ki, alman gəlir vergitutmasında istifadə olunan ədalətlilik anlayışının funksiyalarına milli vergi hüququnun hər üç prinsipində rast gəlmək olar. Öz sırasında, milli vergi hüququnun doqmatik əsasları alman vergi sistemində material təcəssümünü tapmamasına baxmayaraq onlara AFR-nın qanunvericiliyi tərəfindən riayət olunur. İrəli sürülən bu müddəanın bariz nümunəsi kimi AR-nın vergi hüququnda yer alan vergitutmanın ümumilik postulatının AFR-da material formada bərkidilməməsinə rəğmən,

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[52] European Court of Justice v. 28. 1. 1986 - 270/83, EuGHE 1986, 273, 24 (Avoir Fiscal); Christian Calliess and Matthias Ruffert, EUV/AEUV, Art. 113, 24 (5th ed. 2016).

[53] *İngiliscə*: Common Consolidated Corporate Tax Base (CCCTB).

[54] *Bax*: https://ec.europa.eu/taxation_customs/business/company-tax/common-consolidated-corporate-tax-base-ccctb_en (Son dəfə ziyarət olunub: 07.04.2018).

[55] Leonard Etel and Mariusz Popławski, Tax Code Concepts in the Countries of Central and Eastern Europe, 260 (2016).

alman vergi ödəyiciləri ilə münasibətlərdə oynadığı mühüm rolunu qeyd etmək olar. Beləliklə, lokal vergi hüququnun özəlliklərini daşıyan prinsiplər, beynəlxalq vergi hüququ prizmasından, həmçinin, artıq inkişaf etmiş dövlətlər üçün də öz faydasını sübut etmiş olurlar.

Eyni zamanda, beynəlxalq vergi hüququnda, xüsusilə də, ölkələrarası baş tutan vergitutmada ümumi xarakterli postulatların ərsəyə gətirilməsi prosesi daşıdığı innovativ yeniliyə baxmayaraq, hazırki iqtisadi vəziyyətdə həyata keçirilməsi çətin olan plan kimi qələmə alına bilər. Buna rəğmən, yaxın gələcəkdə İqtisadi Əməkdaşlıq və İnkişaf Təşkilatının, Aİ-nin və dünya ölkələrinin sıx əməkdaşlığı nəticəsində bu ideyanın vergi ədalətliliyi postulatının ümumiləşdirilməsi sayəsində həyata keçməsi ehtimalı kifayət qədər yüksəkdir.

Elnur Karimov[*]

Impacts of Wording and Applicable Law on the Energy Investment Arbitration: An Evaluation of the Case of Azpetrol Group v. Azerbaijan

Abstract

Energy investment arbitration is never guaranteed from unexpected challenges or outcomes that may arise from the acts of parties to the dispute. Focused on completely different purposes of negotiations, parties may sometimes make a mistake by accepting settlement agreements with general wordings. Such settlement agreements can, in turn, result in the dismissal of proceedings before arbitration tribunals which can deprive one of the parties of many benefits, especially the compensation. An appropriately chosen applicable law plays a significant role in this case as they help interpret the agreements between parties. However, the Azpetrol case is quite notable to examine that applicable law did not save the investors from the dismissal of proceedings and all claims of claimants.

Annotasiya

Enerji investisiya arbitrajı mübahisə tərəflərinin hərəkətləri nəticəsində meydana gələn gözlənilməz çağırışlar və ya nəticələrdən heç vaxt sığortalanmayıb. Danışıqların bir-birindən tamamilə fərqli məqsədlərinə diqqətlərini toplayan mübahisə tərəfləri bəzən ümumi yazı üslublu barışıq sazişlərini qəbul etməklə səhvə yol verə bilirlər. Bu cür barışıq sazişləri arbitraj heyətləri tərəfindən baxılmağa qəbul edilən mübahisələrin yurisdiksiyadan rədd edilməsinə gətirib çıxara bilir ki, bununla da tərəflərdən biri bir çox mənfəətlərdən, xüsusilə, kompensasiyadan məhrum qala bilər. Doğru seçilmiş tətbiq edilən hüquq tərəflər arasındakı sazişlərin təfsirində əhəmiyyətli rol oynayır. Buna baxmayaraq, Azpetrol işində tətbiq edilən hüququn mübahisəyə təsirinin qiymətləndirilməsi ona görə vacibdir ki, bu mübahisədə tətbiq edilən hüquq iddiaçı investorları mübahisənin və bütün iddiaların rədd edilməsindən xilas edə bilməmişdir.

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Introduction

Investment arbitration is a forum where parties choose with their free will and come to get their binding judgment which will resolve their dispute. In this regard, the role of investment arbitration tribunals should be appreciated that they help several investment disputes be resolved by experts in relevant fields by giving their good offices. The parties' role should not be denied either, because they not only bring their dispute and claims and pleading before arbitration tribunals established by their choices, but they make up their mind on the applicable law that can be quite influential in most cases.

Nevertheless, things may not go always well, and unexpected changes can be followed by unpredictable outcomes by arbitration tribunals. One of such unexpected realities that often occur in the proceedings with developing oil-rich states as respondents, is, unfortunately, corruption or bribery. Such occurrences can sometimes affect the whole process of the arbitration. Parties to the dispute, especially those convicted for their involvement in corruption or bribery issues, are in a hurry in such cases, that's why they want to conclude cases with the help of settlement agreements as soon as possible and protect their reputation. These compromises may result in mistakes in the choice of law or in the form of agreement with several clauses that are not, actually, in favor of claimants.

The *Azpetrol case* initiated by the joint request of parties is one of those cases against the Republic of Azerbaijan. The effects of the general wordings offered by the state party and immediately accepted by the claimants and the flexible approach demonstrated by the applicable law supported the settlement

agreement between the parties. As a result of a binding settlement agreement that contained a very general wording, the bribery claims together with other claims on the Energy Charter Treaty (ECT) stood clear from the examination of the arbitration tribunal.

This case study is going to give a brief introduction to the facts of the case and parties' observations and the award rendered by the tribunal, first. Then in the second chapter, we will discuss the key problems derived from the bribery testimony and general wording of the settlement agreement. In the third chapter, we will focus on the applicable law and how it actually put an impact on the interpretation of the agreement. The case study will finish with a conclusion in which we will also come up with our thoughts and final notes on the case.

I. Facts: What Led the Case to the ICSID Arbitration?

A. Procedural History

It is clear from the award by the International Centre for Settlement of International Disputes (hereinafter, *'ICSID'*) Arbitration Tribunal (hereinafter, *'Tribunal'*) that the Tribunal was established on 13 July 2006 by joint request pursuant to the claims brought by three claimant companies. All of the three companies are incorporated in the Netherlands, namely *Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V.* (Claimants) but they are beneficially owned by the Republic of Azerbaijan (Respondent).[1] The concept of the *beneficial ownership* can be explained so that while these three companies are based and registered in the Netherlands, their parent company is Azpetrol, a registered company in Azerbaijan.[2] In other words, three companies sued the country of nationality of their parent company in the following case.[3] The claims were based on Article 10, 13, 14 and **22** of the ECT. Before going through the summary of the facts of this case, it should be noted that the *Azpetrol case* is one of the few cases against Azerbaijan. It has been examined by the ICSID Tribunal and dismissed due to the lack of jurisdiction.[4]

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[1] 'Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. The Republic of Azerbaijan,' Award, ICSID Case No. ARB/06/15, September 08, 2009, available at https://www.italaw.com/sites/default/files/case-documents/ita0059.pdf, §3, (last visited April 06, 2018). (*'Azpetrol Case'*).

[2] Such cases are often referred as 'round-tripping' or 'treaty shopping' in the legal doctrine. *See*, e.g., Karl P. Sauvant, Emerging Markets and the International Investment Law and Policy Regime, in The Oxford Handbook of Management in Emerging Markets, 34-35. (2018).

[3] Eunjung Lee, *Treaty Shopping in International Investment Arbitration: How Often Has It Occurred and How Has It Been Perceived by Tribunals*, 15-167 Working Paper Series 1, 16. (2015).

[4] N.Jansen Calamita, Adam Al-Sarraf, *International Commercial Arbitration in Iraq: Commercial Law Reform in the Face of Violence*, 31 Journal of International Arbitration 37, 61. (2015).

During the cross-examinations phase of the proceedings before the Tribunal, on 1 July 2008, the director of the Claimant companies testified his involvement in bribery with Azerbaijani officials in early 2006.[5] After this testimony, parties asked for the adjournment of hearings. Later then the director claimed that his testimony about the bribery was absolutely untrue.

After the adjournment request, both parties came closer to discuss any settlement for the case, but the Claimants were reluctant at first, because of the probability of receiving no compensation in the end. However, the Claimants were willing to insert safeguards in the settlement for the director who might be subject to prosecutions by Azerbaijani authorities, in case they decide to conclude a settlement agreement. The Claimant offered the compensation to be paid to Azpetrol Holding[6] but the Respondent was preferring a drop-hands approach (no compensation). It is clear from the contents of exchange of e-mails that the Respondent is not evading from any settlement agreement but from any compensation to cover the costs incurred by the Claimant in this case.

B. Parties' Observations

The gist of the case has been centred in the e-mails exchanged between the parties to the dispute on 16 and 19 December 2008 when they discussed the possible settlement of the dispute and a standstill agreement. On 19 December 2008, the Claimant said that they had confirmed the offer of settlement delivered via e-mail on 16 December 2008 by the Respondent. On the same day, both parties sent a notification to the Tribunal saying that they had reached *"an agreement in principle and they agreed on an immediate procedural standstill until 31 December 2008"*.[7] Following this notification, on 23 December 2008, the Respondent e-mailed the Claimant asking for the draft of the settlement agreement and offered to resolve this issue as soon as possible.

On 24 December 2008, the Respondent sent the draft of the settlement agreement to the attention of the Claimants, but no response was received. The Respondent claimed the existence of a binding settlement and knocked on the waiver of the conditionality of the settlement agreement by stating that they have executed all the documentation by 31 December 2008. The execution of the required documentation until 31 December 2008 was a condition for completing the settlement agreement between the parties, which can only be waived by the Respondent.

As a response to the claims by the Respondent, the Claimant held that there was no binding agreement on the settlement but on a standstill, and the draft sent on 23 December consisted of completely new terms, which turn it into a counter-offer. The Claimant further made a note about the extension of the

[5] *Supra* note 1, §6.
[6] *Ibid*, §19-22.
[7] *Ibid*, §8.

scope of the e-mail of 16 December 2008. The Claimants alleged that they had not reached any concluding binding agreement with the state party on 31 December 2008. However, the state party Respondent disagreed with this view and insisted on the conclusion of the case for the reason that parties had reached a binding settlement.

On 31 December 2008, the Respondent requested the waiver of the documentation requirement of the binding agreement and the termination of proceedings according to ICSID Arbitration Rule 43(1). In addition, on 2 January 2009, the Respondent asked again for the termination of proceedings as there did not exist any legal dispute between parties as required by Article 25(1) of the ICSID Convention.

C. Tribunal's Award

The Tribunal, after the examination of the exchange of emails between parties on 16 and 19 December 2008 concluded that the parties had indeed reached a binding agreement, therefore it has a jurisdiction to hear the case neither on the ECT nor the Convention on the Settlement of Investment Disputes (ICSID Convention). From the procedural context, it should not be discarded that the Tribunal dismissed the proceedings under Article 25(1), instead of Article 43(1) of the ICSID Arbitration Rule, because in order to apply Article 43(1), a joint request from both parties is a pre-condition.[8] However, nodding to the very general wording of the settlement agreement, the Claimant implicitly agreed that no legal dispute existed between the parties; this approval encouraged the dismissal of the proceedings under Article 25(1) of the ICSID Convention.

II. Key Problems: What Factors Triggered the Victory of the Respondent?

A. Effects of the Bribery on the Proceedings

Despite it is invisible from the assessments by the Tribunal, the impetus that brought parties closer to discuss the settlement of the dispute without the Tribunal's final judgment was the testimony given by the director of the Claimant companies. In the cross-examination sessions, the director testified that he had provided bribe to Azerbaijani officials in early 2006, to protect unnamed officials in Azerbaijan. Later on, the parties asked for the adjournment of hearings jointly and started to discuss any swift settlement of the dispute. However, we should not ignore that fact that the possible

[8] August Reinisch, *Introductory Note*, M.Cherif Bassiouni et al (Ed.), in The Global Community Yearbook of International Law and Jurisprudence, 2 Oxford: Oxford University Press 839, 843. (2010).

institution of criminal proceedings in Azerbaijan to investigate the said bribery scandal was another triggering event.[9]

The allegations of corruption were not heard and concluded by the Tribunal, solely because of the fact that the parties had already reached an agreement on the settlement of the dispute between them.[10] As far as there is a dispute over the character of the settlement agreement between the parties, the presence or absence of the said settlement agreement would inevitably influence the case proceedings. If there existed an agreement of the standstill between the parties, instead of a binding settlement agreement, then the Tribunal would resume the examination of the case on merits and also touch the corruption allegations and testimony given by the director of Claimant companies. However, the opposite happened in the end, and the Tribunal ceased the proceedings on the ground that there did not exist any legal dispute between the parties (Article 25(1) of the ICSID Convention). One of the reasons for putting corruption claims aside lied in the wording used in the settlement agreement approved by both parties; to clarify, by accepting the terms of the settlement agreement, the Claimants literally acknowledged that no legal dispute existed between the parties any longer.[11] This wording precluded the claims of bribery from being examined by the Tribunal.

The reaction of the Respondent party was, of course, to benefit from the alleged corruption scandal for its own interests. The Respondent used this opportunity and disputed the admissibility of the case saying that the investment in dispute was involved in corruption and bribery[12], and what the Claimants conducted with Azerbaijani officials was absolutely contradictory

[9] R.Zachary-Torres Fowler, *Undermining the ICSID: How the Global Anti-bribery Regime Impairs Investor-State Arbitration*, 52 Virginia Journal of International Law 995, 1023. (2012).
[10] Austin I. Pulle, *Demand Side of Corruption and Foreign Investment Law*, 4 Journal of International and Comparative Law 1, 28. (2017).
[11] *Supra* note 1, §105.
[12] Sergey Alekhin, Leonid Shmatenko, Corruption in Investor-State Arbitration: It Takes Two to Tango, A.V.Asoskov, A.I.Muranov, R.M.Khodykin, (Ed.), in New Horizons of International Arbitration, Moscow: Association of Private International and Comparative Law 150, 166. (2018).

with the international public policy[13].[14] One more issue to put a consideration on is the effects of the evidence of corruption that might impair the validity of investment contract between the Claimants and Respondent. While the Respondent, in this case, contested the jurisdiction of the Tribunal because of the corruption claim, the Tribunal set a deadline to submit their pleadings to the Tribunal regarding the bribery scandal. But during this period, the parties ended up with a concluding agreement of settlement. In any case, the Respondent party cannot be qualified as justified by contesting the jurisdiction of the arbitration tribunal for the allegation of bribery. Here comes *the principle of separability* or *severability* of an arbitration agreement or dispute settlement agreement from the main investment contract. We would like to state that even if the corruption claims were approved to be true and thereby defected the validity of the underlying investment contract, because the investment in dispute would be tainted, the Tribunal would expect the Respondent party to prove that the arbitration agreement *per se* was invalid too, due to the involvement of bribery in this agreement too. Thus the Tribunal's jurisdiction over the validity of the arbitration agreement would still survive. This notion was reiterated in the case of *Malicorp Ltd v. Egypt*[15]. Although the violation of international public policy has not been explicitly enumerated among the grounds in Article 52 of the ICSID Convention, the Tribunal's failure to address the question of illegality and involvement of bribery, however, would have amounted to the violation of international public policy.[16]

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[13] Bearing in mind that the dynamic nature of the concept of public policy depends on every state, according to the reports of the Committee on International Commercial Arbitration of the International Law Association of 2000 and 2002, the concept of international public policy has been confined to violations of really fundamental conceptions of the legal order in the country concerned. This concept of international public policy includes the following elements:
1) fundamental principles, pertaining to justice or morality; this category is divided into two groups, one of which refers to fundamental substantive principles and the other, procedural public policy principles;
2) rules designed to serve the essential political, social or economic interests of the State ("lois de police" or "public policy rules";
3) duty of the State to respect its obligations towards other States or international organizations.
The scope of the international public policy is narrower than of domestic public policy. See, The International Law Association's Report of the Seventieth Conference (2002), https://home.heinonline.org/ (last visited April 27, 2018).
[14] *Supra* note 1, §7.
[15] 'Malicorp Ltd v. The Arab Republic of Egypt,' Award, ICSID Case No. ARB/08/18, February 07, 2011, available at https://www.italaw.com/cases/660, §119, (last visited April 17, 2018).
[16] Richard H. Kreindler, Competence-Competence in the Face of Illegality in Contracts and Arbitration Agreements, Brill-Nijhoff, 338. (2013).

The legal basis for contesting the jurisdiction of the Tribunal lies in Article 41(1) of the ICSID Convention[17] which specifies the *principle of competence-competence*. According to paragraph 2 of Article 41 of the ICSID Convention, in case of such allegations, *the Tribunal shall either deal with the objection to jurisdiction as a preliminary question or examine it under the merits of the case*. As obvious from the facts of the case, the Tribunal decided to examine it as a preliminary question and set a deadline for both parties in order to receive their memorials and further pleadings. This issue led the Claimants to think about the settlement of dispute amicably more often.

The involvement of corruption and bribery in investment contracts is not only the case of Azpetrol companies. *World Duty Free case*[18] examined by the ICSID Arbitration Tribunal in 2006, three years before the award on the *Azpetrol case,* is also significant in this regard. The common point in both cases is that the Claimants gave pieces of evidence about the involvement of the bribe, but the *World Duty Free case* ended differently from the *Azpetrol case.* The Tribunal in the *World Duty Free case* dismissed the claim brought by the World Duty Free company due to the involvement of the bribe in the investment contract of 1989. According to the view of the Tribunal, the investment contract was null and void, because the contract not only *violated the international public policy* but at the same time the respective rules of English and Kenyan laws in force.[19] The violation of the international public policy is a good point to knock on, in relation to the object of our study, as the Respondent in the Azpetrol case also claimed the violation of the international public policy when they raised the dismissal of the proceedings. In any case, we acknowledge the *World Duty Free case* as a well-established example to demonstrate the possible outcomes and subsequent scenario, if things did not go as well as the parties to the dispute in the *Azpetrol case* wished. The difference between the two outcomes can only be explained by the protection of the reputation of the respective companies because in the *Azpetrol case*, the bribery claim remained undisclosed to the public.[20]

To conclude, two points are worth to note about the possible and existing effects of bribery allegations. Firstly, the testimony by the Claimant had a

[17] *See* the full text of the ICSID Convention, available at https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf, (last visited April 17, 2018).

[18] 'World Duty Free Company Ltd v Republic of Kenya', Award, ICSID Case No ARB/00/7, 4 October 2006, available at https://www.italaw.com/cases/documents/3281 (last visited April 20, 2018). ('*World Duty Free case*')

[19] Cecily Rose, *Questioning the Role of International Arbitration in the Fight against Corruption*, 31 Journal of International Arbitration 183, 210. (2014).

[20] It should also be noted that in the *Fondel case* which we understand from the *Azpetrol case* that the Respondent accepted the payment to the Fondel, the Respondent even managed to prevent the publication of the award and protect its secrecy.

considerable impact on the next stage[21] when both parties aimed to resolve the issue as soon as possible, prior to the judgment by the Tribunal[22]. This practice is familiar to the energy investment arbitration. The parties to the dispute sometimes face with such an unexpected situation, especially during the cross-examinations that they eventually turn to the negotiations on the settlement agreement as soon as possible.[23] Because this tact enables parties to avoid the publication of the judgment which includes some paragraphs about the bribery or other illegal activities of any of parties, although awards on the dismissal of the proceedings are mostly published.[24] Secondly, from our perspective, while the Respondent was indeed wrong when they asserted the dismissal of the proceedings on the claims of bribery by ignoring the principle of separability of the arbitration agreement, they succeeded by the inclusion of a general wording which reads as "no legal dispute exists" in the settlement agreement. If the Claimant contested the terms and conditions of the settlement agreement and did not accept such a general wording either, the pleadings of bribery scandal would probably be heard before the Tribunal.

B. The Nature of Exchange of E-Mails between the Parties

The dispute between the parties, however, mainly derives from the characteristics of the exchange of e-mails by counsels of parties to the dispute. While the Claimants allege that the exchange of e-mails did not create any binding agreement between the parties on the settlement but just aimed at the agreement of standstill until the conclusion of the final binding agreement, the Respondent thought the opposite.

It is clear from the facts of the case that no legal dispute exists over the bindingness of the agreement reached as a result of the exchange of e-mails between the parties on December 16 and 19, 2008, respectively.[25] This fact is crucial, in terms of switching the gears to the most relevant question – to the nature of the agreement. If the agreement concluded between the parties was a settlement agreement, the Respondent was true when they alleged the dismissal of the proceedings by the Tribunal, by completing the documentation by December 31, 2008. On the other hand, if the exchange of e-mails knocked solely on the agreement on a standstill, then the award of the Tribunal was wrong, and the examinations had to proceed until parties reach the final agreement on the dispute settlement.

Subject to the e-mail conversations between the parties prior to December 16, 2008, the e-mails on the specified date and on December 19, 2008, had an

[21] Jean-Michel Marcoux, International Investment Law and the Evolving Codification of Foreign Investors' Responsibilities by Intergovernmental Organizations, University of Victoria, 170. (2016).

[22] *See* the similar purpose in the case facts, *Azpetrol Case*, §17.

[23] Rose, 210.

[24] *Ibid*, 194.

[25] *Supra* note 1, §47.

utmost importance. This importance and huge consideration to their wordings have been reiterated in the award by the Tribunal. On December 16, 2008, the counsel of the Respondent e-mailed the Claimants, the following e-mail:

Our client counter-offers as set out below. Upon receipt of your acceptance (which should expressly state your authority on behalf of all Fondel[26] *and Azpetrol claimants), Azerbaijan is prepared immediately to inform the Fondel and Azpetrol Tribunals that a standstill is agreed until 31 December 2008. The settlement is conditional upon on [sic] all documentation being executed by 31 December 2008, such condition being for the benefit of (and thus can only be waived by) Azerbaijan.*[27] [emphasis added]

This counter-offer included *inter alia* seven independent paragraphs, namely, the *withdrawal of claims, nuisance payment by Azerbaijan in respect of Fondel claim* (1.500.000 US dollars), *no admission of liability by Azerbaijan, confidentiality, the scope of settlement for both claims and parties* and finally, *allegations concerning personal and professional conduct.*

This e-mail consists of the gist of the case, from our perspective, because the Respondent here comes with a precise and novel offer (so-called counter-offer). In this counter-offer, the Respondent connotes the standstill agreement until December 31, 2008, but goes even beyond that, and refers to this e-mail as a settlement, putting a mere documentation condition. Additionally, the wording used in the subsequent seven paragraphs justifies that the dispute is going to be closed. Under the heading of confidentiality, the Respondent refers to these terms as *"terms of this settlement"* again. Under paragraphs 5 and 6 of this settlement e-mail, the wording of settlement has been used for several times with the most general wording to cover all reasonable claims.

Accordingly, on December 19, 2008, after *the acceptance of the offer of settlement* by the counsel of the Claimant in the Fondel case, the counsel of the Claimants in Azpetrol case also confirmed *the acceptance of an offer* on behalf of the Azpetrol companies, with a one-line short response. The Tribunal, in the award, also paid attention to the character of this acceptance and highlighted that this acceptance e-mail was sent as *a reply to the e-mail* of the counsel of the Claimant in the Fondel case. The following e-mails expressed the waiver by the parties of the argument over the bribery issues.[28]

Practically speaking, settlement agreements, in most cases, affect past, present and future claims and events with a general wording contained. Since

[26] The Fondel case was separate but still interrelated with the Azpetrol case that they were resolved simultaneously with a single settlement agreement between the parties. For more information, *see*, 'Fondel Metal Participations B.V. v. The Republic of Azerbaijan,' Award, ICSID Case No. ARB/07/1, (2008), available at https://www.italaw.com/cases/3632, (last visited April 18, 2018). (*'Fondel Case'*).

[27] *Supra* note 1, §28.

[28] *Ibid*, §32.

settlement agreements do not limit themselves to the particular dispute or claim and extend to past and future claims with a general claim, there can even raise another dispute over the meaning of settlement agreements. In such cases, courts or tribunals are expected to look at the objectivity criteria, rather than analyzing subjective intents of parties; at least English law demands that. In *Azpetrol case*, the situation was not very different. That's why the Tribunal took account of an objective meaning and interpreted the plain meaning of the exchange of e-mails between the parties. Putting the reasonable third person in the centre of the interpretation helped the Tribunal a lot at the interpretation phase. The Tribunal's choice was actually the feature of the English law, which demands the exclusion of subjective reservation after the formation of a contract, in order to contest the existence of a contract between parties.[29] The objective criterion brings the reasonable observer to the centre of the assessment of the formation of a contract, and this criterion has been referred as *an outward appearance of the acceptance*[30] in the award of the Tribunal.

As set out above, the parties then on December 19, 2008, informed the Tribunal about *"the agreement in principle"* between the parties to the dispute and asked for a procedural standstill until December 31, 2008. However, between December 19-31, 2008, the Claimant behaved doubtfully towards the nature of the legal agreement between the parties. The Tribunal's interpretation of the exchange of e-mails between the parties relied on the wording and plain meaning of the words used in the e-mails, along with the applicable law, effects of which are discussed under the next chapter.

III. Applicable Law and Its Impact on the Interpretation of the Settlement Agreement

A. The Influence of English Law on the Interpretation

Neither the competence of the Tribunal to determine if a settlement agreement was concluded or not nor the applicability of English law on the existence of a settlement agreement and its interpretation was questioned by the parties, during the proceedings before the Tribunal.[31] The applicability of the English law was the priority for the Tribunal if it is taken by sequence[32]. Notwithstanding the Tribunal sometimes pointed out the international standards, it should be pointed out that the application of the English law affected the final decision significantly.

[29] *Ibid*, §59.
[30] *Ibid*, §60.
[31] *Ibid*, §47.
[32] J.Christopher Thomas, Harpreet Kaur Dhillon, *Applicable Law under International Investment Treaties*, 26 Singapure Academy of Law Journal 975, 994. (2014).

B. Language of the Settlement Agreement

According to the Tribunal, the English law which is the applicable law, in this case, does not ascertain binding requirements for the formation of a contract. Two main requirements are the consideration of parties and meeting of minds (*consensus ad idem*). A formation of a contract is not depended on the written form or other formalities, thus, according to the Tribunal, the parties can conclude their binding settlement agreement simply by exchanging e-mail, if they wish so. Other two requirements for the formation of a contract, developed by the most prominent commentaries are embodied in the *intention to create legal relations and completeness & certainty of a contract.*

Opposed to the pleadings by the Claimants, the Tribunal focused on the plain wording of the settlement agreement and held that according to the meaning of the wording used in the offer dated December 16, 2008, by the Respondent, the request for the immediate standstill had a complementary character, in relation to the main purpose of the offer which was the settlement of the dispute.[33] The Tribunal, in this regard, considered the inclusion of the condition of documentation as an evidence that the agreement was aimed at the settlement of the dispute. We would like to highly appreciate the point of the Tribunal where they spelled the *"argumentum a contrario"* to come to a conclusion that if there was no offer of settlement, the documentation requirement would mean nothing more than nonsense.

The Claimants' evidence of the usage of the terminology of *"agreement in principle"* when both parties informed the Tribunals in written form was considered unsatisfactory by the Tribunal in the final award.[34] The claim was that this term was generally being used to indicate the non-binding feature of a contract in the English law. The Tribunal, in response, held that this term was not used in the communications between the parties and there is no notorious evidence to justify that this term is used for non-binding agreements in the English law. Here again, we witness the impact of the English law on the interpretation of another term. Indeed, the English law is too far away from such terminology and the term *"agreement in principle"* does make no sense even if referred to the legal practice of the English law.

C. Incompleteness of the Settlement Agreement

Apart from the allegations about the absence of *the meeting of minds* that were discussed *supra* under the objectivity criteria, the Claimants also concerned about the incompleteness of the settlement agreement. The Claimants insisted, in this case, on the absence of the provisions below, in the settlement agreement:

- *The provision of the governing law;*

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[33] *Azpetrol Case*, §70.
[34] *Ibid*, §77.

- *The provision of dispute resolution;*
- *The provision on the protection of the director of the Claimant companies who gave an evidence about the fact that he bribed Azerbaijani officials.*[35] [emphasis added]

However, the Tribunal concluded that the first two provisions cannot be established indispensable for the formation of the contract. According to the point of view of the Tribunal, agreements can be concluded well in the absence of such provisions. Being completely agreed with the Tribunal, from our perspective, since these two provisions often appear in arbitration agreements, they are always independent or severable from the main contracts. That's why their absence does not harm the completeness of the main contract, as much as their presence does not contribute to its completeness. Regarding the third provision, the Tribunal did not consider it indispensable as well, because of the insufficiency in the language of the Claimant when asking for a provision for the safeguards in Azerbaijan for the director of the Claimant companies who gave an evidence for the bribery. We would complement this argument by pointing out that even if it had even been included in the agreement as an indispensable part, the intention of the Claimants to ensure the evasion of the director of the Claimant companies would have been quite unreal, because of the illegality of guaranteeing someone suspected to commit a crime.

Apparently, the English law demonstrates a quite flexible approach to the concept of contract. The courts in England recognize the binding feature of a contract, even when the said contracts lack their essential terms.[36] The approach towards the validity of a contract or an agreement is quite broad that there are no legislative criteria that determine what the essential terms of contracts are. In this respect, contracting parties are always free to choose their essential terms and include them in the respective contracts. Furthermore, it should be pointed out that no technical rules dominate in English law, nor does the international law prescribe such an array of rules.[37] Being partly agreed with the Tribunal, in fact, we should not deny the rules of interpretation brought by the Vienna Convention of 1969. The point of view of the Tribunal in the *Azpetrol case*, with regard to the similarities between the thoughts in the English and international law, is true to the extent that both of them focus mainly on the identification of *the intention of the parties fully and fairly*. However, there is a certain difference between their approaches to the interpretation that will be discussed below.

[35] *Id*, §84.
[36] *Id*, §55-57.
[37] Eirik Bjorge, *The Evolutionary Interpretation of Treaties: The Means of Interpretation Admissible for the Establishment of the Intention of the Parties*, Oxford Scholarship Online 1, 37-38. (2014).

D. Relationship between 'Travaux Preparatoires' and the Interpretation

The difference we gave a little clue about above is the exclusion of the *travaux preparatoires* from the interpretation of contracts in the English law. This distinction between the English law and the international legal practice is worth to note because the Tribunal in the *Azpetrol case* put the negotiation sessions of the respective settlement agreement completely aside and focused on the plain wording.[38] We appreciate this paragraph of our case study as the most important one because the exclusion of the negotiations history, in addition, of subsequent conducts of the parties from the interpretation of the concluded settlement agreement, led to a different judgment of the Tribunal.

The Claimants were also alleging the importance of their communications with the Respondent before December 16, 2008, in which they claimed that the parties had agreed to finalize the standstill agreement in the first stage and then move on to the discussions of the settlement agreement after December 31, 2008.[39] According to their claims, this argument was also supported by the subsequent conduct of the parties after December 19, 2008.

From the assessment of the Tribunal, it is more than clear that the Tribunal was inclined to put the negotiations history and subsequent conducts of parties just aside, and concentrate solely on what the e-mails exchanged between December 16-19, 2008 said in this respect. The reference to the *travaux preparatoires* is actual in the international law, but also in the English law in some exceptional cases, such as an aid to interpreting the objective and purpose of parties to the contract. The reason for avoiding the recourse to the negotiations history lies in the aim of encouraging the parties to negotiate in good faith and not to concern about the ramifications of their dialogue at the next stage when they fail to resolve the issue amicably and head to the litigate or arbitrate their dispute. Following this rule, parties will always be free to attempt the resolution of their dispute by negotiations and will not be worried about the "side-effects" of their negotiations during the litigation and arbitration phases in the future.

However, in the Azpetrol case, the Tribunal did not notice any need for the clarification of the parties' objective and purpose while they were e-mailing each other before December 16, 2008. According to the Tribunal, even if it referred to the negotiations history where the parties were speaking about the two-stage resolution of the case, the parties' aim was still the same which was the settlement of the dispute.[40] Thus, the Tribunal considered it unnecessary to take a look at what the parties discussed in their exchange of e-mails before and after December 16-19, 2008, just because of the fact that the

[38] *See* the point of the Tribunal, *Azpetrol Case*, §62-65.

[39] *Ibid*, §89.

[40] *Ibid*, §90-91.

parties' aims remained unchanged in the *travaux preparatoires*, though it changed dramatically by the end of December 2008. The subsequent changes, however, did not affect the parties' positions, due to the already concluded binding settlement agreement between them. Accordingly, the Tribunal held that the recourse to the subsequent conducts of the parties would not prove the claim of the Claimant about the absence of the settlement agreement.[41] Of course, the applicable English law was one of the undeniable factors which helped the Tribunal come up with such an argument.[42]

E. Speak Off The Cuff: What If The Applicable Law Was Other Than English Law?

This case cannot be categorized as complex, as the choice of law which applied to the jurisdiction of the Tribunal and characteristics of the settlement agreement, including its interpretation had been determined by the parties before the Tribunal focused on the jurisdictional matters. The parties agreed on the English law to apply the dominant rules on their dispute, however, in the absence of such an agreement on the choice of law between the parties, things might have gone quite differently. Article 42(1) of the ICSID Convention reads in a way that in the absence of the agreement of parties on the choice of law, the tribunal may apply the law of the host state, together with the rules of international law. Thus, it can be claimed that the state party Respondent in the *Azpetrol case*, did a good job by setting the English law as the applicable law. Because, if the applicable law was not opted by the parties or the parties agreed on an applicable law other than any law based on the *common law* system, the Tribunal might have come to a completely different conclusion from they did in the present case. The point of rules of international law for the interpretation of treaties has been discussed *supra*. However, for this part of our case study, we find it of paramount importance to turn to another alternative situation, in order to better evaluate to what extent the applicable law, in this case, triggered the said conclusion.

As understood from Article 42(1) of the ICSID Convention, the Tribunal would turn to the law of the host state, in this case, if the parties did not choose any applicable law. Which means, Azerbaijani law as the law of the host state would be applied in order to determine if the agreement concluded between the parties was indeed a settlement agreement. Contracts have been regulated under Article 405 of the Civil Code of the Republic of Azerbaijan, which together with subsequent provisions on contracts, specifies the legislative requirements for the conclusion of a contract.

Azerbaijani contract law has been based on the well-known system of offer and acceptance, as many Continental legal systems have. No oral or written

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[41] *Ibid*, §92.

[42] Eleni Methymaki, Antonios Tzanakopoulos, Masters of Puppets? Reassertion of Control through Joint Investment Treaty Interpretation, Cambridge University Press, 171. (2017).

contract requirement exists for the conclusion of a valid contract that we can classify this point as one of the similarities with the applicable English law. According to Article 405, however, a contract is considered concluded when parties come to an agreement on all essential terms of a contract. These essential terms, in accordance with the law, include *the terms related with an object of a contract, the terms referred in the mentioned law as essential or necessary for contracts, and the terms requiring an agreement with the request of one of the parties*. In the *Azpetrol case*, when the Claimants disputed the incompleteness of the agreement, they also referred to the absence of the term about the sufficient safeguards for the director of the Claimant companies who had testified about the bribery with Azerbaijani officials. But the Tribunal, in its award, criticized the term "essential" itself, giving a reference to the English case law.[43] According to the point of view endorsed by the Tribunal in the final award, parties are masters of their agreement, and if they consider a term as essential, they are supposed to insert it into the following agreement. If not, they won't do so, and nor will they be bound by the said terms.

While other terms about the offer and acceptance or the required form of the contract do not frame the contract with the power of the legislator, the philosophy behind the formation of contracts in English and Azerbaijani law seem to be different. The English case law complains about the ambiguity of the term "essential" and leaves it to the mind of contracting parties to determine what is essential for them. The Azerbaijani law, in contrast, demonstrates a positivistic approach and requires that all essential terms shall be included in the contract in order at least to define it as a contract. Even those essential terms have been enumerated in three categories to show the way to courts about what the essential terms are, for different contracts. Taking this approach in the Azerbaijani law into account together with the claims of the Claimants in the *Azpetrol case*, it is not straightforward to claim that the term about the safeguards for the director of the Claimant companies will be related with the object of the settlement agreement. There are no specific requirements for the essential terms of the settlement agreement in the Azerbaijani law either. However, coming to the third category of essential terms in Article 405 of the Civil Code, the Claimants were actually discussing the inclusion of sufficient safeguards for the director of the Claimant companies in the agreement before December 16, 2008, in the negotiations sessions, even when the negotiations started in late summer of 2008. But from the perspective of the Tribunal, these negotiations did only make sense in the interpretation of international treaties in international law. According to Article 404(2) of the Civil Code which regulates the interpretation of a contract, during the interpretation of a contract, previous negotiations and correspondence and subsequent conducts of parties shall be considered. This

[43] *Azpetrol Case*, §57.

provision also supports our claim that if the applicable law had been Azerbaijani law, the Tribunal would have sought essential terms in the contract and have a look at the negotiations phase in order to find out if the provision of the protection for the director was considered as an essential term. Because if the answer is affirmative, there will be no contract because of the incompleteness of its terms.

To summarize, the changes in the applicable law would apparently affect the whole examination conducted by the Tribunal. In our opinion, the significance of the English law on the award of the Tribunal is much more clear, when alternative choices of law are analyzed. Thus, the efforts by the Respondent both in the negotiations and contract drafting sessions, and also when together they decided the applicable law were absolutely successful. The flexibility of approaches in the English law led to the conclusion that the settlement agreement was approved by the Tribunal which contained no provision in favor of the Claimants or in compliance with the expectations of the Claimants.

Conclusion

The *Azpetrol case* is firstly a good example to explain the effects of side events on the arbitration proceedings. Corruption and bribery is not an exception in terms of the investment arbitration, and no parties have been insured from such unexpected happenings during the proceedings. Mostly the state party respondents are successful to benefit from such situations and finalize the dispute by releasing a nuisance payment to the claimants' account. These acts contain "the bottom side of an iceberg", as regards these issues are neither clarified in the tribunal awards nor did they even open to the investigations. The inclination of most parties towards the settlement of disputes amicably increases the importance of settlement agreements in the investment arbitration.

The object of our case study has indeed put a legacy behind which can be used by many parties to investment disputes as a manual. The reflections of the submissions of the Respondent in the exchange of e-mails and precise and certain wordings used were the architects of the ultimate success. In order to avoid the drop-hands result and at least gain some compensations from investment disputes, claimant investment companies have to be careful with the acceptance they submit in response to offers of respondent state parties. However, another tribute needs to be paid to the choice of law, especially by the Respondent party in the *Azpetrol case*, who very much succeeded just because of the flexibility of the English law. As the English law has not set any written conditions for contracts, apart from those established by legal doctrine, the Tribunal found it enough to see the meeting of minds of the parties to conclude a binding contract.

No doubt, the English law played a significant role in the interpretation of the settlement agreement as well. The Tribunal neither looked for the essential terms to be included in the settlement agreement nor did it take the account of negotiations and subsequent conducts of the parties, to decide the validity of the settlement agreement. However, as we discussed *supra*, the law of the host state, in this case, would have been less efficient for the Respondent, because of the peculiarities of contract law in Azerbaijan. Although states tend to choose their own laws as an applicable law in the investment arbitration, the choice of law, this time, has contributed to the victory of Azerbaijan, in the *Azpetrol case*. Thus, the parties to investment agreements should acknowledge that no stable rule exists in the choice of law, and parties should research about all features of laws under which they want their dispute to be examined in the future.

*Zərifə Məmmədova & Süsən Səfərova**

İnsan Hüquqlarının və Əsas Azadlıqlarının Müdafiəsi Haqqında Avropa Konvensiyasının 1 Saylı Protokolunun 1-ci Maddəsi ilə Əhatə Olunan Mülkiyyət Hüququ Sahəsində Qəbul Olunmuş Qərarların Müqayisəli Təhlili

Annotasiya

Məqalədə mülkiyyət hüququ çərçivəsində AİHM presedentlərinin təhlilindən bəhs olunur. Eyni zamanda, müvafiq məqalədə 1 saylı Protokolun 1-ci maddəsində nəzərdə tutulan mülkiyyətin anlayışının izah olunmasına çalışılmışdır. Habelə mülkiyyətə müdaxilənin növləri sadalanmış, müvafiq mövzuda həm Azərbaycan, həm də xarici ölkələrin təcrübələri araşdırılmış, bir sıra məhkəmə işlərinin müqayisəli təhlili aparılmış, eyni məsələ ilə bağlı qaldırılan iddiaların həlli zamanı mövcud fikir ayrılıqları və qərarların müxtəlifliyindən bəhs edilmişdir.

Abstract

The article discusses the analysis of the ECHR's precedents in the context of property law. At the same time the meaning of property which includes in the Article 1 of Protocol No. 1 is tried to be explained in the current article. In addition, types of deprivation of property are mentioned, practices of Azerbaijan and foreign countries are examined, some cases which are relevant to the topic are compared, disagreements that arise on the same subject and the difference of the court's decisions are also discussed.

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Giriş

İnsan hüquqlarının müdafiəsi kontekstində yeni hüquq sahələrinin yaranması, daim dəyişən və inkişaf edən ictimai münasibətlərin tənzimlənməsi əsas məqsədlərdən birini təşkil edir. Hazırda bir çox yeni hüquq sahələrinin yaranması və onları tənzimləmə zərurətinin mövcud olmasına baxmayaraqtəməl hüquq sahələrində onları əlaqələndirən zəruri problemlərin, ziddiyyətli məqamların olması faktı da inkaredilməzdir.

Öz təməlini ingilis hüquq sistemindən götürən, getdikcə kontinental hüquq sisteminə təsir göstərən presedent müasir hüquq nəzəriyyəsində ən aktual mənbələrdən hesab olunur. Məqalədə presedent hüququna Avropa İnsan Hüquqları Məhkəməsi aspektindən toxunulmuşdur. Avropa İnsan Hüquqları Məhkəməsinin presedent hüququ əksər ölkələrdə hüququn tətbiqi təcrübəsində xüsusi yer tutur. AİHM qərarlarından göründüyü kimi edilən müraciətlər sırasında ən mühüm məsələlərdən biri də mülkiyyət hüququ ilə bağlı yaranan mübahisələrdir. Cəmiyyətin formalaşması ilə birlikdə yaranan və onunla birlikdə dəyişən, inkişaf edən mülkiyyət münasibətləri indinin özündə də mürəkkəbliyi ilə seçilir. Hazırki dövrdə ən geniş münasibətlər dairəsinə daxil edilən mülkiyyət münasibətlərinə dar çərçivədə baxılması düzgün sayılmasa da, bu mövzuda müxtəlif fikirlər mövcuddur. Məqalədə 1 saylı Protokolun 1-ci maddəsi ilə əhatə olunan, mülkiyyətlə bağlı bir sıra mübahisəli məsələlərin müqayisəli təhlili aparılmışdır. Həmçinin, mülkiyyətdən məhrumetmənin növləri ilə əlaqədar AİHM-in qərarlarından meydana çıxan ziddiyyətli məqamlar, fikir ayrılıqları təhlil olunur, bu sahədə vahid tənzimlənməyə ehtiyac olduğu vurğulanır.

I. Presedent nədir?

Presedentə verilən bir çox anlayışa nəzər salsaq, ümumiləşdirilmiş formada deyə bilərik ki, presedent məhkəmənin mübahisələrin həll olunmasında istifadə etdiyi, eyni və ya oxşar münasibətləri tənzimləyən, o cümlədən gələcəkdə baş verəcək mübahisələrin həllində istinad edə biləcəyi yazılı hökm - məhkəmə qərarıdır. Bu anlayış özündə məhkəmələrin hüquq tətbiqetmə fəaliyyəti nəticəsində ortaya qoyduqları, qanunu şərh etdikləri və tətbiq etdiklərinə dair praktikanı əks etdirir. Ümumiyyətlə, presedentə yalnız keçmişə bağlı olan yanaşma - dünənin qərarının bu gün üçün qəbul edilməsi ənənəsi mövcuddur.[1] Lakin presedent yalnız keçmişdə qəbul olunan qərarlarındeyil, həmçinin gələcəyi düşünərək bu gün qəbul etdiyimiz qərarların da nəticəsi ola bilər.[2]

[1] Frederick Schauer, *Precedent*, Stanford Law Review, 572, 573 (1987).

[2] Yenə orada, 573.

Presedenti hüququn mənbəyi kimi araşdırarkən onun hüquq sistemlərində fərqli mövqeyə malik olduğunu görürük. Roman-German hüquq sistemində daha çox tövsiyə xarakterli mənbə kimi tanınan presedentə Anqlo-Sakson hüquq sistemində bir qədər fərqli mənbə kimi yanaşılır.[3] Məhkəmə qərar qəbul edərkən, adətən, əvvəlki məhkəmə qərarlarına əsaslanır və bununla da gələcəkdə yaranacaq hüquqi münasibətlərin həllinə birbaşa imkan yaradır.

Presedentlərin əhəmiyyətinə və hüquqi qüvvəsinə görə müxtəlifliyi məhkəmələrin qərar qəbul edərkən onlara yanaşmasına da təsir göstərir. Misal üçün, əgər qərar açıq-aşkar hüquqi məsələlərə tətbiq oluna və onları tənzimləyə bilərsə, məhkəmə hər bir halda bu qərarın tətbiqini nəzərdə tutur. Belə qərarlar məcburi xarakter daşıyır.[4] Presedental təcrübəyə əsasən, ümumilikdə məcburi kimi qiymətləndirilən qərar müəyyən əsaslı səbəblər olduqda, tətbiq olunmaya bilər. Bu cür yanaşma presedentin məcburiliyini istisna etmir.[5] Daha bir yanaşma isə presedentin qeyri-məcburi qüvvəyə malik olması ilə bağlıdır. Burada göstərilir ki, məhkəmənin həmin presedentə istinad etməsi onun qarşısında öhdəlik kimi qoyulmur. Məhkəmənin öhdəliyi sadəcə işin həllinə yönəlmiş qərar qəbul etməkdən ibarətdir.[6]

1950-ci il Avropa İnsan Hüquqları Konvensiyasının (AİHK) 19-cu maddəsinə görə, Avropa İnsan Hüquqları Məhkəməsi (AİHM) - Razılığa gələn Yüksək Tərəflərin bu Konvensiya və ona dair Protokollar ilə öz üzərlərinə götürdükləri öhdəliklərə riayət olunmasını təmin etmək məqsədilə yaradılan və daimi əsaslarla fəaliyyət göstərən regional beynəlxalq məhkəmə orqanıdır. Avropa İnsan Hüquqları Məhkəməsi insan hüquqlarının müdafiəsi sahəsində böyük rola malik olmaqla, eyni zamanda Avropa İnsan Hüquqları Konvensiyasını tətbiq edən, Avropa Şurasına üzv dövlətlərin Konvensiyada əks olunan müddəalara və hüquqlara hörmətlə yanaşmasını və onlara əməl etməsini təmin edir. İnsan hüquqlarının qorunması sahəsində ən effektiv institutlardan biri hesab olunan AİHM presedent hüququnun inkişafında mühüm yer tutur. Məhkəmələrin bütün işlərdə qərar verərkən onun qərarlarına istinad edə bildiyi AİHM-in iş üzrə qərarları üzv olan dövlətlərin hüquq sistemlərinə təsir edir və nəticədə həmin dövlətlərdə müsbət mənada dəyişikliyə səbəb olur.[7] Bu proses "precedent law", bəzi mənbələrdə "case law" kimi də adlandırılır. Bir sıra xüsusiyyətlərinə görə AİHM presedent hüququ "ənənəvi" presedent hüququndan fərqlənir:

i. Anqlo-sakson hüquq sistemlərində konkret hüquq normaları mövcud olmadığına görə presedent hüququna əsaslanaraq məhkəmələr hüququn

[3] John Bell, *Comparing Precedent*, 82 Cornell Law Review, 1243, 1248 (1996-1997).

[4] Charles L. Barzun, *Impeaching Precedent*, The University of Chicago Law Review, 1625, 1655 (2013).

[5] Yenə orada, 1656.

[6] Yenə orada, 1657.

[7] Khamis Seyranov, Literature Review of Precedent Law of the European Court of Human Rights, 2.

mənbəyi kimi əvvəlki qərarlara istinad edirlər. AİHM qərar qəbul edərkən konkret hüquq normalarına (Əsas İnsan hüquq və azadlıqlarının Avropa Konvensiyası və onun protokollarına) istinad edir.[8]

ii. Bundan əlavə, AİHM norma yaratma fəaliyyəti yoxdur. AİHM yalnızca İnsan Hüquqlarının və Əsas Azadlıqlarının Müdafiəsi Haqqında Avropa Konvensiyası və onun protokollarına istinad edərək qərar qəbul edir. Ancaq bəzi dövlətlərdə məhkəmələrə bu səlahiyyət verilmişdir. Məsələn, Çex Respublikasında Konstitusiya Məhkəməsinə normativ hüquqi aktlar arasında ziddiyət yaranarsa yeni hüquq normasının yaradılması səlahiyyəti verilmişdir.[9]

iii. AİHM əvvəlki qərarları birbaşa tətbiq etmir, onu yalnız şərh edir və ya *opinio juris*[10] tətbiq edir. AİHM əvvəl qəbul olunmuş qərarı hüququn mənbəyi hesab edə bilməz. O yalnız məhkəmə işində mövcud olan hallarla bağlı əvvəlki qərarları şərh (interpretasiya) edə bilər.[11]

AİHM-in instansiya iyerarxiyasında yeri olmasa da, onun qəbul etdiyi qərarlar cavabdeh dövlətlər üçün məcburi xarakter daşıyır. Yuxarıda qeyd olunduğu kimi AİHM yalnız Əsas İnsan Hüquq və Azadlıqlarının Avropa Konvensiyasına və onun protokollarında göstərilən normalara münasibətdə qərarlar qəbul edir. AİHM-in presedent hüququ geniş və hərtərəfli olduğuna görə məqalədə mülkiyyət hüququ sahəsində qəbul olunan qərarlara toxunacağıq.

II. İnsan Hüquqlarının və Əsas Azadlıqlarının Müdafiəsi Haqqında Avropa Konvensiyasının 1 saylı Protokolunun 1-ci maddəsi

A. Mülkiyyətin anlayışı

"Mülkiyyət və hüquqlar birlikdə yaranır və birlikdə yox olur".[12]

Jeremy Bentham

İbtidaidən mürəkkəbə doğru inkişaf edən cəmiyyətimizdə uzun əsrlərdən günümüzədək öz aktuallığı və xüsusi əhəmiyyəti ilə qalmaqda davam edən münasibətlərdən biri də mülkiyyət münasibətləridir. Mülkiyyət hüququ fərdin təbii hüquqlarından biridir. Hər bir şəxsə sosial sistem tərəfindən mülkiyyət hüququndan istifadə imkanı verdiyi açıq-aydın nəzərə çarpır.

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[8] Yenə orada, 9.

[9] Yenə orada 9.

[10] *Opinio juris* dövlətin praktiki olaraq tətbiq etdiyi müəyyən öhdəliklərə olan inamında öz əksini tapır. Ətraflı bax: ICJ, North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands), Merits, Judgment (20 February 1969), 1969 ICJ Reports 3, 44.

[11] Seyranov, yuxarıda istinad 8, 9.

[12] Frank Sargent Hoffman, The right to property, *International Journal of Ethics*, 32, (1909).

Mülkiyyətin konseptini başa düşmək üçün ən vacib məqamlardan biri də ona ümumi hüquq və milli hüquq sistemlərinin qarşılıqlı müqayisəsi kontekstində nəzər salmaqdır. Hər iki hüquq sisteminin özünəməxsus mülkiyyət konsepti anlayışı var. Kontinental hüquq sistemində, xüsusilə, XIX əsrdə mülkiyyət şəxsin öz əmlakına sahiblik hüququnun qorunmasına əsaslanırdı. XIX əsr boyunca bu anlayışın daha da möhkəmlənərək bir sıra Avropa dövlətlərində məcəlləşdirildiyinin şahidi oluruq. XX əsrdə mülkiyyətin "qoruyucu" rolunun getdikcə azaldığı müşahidə olunsa da, bu anlayış öz prioritetliyini roman-german hüquq sistemində hələ də saxlamaqdadır.[13] Anqlo-sakson hüquq sistemində isə mülkiyyət üçün ümum qəbul olunmuş anlayış və ya xüsusi termin müəyyən edilmədiyindən mülkiyyətə onlarla anlayışın verilməsi, eyni zamanda müxtlif aspektən yanaşılması normal hal kimi qiymətləndirilir. Kontinental hüquq sisteminə görə əmlakın sahibi ondan sərbəst şəkildə istifadə imkanına malik idisə, ingilis hüquq sisteminə görə ayrı-ayrı şəxslərin bu cür hüquqa malik olması məqbul hesab edilmirdi. XVIII- XIX əsrlərdə mülkiyyətə belə nisbi anlayışın verilməsi dövlətlərin praktikasından irəli gəlirdi və kontinental hüquq sistemi ilə müqayisədə ingilis hüquq sistemində mülkiyyətin qorunması getdikcə daha mütləq və ənənəvi sistem formalaşdırmışdır.[14]

İnsan hüquqları kontekstində mülkiyyət dedikdə, hər bir fərdin öz mülkiyyət hüququndan sərbəst istifadəsi zamanı dövlət tərəfindən edilən hər hansı müdaxilənin yolverilməzliyi başa düşülür.[15]

B. 1 saylı Protokulun 1-ci maddəsinin şərhi

İnsan Hüquqlarının və Əsas Azadlıqlarının Müdafiəsi Haqqında Avropa Konvensiyasının 1-ci Protokolunun 1-ci maddəsində qeyd olunur: "Hər bir fiziki və hüquqi şəxs öz mülkiyyətindən maneəsiz istifadə hüququna malikdir. Heç kəs, cəmiyyətin maraqları naminə, qanunla və beynəlxalq hüququn ümumi prinsipləri ilə nəzərdə tutulmuş şərtlər istisna olmaqla, öz mülkiyyətindən məhrum edilə bilməz. Yuxarıdakı müddəalar dövlətin, ümumi maraqlara müvafiq olaraq, mülkiyyətdən istifadəyə nəzarəti həyata keçirmək üçün yaxud vergilərin və ya digər rüsum və cərimələrin ödənilməsini təmin etmək üçün zəruri hesab etdiyi qanunları yerinə yetirmək hüququnu məhdudlaşdırmır". *Iatridis Yunanıstana qarşı* işində Məhkəmə qeyd edir ki, 1 saylı Protokolun 1-ci maddəsinin birinci hissəsində nəzərdə tutlmuş "mülkiyyət" anlayışı müstəqil məzmuna malik olub, maddi əşyalara sahiblik ilə məhdudlaşmır və milli qanunvericilikdəki formal təsnifatdan asılı deyil. Maddi əşyalar kimi, əmlakı təşkil edən bəzi digər hüquqlar və maraqlar da "mülkiyyət hüququ" kimi tanınmalı və beləliklə, bu maddənin məzmunu baxımından "mülkiyyət" hesab olunmalıdır. "Mülkiyyət" anlayışı "mövcud

[13] Theo R. G. van Banning, The Human Right to Property, 14 (2002).

[14] Banning, yuxarıda istinad 14-15.

[15] Yenə orada, 171.

mülkiyyətlə" məhdudlaşmır və tələblər də daxil olmaqla, ərizəçinin ən azından mülkiyyət hüququndan səmərəli şəkildə istifadənin əldə olunmasına ağlabatan və "qanuni gözləntisi" olan əmlakı da əhatə edə bilər. "Gözlənti" mübahisə obyekti olan mülki maraqla bağlı hüquqi müddəaya və ya hüquqi akta əsaslandığı halda qanunidir. Hər bir işdə, işin bütün halları nəzərə alınmaqla, bu halların ərizəçiyə 1 saylı Protokolun 1-ci maddəsi ilə qorunan maddi marağa hüquq verib-verməməsi müəyyən olunmalıdır.[16] *Sporrong və Lönnroth İsveçə qarşı* işində məhkəmə 1-ci maddənin "3 müxtəlif qaydası"nı nəzərdə tutmuşdur: Protokolun birinci cümləsində əksini tapmış birinci qayda ümumi xarakter daşıyır və mülkiyyətə hörmətlə yanaşma prinsipini elan edir; ikinci cümləsində qeyd olunmuş ikinci qayda əmlakdan məhrum etməni əhatə edir və onu müəyyən şərtlərə tabe edir; üçüncü cümlə isə özündə üçüncü qaydanı ehtiva edərək təsbit edir ki, Razılaşan Dövlətlər digər şərtlərlə yanaşı, mülkiyyətdən ümumi maraqlara müvafiq olaraq istifadəyə nəzarət hüququna malikdirlər. Məhkəmə *Ceyms və başqaları Birləşmiş Krallığa qarşı*[17] işində 3 qaydanın bir-biri ilə əlaqədə olmadığını, əslində onların eyni mənanı ifadə etdiyini açıqca qeyd etmişdir. Məhkəmənin çıxardığı qərara görə ikinci və üçüncü qayda birbaşa olaraq mülkiyyətə hörmət hüququna müdaxilə hallarını nəzərdə tutur və əlaqədar işləri şərh edərkən birinci qayda ümumi prinsip kimi əsas götürülməlidir.

Yuxarıda qeyd etdiyimiz üç qaydanın hər biri mülkiyyətə müdaxilənin müxtəlif formalarını nəzərdə tutur. Lakin dördüncü növ müdaxilə də mövcuddur ki, bu müdaxilə vergilərin və ya digər rüsum və cərimələrin ödənilməsini təmin etməyə zərurətin olduğunu göstərir. Bu 1-ci maddənin sonuncu cümləsindən irəli gəlir və mülkiyyətdən istifadəyə nəzarətin forması hesab olunur.

1. Mülkiyyətdən məhrum etmə[18]

Protokolun 1-ci maddəsi mülkiyyətə müdaxilənin 2 növünü özündə nəzərdə tutur: mülkiyyətdən məhrumetmə və mülkiyyətə nəzarət. Mülkiyyətdən məhrumetmə şəxsin əmlakından istifadə, sahiblik və sərəncam hüququndan məhrum edilməsidir. Protokolun 1-ci maddəsində qeyd olunduğu kimi, heç kim mülkiyyətindən məhrum edilə bilməz. Lakin 3 hal mövcuddur ki, bu zaman mülkiyyətdən məhrumetmə mümkündür:

1. Qanunla müəyyən edildikdə;
2. Cəmiyyətin maraqları naminə;
3. Beynəlxalq hüququn ümumi prinsiplərindən irəli gələn qaydada.

[16] Saghinadze və başqaları Gürcüstana qarşı, Application No. 18768/05, (27 May 2010).
[17] James və digərləri Birləşmiş Krallığa qarşı, Application No. 8793/79, 16, (21 February, 1986).
[18] *İngiliscə*: Deprivation of property.

Mülkiyyətdən məhrumetmə zamanı əmlakın bir yerdən başqa yerə köçürülməsi və ya əmlakın bəzi xüsusiyyətlərini itirməsi başa düşülür.[19] Mülkiyyətə nəzarət isə özündə hər hansı bir yerdəyişməni ehtiva etmir. Nəzarət zamanı şəxs mülkə dair istifadə hüquqlarını məhdudlaşdırılmış şəkildə olsa belə saxlayır.[20] Mülkiyyətdən məhrumetmə 2 yolla təhazür edə bilər: *əmlakın yerdəyişməsi və de-fakto müsadirə*. Əmlakın yerdəyişməsi dedikdə, mülkiyyətçinin öz əmlakına olan istifadə hüququndan birbaşa olaraq məhrum edilməsi üçün görülən tədbirlər başa düşülür. *Ceyms və başqaları* işində mülkiyyətçinin üzərinə öz əmlakını icarəçiyə satmaq öhdəliyinin qoyulması və icarəçiyə isə satın almaq hüququnun verilməsi[21] əmlakın yerdəyişməsi nəticəsində mülkiyyətdən məhrumetmə halına aid edilir.[22] Digər məhkəmə işlərindən birində qeyd olunur ki, əmlakın müvəqqəti olaraq yerinin dəyişdirilməsi mülkiyyətdən məhrumetmə iddialarına əsas vermir. *Poiss Avstriyaya qarşı* məhkəmə işində bəyan edilir ki, iddiaçıların mülkiyyətdən məhrumetmə ilə bağlı iddiaları əhəmiyyətsizdir, çünki müvafiq halda əmlakın yerdəyişməsi müvəqqəti xarakter daşıyırdı.[23] Eyni zamanda, əmlakın müvəqqəti itirilməsinin məhrumetmə kimi deyil, məhz mülkiyyətə nəzarət kimi dəyərləndirilməsi ilk dəfə[24] Handyside[25] işində öz əksini tapmışdır. Əgər hər hansı işin faktiki halları hərtərəfli tədqiq edildikdən sonra müsadirənin rəsmi olmadığı müəyyən olunarsa, deməli, de-fakto müsadirə yolu ilə mülkiyyətə müdaxilə həyata keçirilmişdir. De-fakto müsadirə qanuni prosedura əsaslanmasa da,[26] *Papamichalopoulos* işində də qeyd olunduğu kimi mövcud vəziyyətdə mülkiyyətçi əmlakını sata, bağışlaya, vəsiyyət edə və digər bu kimi hüquqlarından istifadə edə bilmir, eyni zamanda 28 il ərzində heç bir təzminat almadan mülkiyyətindən məhrum edilmiş vəziyyətdə yaşamağa məcbur olur[27] Bu məsələnin tənzimlənməsi ilə əlaqədar hər hansı təşəbbüs olmadığından məhkəmənin çıxardığı qərarın ədalətli olması ilə bağlı fikirlər daha da gücləndi.

i. İctimai maraqlar naminə mülkiyyət hüququndan məhrumetmə

İctimai maraq geniş anlayışdır. Bu halda mülkiyyətdən məhrumetmə demokratik cəmiyyətdə siyasi, iqtisadi və sosial məsələlərin həlli üçün dövlət tərəfindən əmlakın müsadirəsi ilə bağlı qərarın qəbul edilməsidir. Bu, qanun

[19] Laurent Sermet, The European Convention on Human Rights and Property Rights, 23 (1998).
[20] Serment, yuxarıda istinad 23.
[21] Yuxarıda istinad 18, 4.
[22] Yenə orada 23.
[23] Poiss Avstriyaya qarşı, Application No. 9816/82, §64, (29 September, 1987).
[24] Yenə orada 23.
[25] Handyside Birləşmiş Krallığa qarşı, Application No. 5493/72, (7 December, 1976).
[26] Yuxarıda istinad 24.
[27] Papamichalopoulos avə digərləri Yunanıstana qarşı, Application no. 14556/89, §43, (24 June, 1993).

əsasında deyil, müvafiq icra hakimiyyəti orqanının qərarı əsasında qəbul olunur. İctimai maraqların əsasının nələr təşkil etdiyi xüsusi olaraq milli qanunvericilikdə öz əksini tapmır. Bu mənada icra hakimiyyəti orqanının əsas kimi qəbul etdiyi hallar mübahisə obyektinə çevrilə bilər. İctimai maraq naminə mülkiyyətdən məhrumetmə zamanı cəmiyyətin ümumi maraqları ilə şəxsin fundamental hüquqları arasında ədalətli balans qorunmalıdır. Ədalətli balans odur ki, cəmiyyətin maraqları oşəxsin hüquqlarına xələl gəlmədikdə təmin olunur. Şəxsin fundamental hüquqlarından birinə əmlakdan məhrumetmə zamanı həmin şəxsin kompensasiya ilə təmin olunub-olunmamaq istəyinin nəzərə alınması daxildir. Çox zaman şəxslər kompensasiya ilə təmin olunur, digər halda şəxsin əmlakı dəyərində başqa bir əmlakla təmin olunması onun istəyindən asılıdır. *Sporrong və Lönnroth İsveçə qarşı* işində məhkəmə qeyd edir ki, razılaşan dövlətlərin hüquq sistemlərində yalnız müstəsna hallarda əmlak kompensasiya olunmadan məhrum edilə bilər. Bu, təbii ki, effektsiz və səmərəsiz nəticə ilə sonlanacaqdır. Buradan da göründüyü kimi demək olar ki, əksər hallarda əmlakdan məhrumetmə zamanı şəxs kompensasiya ilə təmin olunmalıdır. Kompensasiyanın dəyərinə gəldikdə, məhkəmə məhrum edilmiş əmlakın dəyərində kompensasiya ilə təmin olunmamasını qeyri-mütənasib hesab edir. Yəni, kompensasiyanın əmlakın bazar dəyəri qiymətində olmasını əsas götürür. Lakin Protokolun 1-ci maddəsi bütün hallarda tam kompensasiya ilə təmin olunmanı istisna edir. İqtisadi islahatlar və ya sosial ədalətin bərpası zamanı ictimai marağın qanuni məqsədi kompensasiyanın tam həcmdə, bazar dəyəri qiymətindən daha az ödənilməsini əsas götürə bilər. Belə olduqda ədalətli balansın təmin olunması sual altında qalır. Buradan belə nəticə hasil olur ki, istisna hallarda cəmiyyətin mənafeyi bir şəxsin mənafeyindən üstün tutula bilər.

ii. Mülkiyyətin müsadirəsi ilə bağlı Sporrong və Lönnroth İsveçə qarşı[28] məhkəmə işi

Avropa İnsan Hüquqları Komissiyasına təqdim edilən müsadirə ilə bağlı ilk işlərdən biri olan Sporrong məhkəmə işində İsveçin Stockholm şəhərində müəyyən yenidənqurma əməliyyatlarının aparılması səbəbi ilə dövlət tərəfindən Cənab Sporrong və Xanım Lönnrothun mülkləri də daxil olmaqla bir neçə şəxslərə dair mülklərdə müsadirə icazəsi verilir. Eyni zamanda dövlət müsadirə olunacaq ərazilərə tikinti qadağası qoyur. Sporrongun əmlakına dair müsadirə və tikinti qadağası dəfələrlə tətbiq edilən müddət uzadılmaları ilə birlikdə 23 və 25 il davam etmişdir. Xanım Lönnroth və onun əmlakı ətrafında olan digər mülklərə tətbiq edilən müsadirə və tikinti qadağası isə 8 və 12 il davam etmişdir. Müddət tamamlandıqdan sonra isə həmin ərazilərin yeni salınacaq planda istifadə olunmayacağı bildirilmişdir. Zərərçəkmiş şəxslər mülklərinə edilən müdaxilənin Avropa İnsan Hüquqları

[28] Sporrong and Lönnroth İsveçə qarşı, Application No. 7151/75; 7152/75, (23 Sentyabr 1982).

Konvensiyasının şərtlərini pozduğunu iddia edərək Avropa İnsan Hüquqları Məhkəməsinə müraciət edirlər. AİHM-də Sporrong və Lönnroth işinə 1 saylı Protokolun 1-ci maddəsi çərçivəsində ətraflı baxılır və gələcəkdə oxşar işlərin həllində bu qərar istifadə olunur. Yuxarıda da qeyd etdiyimiz kimi məhkəmə 1-ci maddəni təfsir edərkən orada 3 yanaşmanın (mülkiyyətə hörmətlə yanaşma, əmlakdan məhrum etmə, ictimai maraqların nəzərə alınması) mövcud olduğu mövqeyindən çıxış edərək bu qaydanı digər işlərin, həmçinin müvafiq işin həllində rəhbər tutur.

Məhkəmə ilk növbədə müsadirə icazəsi və tikinti qadağasının, uzadılmaların ağlabatan müddətə uyğun olmadığını və nəticədə zərərçəkmiş şəxslərin daşınmaz əmlakları üzərində olan hüquqlarının məhdudlaşdığını təsbit etmişdir. Eyni zamanda məhkəmə bildirmişdir ki, zərərçəkmiş şəxslərin öz mülklərinə dair hüquqları hər nə qədər məhdudlaşsa da, qalmaqda davam edir. Məhkəmə dəfələrlə vurğulayır ki, müsadirə icazəsi üçün ayrılmış müddətin çox uzadılması və xüsusilə də tikinti qadağası şəxslərin öz əmlakı üzərində istifadə hüququna mənfi təsirini göstərmişdir. Məhkəmə müsadirə ilə bağlı bu ilk qərarında mülkiyyətə müdaxilənin ağır şərtlərlə nəticələndiyini qeyd etmişdir. Belə ki, müsadirə nəticəsində həmin mülklərdən istifadə illərcə məhdudlaşdırılmış və hətta mülkiyyət hüququnun itirilməsi dərəcəsinə gəlib çıxmışdır. AİHM işi mülkiyyətçilərin əmlaklarından istifadə etmək, kirayələmək, satmaq və s. kimi hüquqlarının məhdudlaşması və bunun həmin şəxslərə nə dərəcədə ziyan vurması aspektindən dəyərləndirəcəyini bildirmişdir.

AİHM son olaraq qərarında Avropa İnsan Hüquqları Konvensiyasının 1 saylı Protokolunun 1-ci maddəsinin hər iki iddiaçıya münasibətdə pozulması faktının olduğunu təsbit etmişdir.[29]

III. Avropa İnsan Hüquqları Məhkəməsinin presedent hüququnun Azərbaycanda tətbiqi təcrübəsi

Azərbaycanın müasir inkişaf dövründə hüquqi dövlət quruculuğu və insan hüquqlarının müdafiəsi sahəsində səylərin gücləndirilməsi dövlət siyasətinin əsas istiqamətlərindən biri kimi müəyyən edilmişdir. Hazırda Azərbaycanın yaşadığı yeni inkişaf mərhələsi insan hüquqlarının müdafiəsi sahəsində aparılan ardıcıl islahatların davam etdirilməsini şərtləndirir. 2001-ci il yanvar ayının 25-də AR Milli Məclisi 1950-ci il AİHK və onun 1, 4, 6 və 7 saylı Protokollarını müvafiq bəyanatlar və qeyd-şərtlərlə ratifikasiya etmiş və həmin aktlar 15 aprel 2002-ci ildə qüvvəyə minmişdir. Azərbaycan Respublikası Konvensiyanın ratifikasiya edilməsinə dair Qanunun köməyi ilə AİHM-in Azərbaycan Respublikasına qarşı qəbul etdiyi qərarlarının dövlətdaxili münasibətlər sferasında məcburiliyini tanımışdır.

[29] Yenə orada, 26.

Axverdiyev Azərbaycana qarşı[30] işində, ərizəçi Ədalət Əli oğlu Axverdiyevin iddialarından biri də İnsan Hüquqları və əsas Azadlıqlarının Müdafiəsi haqqında Avropa Konvensiyasının 1-ci maddəsinin tələblərinin pozulmasıdır. Ərizəçinin Bakı şəhəri Xutor qəsəbəsində yerləşən evin mülkiyyət sənədinə malik olmasına baxmayaraq, evin altındakı torpaq sahəsi şəxsin mülkiyyəti kimi sənədləşdirilməmişdir. 14 may 2004-cü il tarixində Bakı Şəhəri İcra Hakimiyyətinin (bundan sonra BŞİH) başçısı Bakı şəhərinin görünüşünün yaxşılaşdırılması məqsədilə onun müxtəlif hissələrinin bir neçə şirkət arasında bölünməsi haqqında sərəncamı ilə bağlı həmin ərazidə yaşayan şəxslərin köçürülməsi məqsədilə Nərimanov rayon İcra Hakimiyyəti (bundan sonra NRİH) yeni evlərin inşasının Azyevro LAU MMC inşa şirkətinə həvalə edilməsi barədə sərəncam imzalanmışdır.

Ərizəçi bildirmişdir ki, NRİH-nin işçilərinin şifahi tələbində həmin əmlakın əvəzində köçürülmüş qəbirstanlıq ərazisində yerləşən A.M.Cuma küçəsində tikilən beş otaqlı 123 kv.m. olan yeni mənzilə yasayış orderini qəbul etməyi tələb etmişlər. Ərizəçinin tələbi isə ev və evin altındakı torpağın bazar dəyəri qiymətində kompensasiya olunmasıdır. Ev sahibinin çıxarılması və evin sökülməsinə görə ərizəçi mülkiyyət hüququndan istifadənin pozulduğunu iddia etmişdir.

Hökumət bildirmişdir ki, ərizəçinin evi "BŞİH-nin 14 may 2004-cü il tarixli sərəncamına əsasən ictimai ehtiyaclar üçün dövlət orqanları tərəfindən alınmışdır".[31] Həmin evləri "gecəqonduya" bənzədərək şəhərin görünüşünə xələl gətirdiyini əsas gətirmişdir.

Məhkəmə qeyd edir ki, mülkiyyətin alınmasının 1 saylı Protokolun 1-ci maddəsinə müvafiq olması üçün üç şərtə əməl olunmalıdır: o, milli orqanlar tərəfindən qanunsuz hərəkətləri istisna edən, "qanunla nəzərdə tutulmuş şərtlərə" uyğun olaraq həyata keçirilməlidir; "ictimai marağa" uyğun olmalıdır və mülkiyyətçinin hüquqları və cəmiyyətin maraqları arasında ədalətli tarazlığı müəyyən etməlidir.[32] İlk növbədə, milli orqanlar tərəfindən köhnə Mənzil Məcəlləsinin (1982) bir sıra müddəalarına istinad olunmuşdur və həmin müddəalar "Dövlət və ya ictimai mənzil fonduna" aid olan mənzillərin sakinlərinin köçürülməsi və onların mənzildən çıxarılması ilə bağlı idi və şəxsi mülkiyyətdə olan mənzillərə tətbiq oluna bilməzdi. Məhkəmə qərarı olmadan həmin orqanlara şəxsin mülkiyyətinin alınması və onun mənzilindən çıxarılması səlahiyyəti verilmirdi. Şəxsi mülkiyyətin dövlət tərəfindən satın alınması ilə bağlı qərarın qəbul olunmasında Nazirlər Kabineti səlahiyyətli orqan olmuşdur. Bu əsaslara görə, 1 saylı Protokolun 1-ci maddəsində nəzərdə tutulan mülkiyyətin alınmasının ilk şərti olan milli orqanlar tərəfindən "qanunla nəzərdə tutulmuş şərtlərə" uyğun həyata

[30] Axverdiyev Azərbaycana qarşı, 76254/11 №-li ərizə, (29 yanvar 2015-ci il).

[31] Yenə orada, §63.

[32] Yenə orada, §81.

keçirilməmişdir. Sonda Ərizəçinin öz mülkiyyətindən qanunsuz olaraq məhrum edilməsi və özbaşına şəkildə müəyyən olunmuş qanunsuz kompensasiyanı qəbul etməyə məcbur edilməsi qeyd olunur. Buna müvafiq olaraq məhkəmə 1 saylı Protokolun 1-ci maddəsinin pozulması ilə bağlı qərar qəbul edir.[33]

Nəticə

Göründüyü kimi hər dövrün mübahisəli məsələsi olan mülkiyyətdən məhrumetmə milli və beynəlxalq təcrübədə bir sıra çatışmazlıqlarla üz-üzədir. Mülkiyyətlə bağlı münasibətlərin mürəkkəb xarakteri onu deməyə əsas verir ki, bu sahədə formalaşan presedentlər arasındakı ziddiyyətli məqamlar vahid tənzimləməni tələb edir. 1 saylı Protokolun 1-ci maddəsində mülkiyyətdən məhrumetməyə əsas verən hallar şəxsin fundamental hüquqlarından biri olan mülkiyyət hüququna xələl gətirmir. Bu əsaslardan biri olan ictimai maraqlar naminə mülkiyyətdən məhrumetmə ən az digərləri qədər hər bir dövlətin milli qanunvericiliyində tənzimlənməsi tələb olunan vacib əsaslardandır. Yəni, cəmiyyətin maraqları naminə mülkiyyətdən məhrumetmə zamanı məhrumetmənin məhz hansı hallara şamil olunmasının əsaslarının milli qanunvericilik sistemlərində öz əksini tapmasını labüd edir. Bununla yanaşı, AİHM qərarlarının beynəlxalq səviyyədə vacib əhəmiyyətli olduğuna baxmayaraq, bu sahədə qeyri-müəyyənliklərin mövcudluğu mübahisələrin yaranmasına səbəb olur. Mübahisə obyektlərindən biri kimi mülkiyyətdən məhrumetmə tətbiq olunan vasitə və üsulların vahid qaydasının müəyyən edilməsini zəruri edir. Nəticə olaraq, müvafiq məsələ ilə əlaqədar səmərəli həll üsulu kimi, bu sahədə qəbul edilmiş qərarlarda az da olsa qeyri-müəyyənliklərin qarşısının alınması üçün müvafiq tənzimləmə ilə bağlı vahid qaydanın müəyyənləşdirilməsi nəzərə alınmalıdır.

[33] Yenə orada, §100.

*Kanan Aliyev**

The Role of "OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions" in the Fight against Corporate Bribery in International Business Transactions

Annotasiya

Rüşvətxorluğun dağıdıcı təsiri ilə bağlı müzakirələr əsasən dövlət orqanları kontekstində aparıldığından onun digər sahələrdə, xüsusilə dünya üzrə rüşvətxorluğun 60%-ni öz üzərinə götürən korporativ sahə diqqətdən kənarda qalmaqdadır. Bununla bağlı bir sıra səbəblərə görə İqtisadi Əməkdaşlıq və İnkişaf Təşkilatı çoxmillətli müəssisələri ciddi iqtisadi təhlükə mənbəyi kimi xarakterizə etmişdir. Məqalədə digər oxşar beynəlxalq saziş və müqavilələr arasında vacib rola malik İƏİT-in Korrupsiyaya qarşı Mübarizə Konvensiyasının Korrupsiyaya qarşı mübarizədəki əhəmiyyəti təhlil edilmiş, tətbiqi, icrası və konvensiyada yeniliklər əks etdirilmişdir. Digər tərəfdən isə ABŞ-ın Konvensiyanın ərsəyə gəlməsində rolu və məhkəmə təcrübəsi araşdırılır.

Abstract

Because of the dominating place of discussions on public sector bribery the corporate bribery of all has stayed out of focus with 60%. With the regarding reasons The Organisation for Economic Co-operation and Development characterised multinational enterprises as the carrier of serious danger. As an important convention among other anti-corruption agreements the role of the OECD Anti-Bribery Convention has been analysed in this article. Article focuses the issues about implementation, enforcement of convention and reforms to it. On the other hand, role of the United States in establishing the OECD Anti-Bribery Convention and case law are included in this article.

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Introduction

Bribery in international business transactions is a cause for serious moral and political concern; it undermines governance and economic development, and it distorts international competitive conditions.[1] According to the World Bank, 'around $1 trillion is paid each year in bribes around the world.'[2] Large-scale bribery investigations involving large multinational enterprises (MNEs) such as BAE Systems[3] and Siemens[4] exemplify how serious bribery can be.[5] Arguably, corporations are among the leading organisations in the globalised economy.[6] The Organisation for Economic Co-operation and Development (OECD) suggests that MNEs' 'trade and investment activities contribute to the efficient use of capital, technology and human and natural resources.'[7] Although corporations are a source of prosperity, they can also cause serious harm. Sara Sun Beale makes the important point that 'modern corporations not only wield virtually unprecedented power, but they do so in a fashion that

[1] International Monetary Fund (Prepared by Policy Department and Review Department), *OECD Convention on Combating Foreign Bribery in International Business Transactions* (2001).
[2] World Bank, 'Anti-Corruption' (2016), http://www.worldbank.org/en/topic/governance/brief/anti-corruption (Last visited: 14 February 2017).
[3] The United States Department of Justice, 'BAE Systems PLC Pleads Guilty and Ordered to Pay $400 Million Criminal Fine' (2010) See: https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine.
[4] The United States Department of Justice, 'Former Siemens Chief Financial Officer Pleads Guilty in Manhattan Federal Court to $100 Million Foreign Bribery Scheme' (2015) https://www.justice.gov/usao-sdny/pr/former-siemens-chief-financial-officer-pleads-guilty-manhattan-federal-court-100 Last visited: 25 March.
[5] Nicholas J Lord, 'Responding to Transnational Corporate Bribery Using International Frameworks for Enforcement: Anti-Bribery and Corruption in UK and Germany' (2014) 14(1) Criminology Criminal Justice 100.
[6] Peter T. Muchlinski, Multinational Enterprises & The Law (2nd edn, OUP 2007) 3.
[7] OECD, 'Guidelines for Multinational Enterprises' (2011) http://www.oecd.org/daf/inv/mne/48004323.pdf (Last visited: 25 March 2018).

often causes serious harm to both individuals and to society as a whole.'[8] Of the bribes studied in the OECD Foreign Bribery Report, 60% were paid by large enterprises.[9] How should the behaviour of large corporations be regulated? In general terms, the 'regulation of the MNEs tends to be based on formal, mandatory sources of regulations such as national laws, administrative rules, and binding international agreements.'[10] In the 1970s, the US tried to combat corporate bribery in international business transactions unilaterally, but the side effects of its efforts were negative. The rationale behind this US decision to act unilaterally is analysed in greater detail in a subsequent section of this paper. One of the ramifications of its ineffectiveness in tackling transnational corporate bribery, moreover, was a more urgent need for a multilateral agreement to deal with the problem.[11]

A number of international agreements have been enacted over the past 20 years in order to tackle transnational corporate bribery. These have included regional agreements such as the Inter-American Convention against Corruption, the Council of Europe's Criminal Law Convention on Corruption, and the African Union Convention on Preventing and Combating Corruption; and multiregional agreements such as the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (known as the OECD Anti-Bribery Convention), and the United Nations Convention against Corruption (UNCAC). These latter two are multiregional agreements which indicate the determination of the international community to fight transnational corporate bribery. This essay, which examines the role of supply-side factors in dealing with the problem, will focus solely on the OECD Anti-Bribery Convention. It is, however, important to acknowledge the role the UNCAC plays in global anticorruption campaigns as it 'embodies innovative and globally accepted anticorruption standards'.[12]

The OECD was created in 1960 and played an important role in the reconstruction of Europe.[13] According to the OECD Treaty, the main goal of the organisations is 'to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of

[8] Sara Sun Beale, 'A response to the Critics of Corporate Criminal Liability' (2009) 46 American Criminal Law Review 1481.

[9] OECD, *Foreign Bribery Report* (2014)

[10] Muchlinski, *supra* note 6, 110.

[11] Clare Fletcher and Daniela Herrmann, *'The Internationalisation of Corruption: Scale, Impact And Countermeasures'* 11 (1st edn, Gower Publishing Limited 2012).

[12] Stefano Manacorda, Gabrio Forti and Francesco Centonze, *'Preventing Corporate Corruption: The Anti-Bribery Compliance Model'* (1st edn, Springer, 2014) 31.

[13] Mark Pieth, 'Introduction' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), *'The OECD Convention On Bribery: A Commentary'* (2nd edn, Cambridge University Press 2014) 13.

the world economy.'[14] The OECD always was keen to tackle transnational corporate bribery as it demonstrated it by the adoption of the 'Multinational Enterprises Guidelines' in 1976.[15] However, it was only in 1997 when the OECD finally adopted OECD Anti-Bribery Convention, 3 years after the Recommendation of 1994.[16]

The central argument of this research is that international corporate bribery is no longer a solely domestic issue, and that while an international law response has been offered by the OECD Anti-Bribery Convention, it provides an inadequate solution and so further reform may be required. The first section of this dissertation demonstrates that tackling transnational corporate bribery unilaterally is ineffective and that the adoption of a multilateral agreement is therefore necessary. The second section illustrates the inadequacies of the OECD Anti-Bribery Convention, focusing especially on the difficulties of implementing the Convention provisions into domestic legal systems, and highlighting, too, the challenges presented by the diversity of juridical systems in the context of corporate liability. Central to the discussion is the assertion that liability for legal persons is a key mechanism in the fight against transnational corporate bribery. Thus, this paper primarily examines the role of the OECD Anti-Bribery Convention with respect to that particular key mechanism. The US, a key innovator in the battle against international corporate bribery, is the main case study.[17] The third chapter of this dissertation, noting a clear gap between the law and its application, examines problems around enforcement in foreign bribery cases. The final chapter considers the desirability of some potential reforms to the current system.

I. Role of US and OECD Anti-Bribery Convention

This chapter analyses the role of the US in establishing the OECD Anti-Bribery Convention. More specifically, the discussion focuses on the role of the US's Foreign Corrupt Practice Act (FCPA), which is an archetypical law concerned with challenging international bribery.[18] This section demonstrates how inefficient the FCPA is in curbing transnational corporate bribery, before going on to consider why it has been so difficult to internationalise the fight against this transnational problem. This chapter concludes by highlighting the

[14] Article 1 of the Convention on the Organisation for Economic Co-Operation and Development.

[15] Pieth, *supra* note 13, 14.

[16] *Id,* 16-22.

[17] Natalie Shu Ying Wee, 'The OECD Convention On Combating Bribery of Foreign Public Officials And The Impact Of The Unite Kingdom's Bribery Act 2010 On Corporations: Is The Act Too Harsh?' (2014) 17 International Trade and Business Law Review 130.

[18] Marco Arnone and Leonardo S. Borlini, '*Corruption: Economic Analysis and International Law*' (1st edn, Edward Elgar Publishing Limited, 2014 2014) 209.

weakness of the OECD Anti-Bribery Convention's 'functional equivalence' doctrine, and by explaining the provisions of the 'soft-law instrument'.

A. Role of the Foreign Corrupt Practices Act 1977

The fight against transnational corporate bribery was first initiated by the US. In 1977, the US passed the Foreign Corrupt Practices Act, which was the first legal instrument to criminalise bribery among foreign public officials.[19] This harsh and unique measure was widely seen as reflecting the US government's domestic political agenda.[20] The legislation was passed as a response to the infamous Watergate scandal of the early 1970s. During the Securities and Exchange Commission's (SEC) investigation of Watergate, it was revealed that many companies did not disclose the donations and political contributions they made. Under the terms of the SEC's investigation, 400 corporations voluntarily disclosed their illegal payments and bribes.[21] This caused further public resentment, leaving the Gerald Ford and Jimmy Carter administrations with little choice but to react unilaterally, without any consultation with their main trade partners.[22] The rationale behind this response is widely debated, and a range of different reasons have been suggested. Firstly, the behaviour of large enterprises was deemed to be extremely unethical. Although MNEs are vehicles for development,[23] their unregulated behaviour in international business was a cause for concern. According to Mark Pieth, 'the fact the OECD enacted its version of an "OECD Guideline for Multinational Enterprises" in 1976 was an expression of the need perceived by governments to contain public discontent with the role of MNEs.'[24] Public discontent was enormous in the US because of the size and the nature of its corporate scandals,[25] of which The Lockheed scandal was one of the most notable. The Lockheed Corporation, one of the world's largest defence contractors, was involved in bribing foreign public officials. In 1976, the corporation admitted that they had paid up to $26 million in bribes.[26] As a result of the scandal, Kakuei Tanaka, a former prime minister of Japan, was

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[19] Pieth, *supra* note 13, 10.

[20] *Id,* 10.

[21] Arnone and Borlini, *supra* note 18, 209.

[22] Pieth, *supra* note 13, 10..article 16D Anti-Bribery ibery bery COnvetion ConvetionECD Anti-Bribery Convetion equal the same. But curront author views this

[23] Adefolake Adeyeye, '*Anti-Corruption as A CSR Standard. Corporate Social Responsibility Of Multinational Corporations In Developing Countries: Perspectives on Anti-Corruption*' (1st edn, Cambridge University Press 2012) 44.5biditionally, ty Office) report0. Convetion cer.d the OECD Anti-Bribery Convetion equal the same. But curront author views this

[24] Pieth, *supra* note 13, 11.

[25]*Ibid.*

[26] Martin T.Biegelman and Daniel R.Biegelman, *'Foreign Corrupt Practice Act Compliance Handbook: Protecting Your Organization From Bribery and Corruption'* (1st edn, Wiley & Sons Inc 2010) 40.

found guilty of accepting $ 2.1 million in bribes.[27] Pieth notes that this 'was highly embarrassing for US foreign policy'.[28] Clearly, therefore, the US government felt obliged to respond to this highly publicised transnational corporate bribery. However, its decision to act unilaterally had very serious side effects. Indeed, before the enactment of the FCPA, the US was already acknowledging its potentially harmful effects.[29]

The instigation of this unique legislation was, at the time, met with firm condemnation. In 1981, a General Accounting Office (now known as the Government Accountability Office) report to Congress acknowledged that reforms should strengthen the system of corporate accountability,[30] but it also stressed that 'more than 30 percent of the respondents engaged in foreign business cited the anti-bribery provisions as a cause of US companies losing foreign business.'[31] Additionally, Hines indicated that there was a decline in the activity of US firms in corrupt countries; he argued, however, that this fact did not imply that US law was at fault.[32] Other scholars, such as Wei, argue that US enterprises are hostile to corruption when they find it, except in the case of other OECD states.[33] Despite different scholars perceiving and evaluating the effect of the FCPA differently, there is no doubt that FCPA alarmed US corporations.

After passing the law, the US expected that other countries would follow their example and outlaw foreign bribery, because otherwise corporations in the US would be disadvantaged.[34] Unfortunately, this did not come to pass. Some states even used tax policies to incentivise bribery payments, which could be written off as expenses.[35] This caused significant concern in the US; and although the US tried to internationalise the fight against corporate bribery by adopting a multinational agreement, all their attempts in the 1980s

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[27] The New York Times, 'Tanaka Is Guilty in Bribery Trial' (1983) http://www.nytimes.com/1983/10/12/world/tanaka-is-guilty-in-bribery-trial.h tml (Last visited: 21 March 2017).
[28] Pieth, *supra* note 13, 11.
[29] Lianlian Liu, 'The Dynamic of the Institutionalization of the OECD Anti-Bribery Collaboration' (2014) 11.1 South Carolina Journal of International Law & Business 29, 42.
[30] By the Comptroller General Report to the Congress of United States, 'Impact Of Foreign Corrupt Practices Act On U.S. Business' (General Accounting Office 1981) http://www.gao.gov/assets/140/132199.pdf Last visited: 25 March 2017.
[31] *Ibid.*
[32] James R. Hines, Jr, 'Forbidden Payment: Foreign Bribery and American Business After 1977' (NBER Working Paper 5266, 1995) http://www.nber.org/papers/w5266 (Last visited: 25 March 2017).
[33] Shang-Jin Wei, 'How Taxing is Corruption on the International Investors' (NBER Working Paper 6030, 2000) <http://www.nber.org/papers/w6030.pdf> Last visited: 2 March 2017.
[34] 'The Limits of Institutional Design: Implementing The OECD Anti-Bribery Convention' (2004) 44:3 Virginia Journal of International Law 665, 673.
[35] OECD, 'No Longer Business as Usual: Fighting Bribery And Corruption' (OECD 2000) 67.

were unsuccessful.[36] One possible reason for this failure is that other states did not share the US's domestic agenda,[37] so they were not inclined to act in the same way. Furthermore, Kenneth W. Abbott and Duncan Snidal have argued that the US's competitors were aware of the fact that Congress would not be able to repeal or weaken the FCPA legislation, because it was seen to represent American values and interests.[38] The US government certainly did not have any leverage in negotiating with its international partners, putting it in an extremely disadvantageous position. Repealing the law would have caused public outrage, so the only possible solution would be to amend it.

In 1988, the US government relaxed the act but, more importantly, it authorised the President to 'pursue negotiations of an international agreement, among the members of the [OECD].'[39] The rationale for choosing the OECD as the institution through which transnational corporate bribery would be outlawed was that its member countries were the US's main business competitors.[40] This is less true today, because emerging economies such as China and India are not members of the OECD.

In 1994, Bill Clinton's government was determined to use aggressive tactics in its negotiations with its European and Asian partners. The results of these efforts led to the adoption of the Recommendation of 1994, which proposed 'that member countries take effective measures to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions'.[41] The OECD Anti-Bribery Convention was adopted in 1997 and came into force in 1999. The Convention internationalised attempts to criminalise the supply side of bribery, and in so doing it revolutionised global anti-bribery policy.

The effort of the US in internationalising the FCPA is uncontestable. There are three main reasons why the US was successful in pursuing its negotiations which resulted in the adoption of the Convention. First, many large corporations abandoned the idea that the FCPA would be repealed, which

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[36] Liu, *supra* note 29, 45.
[37] Kenneth W. Abott and Duncan Snidal, 'Filling in the Folk Theorem: The Role of Gradualism and Legalization in International Cooperation to Combat Corruption' (ResearchGate, 2002) https://www.researchgate.net/publication/228746902 (Last visited: 25 March 2017).
[38] *Ibid.*
[39] Amendments to Foreign Corrupt Practice Act 1977, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2012/08/29/houserpt-100-418.pdf (Last visited: 25 of March).
[40] Barba Crutchfield George, Kathleen A.Lacey and Jutta Birmele, 'The 1998 OECD Convention: An Impetus For Worldwide Changes In Attitudes Towards Corruption In Business Transactions' (2000) 37 American Business Law Journal 487.
[41] Council Recommendation of the Council on Bribery in International Business Transactions (adopted 27 of May 1994) http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/1952622.pdf (Last visited: 25 March).

therefore focused their attention on internationalisation of the problem.[42] Second, many economists changed their view of the corruption: they had, with the World Bank, formerly seen corruption as a means of avoiding bureaucracy in developing countries. The shift in their perception was effected, in part, by the establishment of Transparency International (TI) by an erstwhile World Bank employee. Peter Eigen, former economist for the World Bank, established a non-governmental organisation which aimed to change social attitudes towards corruption. The role of TI in shaping public opinion was unquestionable.[43] The third reason for the US's success was a domestic one: in Clinton it had a newly-elected president, and new presidents comes to power with new ideas and new strategies.[44] Due to the convergence of these three factors, the US was finally able to achieve much of what it had long wished for. Twenty years after the adoption of the Convention, however, not much has changed. The OECD-Anti Bribery Convention possesses serious structural challenges which act as obstacles to the curbing of transnational bribery.

B. OECD Anti-Bribery Convention

It is remarkable how swiftly the Convention was adopted by the OECD member states. The Convention is itself very unique as it possesses two legal instruments: 'the Convention of 21 November 1997 and the Recommendation for Further Combating Foreign Bribery of 26 November 2009 with its own Annexes.'[45] This paper discusses both of these, focusing on the former or the latter depending on the context.

Generally, international conventions do not necessarily signify or indicate that international law will be implemented into domestic legal systems directly, nor that there will be a uniform application thereof.[46] Consequently, in the case of the present study, which is concerned with the criminalisation of bribery among foreign public officials, does not have a direct effect.[47] Before adopting the Convention, the OECD Working Group on Bribery (WGB) presumed that in contrasting legal systems a 'soft law' instrument would be the most efficient and appropriate means to coordinate international rules on transnational corporate bribery.[48] Therefore, in the fight against transnational corporate bribery, the OECD adopts the principal doctrine of 'functional equivalence'.[49] Note that the principal doctrine of 'functional equivalence' is

[42] Tarullo, *supra* note 34, 676.
[43] Geoge, A.Lacey and Birmele (n 40) 523.
[44] Tarullo, *supra* note 34, 676.
[45] Pieth, *supra* note, 35.
[46] Arnone and Borlini, *supra* note 18, 223.
[47] *Ibid.*
[48] Pieth, *supra* note 13, 37.
[49] Official Commentaries of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention).

found in the official Commentaries of the Convention. Although these official Commentaries are an addition to the Convention, they do not form part of the Convention and they were not endorsed by its signatories.[50] Nonetheless, they play a crucial role in the interpretation of the Convention, and can certainly be used for such a purpose.[51]

The concept of functional equivalence was taken from comparative law. According to Pieth:

> The approach assumes that every legal system has its own logic, which is not necessarily determined by legal texts alone. Only holistic appraisal of the law in operation, including the formal rules and practices as well as functions assumed by other legal institutions, will allow us to assess whether the overall legal effects produced by a country's legal system adequately meet the requirements of the Convention.[52]

The doctrine aims to harmonize various different systems and implement provision of the agreement into domestic legal systems. Although it might seem admirably ambitious in principle, it presents various obstacles to the smooth operation of MNEs, and it creates unnecessarily complicated language for communication between corporations and the various states.[53]

As for the provisions of the Convention, Article 1 forbids:

'any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business'.[54]

The scope of the provision only includes the 'pecuniary or other advantage' given to the foreign public official. Foreign public officials are those who hold administrative or judicial office, and they are required to behave according to the accepted standards for public servants, whether they are elected or appointed. Article 1 relates to officials from both public international organisations and public enterprises. Furthermore, the Article does not

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[50] Arnone and Borlini, *supra* note 18, 223.

[51] Section 31(2) Vienna Convention on the Law of Treaties.

[52] Pieth, *supra* note 13, 37.

[53] Meg Beasley, 'Dysfunctional Equivalence: Why The OECD Anti-Bribery Convention Provides In The Era Of The Multinational' (2015) 47 The George Washington International Law Review 191,193.

,'Introduction'Foreign Public Officials'ribery ConvetionECD Anti-Bribery Convetion equal the same. But curront author views this[54]Article 1(1) of the OECD Anti-Bribery Convention.,'Introduction'Foreign Public Officials'ribery ConvetionECD Anti-Bribery Convetion equal the same. But curront author views this

specify for whom it is illegal to commit an act of bribery, as the article simply refers to 'any person'. The rationale for using this terminology is that it includes anyone who can potentially be involved in bribery.[55]

Looking closer at the Convention, however, it becomes clear that 'any person' can also be a legal person.[56] As Article 2 of the Convention notes: 'Each party shall take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the foreign public official.'[57] This Article is extremely salient for MNEs in that different signatories to the agreement implementing this particular provision become problematic. Nevertheless, the designers of the Article intended for it to be open to broad interpretation.[58] By consulting Article 3, it becomes evident that, regardless of the legislation implemented by the relevant parties, the sanctions have to be 'effective, proportionate and dissuasive.'[59] Even though there are certain differences, this point was largely inherited from EU law,[60] and the fundamental justification for it hinges crucially on the principle of 'functional equivalence'.[61]

Article 4 of the agreement calls on states to implement international law into their respective national legal systems.[62] The Convention's approach is one of compromise, as it incorporates 'territoriality' supplemented by 'nationality', as long as the concept already existed in the legal system of the state.[63] The investigation and prosecution of parties must be in accordance with the legal principles of the states that were party to the agreement.[64] More importantly, the investigation and prosecution of parties involved in the bribery of foreign public officials should not be influenced by 'considerations of national economic interest, the potential effect upon relations with another state or the identity or legal persons involved.'[65]

This section will become more relevant in the discussion, below, of the UK Serious Fraud Office's (SFO) investigation of the Al Yamamah arm deal. The

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[55] Ingeborg Zerbes, 'The Offence of Foreign Public Officials' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014) 73.

[56] Article 2(1) OECD Anti-Bribery Convention.

[57] *Ibid.*

[58] Peter J. Cullen, 'Sanctions' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014) 259.

[59]Article 3(1) OECD Anti-Bribery Convention.

[60] Zerbes, *supra* note 57, 69.

[61]Official Commentaries of the OECD Anti-Bribery Convention.

[62] *Id,* article 4(1).

[63] Mark Pith, 'Jurisdiction' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014).

[64] Article 5 of the OECD Anti-Bribery Convention.

[65] *Ibid.*

OECD Anti-Bribery Convention notes that statute limitation should be adequate for a certain period of time.[66]

Furthermore, Article 8 imposes the accounting standards which companies must follow.[67] Additionally, it requires states to punish the contravention of accounting standards with sanctions.[68] Articles 9, 10 and 11 are concerned with international cooperation, while Article 12 stipulates that: 'The parties shall co-operate in carrying out a program of systematic follow-up to monitor and promote the full implementation of this Convention'. Generally, the lack of monitoring was also perceived to be one the vulnerabilities of the soft law instruments.[69] The monitoring process is implemented by the OECD Working Group on Bribery in International Business Transactions, 'whose only main sanction is bad publicity.'[70] The final provisions of the Convention are focused on the signatory and accession;[71] ratification and depositary;[72] entry into force;[73] amendment;[74] and withdrawal.[75]

This concludes the overview of the general provisions of the Convention. The next phase will focus on two main issues: the general implementation procedure of the Convention, and the specific implementation of its Article 2.

II. Implementation

The previous chapter illustrated the role of the US in the opposition against transnational bribery. It outlined the ineffectiveness of the unilateral criminalisation of bribery among foreign public officials. Furthermore, it elucidated the main principle of 'functional equivalence', on which the OECD Anti-Bribery Convention was engineered, coupled with an explanation of the provisions of the 'soft law' instrument.

This chapter identifies and explores three main issues with the OECD Anti-Bribery Convention. These issues hinder the combating of transnational corporate bribery. As is now evident, international agreements have to be implemented by states into their domestic system with a common standard.[76] The domestic implementation of the Convention can be a laboured process,

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[66] *Id,* article 6.
[67] *Id,* article 8(1).
[68] *Id,* article 8(2).
[69] Nicola Bonucci, 'Monitoring and Follow up' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention on Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014) 538.
[70] Susan Rose-Rockerman, 'International Actors And The Promises And Pitfalls Of Anti-Corruption Reform' (2013) 34:3 University of Pennsylvania Journal of International Law 447.
[71] Article 13 of the OECD Anti-Bribery Convention.
[72] *Id,* article 14.
[73] *Id,* article 15.
[74] *Id,* article 16.
[75] *Id,* article 17.
[76] Arlone and Borline, *supra* note 18, 209.

as in the case of the UK in 2010.[77] By comparison, the US and Japan successfully amended their anti-bribery laws in order to comply with the convention in 1998 and 1999, respectively.[78] Moreover, the signatories to the agreement implement its provisions according to their respective domestic legal principles; there is no uniformity, therefore, in the fight against transnational corporate bribery. An international agreement does not guarantee the consistency of its application, so the larger the difference in the law, the larger the enforcement gap between states.[79]

A. United Kingdom

The UK finally complied with the OECD Anti-Bribery Convention in 2010, when it enacted the Bribery Act 2010. Clearly, the BAE Systems scandal was a catalyst for the implementation of the law, as its effect in the UK was comparable to Watergate in the US. By outlining the process by which the UK adopted the new anti-bribery laws, this section analyses the limits of the OECD Anti-Bribery Convention.

Before the enactment of the Bribery Act 2010, the UK's anti-bribery laws were divided into various acts such as the 1906 Prevention of Corruption Act and the 1889 Public Bodies Corrupt Practices Act. Some bribery offences were also covered by common law. Even though after ratifying the Convention the UK Parliament concluded that existing laws were enough to comply with the Convention, government representatives also admitted that the law should be in a separate, new statute.[80] In its Phase 1 Report, 'the working group [on the implementation of the Convention urged] the UK to enact appropriate legislation and to do so as a matter of urgency.'[81] One of the issues identified in this first phase was that UK law did not contain explicit laws criminalising foreign bribery, and that its national jurisdiction did not extend over acts of foreign bribery.[82] The UK government addressed these concerns in the twelfth part of the 2001 Anti-terrorism, Crime and Security Act. The OECD WGB, in its Phase 1 bis report, noted that "the laws in the United Kingdom against 'foreign' bribery are now strengthened."[83] However, the WGB expressed its concerns regarding Article 5 of the OECD Anti-Bribery Convention, and

[77] Bribery Act 2010 (UK).
[78] Edmund W. Searby and Erin Murdock-Park, 'Closing The Gaps in Global Anti-Bribery Enforcement' (2012) 3:1, Global Business Law Review 143, 145.
[79] *Id*, 148.
[80] Monitoring Report, 'United Kingdom: Review of Implementation Of The Convention And 1997 Recommendation' (OECD 1999) http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2754266.pdf Last visited: 25 March 2017.
[81] *Id*, 24.
[82] *Ibid.*
[83] Monitoring Report, 'United Kingdom: Review Of Implementation Of The Convention And 1997 Recommendation Phase 1 Bis Report' (OECD 2017) http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2498215.pdf (Last visited: 25 March 2017).

hoped that the United Kingdom would fully implement that particular provision.[84] In Phase 2 and Phase bis 2, the WGB further expressed its disappointment with UK authorities.[85]

The main source of disappointment was the UK SFO's decision to suspend its investigation into the Al Yamamah arms deal. In July 2004, the SFO commenced an investigation into the violation of the newly implemented provisions of the Anti-terrorism, Crime and Security Act by BAE Systems. It was concerned, in particular, with the Al Yamamah arms contract between the UK government and the Kingdom of Saudi Arabia.[86] In December 2006, the director of the SFO ceased the investigation into the BAE system because:

[E]ven had I thought that discontinuing the investigation was not compatible with Article 5 of the Convention, I am in no doubt whatever that I would still have decided, by reason of the compelling public interest representations … that the investigation should be discontinued.[87]

The Corner House Research argued that it was unlawful for the SFO to disregard its international obligations under Article 5 of the OECD Anti-Bribery Convention.[88] However, as Lord Bingham suggested, this was a case of 'an unincorporated treaty provision not sounding in domestic law.'[89] The concern regarding Article 5 was expressed by the WGB in the previous report, as is outlined above. Therefore, in the 2007 report, the WGB wrote: 'The recent discontinuance of a major foreign bribery investigation concerning BAE SYSTEMS plc. and the Al Yamamah defense contract with the government of Saudi Arabia has further highlighted some of these concerns.'[90] It was not until a full 12 years after it ratified the OECD Anti-Bribery Convention that the UK parliament enacted the Bribery Act 2010.

Three conclusions can be drawn from this. The first relates to the fact that the UK anti-bribery laws were outdated over a long period of time, which allowed many firms to take advantage of the ill-defined laws.[91] Thanks to these loose laws on foreign bribery, the Al Yamamah arms deal investigation was suspended. Evidently, the UK did not fully incorporate Article 5 of the

[84] *Ibid.*
[85] Cecily Rose, 'The UK Bribery Act 2010 And Accompanying Guidance: Belated Implementation of The OECD Anti-Bribery Convention' (2012) 61 International and Comparative Law Quarterly 485,489.
[86] *Ibid.*
[87] *R. (on the application of Corner House Research) v. Director of the Serious Fraud Office* [2008] UKHL 60, § 849.
[88] *Ibid.*
[89] *Id*, § 840.
[90] Monitoring Report, 'Following Up Report On The Implementations Of The Phase 2 Recommendations' (OECD 2007) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/38962457.pdf> Last visited: 25 March 2017.
[91] Jessica A .Lordi, 'The UK Bribery Act : Endless Jurisdictional Liability On Corporate Violations' (2012) 44 Case Western Reserve Journal of International Law 956, 970.

Convention, despite the concerns expressed by the OECD WGB. Hence, domestic courts were unable to apply the international law as part of the domestic law. This leads to a second conclusion: there are doubts about the role of the OECD WGB. Indira Carr and Opi Outhwaite commented in their response to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments that 'questions remain in respect of the effectiveness of the monitoring process in bringing about the necessary level of compliance'.[92] They further argued that the OECD suggested implementing a single anti-bribery law, but that this process was only making limited progress.[93] Although the member states are satisfied with the role of the OECD WGB, Daniel K. Tarullo, argued that 'without sanctions for non-compliance' it would be very hard to implement the legislation.[94] The final conclusion is a reiteration of the aforementioned contention that the incorporation of the OECD Anti-Bribery Provisions is a difficult process: it is important to note that the technique employed by the OECD Anti-Bribery Convention is insufficient to curb transnational corporate bribery, as evinced by the delayed actions of the UK government.[95]

B. Liability for Legal Persons

In its reply to the Consultation Paper on the Review of the OECD Anti-Bribery Instruments, the French Prometheus Foundation pronounced that 'the concept of 'functional equivalence', in the heart of the implementation of the Convention, has considerably underestimated the difference between the juridical environments of each Parties, both from the point of view of the modalities of juridical pursuit and sanctions as well.'[96] The previous chapter argued that 'functional equivalence' was an ineffective measure. This chapter seeks to display how inadequate the doctrine is in the context of Article 2 of the OECD Anti-Bribery Convention. This Article requires states to implement laws which ensure the liability of legal persons. In curbing transnational bribery, particularly when examining the role of the OECD Anti-Bribery Convention, attributing liability to corporations becomes critical.[97]

1. *Criminal vs Non-Criminal Liability*

The liability of a legal person for a foreign bribery offence is crucial to the development a legal infrastructure for the globalised economy because,

[92] India Carr and Opi Outaite, 'Responses to The Consultation Paper Review Of The OECD Anti-Bribery Instruments' (OECD 2008) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40497521.pdf> Last visited: 25 March 2017.
[93] *Ibid.*
[94] Tarullo, *supra* note 687.
[95] Rose, *supra* note 87.
[96] The Promethaus Foundation (France), 'Responses To The Consultation Paper Review Of The OECD Anti-Bribery Instruments' (OECD 2008) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40498944.pdf> Last visited: 25 March 2017.
[97] Arnone and Borlini, *supra note 18.*

without liability for corporations, fighting against transnational corporate bribery would be fruitless.[98] Corporate liability ensures that individual enterprises can be held specifically accountable for any wrongdoing.[99]

The OECD Anti-Bribery Convention has adopted a broad approach to corporate liability, due to the fact that different states have different approaches to corporate liability. As the Convention does not require the state to adopt criminal liability for corporations if doing so would not be consistent with the legal system of the certain states.[100] Out of the 41 state parties to the OECD Anti-Bribery Convention, only 27 states ensure criminal liability for corporations, while 11 states have non-criminal liability, two states have both, and one state does not impose liability at all.[101] From these statistics it is clear that not all states ensure the criminal liability of legal persons. This creates uncertainty as different states impose different types of liability.

The US implements the doctrine of the *respondeat superior*.[102] Within this, vicarious criminal liability is when a corporation is responsible for the wrongful act committed by the employee or the agent within their responsibilities on behalf of the corporation. This doctrine is also applied by the FCPA.[103] Multinational enterprises can be criminally liable for the wrongful acts of their subsidiaries.[104] This can occur in two particular circumstances. Firstly, the parent company has to be directly liable for the wrongful act.[105] Secondly, the parent company might be liable under the general agency doctrine.[106] Furthermore, under the agency concept, any unlawful action and knowledge by the subsidiary can be attributed to the parent company.[107]

The primary justification for imposing criminal corporate liability onto the corporations is that 'potential offenders make rational choices regarding their crimes, that they weigh the advantages and disadvantages of committing

[98] OECD, 'Liability of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf (Last visited: 26 March 2017).

[99] *Ibid.*

[100] Simeon Obidairo, *Transnational Corruption And Corporations: Regulating Bribery Through Corporate Bribery* (1st edn, Ashgate Publishing 2013) 103.

[101] OECD, 'Liability of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> Last visited: 26 March 2017, 21.

[102] *Standard Oil Co. v. United States*, 307 F.2d 120, 127 (5th Cir. 1962).

[103] The Criminal Division of the US Department of Justice and the Enforcement of US. Securities and Exchange Commission, 'Resource Guide to The US. Foreign Corrupt Practice Act' (The Department of Justice 2012) 27.

[104] *Ibid.*

[105] *Ibid.*

[106] *United States v. NYNEX Corp*, 788 F. Supp. 16, 18 n.3 (D.D.C. 1992).

[107] *Pacific Can Co v Hewes ex Corp,* 95 F.2d 42, 46 (9th Cir. 1938).

offenses.'[108] Corporations are concerned with profit maximisation and will therefore be cautious with their improper behaviour, since criminal liability will increase the cost of that behaviour.[109] An alternative view is that, by making corporations criminally liable, the punishment is ascribed to the innocent parties as the 'innocent shareholders pay the fines and the innocent employees, creditors, customers and communities sometimes feel the pinch too.'[110] This stands true to a certain extent, as once criminal charges are brought against a legal person, those charges automatically represent a form of conviction because of the reputational harm caused.[111] Patently, this has unfair ramifications on the corporations, as they are forced to plead guilty in order to contain the problem.[112] Therefore, it is logical to consider an alternative approach to corporate liability. Germany, for example, does not recognise corporate criminal liability. The rationale for the absence of criminal liability for the legal person is that unlike a 'natural person', a legal person cannot act: it is an empty body.[113] There are administrative sanctions that can be imposed on the corporations instead, and this can be done either by the administrative or by the criminal court.[114] For Roland Hefendehl, this means that '[l]iability is restricted to instances in which the company's legal representatives or directors have ever acted improperly or failed to supervise their employees properly.'[115] One might argue that administrative liability is as a more neutral approach than criminal liability.[116] Administrative liability is not intended to establish personal liability or guilt but, rather, to act as a preventative measure and to limit risk in the economic environment and decision-making.[117] The other argument for the imposition of civil liability on the corporation stems from the idea that corporate liability and civil liability

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[108] John T. Bryan, 'Economic Inefficiency Of Corporate Liability' (1982) 72 Journal of Criminal Law and Criminology 582, 586.
[109] *Ibid.*
[110] Albert Alschuler, 'Two Ways To Think About Punishment of Corporations'(Faculty Working Papers 192, 2009) <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1191&context=facultyworkingpapers> (Last visited: 26 march).
[111] Obidario, *supra* note 102, 179.
[112] *Ibid.*
[113] Roland Hefendehl, 'Corporate Criminal Liability: Model Penal Code Section 2.07 And The Development In Western Legal Systems' (2000) 4(1) Bufallo Criminal Law Review 283, 300.
[114] *Ibid.*
[115] *Ibid.*
[116] Gennady A.Esakov, 'Corporate Criminal Liability: A Comparative Review' (2010) 2:1 University of Hong Kong Law Review 173, 184.
[117] Hefendehl, *supra* note 115, 300.OECDti-bribery/44176910.pdf>ing 956, 970.dia are not part of the OECD Anti-Bribery Convetion as it' 259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259259 259

have the same consequences, as it is physically impossible to imprison the corporation.[118]

In the context of international corporate bribery, it is hard to disagree with the American approach to corporate liability. Although the OECD Anti-Bribery Convention does not require states to adopt criminal liability for legal persons, it appears to be a more influential tool for curbing transnational corporate bribery. Regarding corporations as an 'empty body' is misleading particularly in the context of MNEs. The MNEs do not simply hold unrivalled power:[119] their wrongful conduct harms individuals and society as a whole.[120] In the case of Siemens,[121] investigators uncovered that the bribers were part of the company's business strategy.[122] Therefore, many shareholders, creditors and investors could benefit from high stock prices due to the unlawful activities of the corporation.[123] In order to achieve results in the fight against transnational corporate bribery, it is important that states ensure criminal liability for legal persons, as the crime is exceptional and a wide range of legal tools are required to fight it.[124]

2. *Who can trigger liability for a legal person?*

The OECD Recommendation of the Council urged the member states not to limit the liability cases where natural persons who committed the offence have already been 'prosecuted and convicted.'[125] Thus, the OECD Recommendation urged the states to try to attribute the liability of the natural person to the legal person.[126] By examing how member countries determine when the legal person will be held liable for the acts of natural persons, it becomes clear that there is significant diversity in the conditions they employ.[127] This is clearly a matter of great concern. As the OECD report states, the range of different conditions employed by states:

> 'can be grouped into five main categories: (1) in relation to the legal person's activity; (2) in the legal person's name or on its behalf; (3) within

118 Obidario, *supra* note 102, 178-179.
119 Muchlinski, *supra* note 6.
120 Beale, *supra* note 8.
121 '#08-1105: Siemens AG and Three Subsidiaries Plead Guilty To Foreign Corrupt Practices Act Violations And Agree To Pay $450 Million In Combined Criminal Fines (2008-12-15)' (Justice.gov, 2017) <https://www.justice.gov/archive/opa/pr/2008/December/08-crm-1105.html> (Last visited: 28 March 2017).
122 Beale, *supra* note 8.
123 *Ibid.*
124 *Ibid.*
125 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions , < http://www.oecd.org/ daf/anti-bribery/44176910.pdf > Last visited: 26 March
126 *Ibid.*
127 OECD, 'Liability Of Legal Persons For Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> Last visited: 26 March 2017, 53.

the scope of the natural person's particular duties or authority; (4) for the legal person's benefit or interest; (5) as a result of a failure to supervise.'[128]

An examination of two common law states that apply the imputation theory[129] towards corporate liability demonstrates that the diversity of corporate liability complicates the functioning of corporations.

In contrast with the principle of vicarious criminal liability used in the US, the UK generally adopts an 'identification' approach to corporate criminal liability.[130] According to this approach, it is important to establish a corporate mind when examining the *mens rea.*[131] 'The idea behind this theory is the distinction maybe made by between employees who act as hands and those who represent the brains.'[132] The identification approach is less useful when it comes to MNEs, which are often heavily decentralised due to their complicated structure.[133] It would be easy for large enterprises to distance themselves from wrongful conduct by shifting the burden of blame for their bribery to the foreign commission agent.[134] The ineffectiveness of the corporate liability regime in the UK was criticised by the OECD WGB[135] and acknowledged by the Joint Committee on the Draft of the Bribery Bill.[136] Nevertheless, the Bribery Act 2010 incorporated the 'alter ego'[137] approach. Under Sections 1 and 6 of the Bribery Act 2010, such an approach is considered to exclude bribery committed by 'regional managers, relatively senior management, a salesperson or an agent'[138] because the 'directing mind' needs to be in the board of directors. In the light of Sections 1 and 6 of the Bribery Act, one might perceive the US approach to be more effective than the UK one due to the fact that the identification theory requires 'state of mind' to be taken into consideration; it is, after all, very hard to hold MNEs liable under such a theory because of their decentralized nature.

[128] *Id, 54*.
[129] Mark Pieth, 'The Responsibility of Legal Person' in Mark Pieth, Lucinda A. Low and Nicola Bonucci (eds), '*The OECD Convention On Bribery: A Commentary*' (2nd edn, Cambridge University Press 2014) 218.
[130] *Tesco Supermarkets, LTD vs Nattrass* [1972] A.C. 153.
[131] Lord, *supra* note 5.
[132] Arnone and Borlini (n 18) 369.
[133] Pieth, *supra* note 131, 220.
[134] Lord, *supra* note 5.
[135] Monitoring Report, 'United Kingdom : Phase 2 Bis' (OECD 2008) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/41515077.pdf> (Last visited: 26 March 2017, 21-22).
[136] Joint Committee on the draft Bribery Bill (28 July 2009), para 72.
[137]*Lennard's Carrying Co. v Asiatic Petroleum* [1915] A.C. 7.
[138] Bribery Act 2010 (UK), 1-6.

The UK also adopted a strict liability regime in Article 7 of the Bribery Act, as it notes 'the failure of commercial organisations to prevent bribery.'[139] Section 7 of the Bribery Act imposes liability on the commercial organisation if a person 'associated' with the commercial organisation commits foreign bribery. An obvious conclusion from this provision is that it does not ensure liability for the act of bribery[140] but, rather, for the inability to foresee it. The rationale for adopting an additional type of liability for legal persons is that it covers the operation of MNEs. Clearly, MNEs are generally comprised of groups of companies, and such groups consist of the different companies headed by the parent company.[141] Consequently, and by definition, MNEs operate in a multitude of jurisdictions. As Marco Arnone and Leonardo Borlini convincingly put it, '[c]orrupt practices are characterized by the "race to bottom" – that is, a search for those jurisdictions that offer the most forgiving rule, the least transparency and accountability, [and] the greatest ease of "no questions" operations'.[142] Thus, in their attempts to curb transnational corporate bribery, states are limited by their lack of power over extra-territorial jurisdictions.

'As a traditional extension to "territoriality",' Mark Pieth points out that '"active personality" or "nationality" have facilitated the trial of a state's nationals at home for crimes committed anywhere in the world.'[143] The OECD Anti-Bribery Convention adopts the 'territoriality' doctrine in combination with the 'nationality' doctrine, which has to be applied if it existed before in the domestic legal system.[144] The UK adopts both principles with respect to commercial organisations, but this fails to prevent bribery.[145] The UK's anti-bribery legislation applies the behaviour of companies anywhere in the world as long as they conduct at least part of their business in the UK. More significant, however, is that the Ministry of Justice Guidance states that 'the government anticipates that applying a common sense approach would imply that the organisations that do not have a demonstrable business presence in the United Kingdom would not be caught'. Further, 'the government would not expect, for example, the mere fact that a company's securities have been admitted to the UK Listing Authority's Official List and therefore admitted to trading on the London Stock Exchange, in itself, to qualify that company as carrying on a business or part of a business in the UK, and therefore falling

[139] *Id*, 7.

[140] Newman C. J., Michael Macaulay M, 'Comment: *Placebos or Panaceas : Anglo-New Zealand Experiences of Legislative Approaches to Combatting Bribery*' (2013) 77 Journal of Criminal Law 482, 492.

[141] *Ibid.*

[142] Arnone and Borlini, *supra* note 18, 634.

[143] Pieth, *supra* note 65, 325.

[144] *Ibid.*

[145] Article 4 of the OECD Anti-Bribery Convention.

within the definition'.[146] As it clear from the MOJ guidance mere listing in the London Stock exchange does not confer jurisdiction to the UK.

Returning to consider the US, it should be noted that the FCPA adopts very aggressive jurisdictional provisions. First, it adopts an extra-territorial jurisdiction over foreign bribery as the extension on the 'territorial' principle as well as a nationality principle as an alternative jurisdiction.[147] According to the US Department of Justice (DOJ), 'issuers and domestic concerns – as well as their officers, directors, employees, agents, or stockholders - may be prosecuted for using the US, mails or any means or instrumentality of "interstate commerce"[148] in furtherance of a corrupt payment to foreign officials.'[149] Furthermore, the FCPA also adopts a 'nationality' jurisdiction. Under the FCPA, mere trading in the US stock market means that the company has to comply with the SEC. Therefore, the DOJ can more easily bring charges to a company; the example of Statoil indicates that mere listing in the US suffices under the FCPA. Clearly, the US's application of the extraterritorial jurisdiction has been significantly influenced by its political objectives.[150] However, the reasons that the US possesses such stringent extra-territorial laws is clear: they are arguably policing transnational corporate bribery.[151]

The FCPA rules on corporate liability are very severe and, as argued by many scholars, it is unfair to hold a corporation liable for the unlawful conduct of low-level employees.[152] By contrast, the UK approach precludes liability for corporations, as Section 7 of the 2010 Bribery Act provides the appropriate defence for the commercial organisation to prevent bribery.[153] The defence is required in order to protect the corporation in cases where the employee or agent acts alone, without any consent from the parent company. The corporation is required to prove that it had adequate policies or procedures in place to prevent bribery.[154] The defence is very distinctive, as it

[146] Bribery Act 2010 (UK).

[146] Ministry of Justice Guidance (MOJ), § 36

[147] The Criminal Division of the US Department of Justice and the Enforcement of US. Securities and Exchange Commission, 'Resource Guide to The US. Foreign Corrupt Practice Act' (The Department of Justice 2012).

[148]Foreign Corrupt Practice Act (US) 1977.

[149] The Criminal Division of the US Department of Justice and the Enforcement of US. Securities and Exchange Commission, 'Resource Guide to The US. Foreign Corrupt Practice Act' (The Department of Justice 2012).

[150] M Sornarajah, The International Law On Foreign Investment (Cambridge University Press 2004) 184.

[151]William Magnuson, 'International Corporate Bribery and Unilateral Enforcement' (2013) 61 Columbian Journal of Transnational Law 360,363.

[152] Ved P. Vanda 'Corporate Criminal Liability' in Mark Pieth and Radha Ivory (eds), 'Corporate Criminal Liability: Emergence, Convergence and Risk' (1edn, Springer, 2011) 85.

[153] Bribery Act 2010 (UK).

[154] Bribery Act 2010 (UK), 7.

allows commercial organisations to avoid criminal liability by designing and implementing adequate procedures to ensure that they act in an ethically and morally correct manner.[155] A similar defence is not part of the FCPA and, in fact, just 12 out of 41 countries have a similar type of defence.[156] Many scholars in the US urge the DOJ to adopt a UK-style principle of defence.[157]

To conclude this chapter, reference should be made to two important points. First, the general implementation of the convention is an extremely laboured process. The reason for the slow implementation of the Convention can be attributed to the flaws in the design of the Convention, and to the weaknesses of the OECD WGB whose only sanction is 'bad publicity'.[158] The second point relates to the lack of consistency in corporate liability regimes. As we examined above, the difference between criminal and non-criminal liability, and between the vicarious liability principle and the identification doctrine, renders it more apparent that in such diverse juridical environments it is inadequate to fight transnational issues through domestic legal systems. The next chapter demonstrates more explicitly that increased diversity of legal systems leads to greater diversity in the enforcement of foreign bribery law.

III. Enforcement

Previously, this paper described the BAE scandal, illustrating how the SFO suspended the investigation due to the fact that the UK had not implemented article 5 of the OECD Anti-Bribery Convention. Thus, BAE System was able to avoid corporate liability under UK law. A few months after the investigation was suspended, the DOJ launched its own investigation into BAE System PLC.[159] Hence, in 2010, BAE pled guilty and paid a fine of around $400.[160] According to the William Magnusson, "what is most striking about the BAE affair is not that the BAE was held liable, but who held them liable,

[155] Jon Jordan, 'The Adequate Procedures Defense Under The UK Bribery Act: A British Idea For The Foreign Corrupt Practices Act' (2011) 17:1 Stanford Journal of Law, Business & Finance 25.

[156] OECD, 'Liability of Legal Persons for Foreign Bribery: A Stocktaking Report' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> Last visited: 26 March 2017, 56.

[157] Vanda, *supra* note 154, 86.

[158] Rose Rockerman, *supra* note 72.

[159] 'Department Of Justice Is Right To Investigate BAE Systems' (ft.com, 2007) < https://www.ft.com/content/9e9a7c62-24e0-11dc-bf47-000b5df10621> Last visited: 26 March 2017.

[160] 'BAE Systems PLC Pleads Guilty And Ordered To Pay $400 Million Criminal Fine' (*Justice.gov*, 2017) <https://www.justice.gov/opa/pr/bae-systems-plc-pleads-guilty-and-ordered-pay-400-million-criminal-fine> Last visited: 28 March 2017.

and for what."[161] The paper has already illustrated how certain issues have fostered new glitches. This chapter thus primarily focuses on two intertwined problems: (1) the colossal gap in enforcement between member states and (2) the fact that the US polices international bribery. The final section of this chapter describes the results of the accumulated weaknesses of the OECD Anti-Bribery Convention.

A. Lack of Enforcement

This section argues two main points. The first of these pertains to the fact that while 41 states have formally implemented the OECD Anti Bribery Convention to some extent, that does not necessarily translate into effective enforcement.[162] This section thus demonstrates how states have failed to engage in any investigations, and it also illustrates the enforcement gap between various states. Examples of the enforcement of foreign bribery cases in four countries (i.e., the US, Japan, the UK, and Germany) are also provided.

As a side note, it essential to justify why comparison between those particular states is made. First of all, it would be very hard to compare the number of foreign bribery cases enforced by, for example, the US and Latvia, as Latvia would be at a disadvantage since it has fewer resources than US.[163] Thus, the comparison would be inaccurate. Secondly, an analysis of Latvia would undercover significantly fewer corporations involved in international business transactions than would a similar analysis of the US, Germany, or the UK. Therefore, it is not reasonable to expect the same level of enforceability from Latvia. Thirdly, some states are willing to enforce the convention in more cases, but corporations do not engage in a substantial amount of unlawful behaviour. In such instances, it would logical to expect low levels of enforcement.[164]

In 2015, the US sanctioned 67 individuals and 37 legal persons,[165] while the UK sanctioned 10 individuals and 3 legal persons.[166] Germany, the laws of which do not mandate criminal corporate liability, sanctioned 73 individuals (17 of whom agreed to punitive action) and penalized 12 legal persons.[167] In Japan, which provides 3.7% of total global exports, enforceability left much to be desired, as that country only punished 10 individuals and 2 legal

[161] William Magnusson, 'International Corporate Bribery and Unilateral Enforcement'(2013) 51 Columbian Journal of Transnational Law 360.363

[162] Rachel Brewster. 'The Domestic and International Enforcement of the OECD Anti-Bribery Convention'(2014) 15 Chicago Journal of International Law Vol 84,105.

[163] *Id,* 104-105.

[164] *Id,* 105.

[165] OECD Working Group on Bribery, '2015 Data On Enforcement Of The Anti-Bribery Convention' (OECD 2016) <http://www.oecd.org/daf/anti-bribery/WGB-Enforcement-Data-2015.pdf> Last visited: 27 March 2017.

[166] *Ibid.*

[167] *Ibid.*

persons.[168] Thus, there is a clear gap between the US and the other countries. Japan's lack of enforcement for foreign bribery cases is especially shocking, due to the fact that it was deemed a "clear model of a compliant signatory to the OECD Convention."[169] Transparency International indicated that an obvious lack of resources and inadequate sanctions were the reasons behind this lack of enforcement.[170] However, these factors alone cannot explain such a low level enforcement, as it undermines the OECD Anti-Bribery Convention's entire concept and larger goals. The main goal of the OECD Anti-Bribery Convention is to achieve greater efficiency in foreign investment by preventing bribery from undermining it.[171] However, it is not up to states to decide where and how MNEs should invest. Rather, the job of the home state is to regulate their behaviour, but the statistics suggest that some states have failed to do so. Thus, this example exhibits one of the main problems with the anti-bribery agreement: If even a single state attempts to cheat in terms of upholding the agreement by allowing bribery to take place and undermines the efficiency of entire anti-corruption strategy.[172] Unfortunately, due to the prisoner's dilemma and the lack of sanctions against states,[173] the entire initiative thus comes face-to-face with a dead end.

In some cases, however, the home state might be incapable of regulation. While this initially seems to simply be a restatement of the previous problem, this interpretation views the issue from a different angle. "Prosecuting bribery abroad requires both knowledge of the crime and the ability to gather evidence on the crime."[174] The cases brought against Siemens, Walmart, and GlaxoSmithKline were based on the information collected by the host country's own investigations.[175] Consequently, the role of the host country might be significant, as it might possess important evidence that could help to hold the involved persons accountable.[176] If the host decides to conceal this

[168] *Ibid.*

[169] Obidario, *supra* note 102, 100.

[170] Transparency International, ''Exporting Corruption: Progress Report 2015: Assessing Enforcement of OECD Anti-Bribery Convention' (Transparency International 2017) <http://www.transparency.org/whatwedo/publication/exporting_corruption_progress_report_2015_assessing_enforcement_of_the_oecd> Last visited: 27 March 2017, p 8.

[171] Blundell-Wignall, A. and C. Roulet 'Foreign direct investment, corruption and the OECD Anti-Bribery Convention'(2017) OECD Working Papers on International Investment, <http://dx.doi.org/10.1787/9cb3690c-en> Last visited: 26 of March.

[172] Brewster, *supra* note *164,* 97.

[173] *Ibid*.

[174] Nathan Jensen and Edmund J.Malesky, 'Does the OECD Ant-Bribery Convention Reduce Bribery? An Empirical Analysis Using the Unmatched Count Technique'(working paper 2014) < http://www.natemjensen.com/wp-content/uploads/2014/09/20141205_OECD_Working-Paper_ejm.pdf> Last visited: 26 march

[175] *Id*,8.

[176] *Ibid.*

evidence, the result is a home state that cannot regulate its own companies. This is more relevant in situations in which the investment in the host state is made by a country that is not party to the OECD Convention.

This point consequently leads to another important fact, namely, that OECD member states only account for 64% of FDI flows.[177] Although this more than half of all such flows, this figure still highlights a challenge, since it illustrates the geographical limitations of the OECD Anti-Bribery Convention.

Returning to the response of the Prometheus Foundation (France), that organization expressed its concern that other big economies such as China and India are not part of the OECD Anti-Bribery Convetion as it's distorts competition.[178] This trepidation is due to the fact that countries like China, India, Hong Kong, Indonesia, Malaysia, Singapore, Philippines, and Thailand represent 22% of FDI. Thus, they are not monitored and reviewed by the OECD WGB. This issue was firmly stressed by the secretary general of the OECD.[179]

B. FCPA Enforcement

The US is the largest enforcer of foreign bribery cases, as the example demonstrated. We have already outlined the US' role in ensuring the passage of the OECD Anti-Bribery Convetion. However, there is a significant difference between FCPA enforcement prior to the passage of the OECD Ant-Bribery Convention and after its passage.[180] Thus, FCPA can be attributed to the OECD Ant-Bribery Convention because the FCPA's hands were tied due to the competitive disadvantages faced by US corporations.

As one of the largest enforcers of foreign bribery cases, the US essentially acts as a policeman. The above example of BAE System comes into play here, because the US conducted an investigation just few months after the SFO suspended its own inquiry. Thus, one might argue that the reluctant enforcement of foreign bribery cases forces the US to act as an international policeman. The US exercises extra-territorial jurisdiction to the fullest extent allowed by customary international law, meaning that it exercises overreaching jurisdiction, even in non-OECD countries.[181] Nonetheless, the

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[177] Blundell-Wignall, A. and C. Roulet 'Foreign direct investment, corruption and the OECD Anti-Bribery Convention'(2017) OECD Working Papers on International Investment, <http://dx.doi.org/10.1787/9cb3690c-en> Last visited: 26 of March.

[178] The Prometheus Foundation, *supra* note 98.

[179] Thomson Foundation, 'China, India and Others Should Join Anti-Bribery Convention – OECD' (news.trust.org, 2017) <http://news.trust.org//item/20140204160554-3n6b9/?source=hptop> (Last visited: 27 March 2017).

[180] Searby and Murdock-Park, *supra* note 147.

[181] David A. Gantz, 'Globalizing Sanctions against Foreign Bribery: The Emergence of a New International Legal Consensus'(1998) 18 Northwestern Journal of International Law and Business 457, 466.

US has been heavily criticized for impinging on other states' sovereignty, prosecuting MNEs from foreign states too often, and using the FCPA as a foreign policy instrument.[182]

US actions might result in a breach of article 5 of the OECD Anti-Bribery Convention, because enforces it in light of political and/or economic considerations.[183] One could argue that by policing international bribery, the US has effectively forced other OECD members states to respect the provisions of the soft-law instrument.[184] Even if this is the case— which is debatable—significant questions remain as to whether the US enforces anti-bribery cases to suit its own agenda. Surprisingly, FCPA actions have had a substantial impact on foreign corporations. If we look at the 10 largest FCPA and SEC settlements, 9 of them concerned foreign corporations.[185] Returning to the BAE System investigation, the US charged BAE Systems on the grounds that it had previously conducted business with US Department of Defense and thus promised to comply with the FCPA.[186] This all sounds questionable to this author, as the evidence suggests that the US tried to clear a path for its own corporations.

Stephen J Choi and Kevin E. Davis have acknowledged a discriminatory effect towards foreign corporations, but they have argued that, "[i]t could be that the DOJ and SEC obtain better evidence when a foreign regulator is involved, allowing the DOJ and SEC to construct a stronger case leading to a higher sanction."[187] Furthermore, they "[found] evidence that the SEC and DOJ impose disproportionately large sanctions against firms from countries which have strong legal institutions and cooperation agreements with the DOJ or the SEC."[188]

This research recognizes that the stronger the cooperation between OECD member states, the easier it is to enforce foreign bribery cases. However, even if this is the case, it gives the US too much authority to regulate transnational corporate bribery offenses, because it creates an unfair system. On the other hand, it is possible to argue that the US has more expertise than any other member state and that in the future, enforcement from other states will be its

[182] Spahn, Elizabeth K. 'Implementing Global Anti-Bribery the Foreign Corrupt Practice Act To The OECD Anti-Bribery Convention To U.N Convention Against Corruption.'(2013) 23 Indiana International & Comparative Law 1, 14-15.rategies. le. Final reason rests with new elected president in US. New president always comes to power with new ideas and new st
[183] Article 5 of the OECD Anti-Bribery Convention.
[184]'Developments in the Law of Extraterritoriality' (2011) Vol. 124 Harvard Law Review 1285-1290.
i[185] Magnuson, *supra* note 153, 403.
[186] *Ibid.*
[187] Kevin E. Davis and Stephen J.Choi, 'Foreign Affairs and Enforcement of the Foreign Corrupt Practice Act' (NYU Law and Economics Research Paper No. 12-15, 2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2116487> Last visited: 26 march.
[188] *Ibid.*

equal.[189] That said, this author views this as highly unlikely, as the US was the main initiator of the OECD Anti-Bribery Convention, and it will continue to act as its chief enforcer.

IV. Reforms

In previous chapters, this paper has illustrated the limits of soft law initiatives in the context of the OECD Anti-Bribery Convention's combat against corporate bribery in international business transactions. The OECD Anti-Bribery Convention technique, which seeks to fight corporate bribery in an international business context through the enforcement of corporate liability through domestic legal systems, generates obstacles.[190] Evidently, the trust placed on domestic laws at the time by the OECD was a suitable mechanism for achieving this goal. However, two decades later it has become apparent that an enquiry into international law is necessary if a successful solution is to be reached.[191]

Nevertheless, international hard law is required in this instance. It is important to remember that the OECD Anti-Bribery Convention is a unique international legal instrument, but the reform proposed would be concerned with direct corporate responsibility under international law, which is more legally desirable in terms of its effectiveness in curbing international bribery.[192] The justification for it is that 'national regulation by whatever form is inadequate, bearing in mind the structure of [MNEs] which [have] roots in many countries and so may require different laws and approaches.'[193]

In order to propose a prospective reform, it is necessary to define what is meant by direct corporate responsibility. The definition of Corporate Social Responsibility is widely debated. Jennifer Zerk's definition is particular helpful, however: she argues that corporate social responsibility entails voluntary obligations which are imposed on the MNEs.[194] As Zerk suggests, every MNE 'has a responsibility to operate ethically and in accordance with its legal obligations and to strive to minimise any adverse effects of its operations and activities on the environment, society and human health.'[195]

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[189] Duncan Smith, 'Responses To The Consultation Paper Review Of The OECD Anti-Bribery Instuments' (OECD 2017) <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/40497680.pdf> Last visited: 27 March 2017.

[190] Adeyeye, *supra* note 18, 128.

[191] *Ibid.*

[192] *Ibid.*

[193] *Ibid.*

[194] Jennifer A Zerk, *Multinationals And Corporate Social Responsibility* (1st edn, Cambridge University Press 2006).

[195] *Ibid.*

A. Direct Corporate Responsibility under International Law

Adefolake Adeyeye contends that direct corporate responsibility should be used as the technique to fight international corruption.[196] This paper's foregoing findings strongly support this contention, and this section scrutinise the possible corporate responsibility models in greater detail. The necessity for such a radical view is derived from the impotent role of individual nation states to punish violations of international law.[197] The challenge here is that international law generally applies to the subjects of the international law but that corporations are not subject to it.[198] However, the limited role of MNEs is addressed by foreign investment law through the International Centre for Settlement of Investment Disputes (ICSID). The ICSID is 'an instrument of international policy for the promotion of economic development.'[199]

In order to have direct corporate responsibility under international law, it is mandatory to render corporations subject to international law.In assuming that MNEs will enjoy legal personhood under international law, however, a new set of contentions arises. Soft law instruments proved inadequate in addressing the issue of transnational corporate bribery, as states were implementing the provision of international agreements too slowly and with insufficient zealousness. Therefore, in light of the proposed concept of direct corporate responsibility, we need to consider which precise model should be employed.

1. *Flourishing International Criminal Law?*

The central argument is that corporate responsibility under international law can develop through international criminal law.[200] The previous chapter indicated that certain states do not recognise criminal corporate liability, on the assumption that a legal person cannot act: it is an empty body.[201] A parallel but contrary point may be advanced, however. As it was stated in the famous Nuremberg trial of Second World War criminals: 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.'[202]

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[196] Adeyeye, *supra* note 18, 129

[197] *Ibid.*

[198] *Ibid.*

[199]Delaume G., *ICSID Arbitration' in JDM Lew (ed) Contemporary Problems in International Arbitration* (London: Queen Marry College, Centre for Commercial Law Studies, 1986) 23.

[200] Adeyeye, *supra* note 18, 130.

[201] Hefendehl, *supra* note 115, 300.

[202]*Trial of Major War Criminals (Goering et al)*, International Military Tribunal (Nuremberg) Judgment and Sentence 30 September and 1 October 1946 (London: HMSO) Cmd 6964, at 41.

Despite this, in the early negotiations for the Rome Statute in 1998, some states advocated the inclusion of corporate criminal responsibility within the jurisdiction of the International Criminal Court.[203] The idea did not last because 'the discussions had become bogged down in questions of how various national penal systems would accommodate, what was for them, the alien concept of corporate criminal responsibility.'[204] Andrew Clapham continues that:

> 'as long as we admit that individuals have rights and duties under customary international human rights law and international humanitarian law, we have to admit that legal persons may also possess the international legal personality necessary to enjoy some of these rights, and conversely to be prosecuted or held accountable for violations of the relevant international duties.'[205]

It may be concluded from this argument that MNEs have some limited personhood under international law in relation to natural persons. Therefore, it is not unreasonable to suggest that MNEs can be held accountable under the emerging international criminal law; and this would certainly avoid the ponderous process of implementation of the previous 'soft law instruments'. Furthermore, it would provide a uniform legal principle on international corporate liability, and will signpost a shift away from the double jeopardy problem.

The justification for imposing international criminal responsibility on MNEs was made in the context of human rights violations. It is not the purpose of the current research to examine if legal persons should be responsible for human rights violations. It would, however, provide a useful comparison, as both violations are serious international crimes. Ilias Bantekas and Susan Nash have argued that 'it is obvious that bribery of foreign public officials has been finally recognized as a contemporary scourge, an international offence, being a threat to commerce, stability and the enjoyment of human rights.'[206] Furthermore, international bribery might be perceived as a crime against humanity in certain circumstances[207] and might also empower the International Criminal Court.[208] In order for a new agreement on international bribery law to succeed, substantial support from individual

[203] Andrew Clapham, *Human Rights Obligations Of Non-State Actors* (1st edn, Oxford University Press 2006).

[204] *Ibid.*

[205] *Ibid.*

[206] Bantekas Illias and Susan Nash, *International Criminal Law* (2nded, Cavendish, London, 2003) 86.

[207] Article 7(1) of the ICC Statute.

[208] Bantekas Illias, 'Corruption as an International Crime and Crime against Humanity: An Outline of Supplementary Criminal Justice Policies.' (2006) Journal of International Criminal Justice 466, 484.

states will certainly be required.[209] However, although this support might be legally desirable, it is, unfortunately, highly unlikely because if many states were reluctant to implement and enforce the OECD Anti-Bribery Convention, as it doubtful they will give consensus.

Conclusion

It has been demonstrated that role of the OECD Anti-Bribery Convention is limited. In the first chapter of this paper, we outlined the process which brought the Convention into the light. Unilateral criminalization of transnational corporate bribery was faced with failure from the beginning as we have clearly illustrated. US was very concerned that domestic corporations were at competitive disadvantages, thus they were the ones who started negotiations.

Techniques adopted by the Convention lacked enforceability as OECD Working Group could only criticize the member states. Further, it was unrealistic to expect that there would be the same level of compliance from the member states. UK example has clearly manifested that even leading members of the OECD may lack the necessary will to implement Convention.

In addition different legal systems possess, a different problem as they have different rules on corporate liability which is the critical tool to curb transnational bribery. Enforceability also one of the challenges because some states lack necessary expertise and resources. In the case of US, policing corporations does not seem very fair for the current author.

So where we go from here? Current research proposed reform in the area of international criminal law. It appears to this research that hard international law would be more adequate measure to curb transnational corporate bribery. Having said, it is highly unlike due to the fact that many states would not want to give their right to regulate corporate liability.

[209] Adeyeye, *supra* note 18, 130.