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E-COMMERCE IN ASEAN: AN EMERGING ECONOMIC SUPERPOWER AND THE CASE FOR HARMONIZING CONSUMER PROTECTION LAWS

*Juthamas Thirawat**

INTRODUCTION

It appears that the Asian century has already begun. Asia is home to around 60% of the world's population.¹ Asia has become the world's largest economy for the first time in 2020 since the nineteenth century,² and it will not stop here. Asia is expected to account for more than half of global GDP in 2024.³ Whereas the public's attention is mostly focused on China, the future of Asia is not a China-only story. More actors play a vital role in developing Asian economies. The prominent one that we cannot ignore is the Association of Southeast Asian Nations (ASEAN), consisting of ten member states: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Vietnam. ASEAN combines over 660 million people,⁴ creating the world's third-largest market, surpassed only by China and India.⁵ More importantly, ASEAN is currently the world's fifth-largest economy by GDP, behind the United States (US), the European Union (EU), China, and Japan.⁶ It will soon step up to the fourth rank.⁷ As a result, ASEAN has become "the only project on this scale in the developing world."⁸

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¹ Asian population accounts for 59.76% of the world's population. See *Asia Population*, WORLDOMETERS, <https://www.worldometers.info/world-population/asia-population/> (last visited Jan. 17, 2022).

² Valentina Romei & John Reed, *The Asian Century Is Set to Begin*, FIN. TIMES (March 25, 2019), <https://www.ft.com/content/520cb6f6-2958-11e9-a5ab-ff8ef2b976c7>.

³ Oliver Tonby et al., *The Future of Asia: Asian flows and networks are defining the next phase of globalization*, MCKINSEY GLOB. INST. (Sept. 2019), <https://www.mckinsey.com/~/media/mckinsey/featured%20insights/asia%20pacific/the%20future%20of%20asia%20asian%20flows%20and%20networks%20are%20defining%20the%20next%20phase%20of%20globalization/mgi-future-of-asia-flows-and-trade-discussion-paper-sep-2019.pdf>.

⁴ *Total population of the ASEAN countries from 2011 to 2021*, STATISTA, <https://www.statista.com/statistics/796222/total-population-of-the-asean-countries/> (last visited Feb. 12, 2022) [hereinafter "STATISTA, *Total population*"].

⁵ See *Countries in the World by Population* (2021), WORLDOMETERS, <https://www.worldometers.info/world-population/population-by-country/> (last visited Feb. 12, 2022); *Total Population by Country 2021*, WORLD POPULATION REVIEW, <https://worldpopulationreview.com/countries> (last visited Feb. 12, 2022); *4 ASEAN Infographics: Population, Market, Economy*, ASEAN UP (Mar. 26, 2018), <https://aseanup.com/asean-infographics-population-market-economy/>.

⁶ See *GDP Indicators 2021*, STATISTIC TIMES (Mar. 13, 2021), <https://statisticstimes.com/economy/gdp-indicators-2021.php>; Gross Domestic Product, Current Prices, IMF, <https://www.imf.org/en/Publications/WEO/weo-database/2021/April> (last visited Feb. 12, 2022); *ASEAN Integration Report 2019*, ASEAN, at xii, xiv, 6 (2019), <https://asean.org/storage/2019/11/ASEAN-integration-report-2019.pdf>.

⁷ *The Asian Century Has Arrived*, MCKINSEY & COMPANY (Nov. 15, 2019), <https://www.mckinsey.com/featured-insights/asia-pacific/the-asian-century-has-arrived>.

⁸ Peter A. Petri et al., *ASEAN Economic Community: A General Equilibrium Analysis*, 26 ASIAN ECON. J. 93, 94 (2012).

These statistics tell the same story when it comes to e-commerce. Despite many challenges, ASEAN has the world's third-highest number of internet users, outranking higher internet penetration regions.⁹ Its digital economy is expected to hit US \$300 billion by 2025 and 1 trillion gross merchandise value (GMV) by 2030.¹⁰ ASEAN has recognized the great potential and benefit of its e-commerce. The importance of e-commerce became even more critical when ASEAN decided to strengthen the cooperation of its member states to reach toward the ultimate goal of forming the highest integration as one community, "the ASEAN Community."¹¹ To achieve this goal of integration, ASEAN launched one of the three pillars that anchored the ASEAN Community—the ASEAN Economic Community (AEC)—in 2015.¹² The main objective of the AEC is to transform the Southeast Asian region into one competitive single market and production base with a free flow of goods and services, investment, skilled labor, and capital among the ten member states.¹³ As the most recent regional integration of the world, the AEC obviously draws attraction from investors globally.

However, ASEAN cannot reap the greatest benefits from its enormous e-commerce market under its new AEC integration. This is because, in effect, ASEAN still lacks a general uniform consumer protection law, not to mention a specific one for e-commerce.¹⁴ The existing legal instruments are soft laws—those with no legally binding force—that only provide inadequate consumer protection. The absence of a uniform law results in inconsistent and inefficient consumer protection laws for e-commerce of member states. This problem causes adverse effects on both consumer and business sides. For the consumer side, consumers often face risks of online fraud, resulting in non-delivery or incompliance of products because they do not have direct interaction

⁹ Typically, the number of internet users follow the number of internet penetration, but interestingly, ASEAN is the exception. See *Number of Worldwide Internet Users in 2021, by Region*, STATISTA (Sep. 29, 2021), <https://www.statista.com/statistics/249562/number-of-worldwide-internet-users-by-region/> [hereinafter "STATISTA, *Internet Users*"].

¹⁰ GOOGLE ET AL., *E-Conomy SEA 2021: Roaring 20s: The SEA Digital Decade* at 8, 83-87 (2021), https://services.google.com/fh/files/misc/e_conomy_sea_2021_report.pdf [hereinafter "GOOGLE ET AL. 2021"]; GOOGLE ET AL., *E-Conomy SEA 2020: At Full Velocity: Resilient and Racing Ahead* 92 (2020), https://storage.googleapis.com/gweb-economy-sea.appspot.com/assets/pdf/e-Conomy_SEA_2020_Report.pdf [hereinafter "GOOGLE ET AL. 2020"]; Aradhana Aravindan, *Southeast Asia's internet economy to hit \$300 billion by 2025: Report*, REUTERS, <https://www.reuters.com/article/us-southeast-asia-internet/southeast-asias-internet-economy-to-hit-300-billion-by-2025-report-idUSKBN1WI07X> (last visited Feb. 12, 2022).

¹¹ The ASEAN Community was first mentioned at the 9th ASEAN Summit in 2003 and the leaders signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 at the 12th ASEAN Summit in 2007. See *ASEAN Community*, ASEAN, <https://asean.org/storage/2012/05/7.-Fact-Sheet-on-ASEAN-Community.pdf> [hereinafter "ASEAN COMMUNITY"]; *Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015*, ASEAN (Jan. 11, 2007), <https://asean.org/cebu-declaration-on-the-acceleration-of-the-establishment-of-an-asean-community-by-2015/> [hereinafter "*Cebu Declaration*"]; Tang Siew Mun, *Is ASEAN Due for a Makeover?*, 39 CONTEMP. SOUTHEAST ASIA: J. INT'L & STRATEGIC AFFS. 239, 243 (2017).

¹² *Declaration of ASEAN Concord II (Bali Concord II)*, ASEAN (Oct. 7, 2003), <https://asean.org/speechandstatement/declaration-of-asean-concord-ii-bali-concord-ii/>.

¹³ *ASEAN Economic Community Blueprint 2015*, ASEAN at 5 (Jan. 2008), <https://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf> [hereinafter "AEC BLUEPRINT 2015"].

¹⁴ Eliza Mik, *Legal and Regulatory Challenges to Facilitating e-Commerce in ASEAN*, in *ASEAN LAW IN THE NEW REGIONAL ECONOMIC ORDER: GLOBAL TRENDS AND SHIFTING PARADIGMS* 342, 358 (Pasha L. Hsieh & Bryan Mercurio eds., 2019).

with the products they purchase.¹⁵ Unlike in physical stores, all related activities happen “in the dark.”¹⁶ Buyers do not meet sellers in person. Nor can they fully access or inspect products before the conclusion of contracts. Thus, consumers in this region do not trust e-commerce— and are even reluctant to purchase products online—because they are afraid of widespread online fraud.¹⁷ Consumers are simply not confident enough to conduct domestic online,¹⁸ not to mention cross-border e-commerce. This is because if something goes wrong, it will likely be difficult for consumers to process claims that have different redress rules in other jurisdictions.¹⁹

Furthermore, cross-border transactions are more costly than domestic transactions, which creates a disincentive for businesses and consumers to form contracts abroad.²⁰ Particularly for the seller side, these additional costs come about because businesses have to research proper market intelligence and legal compliance strategies for targeted export countries.²¹ Businesses pass on these costs to consumers. The cost of researching various legislation across the different targeted markets also causes businesses to be reluctant to sell their products or, in some cases, conduct business in foreign countries.²² The disparity of laws regarding consumer protection in e-commerce thereby creates trade barriers and limits growth in cross-border trading.

A common regulatory framework in every member state would promote a more effective internal market by increasing legal certainty for both consumers and businesses, allowing them to rely on a single set of rules. Harmonizing consumer protection law in ASEAN would incentivize businesses to conduct cross-border trade that provides a greater variety of choices and prices for

¹⁵ Florian N. Egger, *Consumer Trust in E-Commerce: From Psychology to Interaction Design*, in TRUST IN ELECTRONIC COMMERCE: THE ROLE OF TRUST FROM A LEGAL, AN ORGANIZATIONAL, AND A TECHNICAL POINT OF VIEW 11, 16 (J.E.J. Prins et al. eds., 2002).

¹⁶ John Dickie, *Consumer Confidence and the EC Directive on Distance Contracts*, 21 J. CONSUMER POL'Y 217, 217-18 (1998).

¹⁷ Digital fraud caused Southeast Asia to lose US \$260 million in 2019. See ATKEARNEY, *Lifting the Barriers TO E-Commerce in ASEAN* at 11 (2015), <https://www.atkearney.co.uk/documents/10192/5540871/Lifting+the+Barriers+to+E-Commerce+in+ASEAN.pdf/d977df60-3a86-42a6-8d19-1efd92010d52>; Alexander Ayertey Odonkor, *Challenges and Prospects in Southeast Asia's E-commerce Market*, CGTN (Sept. 24, 2020), <https://news.cgtn.com/news/2020-09-24/Challenges-and-prospects-in-Southeast-Asia-s-e-commerce-market-U2X7dP2ekM/index.html>.

¹⁸ For example, a major reason for Thai consumers for not purchasing goods or services is because they consumers are afraid businesses might deceive them (51.1%). *Thailand Internet, User Profile 2017*, ELECTRONIC TRANSACTIONS DEVELOPMENT AGENCY, 26 (2017), <https://www.etda.or.th/publishing-detail/thailand-internet-user-profile-2017.html>. Likewise, many Indonesian online consumers have also indicated that they are “afraid of fraud” in e-commerce (34%). *E-commerce in Southeast Asia: Should Merchants Offer Cash on Delivery?*, JANIO, <https://janio.asia/articles/e-commerce-in-southeast-asia-should-merchants-offer-cash-on-delivery/> (last visited Dec. 6, 2021); *Jeehun Seo, How Can Southeast Asia Galvanize E-Commerce?*, CENTER FOR INTERNATIONAL PRIVATE ENTERPRISE (June 1, 2018), <https://www.cipe.org/blog/2018/06/01/how-can-southeast-asia-galvanize-e-commerce/>

¹⁹ Geraint Howells, *Consumer Law Enforcement and Access to Justice*, in RESEARCH HANDBOOK ON EU CONSUMER AND CONTRACT LAW 406, 407 (Christian Twigg-Flesner ed., 2016).

²⁰ Jan Smits, *Full Harmonization of Consumer Law? A Critique of the Draft Directive on Consumer Rights*, 18 EUR. REV. PRIV. L. 5, 7 (2010).

²¹ *Id.*

²² Proposal for a Consumers Right Directive, at 1-2; Ioannis Lianos et al., *The Global Governance of Online Consumer Protection and E-commerce*, WORLD ECON. F. 5 (2019), http://www3.weforum.org/docs/WEF_consumer_protection.pdf.

consumers²³ and boost consumer confidence to participate in cross-border online transactions. Then, ASEAN could expand to its full capacity and potential of e-commerce. Indeed, ASEAN has realized this importance and provided legal frameworks for its most recent economic integration, the AEC. The consumer protection scheme is on the priority list since ASEAN has recognized that consumer protection would be the critical part of developing its e-commerce to build back consumer trust and make use of the immense potential of e-commerce. Nevertheless, the AEC legal framework and ASEAN legal instruments are still inadequate.

In this Article, I assert that the current strategic measures have not yet reached the AEC's goal of a higher level of consumer protection at the regional level in order to facilitate cross-border e-commerce transactions. The insufficient regional instrument on consumer protection causes the inconsistency and inefficiency of laws in ASEAN member states, which hinder growth of e-commerce. I support this claim by examining the most recent laws regarding consumer protection in e-commerce of six member states. This is the first comparative discussion of this kind and provides the most up-to-date information on these states' consumer protection laws available. I additionally provide the first comparative study of precontractual information duties for online sellers of these six member states as one of the critical tools to protect consumers. This comparative study demonstrates how the absence of harmonizing consumer protection law in this region harms all ASEAN market players. This Article does not cover all questions about technical procedures to impose the law in ASEAN. Nor does it seek to list all rules that should be filled in the ASEAN's consumer protection law. It is, rather, a starting point for additional research in this area. It makes a case for thinking about harmonizing consumer protection law in ASEAN by showing concrete evidence of the inconsistency and inefficiency of laws that pose an obstacle to cross-border transactions in e-commerce.

This Article consists of five parts. Part I explains the history and unique character of ASEAN and introduces the AEC, the latest attempt at regional economic integration of ASEAN. It shows how ASEAN and the AEC function. Part II discusses ASEAN's e-commerce that has enormous potential to affect both players in its internal market—governments, private sectors, and consumers—and on the global scale. This part further directs attention to how ASEAN instruments and the AEC frameworks have significantly impacted e-commerce in connection with consumer protection in response to the great potential of growth and people's readiness in e-commerce.

ASEAN has not yet created a uniform and comprehensive legal instrument for consumer protection relating to precontractual information duties. Thus, Part III of this Article lays out relevant domestic laws of ASEAN member states that deal with this matter. I have selected laws, including both hard law and soft law, from six of the ten member states, namely Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam. I made this selection by considering

²³ Geraint Howells & Norbert Reich, *The Current Limits of European Harmonisation in Consumer Contract Law*, 12 ERA F. 39, 42 (2011).

three factors: (1) potential to develop e-commerce;²⁴ (2) existing e-commerce companies;²⁵ and, most importantly, (3) accessibility of resources for research.²⁶

After reviewing the member states' consumer protection laws for e-commerce in Part III, Part IV looks more deeply into one type of consumer protection law, precontractual information duties, which protects consumers engaging in e-commerce transactions. I chose this principle because it represents the fundamental right of consumers: the right to be informed, which essentially supports other consumer rights. This Article is the first to provide a comparative analysis of precontractual information duties between ASEAN member states and two nations that are considered to lead the international standard in this matter—the EU and the US. This comparative study reveals that member states' laws are still inconsistent and inefficient among member states compared to globally accepted standards, and that those inconsistencies create barriers to trade. Part V analyzes lessons learned from the selected six member states' consumer protection laws in e-commerce as well as a comparative study of precontractual information duties in these member states. The findings show that in order to have ASEAN's e-commerce flourish and provide adequate protection for consumers in the region, ASEAN needs to develop its legal framework by harmonizing consumer protection law.

I. ASEAN AND THE AEC

A. THE HISTORY OF ASEAN

ASEAN was established when its five founding members—Indonesia, Malaysia, the Philippines, Singapore, and Thailand²⁷—signed the Bangkok Declaration on August 8, 1967.²⁸ ASEAN was later joined by another five states, namely Brunei (1984), Vietnam (1995), Myanmar and Laos (1997), and Cambodia (1999).²⁹ Accordingly, ASEAN creates regional cooperation from ten member states in Southeast Asia.

²⁴ See generally Catherine Saez, *ASEAN Members Want A Regional Agreement On E-Commerce, Less Developed Members Struggle To Catch Up*, IP-WATCH (Apr. 19, 2018), <https://www.ip-watch.org/2018/04/19/asean-members-want-regional-agreement-e-commerce-less-developed-members-struggle-catch/>; Melissa Ho, *ASEAN E-commerce: Beyond the Pandemic*, HKTDRC RSCH. (June 9, 2021), <https://research.hktdc.com/en/article/NzY4MzkzMzg1; Overview of e-commerce in Southeast Asia>, ASEAN UP (Feb. 14, 2018), <https://aseanup.com/overview-of-e-commerce-in-southeast-asia/>; GOOGLE ET AL. 2020, *supra* note 10, at 5.

²⁵ For example, two big online marketplaces in the ASEAN, Lazada and Shopee operate in only six countries (Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam). *About*, LAZADA, <https://www.lazada.com/en/about/> (last visited Feb. 12, 2022); *About*, SHOPEE, <https://careers.shopee.sg/about/> (last visited Feb. 12, 2022).

²⁶ Brunei, Laos, and Myanmar are left out in this Article because they do not have legislation regarding pre-contractual information duties for online contracts. Although Cambodia may have these duties in its Consumer Protection Law that was enacted in November 2019, this law is not available in English even on the website of the ASEAN Committee on Consumer Protection. See *Cambodia*, ACCP, <https://aseanconsumer.org/selectcountry=Cambodia> (last visited Feb. 12, 2022).

²⁷ *The Founding of ASEAN*, ASEAN, <https://asean.org/about-asean/the-founding-of-asean/#:~:text=The%20Association%20of%20Southeast%20Asian,%2C%20Philippines%2C%20Singapore%20and%20Thailand> (last visited Feb. 12, 2022).

²⁸ ASEAN SECRETARIAT, HANDBOOK ON SELECTED ASEAN POLITICAL DOCUMENTS at I (2013), <http://www.asean.org/uploads/archive/pdf/HBPDR.pdf>.

²⁹ *ASEAN Member States*, ASEAN, <https://asean.org/about-asean/member-states/> (last visited Feb. 12, 2022).

ASEAN has a truly heterogeneous community with different economies, cultures, political systems, and legal systems. A clear example of these differences among member states can be seen in different economies. On the one hand, Singapore, ranked 7th of 193 countries, has the world's top GDP per capita in 2021, but on the other hand, some member states in ASEAN have the lowest GDP per capita, such as Cambodia, which is ranked 153rd of 193 countries, and Myanmar, which is ranked 157th of 193 countries.³⁰ Besides these diverse economies, the legal systems also vary significantly. Some member states inherit the common law system from British colonies, such as Brunei, Malaysia, and Singapore, while others follow the civil law system, such as Thailand, Indonesia, Cambodia, Laos, and Vietnam.³¹ Owing to this combination, ASEAN represents one of the most diverse regions of the world.³² Yet, despite a great diversity, ASEAN is considered the most successful regional organization in the developing world.³³

The initial *raison d'être* of ASEAN was more political than economic. It was formed to contain and counteract the communist insurgency after the Cold War.³⁴ However, the political stability of member states was a sensitive issue that could inflame tension in the region, so the founding members deliberately hid their original political and military intent in order to dispel any suspicions that ASEAN could be a military alliance.³⁵ ASEAN, therefore, chose to highlight its focus on economic development, especially economic cooperation and announced its goal of eradicating poverty,³⁶ which would obviate the reason for people participating in communism.³⁷ For this reason, the Bangkok Declaration lists the main objectives of ASEAN as “accelerat[ing] economic growth ... through joint endeavours... [, and] ... promot[ing] active collaboration and mutual assistance on a matter of common interest in the economic ... fields.”³⁸

Turning to the core concept of cooperation in ASEAN, it is important to mention that ASEAN has a unique approach to international relations among member states called the “ASEAN

³⁰ The statistic referenced in the text is based on GDP per capita at a normal value. *List of Countries by Projected GDP Per Capita*, STAT. TIMES (Mar. 15, 2021), <https://statisticstimes.com/economy/countries-by-projected-gdp-capita.php>.

³¹ Myanmar is partly common law since it is now under socialist and military dictatorship regimes. The Philippines adopts a mixture of both systems. It mostly follows common law tradition, but civil law also retains some influence. See LUKE NOTTAGE ET AL., *ASEAN CONSUMER LAW HARMONISATION AND COOPERATION: ACHIEVEMENTS AND CHALLENGES* 20, 29-30 (2019), for in-depth information.

³² Philippe Gugler & Julien Chaisse, *The ASEAN in a New Era: Unveiling the Promises*, in *COMPETITIVENESS OF THE ASEAN COUNTRIES: CORP. AND REGUL. DRIVERS* 1, 1 (Philippe Gugler & Julien Chaisse eds., 2010).

³³ SIOW YUE CHIA & MICHAEL G. PLUMMER, *ASEAN ECONOMIC COOPERATION AND INTEGRATION: PROGRESS, CHALLENGES AND FUTURE DIRECTIONS* 1 (2015).

³⁴ STEFANO INAMA & EDMUND W. SIM, *THE FOUNDATION OF THE ASEAN ECONOMIC COMMUNITY: AN INSTITUTIONAL AND LEGAL PROFILE* 1 (2015); NARONGCHAI AKRASANE & DAVID STIFEL, *The Political Economy of the ASEAN Free Trade Area*, in *AFTA: THE WAY AHEAD* 27, 27 (Seiji F Naya & Pearl Imada Iboshi eds., 1992); DONALD E. WEATHERBEE, *INTERNATIONAL RELATIONS IN SOUTHEAST ASIA* 3 (3d ed. 2014); Chia Siow Yue & Joseph L.H. Tan, *An Overview*, in *ASEAN & EU: FORGING NEW LINKAGES AND STRATEGIC ALLIANCES* 1, 1 (Chia Siow Yue & Joseph L.H. Tan eds., 1997); Surachai Sirikrai, *ASEAN's Three Decades of Regionalism: Success or Failure?*, 3 *THAMMASAT REV.* 4, 15 (1998).

³⁵ *Id.*; Rodolfo C. Severino, *Politics of Association of Southeast Asian Nations Economic Cooperation*, 6 *ASIAN ECON. POL'Y REV.* 22, 23 (2011).

³⁶ Akrasanee & Stifel, *supra* note 34 at 27; YOSHI KODAMA, *ASIA PACIFIC ECONOMIC INTEGRATION AND THE GATT-WTO REGIME* 86 (2000).

³⁷ Visoot Tuvayanond, *The Opportunities for the Future Economic Rebound in ASEAN*, 22 *UNIV. THAI CHAMBER COM. J.* 89, 91 (2002).

³⁸ ASEAN SECRETARIAT, *HANDBOOK ON SELECTED ASEAN POLITICAL DOCUMENTS*, at I (3rd ed. 2006),

Way.”³⁹ The ASEAN Way is comprised of two main principles: non-interference⁴⁰ and decision-making based on consensus and consultation.⁴¹ These two principles are key to understanding the character and function of ASEAN.

The first principle under ASEAN Way is non-interference. According to the ASEAN Charter, member states are required to respect the independence and sovereignty of each state.⁴² Thus, member states must maintain “non-interference in the internal affairs of [other states].”⁴³ The principle of non-interference comes from a deep-rooted fear of colonialism because, except for Thailand, all Southeast Asian countries were colonized.⁴⁴ With this history, even after the postcolonial period, ASEAN member states still insist on preserving this norm.⁴⁵ These member states have refused to sacrifice their sovereignty to a supranational organization, and, therefore, ASEAN cannot create a strong and binding institutional structure.⁴⁶ Without a supranational organization, ASEAN cannot impose community law, monitor the harmonization of law, or enforce compliance or dispute resolution.⁴⁷ Unlike the EU, a clear example of highly developed institutionalism that has already established supranational institutions, such as the Council, the Commission, the Court of Justice, and the Parliament, ASEAN still focuses little attention on institutional integration.⁴⁸

In contrast, ASEAN is an intergovernmental organization⁴⁹ that cannot issue any legally binding treaties⁵⁰ or legislative acts by means of regulations or directives⁵¹ like in the EU for the AEC. The enforcement of non-legally binding agreements is based on member states’ efforts at

³⁹ ASEAN Charter, Dec. 16, 2008, <https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf> (summarizing the ASEAN Way).

⁴⁰ ASEAN Charter art. 2(2)(e).

⁴¹ *Id.* art. 20.

⁴² ASEAN Charter art. 2(2)(a). *See also* Lee Leviter, Note, *The ASEAN Charter: ASEAN Failure or Member Failure?*, 43 N.Y.U. Int’l L. & Pol. 159, 161 (2010); Susumu Yamakage, *The Construction of an East Asian Order and the Limitations of the ASEAN Model*, 12 ASIA-PAC. REV. 1, 6 (2005).

⁴³ ASEAN Charter art. 2(2)(e).

⁴⁴ Malaysia, Myanmar, and Singapore were British Colonies; Brunei was a British protectorate; Indonesia was under the Dutch; the Philippines were under Spain; Cambodia, Laos, and Vietnam were under France.

⁴⁵ LEE JONES, ASEAN, SOVEREIGNTY AND INTERVENTION IN SOUTHEAST ASIA 47 (2012); IMELDA DEINLA, THE DEVELOPMENT OF THE RULE OF LAW IN ASEAN: THE STATE AND REGIONAL INTEGRATION 5 (2017); Leviter, *supra* note 42, at 16; Yamakage, *supra* note 42, at 6.

⁴⁶ SHAUN NARINE, EXPLAINING ASEAN: REGIONALISM IN SOUTHEAST ASIA 33 (2002).

⁴⁷ Lay Hong Tan, *Will ASEAN Economic Integration Progress beyond a Free Trade Area*, 53 INT’L & COMP. L.Q. 935, 949 (2004).

⁴⁸ Suthiphand Chirathivat, *What Can ASEAN Learn from the Experience of European Integration? An ASEAN Perspective*, in ASEAN & EU: FORGING NEW LINKAGES AND STRATEGIC ALLIANCES 206, 215-18 (Chia Siow Yue & Joseph L.H. Tan eds., 1997).

⁴⁹ ASEAN Charter art. 3.

⁵⁰ DEINLA, *supra* note 45, at 4.

⁵¹ *Types of legislation*, EUROPEAN UNION, https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en (last visited Feb. 12, 2022). The regulation, such as the Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, has more strict binding nature because it is directly applicable to member states, leading to full unification. In contrast, a directive, such as Consumer Rights Directive, leaves the choice of form and methods to the national authorities to implement such a directive. *See generally* Martin Gebauer & Felix Berner, *Unification and Harmonization of Laws*, in MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW ¶ 12 (2019).

the national stage.⁵² Policymaking can be conducted through the medium of ASEAN summits and ministerial meetings.⁵³ Even the Secretary-General of ASEAN does not have decision-making powers.⁵⁴ Instead, the Secretary-General can only “facilitate and monitor progress in the implementation of ASEAN agreements and decisions.”⁵⁵ Unlike the EU, the Secretary-General of ASEAN and the ASEAN Secretariat has no teeth. They cannot control the compliance of member states with AEC measures.⁵⁶

Despite ASEAN having no supranational organization, the emergence of globalization and fast-growing e-commerce can be a driving force to strengthen cooperation among member states. This cooperation can eventually develop into a future supranational organization because all member states can share the mutual benefits of the expanding market. Furthermore, people in the region show a genuine willingness to engage in the e-commerce market. This situation can bolster legitimate political will from the people up to the governmental leaders, which can lead to concrete steps for further economic integration.

The second principle under ASEAN Way is “decision-making based on consensus.” ASEAN emphasizes decision-making based on consultation and consensus,⁵⁷ and this norm informally regulates state behavior.⁵⁸ ASEAN has its own working approach—flexible accommodations, common decisions, collective encounters, and conflict avoidance or containment.⁵⁹ The consensus principle requires that a decision can be made only when all member states accept it.⁶⁰ This working style reflects another primary reason why ASEAN has eschewed supranationalism—it does not want any institution to deliver a decision that points out a loser or a winner. ASEAN envisions a sense of community where all member states are working together rather than forcing some member states to follow a majority decision. On this basis, a decision made by consensus has greater legitimacy than other methods, such as a majority vote,⁶¹ and it presents a unified statement, increasing the diplomatic authority of ASEAN in the international community.⁶² It encourages member states to consult, communicate, and understand the interests of their counterparts.⁶³ However, decision-making based on consensus and consultation, by nature, can lead to more confrontation and deadlock since no rigid agreement can be reached. The process

⁵² DEINLA, *supra* note 45, at 4.

⁵³ ASEAN Charter art. 7.

⁵⁴ Thomas Schmitz, *The ASEAN Economic Community and The Rule of Law* 4 (Dec. 15, 2014), http://home.lu.lv/~tschmit1/Downloads/BDHK-Workshop_15-12-2014_Schmitz.pdf.

⁵⁵ ASEAN Charter art. 11.

⁵⁶ Stefano Inama & Edmund Sim, *Prioritizing Integration Goals in the ASEAN Economic Community in a Changing World* 3 (EUR. U. INST. ROBERT SCHUMAN CENTRE FOR ADVANCED STUDIES, Working Papers RSCAS 2016/05), https://cadmus.eui.eu/bitstream/handle/1814/40145/RSCAS_2016_05.pdf?sequence=1&isAllowed=y.

⁵⁷ ASEAN Charter art. 20.

⁵⁸ Yoshinobu Yamamoto, *Regional Integration, Regional Institutions, and National Policies: A Theoretical and Empirical Examination of Regional Integration in Asia and Europe*, in REGIONAL INTEGRATION AND INSTITUTIONALIZATION COMPARING ASIA AND EUROPE 54 (G. John Ikenberry et al. eds., 2012).

⁵⁹ Surin Pitsuwan, *ASEAN's Three Decades of Regionalism: Success or Failure*, 3 THAMMASAT REV. 4, 7, 1998; DEINLA, *supra* note 45, at 8.

⁶⁰ OTTO F. VON FEIGENBLATT, THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS (ASEAN): CONFLICT AND DEVELOPMENT 16 (2012).

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

to reach a consensus is also very time-consuming with a lengthy and high possibility of additional required negotiations,⁶⁴ making it difficult to respond to severe problems in a timely fashion.⁶⁵

Moreover, a consensus is not compatible with integration that entails complex decision-making, making it more difficult to reach decisions.⁶⁶ The consensus-making process can obstruct integration or even slow down its movement.⁶⁷ And a decision based on consensus may even fail to reflect the reality of regional politics and deflect attention away from state intervention.⁶⁸ The EU had experienced this phenomenon before and agreed in the end to adopt the principle of the qualified majority instead of consensus as to the result of the European Single Act.⁶⁹ Therefore, decision-making based on consensus might not be in the best of interests for ASEAN when it is trying to create greater economic integration for the AEC.⁷⁰

Still, decision-making based on consensus provides a substantial benefit to the foundation of the ASEAN by creating unity without leaving any member state behind, so it is worth saving. This Article recommends that ASEAN should not discard this ASEAN Way. We can fix what is wrong and strengthen the rest. As such, ASEAN should retain the decision-making process based on consensus specifically for sensitive areas, such as security and foreign policy.⁷¹ In the case of trade or economic development in e-commerce, member states should utilize a majority-vote process.⁷² In such situations, member states who are not ready to carry out a majority vote decision can choose to apply the “ASEAN minus X”⁷³ formula for more flexible participation.⁷⁴ The ASEAN minus X allows member states at different levels of development—some of which may need more time to fully implement a decision—to comply with a decision at a later stage of the process.⁷⁵ Using this concept can help member states to stay together even when they disagree on a particular action.⁷⁶ This working style that cultivates joint participation can keep member states together.

To sum up, two principles under ASEAN Way, non-interference and decision-making based on consensus, follow the unique character of ASEAN as the cooperation of a greatly diverse community. ASEAN Way has dominated working concepts, regional policies, and frameworks in ASEAN. Thus, the current ASEAN instruments come out as broad commitments in order to accommodate all member states to gradually implement them together as a whole despite their

⁶⁴ DEINLA, *supra* note 45, at 8.

⁶⁵ FEIGENBLATT, *supra* note 60, at 16.

⁶⁶ CHIRATHIVAT, *supra* note 48, at 220.

⁶⁷ *Id.*

⁶⁸ JONES, *supra* note 45, at 2.

⁶⁹ Single European Act Amending the 1957 Treaty of Rome, Feb. 17, 1986, 1987 O.J. (L 169).

⁷⁰ CHIRATHIVAT, *supra* note 48, at 220.

⁷¹ ASEAN, REPORT OF THE EMINENT PERSONS GROUP ON THE ASEAN CHARTER ¶63 (2006),

<http://www.asean.org/wp-content/uploads/images/archive/19247.pdf>.

⁷² *Id.*

⁷³ ASEAN Charter art. 21(2).

⁷⁴ Surin Pitsuwasn, *ASEAN's Three Decades of Regionalism: Success or Failure*, 3 THAMMASAT REV. 4, 7 (1998).

⁷⁵ PITSUWAN, *supra* note 59, at 7.

⁷⁶ *Id.*

disparity of social, political, and legal backgrounds. This is the main reason why ASEAN cannot impose binding laws, such as regulations or directives following the EU steps.

B. THE AEC: THE REGIONAL ECONOMIC INTEGRATION PROJECT OF ASEAN

The AEC is the regional economic integration established by ASEAN on December 31, 2015.⁷⁷ In fact, ASEAN has created several projects prior to the AEC to work on economic integration. ASEAN's first serious step took place in 1992 with the agreement in the ASEAN Free Trade Area (AFTA).⁷⁸ The AFTA was created in response to the loss of market shares from trading blocs in Europe and North America.⁷⁹ By establishing the European Common Market, also known as the European Economic Community (EEC), and the North American Free Trade Area (NAFTA), ASEAN has taken necessary responsive measures to mitigate any adverse effects from these economic blocs and sought alternative markets for its products through the AFTA.⁸⁰ Thus, the AFTA has tried to increase international competitiveness and not be left out in the world's mainstream.⁸¹ The AFTA eliminates tariff and non-tariff barriers to increase the free flow of goods in the region, which attracts substantially more trade and investment.⁸²

To be competitive in globalization, ASEAN has agreed to strengthen its ten member states toward the ultimate goal of reaching the highest degree of integration into one community as "the ASEAN Community."⁸³ The ASEAN community is often compared with the EU—the most successful regional economic integration globally. It is also important to mention that the EU has a long history with ASEAN through its colonial ties.⁸⁴ But in fact, ASEAN does not intend to pursue the ASEAN Community by following all the ways of the EU.⁸⁵ The ASEAN Community is comprised of three pillars: the AEC, the ASEAN Political-Security Community, and the ASEAN Socio-Cultural Community.⁸⁶ ASEAN first mentioned the AEC at the Bali Summit in October 2003⁸⁷ and chose to launch the AEC before the other two pillars because it considered economic integration the most important pillar and a precondition to support the accomplishment of the other two.⁸⁸ The AEC's objective is to transform Southeast Asia into a competitive single market and production base with a free flow of goods and services, investment, skilled labor, and capital

⁷⁷ *ASEAN Economic Community*, ASEAN, <https://asean.org/asean-economic-community/> (last visited Feb. 12, 2022).

⁷⁸ YUE & TAN, *supra* note 34, at 2; see AKRASANEE & STIFEL, *supra* note 34, at 31.

⁷⁹ Kathryn L. McCall, *What is Asia Afraid of? The Diversionary Effect of NAFTA's Rules of Origin on Trade Between the United States and Asia*, 25 CAL. W. INT'L L. J. 389, 410-413 (1995).

⁸⁰ Jaturon Thirawat, *Salient Aspects and Issues Concerning AFTA*, 7 THAMMASAT R. 2, 6 (2002).

⁸¹ *Id.* at 11.

⁸² PAUL J. DAVIDSON, *ASEAN THE EVOLVING LEGAL FRAMEWORK FOR ECONOMIC COOPERATION* 75 (2002).

⁸³ *ASEAN Community*, *supra* note 11; see *Cebu Declaration*, *supra* note 11.

⁸⁴ *An Overview*, in *ASEAN & EU: FORGING NEW LINKAGES AND STRATEGIC ALLIANCE* 1, 3 (Chia Siow Yue & Joseph L.H. Tan eds., 1997).

⁸⁵ Rodolfo Severino, Secretary-General of ASEAN, *ASEAN: Expectations, Myths and Facts*, Statement at the Writers' Workshop on Reporting Development in ASEAN, ISEAS, Singapore (June 26-27, 2012).

⁸⁶ *ASEAN COMMUNITY*, *supra* note 11.

⁸⁷ *Declaration of ASEAN Concord II*, *supra* note 12.

⁸⁸ INAMA & SIM, *supra* note 34, at 5 (noting that at the 12th ASEAN Summit in 2007, the leaders affirmed their commitment to establish the AEC and adopt the ASEAN Economic Blueprint in 2015); see *Cebu Declaration on the Blueprint of the ASEAN Charter*, ASEAN (Jan. 13, 2007), http://asean.org/?static_post=cebu-declaration-on-the-blueprint-of-the-asean-charter-cebu-philippines-13-january-2007.

among the ten member states.⁸⁹ The AEC represents one type of economic integration that relates to several agreements (e.g., on trade in goods, services, investment) that support ASEAN's economic integration similar to other trade agreements like the United States–Mexico–Canada Agreement (USMCA),⁹⁰ for example.

More importantly, the AEC has often invited the comparison with other successful economic integration models, particularly the EU, and its prior economic integration, the EEC. It is easy to find false parallels between EEC and AEC because of their similar names. In fact, the AEC's ultimate goal is to transform ASEAN into “a single market and production base,”⁹¹ which could be interpreted as reaching the highest level of integration as a single market in an economic and monetary union like the EU.⁹² However, the AEC does not fit with any four levels under the broad theory of economic integration: (1) free trade area (FTA); (2) custom union; (3) common market; and (4) economic and monetary union.⁹³ Nor can the AEC be compared to those integration steps in Europe.⁹⁴

In effect, ASEAN has not yet declared an explicit plan of becoming the final stage of economic integration despite the wording of its goal (a competitive single market and production base) suggesting that conclusion.⁹⁵ It will take time for the AEC to achieve the highest integration and fulfill the conditions of a single market in an economic and monetary union like the EU.⁹⁶ In order to become a single market, the AEC needs to further abolish all customs for intra-trade, eliminate more non-tariff barriers, encourage more free movement of labor, and implement systematic harmonization of law.⁹⁷

Despite any surface-level similarities between the AEC and the EEC, the AEC has its own unique way of approaching economic integration that is quite different from European models. Although the AEC has a similar name to the EEC, it has not yet reached a common market, the third stage of economic integration, like the EEC.⁹⁸ This is because the AEC has not completely liberalized trades in goods and services and the movement of capital and labor.⁹⁹ In addition, the

⁸⁹ AEC BLUEPRINT 2015, *supra* note 13, at 5.

⁹⁰ See Office of the United States Trade Representative, *United States-Mexico-Canada Agreement*, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement> (last visited Feb. 12, 2022) (noting USMA replaced NAFTA in 2020).

⁹¹ AEC BLUEPRINT 2015, *supra* note 13, at 5.

⁹² Jacques Pelkmans, *THE ASEAN ECONOMIC COMMUNITY: A CONCEPTUAL APPROACH* 20, 27 (2016).

⁹³ Janina Witkowska, *Integration Processes in the Global Economy: Current State and Prospects. The Cases of the European Union, ASEAN Economic Community, And NAFTA*, 19 *COM. ECON. RES.* 47, 49-50 (2016); see Bela Balassa, *THE THEORY OF ECONOMIC INTEGRATION* 1-17 (2011); *Economic Integration*, *ECONOMICS ONLINE*, https://www.economicsonline.co.uk/Global_economics/Economic_integration.html (last visited Feb. 12, 2022).

⁹⁴ WITKOWSKA, *supra* note 93, at 54.

⁹⁵ WITKOWSKA, *supra* note 93, at 55.

⁹⁶ In order to be considered as an economic and monetary union, such economic integration must have a well-functioning internal market, common competition, and economic policies enabling a single market, a common trade policy, and a single currency together with a common monetary policy. See SANCHITA BASU DAS, *THE ASEAN ECONOMIC COMMUNITY AND BEYOND: MYTHS AND REALITIES* 14 (2016); Witkowska, *supra* note 93 at 50; *Economic Online*, *supra* note 93; Thomas Schmitz, *The ASEAN Economic Community and The Rule of Law*, (Dec. 15, 2014), http://home.lu.lv/~tschmit1/Downloads/BDHK-Workshop_15-12-2014_Schmitz.pdf, at 2.

⁹⁷ Schmitz, *supra* note 96 at 2.

⁹⁸ *ECONOMIC ONLINE*, *supra* note 93; DAS, *supra* note 96 at 60.

⁹⁹ Witkowska, *supra* note 93 at 50.

AEC has not even integrated into a custom union, the second stage of economic integration¹⁰⁰ because it still has not created a common external custom against non-member states.¹⁰¹ The AEC's deviation from any levels of economic integration proves that the AEC does not fit in the current theory and, therefore, has its own unique level of economic integration. The AEC can be viewed as deepening the regional economic integration from the existing AFTA.¹⁰² Thus, the AEC represents an advanced step of FTA as "FTA-plus."¹⁰³ by removing tariffs for member states and committing to further facilitating the free flow of goods, services, investment, capital, and skilled labor.¹⁰⁴

Though the AEC is dissimilar to footsteps in Europe, and, in fact, does not follow the broad theory of four levels of economic integration, a study that assessed the comprehensive benefits of the AEC establishment suggests that the AEC "could produce gains similar to those resulting from the Single European Market."¹⁰⁵ For this reason, it is unsurprising that, as of 2021, this large collective market has a value of approximately over U.S. \$3 trillion.¹⁰⁶ Because of this vast market, presenting more than half a billion people, the AEC undoubtedly attracts local and foreign investment. For example, the AEC is the EU's third-largest trading partner outside Europe, only after the U.S. and China.¹⁰⁷ Also, the AEC is the U.S.' fourth-largest source for imported goods and the export market, after Canada, Mexico, and China.¹⁰⁸ As the AEC's physical market expands, so does the online market. In fact, the AEC has been under the spotlight around the world, especially from China who plays an active role in promoting digital connectivity in Southeast Asia.¹⁰⁹

II. THE POTENTIAL OF E-COMMERCE IN ASEAN UNDER THE AEC

Digitalization has reshaped traditional ways of doing business. It has created new modes of trading where people can buy or sell goods and services electronically without physical face-

¹⁰⁰ Schmitz, *supra* note 96, at 2.

¹⁰¹ Schmitz, *supra* note 96, at 2.

¹⁰² AEC BLUEPRINT 2015, *supra* note 13, at 5; Richard Pomfret, *ASEAN's New Frontiers: Integrating the Newest Members into the ASEAN Economic Community*, 8 ASIAN ECON. POL'Y REV. 25, 28 (2013).

¹⁰³ Koichi Ishikawa, *The ASEAN Economic Community and ASEAN Economic Integration*, J. CONTEMP. EAST ASIA STUD. 1, 11 (2021); PELKMANS, *supra* note 92, at 18-40; Vinod K. Aggarwal & Min Gyo Koo, *Designing Trade Institutions for Asia*, in ASIAN DESIGNS: GOVERNANCE IN THE CONTEMPORARY WORLD ORDER 35-58, 41-42 (Saadia M. Pekkanen ed., 2016).

¹⁰⁴ AEC BLUEPRINT 2015, *supra* note 13, at 5-16. This goal is reaffirmed in ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT 2025, at 3-11 (2015), https://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf [hereinafter "AEC BLUEPRINT 2025"].

¹⁰⁵ Peter A. Petri et al., *ASEAN Economic Community: A General Equilibrium Analysis*, 26 ASIAN ECON. J. 93-118 (2012).

¹⁰⁶ Aaron O'Neill, *Gross Domestic Product (GDP) of the ASEAN Countries from 2010 to 2020*, STATISTA (Apr. 1, 2021), <https://www.statista.com/statistics/796245/gdp-of-the-asean-countries/>; Elffie Chew, *Southeast Asia Weighs Benchmarks for \$3 Trillion Green Financing*, BLOOMBERGQUINT (Mar. 30, 2021, 7:26 PM), <https://www.bloombergquint.com/business/southeast-asia-weighs-benchmarks-for-3-trillion-green-financing>.

¹⁰⁷ *Countries and Regions: Association of South East Asian Nations (ASEAN)*, EUROPEAN COMMISSION, <https://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/> (last visited Feb. 12, 2022).

¹⁰⁸ Brian Harding & Kim Mai Tran, *U.S.-Southeast Asia Trade Relations in an Age of Disruption*, CSIS BRIEF 2 (June 2019), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/190627_HardingandTran_SoutheastAsiaTradeRelations_layout_FINAL.pdf.

¹⁰⁹ Rakhahari Chatterji, *China's Relationship with ASEAN: An Explainer*, OBSERVER RESEARCH FOUNDATION ISSUE BRIEF 7 (Apr. 2021), https://www.orfonline.org/wp-content/uploads/2021/04/ORF_IssueBrief_459_China-ASEAN.pdf.

to-face contracts. It enhances a consumer's capacity to search, compare, and choose the best and most suitable choices in terms of price, quality, quantity, or customers' reviews of products before purchasing.¹¹⁰ A non-geographical border of e-commerce¹¹¹ helps businesses connect to targeted individuals directly, promptly, and speedily, which is key to trading worldwide.¹¹² E-commerce has become the world's most rapidly growing commercial marketplace even before the COVID-19 pandemic,¹¹³ and it will continue to play a prominent role at national, regional, and international levels.¹¹⁴

A. THE READINESS OF PEOPLE IN THE REGION

The internet penetration in the Southeast Asian region (ASEAN plus Timor-Leste) has risen to 75%, but it is still less than the 90% in North America and the 87% in Europe.¹¹⁵ Nevertheless, this region has the world's third-highest number of internet users, outranking higher internet penetration regions.¹¹⁶ Four member states of ASEAN, Indonesia (ranking 4th), Philippines (ranking 12th), Vietnam (ranking 14th), and Thailand (ranking 18th), are in the top 20 of the world's internet users.¹¹⁷ More importantly, ASEAN has a distinctive culture in which 90% of the internet users access the internet predominantly via their mobile phones.¹¹⁸

In many member states, internet users spend the most time worldwide accessing the internet through mobile devices.¹¹⁹ The world's average daily time spent on mobile internet is 3.39 hours.¹²⁰ Users in the Philippines lead the world with 5.54 hours, followed closely by Thailand with 5.07 hours and Indonesia with 5.02 hours.¹²¹ Users in other countries, however, use less mobile internet on a daily basis—3.13 hours in the United States, 3.10 hours in China, or 1.37 hours in Japan.¹²² These statistics tell the same story even when comparing overall daily internet usage combining all devices.¹²³ Six out of ten ASEAN member states are active on social media

¹¹⁰ Justin Malbon, *Consumer Strategies for Avoiding Negative Online Purchasing Experiences: A Qualitative Study*, 20 COMPETITION & CONSUMER L. J. 249, 256 (2013).

¹¹¹ DANIELE AMOR, *THE E-BUSINESS (R)EVOLUTION LIVING AND WORKING IN AN INTERCONNECTED WORLD* 112 (2000).

¹¹² JANE K. WINN & BENJAMIN WRIGHT, *THE LAW OF ELECTRONIC COMMERCE* 1-3 (4th ed. 2001).

¹¹³ Isabelle Durant, *Developing Countries and Trade Negotiations on E-commerce*, UNCTAD (Feb. 19, 2021), <https://unctad.org/news/developing-countries-and-trade-negotiations-e-commerce>.

¹¹⁴ LILIAN EDWARDS & CHARLOTTE WAELDE, *LAW AND THE INTERNET: A FRAMEWORK FOR ELECTRONIC COMMERCE* 17 (2d ed. 2000).

¹¹⁵ GOOGLE ET AL. 2021, *supra* note 10, at 10; *Digital in 2020 Global Overview*, WE ARE SOCIAL & HOOTSUITE, slide no. 34, <https://wearesocial.com/digital-2020> (last visited Feb. 12, 2022).

¹¹⁶ STATISTA, *Internet Users*, *supra* note 9.

¹¹⁷ *Top 20 Countries with the Highest No. of Internet Users -2020 Q1*, INTERNET WORLD STATES (Dec. 31, 2019), <https://www.internetworldstats.com/top20.htm>.

¹¹⁸ *Econ. Sea 2019: Swipe Up and to the Right: Southeast Asia's \$100 Billion Internet Econ.*, GOOGLE ET AL 4 (2019), https://www.blog.google/documents/47/SEA_Internet_Economy_Report_2019.pdf (This report covers six countries in Southeast Asia, which are Indonesia, Malaysia, Philippines, Singapore, Thailand, and Vietnam); Mik, *supra* note 14, at 359.

¹¹⁹ *Digital in 2021 Glob. Overview Rep.*, WE ARE SOCIAL & HOOTSUITE, slide no. 35, <https://wearesocial.com/digital-2021> (last visited Feb. 12, 2022).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 34.

and buy more products online than the average internet user around the world.¹²⁴ This trend is likely to continue as people tend to shop online rather than in physical shops.¹²⁵

The number of ASEAN online shoppers will certainly increase in the near future due to one important factor: the age profile of the population.¹²⁶ In the ASEAN, 70% of the population is under the age of forty years old, compared to 57% in China.¹²⁷ The median age of the ASEAN population is around twenty-eight years old,¹²⁸ making ASEAN a relatively young population.¹²⁹ This younger population is a generation of digital natives and technical innovators.¹³⁰ Members of the young generation not only have a greater understanding of technological concepts through their interaction with digital technology from an early age,¹³¹ but, due to this increased interaction, they also have a greater tendency to engage in e-commerce.¹³² In fact, some statistics project that by 2025 most people in ASEAN will be fully engaged in the digital economy.¹³³ The robust use of digital technology and services in professional and personal situations will empower the majority of people in the Southeast Asian region to become digital natives and comfortable with the online world.¹³⁴ Even more significantly, this region has a strong middle class with increasing purchasing power and consumption.¹³⁵

In addition to the high volume of internet users, the increase in internet speed across the region is a dominant factor in growth of e-commerce because it was predicted that the Southeast Asian region would add nearly 4 million new users to the online world every month from 2015 to 2020.¹³⁶ The result in 2021 was on track with this prediction as the number of internet users increased in the US from 260 Million to 440 million in 2015.¹³⁷ All of these statistics support the claim that, despite many challenges, the ASEAN digital economy is expected to reach US \$300

¹²⁴ These states are Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam (alphabetical order). See *Digital in 2021 Glob. Overview Rep.*, *supra* note 119, at slides 83, 226.

¹²⁵ Rolf H. Weber, *Digital Trade and E-Commerce: Challenges and Opportunities of the Asia-Pacific Regionalism*, 10 *ASIAN J. WTO & INT'L HEALTH L & POL'Y*, 321, 322 (2015).

¹²⁶ CASSEY LEE & SANCHITA BASU DAS, *E-COMMERCE, COMPETITION AND ASEAN ECONOMIC INTEGRATION* 7, 11 (Cassey Lee & Eileen Lee ed., 2019).

¹²⁷ *E-Conomy Sea: Unlocking the \$200 Billion in Digit. Opportunity in Southeast Asia*, GOOGLE REPORT slide no.12 (2016), <https://www.slideshare.net/economySEA/economy-sea-by-google-and-temasek>.

¹²⁸ HARDING & TRAN, *supra* note 108, at 2.

¹²⁹ LEE & DAS, *supra* note 126, at 11.

¹³⁰ ATKERNEY, *THE ASEAN DIGITAL REVOLUTION* 7 (2015), <https://www.atkearney.com/documents/10192/7567195/ASEAN+Digital+Revolution.pdf/86c51659-c7fb-4bc5-b6e1-22be3d801ad2>.

¹³¹ *Id.*

¹³² LEE & DAS, *supra* note 126, at 11.

¹³³ ATKERNEY, *supra* note 130, at 20.

¹³⁴ *Id.*

¹³⁵ Weber, *supra* note 125, at 322.

¹³⁶ GOOGLE REPORT, *supra* note 127, at slide no. 12.

¹³⁷ GOOGLE ET AL. 2021, *supra* note 10, at 11; GOOGLE ET AL. 2020, *supra* note 10, at 92.

billion by 2025.¹³⁸ ASEAN has experienced a boom in technology, led by six unicorns (a company with a value of \$1 billion).¹³⁹

Unsurprisingly, with the considerable potential of economic growth in e-commerce, Chinese companies have made a play for the ASEAN e-commerce market while American companies remain on the periphery of ASEAN markets. The ASEAN e-commerce market has also incentivized investors from giant, well-known Chinese companies, such as Alibaba,¹⁴⁰ Tencent,¹⁴¹ and JD.com.¹⁴² ASEAN is a hot battleground among these competitors.¹⁴³ The fierce competition of these Chinese e-commerce companies displays in ASEAN through the top rivals for online marketplaces (Southeast Asia Amazon), which are Lazada and Shopee. These two online marketplaces cover seven markets: Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Vietnam.¹⁴⁴ Alibaba bought 51% of Lazada in 2016 and injected around \$4 billion in 2017.¹⁴⁵

¹³⁸ GOOGLE ET AL. 2021, *supra* note 10, at 8, 83-87; GOOGLE ET AL. 2020, *supra* note 10, at 94; Aradhana Aravindan, *Southeast Asia's internet economy to hit \$300 billion by 2025: Report*, REUTERS (Oct. 3, 2019, 12:07 AM), <https://www.reuters.com/article/us-southeast-asia-internet/southeast-asias-internet-economy-to-hit-300-billion-by-2025-report-idUSKBN1W107X>

¹³⁹ See *The Full List of Unicorn Startups in Southeast Asia*, NEXT UNICORN (Mar. 30, 2021), <https://nextunicorn.ventures/the-full-list-of-unicorn-startups-in-southeast-asia/> (providing that examples of unicorns in ASEAN are: Sea, Grab, Razer, Go-Jek, Lazada, Tokopedia, Traveloka, etc.); ASIAN UP, *The 6 Tech Unicorns of Southeast Asia* (Aug. 6, 2020), <https://aseanup.com/tech-unicorns-southeast-asia/>; Akhyari Hananto, *Unicorns of Southeast Asia and Their Current Valuations* (Apr. 23, 2021, <https://seasia.co/2021/04/23/unicorns-of-southeast-asia-and-their-current-valuations-updated-april-2021>).

¹⁴⁰ See Patpicha Tanakasempipat, *Alibaba to invest \$320 Million in Thailand, as rivals boost presence*, REUTERS (Apr. 19, 2018, 6:21 AM), <https://www.reuters.com/article/us-alibaba-thailand/alibaba-to-invest-320-million-in-thailand-as-rivals-boost-presence-idUSKBN1HQ1BI> (demonstrating that Alibaba has been investing aggressively in Southeast Asia. For example, it has invested \$1.1 billion in the Indonesian marketplace, Tokopedia, in 2018 and \$320 million in Thailand in 2018).

¹⁴¹ See Elleen Yu, *China tech giants to fight for \$53B SEA e-commerce Market*, ZDNET (Nov. 30, 2018, 8:47 AM), <https://www.zdnet.com/article/china-tech-giants-to-fight-for-53b-sea-e-commerce-market/> (explaining that Tencent has invested in several companies, such as investing, \$1.2 billion in Indonesian ride-sharing application Go-Jek).

¹⁴² See Yu, *supra* note 141; see also *Alibaba and Tencent: Showdown in Southeast Asia*, THE ASEAN POST (Mar. 16, 2018), <https://theaseanpost.com/article/alibaba-and-tencent-showdown-southeast-asia> (explaining that JD.com, the ally of Tencent, launched its local store in Indonesia in 2015 and has invested in other e-commerce players, including Indonesian Traveloka and, the Thai online fashion site, Pomelo).

¹⁴³ Yu, *supra* note 141; Weizhen Tan & Akiko Fujita, *Chinese companies are set to boost Southeast Asia's e-commerce market: Credit Suisse*, CNBC (Mar. 23, 2018, 3:26 AM), <https://www.cnbc.com/2018/03/23/chinese-companies-are-set-to-boost-southeast-asias-e-commerce-market-credit-suisse.html>; eMarketer Staff, *Chinese E-commerce Firms Dominate SE Asian Market*, MONI (Oct. 2, 2017), <https://www.monigroup.com/tc/node/94>; Matteo Sutto, *The State of eCommerce in Southeast Asia 2017*, THE STARTUP (Feb. 9, 2018), <https://medium.com/swlh/the-state-of-ecommerce-in-southeast-asia-in-2017-5a779f962623>; Aron Chen, *Alibaba and Tencent Target Southeast Asia for Potential Growth*, PINGWEST (Sep. 25, 2019, 4:53 PM), <https://en.pingwest.com/a/3537>.

¹⁴⁴ Mercedes Ruehl & Henny Sender, *The battle for south-east Asia's online shoppers*, FINANCIAL TIMES (July 19, 2020), <https://www.ft.com/content/eb264616-0eb1-4dc9-bfbe-5406f349a5fb>; Luis Sanchez, *These 2 Companies Dominate E-Commerce in Southeast Asia*, THE MOTLEY FOOL (Jan. 28, 2020, 11:12AM), <https://www.fool.com/investing/2020/01/28/these-2-companies-dominate-e-commerce-in-southeast.aspx>.

¹⁴⁵ Jon Russell, *Alibaba doubles down on Lazada with fresh \$2B investment and new CEO*, TECHCRUNCH (Mar. 19, 2018, 12:44 AM), <https://techcrunch.com/2018/03/18/alibaba-doubles-down-on-lazada/>; Qian Linliang, *Belt and road on steroids: How Alibaba conquered Southeast Asia*, FINANCIAL REVIEW (Apr. 2, 2019, 11:00 PM), <https://www.afr.com/world/asia/belt-and-road-on-steroids-how-alibaba-conquered-southeast-asia-20190327-p517xs>.

Alibaba even replaced the Lazada CEO with its long-standing executive in order to monopolize the market and tie the business of Lazada into Alibaba's core e-commerce services.¹⁴⁶

Tencent has fought back to win the e-commerce market in this region by putting \$500 million in Shopee for its capital.¹⁴⁷ Shopee is owned by Sea, Ltd. which Tencent has backed since 2017.¹⁴⁸ JD.com, the strategic ally of Tencent, entered into a joint venture totaling \$500 million in 2018 with the Central Group and opened JD Central, another online marketplace in Thailand.¹⁴⁹ These events show the intense movement of Chinese companies in the ASEAN e-commerce market, whereas Amazon, representing American interests, still confines itself to Singapore.¹⁵⁰

The ASEAN e-commerce market continues to flourish under the AEC.¹⁵¹ Besides, as mentioned earlier, COVID-19 has highlighted the importance of e-commerce.¹⁵² The pandemic has caused the acceleration of digital assumption because people need to use online services to conform with social distancing policies. The statistic shows that one in every three people in ASEAN started using online services for the first time, and 90% of this population intend to continue using these services going forward.¹⁵³ They have accepted e-commerce as a new way of life.¹⁵⁴ Online shoppers in ASEAN have already reached 440 million by the end of 2021—more than the prior prediction.¹⁵⁵ These statistics reflect the strong readiness of people in ASEAN, including businesses and consumers, to participate in e-commerce, which will contribute to the inevitable exponential growth of the e-commerce market. Since people in ASEAN are ready to engage in e-commerce, the AEC can effectively implement the frameworks for economic integration and foster cooperation at the domestic level and between member states. Therefore,

¹⁴⁶ Russell, *supra* note 145.

¹⁴⁷ Yu, *supra* note 141.

¹⁴⁸ Jon Markman, *At Sea Ltd, Red Hot Meets Red Ink*, THE STREET (Dec. 15, 2020), <https://www.thestreet.com/tech/news/sealtdjdm121520>; Yoolim Lee, *World's Hottest Stock Gains Another 9% After Doubling Revenue*, BLOOMBERGQUINT (Aug. 19, 2020, 6:00 PM), <https://www.bloombergquint.com/business/tencent-backed-sea-s-sales-double-in-e-commerce-gaming-boom>

¹⁴⁹ *JD.Com Officially Launches its E-commerce Platform in Thailand*, JD.COM (Sep. 25, 2018), <https://jdcorporateblog.com/jd-com-officially-launches-its-e-commerce-platform-in-thailand/>; Aron Chen, *Alibaba and Tencent Target Southeast Asia for Potential Growth*, PINGWEST (Sep. 25, 2019, 4:53 PM), <https://en.pingwest.com/a/3537>.

¹⁵⁰ See Sheji Ho On, *10 Ecommerce Trends That Will Shape Southeast Asian Ecommerce in 2018*, ECOMMERCEIQ (Dec. 20, 2017), <https://ecommerceiq.asia/10-southeast-asia-ecommerce-trends-2018/> (providing that Amazon entered the Singaporean market and launched its Prime Now service in 2017).

¹⁵¹ *Southeast Asia E-commerce to Grow by 5.5% in 2021*, DIGFIN (Dec. 20, 2020), <https://www.digfingroup.com/ppro-2021/>; Yoolim Lee, *Southeast Asia Tech Startups Ride Out 2020, Raising \$8.2 Billion*, BLOOMBERG (Mar. 26, 2021), <https://www.bloomberg.com/news/articles/2021-03-26/southeast-asia-tech-startups-ride-out-2020-raising-8-2-billion>.

¹⁵² GOOGLE ET AL., *supra* note 10, at 8, 15-16; Research and Markets, *Southeast Asia B2C E-Commerce Market Report 2021: Market Continued Accelerating During the COVID-19 Pandemic in 2020*, GLOBAL NEWswire (Mar. 15, 2021, 5:48 AM), <https://www.globenewswire.com/news-release/2021/03/15/2192541/0/en/Southeast-Asia-B2C-E-Commerce-Market-Report-2021-Market-Continued-Accelerating-During-the-COVID-19-Pandemic-in-2020.html>; *Online Shopping Soars in Southeast Asia*, TTR WEEKLY (Mar. 18, 2021), <https://www.ttrweekly.com/site/2021/03/online-shopping-soars-in-southeast-asia/>.

¹⁵³ GOOGLE ET AL., *supra* note 10, at 10, 18.

¹⁵⁴ GOOGLE ET AL., *supra* note 10, at 26.

¹⁵⁵ *Id.* at 11; Eileen Yu, *Southeast Asian Consumers Intensify Online Habits, Spending 60% More*, ZDNET: BY THE WAY (Aug. 31, 2021), <https://www.zdnet.com/article/southeast-asian-consumers-intensify-online-habits-spending-60-more/#:~:text=Windows%2011-,Southeast%20Asian%20consumers%20intensify%20online%20habits%2C%20spending%2060%25%20more,to%20%24254%20billion%20by%202026>.

even though ASEAN cannot impose a binding top-down legal framework like the EU or like a government at a national level, people in the community are essential to drive the political will of the member states to further strengthen the economic development of the AEC. In other words, great support from people in ASEAN can ultimately create a bottom-up legal framework with which member states would willingly comply.

B. THE REGIONAL POLICY AND FRAMEWORK OF THE AEC CONCERNING E-COMMERCE

In recognition of ASEAN's great potential for e-commerce, the readiness of its people, and achieving a goal of a healthy e-commerce market, ASEAN also launched many regional policies, initiatives, and instruments to govern the e-commerce market. ASEAN is the first developing region that is working on a unified e-commerce legal framework.¹⁵⁶ The most important policy frameworks are the AEC Blueprints of 2015 and 2025.¹⁵⁷ The AEC Blueprints have served as a master plan for the AEC's implementing process and outlined timelines and goals for specific reforms.¹⁵⁸ As mentioned earlier, ASEAN has no supranational organization to impose legislation, such as rules or directives. Therefore, the AEC Blueprints are only a soft law—a nonlegally binding agreement—that asks for the cooperation of member states in implementing the AEC goals and strategic measures. The AEC Blueprints are more like an aspirational plan that lists broadly agreed commitments in order to accommodate all ASEAN member states, which have economic disparity and require gradual implementation. The AEC Blueprints, then, allow various sectoral bodies in ASEAN to further elaborate and issue more detailed and specific initiatives and work plans that support the implementation of the AEC Blueprints.¹⁵⁹

To reach the AEC's ultimate goal as a single market and production base within ASEAN, the AEC issues many comprehensive strategic plans to promote e-commerce. The AEC Blueprint 2015 and 2025 have devoted one section to e-commerce, containing commitments related to draft policies and legal infrastructure for e-commerce transactions.¹⁶⁰ The AEC Blueprint 2015, though expired in 2015, situated the policy and legal infrastructure for e-commerce with the specific goal of being "the Competitive Economic Region."¹⁶¹ It required member states to enact, amend, or update their e-commerce legislation to be consistent with regional best practices, guidelines, and standards based on common practices in order to support regional e-commerce activities.¹⁶² The priority action was the full harmonization of the legal infrastructure of e-commerce in ASEAN.¹⁶³

Although the AEC Blueprint 2015 has already expired, member states adopted the AEC Blueprint 2025 to carry out the AEC targets from 2016 to 2025.¹⁶⁴ The AEC Blueprint 2025 has continued to promote e-commerce in light of its obvious importance in the global economy.¹⁶⁵

¹⁵⁶ MIK, *supra* note 14, at 342.

¹⁵⁷ AEC BLUEPRINT 2015, *supra* note 89; ASEAN BLUEPRINT 2025, *supra* note 104.

¹⁵⁸ The U.S. Commercial Service, *Understanding the ASEAN Economic Community (AEC) – Frequently Asked Questions*, https://2016.export.gov/asean/build/groups/public/@eg_asean/documents/webcontent/eg_asean_084987.pdf (last updated Aug. 2014).

¹⁵⁹ AEC BLUEPRINT 2015, *supra* note 13; ASEAN BLUEPRINT 2025, *supra* note 104.

¹⁶⁰ AEC BLUEPRINT 2015, *supra* note 13, at 23, § B.6; AEC BLUEPRINT 2025, *supra* note 104, at 24, § C.3. f.

¹⁶¹ AEC BLUEPRINT 2015, *supra* note 13, at 23, § B.6.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ AEC BLUEPRINT 2025, *supra* note 104.

¹⁶⁵ *Id.* at 24.

The AEC Blueprint 2025 recognizes that globalization makes the world interconnected through information and communications technology.¹⁶⁶ It views e-commerce as the essential factor “not only in cross-border trade but also in facilitating foreign investment through the supply of intermediary services.”¹⁶⁷ Hence, the AEC Blueprint 2025 moves e-commerce from a strategic measure under “the Competitive Economic Region” of the Blueprint 2015 to “the Enhanced Connectivity and Sectoral Cooperation.”¹⁶⁸

The change of emphasis seen in these two Blueprints related to e-commerce reflects the development of the AEC from recognizing the importance of e-commerce as one of the competitive factors to enhancing and strengthening the cooperation and connection between sectors in each state and among member states.¹⁶⁹ The AEC plans to further intensify cooperation in e-commerce among member states to facilitate cross border e-commerce transactions.¹⁷⁰ It will facilitate cooperation by setting significant strategic measures, including harmonization of consumer rights and protection laws, online dispute resolution, and electronic identification.¹⁷¹ The cooperation among member states would help build trust, gain credibility from developed countries, and increase investment in the AEC e-commerce market, which is expected to grow at least twice as fast as markets in other regions.¹⁷² Also, both Blueprints have incorporated the 2000 e-ASEAN Framework Agreement, which provides a list of activities that member states need to undertake to build e-commerce platforms in their countries and subsequently in the region, to intensify cooperation in AEC e-commerce.

Recognizing e-commerce as a vital element of the global economy, a number of initiatives and working groups were established to support the implementation of the AEC Blueprints. An important working group that addresses e-commerce issues is the ASEAN Coordinating Committee on Electronic Commerce (ACCEC), which was created in 2017 to manage ASEAN policy regarding e-commerce and digital trade.¹⁷³ The leading initiative of the ACCEC is the ASEAN Work Programme on Electronic Commerce (AWPEC) 2017-2025.¹⁷⁴ The AWPEC covers multi-sectoral bodies and initiatives in various areas of e-commerce, including “infrastructure, education and technology competency, consumer protection, modernization of the legal framework, security of electronic transactions, competition, and logistics.”¹⁷⁵

Another recent important initiative of the ACCEC is “the Guideline on Accountabilities and Responsibilities of E-marketplaces,” one of the initiatives under the AWPEC with a view

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ AEC BLUEPRINT 2015, *supra* note 13, at 23; AEC BLUEPRINT 2025, *supra* note 104, at 24.

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² ASEAN UP, *supra* note 24; Sheji Ho & Felicia Moursalien, *Forget China: There's An E-Commerce Gold Rush in Southeast Asia*, TECHCRUNCH (Jun. 22, 2015), <https://techcrunch.com/2015/06/22/forget-china-theres-an-e-commerce-gold-rush-in-southeast-asia/>; Budi Yuwono, *ASEAN E-Commerce and Its Legal Infrastructure*, presented at Expert Meeting on Cyberlaws and Regulations for Enhancing E-Commerce: Including Case Studies and Lessons Learned 5 (Mar. 25-27, 2015), http://unctad.org/meetings/fr/Presentation/CII_EM5_P_B_Yuwono_en.pdf.

¹⁷³ *Overview*, ASEAN, <https://asean.org/our-communities/economic-community/asean-e-commerce/> (last visited Feb. 12, 2022) [hereinafter “ASEAN, *Overview*”].

¹⁷⁴ ASEAN, ASEAN WORK PROGRAMME ON ELECTRONIC COMMERCE, https://asean.org/wp-content/uploads/2021/09/ASEAN-Work-Programme-on-Electronic-Commerce_published.pdf (last visited Feb. 12, 2022).

¹⁷⁵ *Id.* at 4-10.

toward creating a conducive environment, especially for growing e-commerce platforms.¹⁷⁶ This Guideline encourages e-commerce platforms to incorporate guiding principles to unlock opportunities for cross-border trade and foster the development of consumer confidence in ASEAN.¹⁷⁷ Interestingly, the Guideline recommends e-marketplace providers require some material information disclosure in the preferred or local language, such as information related to products, prices, payments, the duration of contracts and delivery modes, returns and cancellation policies, and methods for placing an order.¹⁷⁸ More importantly, the Guideline recommends e-marketplace providers delist merchants if they are found to be in noncompliance with the rules.¹⁷⁹ Nevertheless, the Guideline is limited to e-marketplace providers and does not contain detailed recommendations of when this information should be disclosed or how to disclose information effectively.

One important initiative related to e-commerce is the ASEAN Agreement on Electronic Commerce 2021-2025, which was adopted in 2019 and entered into force in 2021 as the latest comprehensive agreement.¹⁸⁰ It intends to deepen cooperation among the ASEAN member States and govern several cross-sectoral bodies necessary for the development of e-commerce.¹⁸¹ The Work Plan, which supports the Agreement, launched in 2021 to provide a coherent and harmonized approach for implementing this Agreement.¹⁸² The ACCEC is responsible for coordinating with relevant ASEAN sectoral bodies to implement this Agreement in a timely manner.¹⁸³

More significantly, when closely examining the new Blueprint 2025 under the e-commerce section, the Blueprint 2025 places the harmonization of consumer rights and consumer protection on the top list among strategic measures regarding e-commerce.¹⁸⁴ This prioritization is in accordance with the direction of general consumer protection under the AEC Blueprint 2025. The Blueprint 2025 highlights the importance of building higher consumer confidence and cross-border commercial transactions.¹⁸⁵ Since e-commerce has no physical examination, concrete identity of a seller, or on-site delivery, it can substantially impact consumers. In response to this potential impact, the Blueprint has set firm goals to “establish a common ASEAN consumer protection framework through higher levels of consumer protection legislation, improve enforcement and monitoring of consumer protection legislation, and make available redress mechanisms.”¹⁸⁶

¹⁷⁶ ASEAN, THE GUIDELINE ON ACCOUNTABILITIES AND RESPONSIBILITIES OF E-MARKETPLACES (2019), <https://asean.org/asean2020/wp-content/uploads/2020/12/Guideline-on-Accountabilities-and-Responsibilities-of-E-Marketplace-Providers.pdf> [hereinafter “ASEAN, THE GUIDELINE”].

¹⁷⁷ *Id.* at 1-2. (noting that there are four main guiding principles for four areas: personal data protection, e-contracting, honest advertising, and dispute resolution.)

¹⁷⁸ *Id.* at 3 (referencing principle 2.10-11).

¹⁷⁹ *Id.* at 4 (referencing principle 2.18).

¹⁸⁰ ASEAN, *Overview*, *supra* note 173.

¹⁸¹ *Id.*

¹⁸² ASEAN, WORK PLAN ON THE IMPLEMENTATION OF ASEAN AGREEMENT ON ELECTRONIC COMMERCE (2021), <https://asean.org/book/work-plan-on-the-implementation-of-asean-agreement-on-electronic-commerce/>.

¹⁸³ *Id.*

¹⁸⁴ AEC BLUEPRINT 2025, *supra* note 10, at 24.

¹⁸⁵ *Id.* at 13.

¹⁸⁶ *Id.*

These goals under the Blueprint 2025 are also reiterated in many initiatives. One such initiative is the ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) that addresses consumer policy over the next ten years (2016-2025) by modernizing relevant provisions of consumer protection legislation in member states.¹⁸⁷ Another significant initiative to support the improvement of consumer protection in member states is the 2017 ASEAN High-Level Principles on Consumer Protection (AHLP).¹⁸⁸ Interestingly, the AHLP refers to e-commerce and identifies it as an area that lacks adequate and effective consumer protection.¹⁸⁹ Hence, the AEC has a clear policy under the Blueprint 2025 of strengthening regional consumer protection in e-commerce, found explicitly in both the consumer and e-commerce sections.

Moreover, with the emphasis on consumer protection, another sectoral working group was established in 2007, named the ASEAN Committee on Consumer Protection (ACCP), to serve as the primary ASEAN sectoral committee responsible for implementing and monitoring agreements and mechanisms to foster consumer protection in the AEC.¹⁹⁰ Recently, ACCP launched the first-ever “ASEAN Regional Information Campaign on Online Shopping” in 2020 to improve consumers’ awareness of their right to seek product information and, in turn, ensure that online businesses respect consumer rights by giving accurate information.¹⁹¹ This campaign reflects ASEAN’s attempt to protect the growing number of consumers who are online shoppers, along with its focus on e-commerce growth in the region.¹⁹²

Another recent initiative in 2020 is “the ASEAN Online Business Code of Conduct,” a joint endeavor of the ACCP and the ACCEC.¹⁹³ The Code of Conduct complements the legislation of ASEAN member states.¹⁹⁴ It sets fifteen commitments for businesses operating online to build consumer confidence in e-commerce and support good business practices.¹⁹⁵ Some of the commitments impose broad pre-contractual information duties. For instance, businesses should communicate honestly and truthfully by providing complete and correct information about goods services, a clear cost of products without hidden fees, and businesses should offer options for cancellation.¹⁹⁶ These two recent initiatives, the Information Campaign and the Online Business Code of Conduct, show that the AEC is currently putting a spotlight on consumer protection in e-commerce to foster its digital economy.

In conclusion, the AEC has firmly focused on intensifying cooperation among ASEAN member states toward regional consumer protection law and policy, particularly in e-commerce.

¹⁸⁷ *ASEAN Strategic Action Plan for Consumer Protection (ASAPCP) 2025*, ASEAN, <https://aseanconsumer.org/read-publication-asean-strategic-action-plan-for-consumer-protection-asapcp-2025> (last visited Feb. 12, 2022).

¹⁸⁸ *ASEAN High-Level Principles on Consumer Protection*, ASEAN, <https://aseanconsumer.org/cterm-regional-cooperation-in-asean/asean-high-level-principles-on-consumer-protection> (last visited Feb. 12, 2022).

¹⁸⁹ *Id.*

¹⁹⁰ *ASEAN Committee on Consumer Protection (ACCP)*, ASEAN, <https://aseanconsumer.org/cterm-regional-cooperation-in-asean/asean-committee-on-consumer-protection-accp> (last visited Feb. 12, 2022).

¹⁹¹ ASEAN, *ASEAN Regional Information Campaign on Online Shopping*, (Mar. 16, 2020), <https://aseanconsumer.org/read-publication-asean-regional-information-campaign-on-online-shopping>.

¹⁹² *Id.*

¹⁹³ ASEAN, ASEAN ONLINE BUSINESS CODE OF CONDUCT (2020), [https://aseanconsumer.org/file/post_image/2020-02-26%20ASEAN%20COC%20\(fin\).pdf](https://aseanconsumer.org/file/post_image/2020-02-26%20ASEAN%20COC%20(fin).pdf) [hereinafter “ASEAN, CODE OF CONDUCT”].

¹⁹⁴ *Id.* at 1.

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 12-14 (referencing commitments number 6,7, and 9).

By obtaining that objective, the Blueprint 2025 heavily emphasizes how important it is that member states harmonize their legislation for “consumer protection.” The harmonization would serve as a stepping stone for thriving cross-border e-commerce and significantly benefits both consumers and businesses. Many initiatives and working groups of ASEAN sectoral bodies have been created to support e-commerce. Although the AEC policy encourages the development of common ASEAN legislation for greater consumer protection in e-commerce, to this point ASEAN’s comprehensive and harmonized consumer protection law is missing. A lack of harmonized consumer protection law results in inconsistent and inefficient consumer protection laws among member states. This legal diversity adversely affects consumers, businesses, and governments. The following parts will support this claim.

III. CONSUMER PROTECTION IN THE CONTEXT OF E-COMMERCE OF THE SELECTED SIX MEMBER STATES

At present, ASEAN only has an overly broad framework regarding harmonizing and strengthening consumer protection in e-commerce under the AEC Blueprint and its following initiatives. Although unified or harmonized e-commerce law and consumer protection law are not yet in place under the AEC framework, all member states are aware of the importance of e-commerce. They recognize the immense potential of the AEC e-commerce market and have already enacted e-commerce law.

In brief, all ASEAN member states have already enacted domestic laws concerning e-commerce transactions with influence from the United Nations Commission on International Trade Law (UNCITRAL) instruments.¹⁹⁷ Most domestic laws of member states, such as the Philippines and Indonesia, are based on the 1996 UNCITRAL Model Law on Electronic Commerce.¹⁹⁸ Some states promulgated e-commerce transaction laws based on the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (Electronic Communications Convention), the updated and complemented version of the Model Law, such as Singapore (fully adopted), Malaysia (partially adopted), Thailand (partially adopted), and Vietnam (mostly adopted).¹⁹⁹

Nevertheless, ASEAN member states’ electronic transaction laws do not all contain specific provisions on consumer protection because the main principles of both UNCITRAL instruments are technological neutrality and functional equivalence.²⁰⁰ These two principles establish rules that provide equal treatment to traditional paper based and electronic means and

¹⁹⁷ U.N. Conf. on Trade and Development, Review of E-commerce Legislation Harmonization in the Association of Southeast Asian Nations, UNCTAD/DTL/STICT/2013/1, at 8 (2003); MIK, *supra* note 14 at 347 [hereinafter UNCTAD].

¹⁹⁸ MIK, *supra* note 14 at 347-48.

¹⁹⁹ *Id.* at 48; UNCTAD, *supra* note 197 at 30, 38, 44; *ICT Ministry Amending Act*, THE NATION THAILAND, <https://www.nationthailand.com/edandtech/30181289> (last visited Feb. 12, 2022).

²⁰⁰ U.N. Comm’n on Int’l Trade Law, *Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998*, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (last visited Feb. 12, 2022); U.N. Comm’n on Int’l Trade Law, *United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)*, https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (last visited Feb. 12, 2022).

affirm the formation and validity of contracts concluded electronically.²⁰¹ With no consumer protection provision in e-commerce transaction law, general consumer protection laws in member states have had to widen their scope of application that generally apply to traditional offline transactions to regulate online transactions. More significantly, most states have decided to promulgate sui generis laws in the form of an act, regulation, decree, or administrative order to specifically cover consumer protection for e-commerce transactions, separated from their main e-commerce transaction or consumer protection laws.

To date, scholars have focused on either e-commerce law or consumer protection law.²⁰² Yet these two areas are closely connected in this digital era and becoming more and more so. Instead of studying them independently of each other, this Article fills this gap and takes an integrative approach by discussing consumer protection in the context of e-commerce. It is the first to collect the most updated data of consumer protection in relation to e-commerce transactions up to six ASEAN member states based on the potential to develop e-commerce, the current existing e-commerce companies, and accessibility of resources to research. This part comprises member states' main laws and a brief background of several entities that regulate consumer protection, including state agencies (either a separate organization or ministry), leading authorities, organizations, and associations serving as non-governmental organizations (NGOs). The information about the competent authorities and NGOs in each state help clarify the source of legislation and focal points of consumer protection for each state because these authorities generally propose, monitor, or enforce laws and educate consumers. The selected six member states are arranged alphabetically as follows.

A. INDONESIA

The Indonesian population comprises approximately a third of all people in ASEAN.²⁰³ In terms of e-commerce, Indonesia is thought to account for 52% of the e-commerce market in this region.²⁰⁴ Indonesia has the second most unicorns in ASEAN, such as Go-Jek, Traveloka, Tokopedia, Bukalapak, and only Singapore outranks Indonesia.²⁰⁵ The law that regulates all internet-related activities in Indonesia is the 2008 Law on Information and Electronic Transactions,²⁰⁶ which was partly amended in 2016.²⁰⁷ The Law provides general provisions for

²⁰¹ . U.N. Comm'n on Int'l Trade Law, *Model Law on Electronic Commerce (1996) with additional article 5 bis as adopted in 1998*, https://uncitral.un.org/en/texts/ecommerce/modellaw/electronic_commerce (last visited Feb. 12, 2022); U.N. Comm'n on Int'l Trade Law, *United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)*, https://uncitral.un.org/en/texts/ecommerce/conventions/electronic_communications (last visited Feb. 12, 2022).

²⁰² UNCTAD, *supra* note 197; ASEAN, HANDBOOK ON ASEAN CONSUMER PROTECTION LAWS AND REGULATIONS (2d ed. 2021). <https://aseanconsumer.org/file/ASEAN%20Handbook/2nd%20Edition%20of%20The%20ASEAN%20Consumer%20Protection%20Handbook%20-%2013Sep21.pdf> [hereinafter ASEAN, HANDBOOK]; Mik, *supra* note 14 at 358.

²⁰³ STATISTA, *Total population*, *supra* note 4.

²⁰⁴ Siwage Dharma Negara et al., *E-Commerce Development in Indonesia: Challenges and Prospects*, in *E-COMMERCE, COMPETITION AND ASEAN ECONOMIC INTEGRATION* 119, 119 (Cassey Lee & Eileen Lee eds., 2019).

²⁰⁵ NEXT UNICORN, *supra* note 139; Hananto, *supra* note 139.

²⁰⁶ Information and Electronic Transactions, 2008 (Law No. 11) (Indon.); UNCTAD, *supra* note 197 at 25.

²⁰⁷ Amendment to Law No. 11 of 2008, 2016 (Law No. 19) (Indon.) (for details of the amendment, please see Kristo Molina, *Indonesian Electronic Information and Transactions Law Amended* (Dec. 15, 2016), <https://www.whitecase.com/publications/alert/indonesian-electronic-information-and-transactions-law-amended>).

all internet-based transactions and specific provisions on privacy, cybercrime, and content issues.²⁰⁸

Since the Law on Information and Electronic Transactions does not include a consumer protection provision, Indonesia's 1999 Law on Consumer Protection²⁰⁹ subsequently governs consumer protection in electronic transactions as long as the provisions of law permit.²¹⁰ Among other consumer rights,²¹¹ several sections in the Law on Consumer Protection relate to the right to information for consumers, such that they should be able to obtain accurate and clear information provided electronically about contract requirements, manufacturers, and product details of goods and services.²¹²

Additionally, Indonesia issued "the Government Regulation No. 80 of 2019 on Trading through Electronic System (GR 80)"²¹³ with the intention to improve the governance of Indonesian e-commerce.²¹⁴ GR 80 requires businesses to comply with a specific setup when they engage in e-commerce activities, such as licensing, disclosing correct, clear, and honest information about goods or services, and ensuring tax compliance.²¹⁵ It covers all players (i.e., merchants, e-commerce providers, and intermediary service providers) that offer their goods or services within an e-commerce trading system in the Indonesian territory.²¹⁶ More importantly, GR 80 emphasizes that those e-commerce businesses must comply with consumer protection and rights as stated in the Law on Consumer Protection, along with specific protection frameworks provided in GR 80 regarding personal data protection, consumer complaint services, and dispute resolutions.²¹⁷

²⁰⁸ Siwage Dharma Negara et al., *supra* note 204 at 139; UNCTAD, *supra* note 197 at 25.

²⁰⁹ Consumer Protection, 1999 (Law No. 8) (Indon.). (effective Apr., 20, 2000.)

²¹⁰ UNCTAD, *supra* note 197 at 25. (The official Elucidation on Law on Consumers Protection specifies that the Law applies to electronic and cross-border transactions.)

²¹¹ For example, right to safety, right to choose, right to be heard, right to presentation, right to education, right to redress. *See* detailed information in Consumer Protection, 1999 (Law No. 8) (Indon.), art. 4.

²¹² *Id.*; UNCTAD, *supra* note 197 at 25.

²¹³ Government Regulation No. 80 of 2019 on Trading through Electronic System (Indon.) [hereinafter GR 80]. (To further implement certain provisions of the GR 80, the Indonesian Minister of Trade (MOT) subsequently issued Regulation No. 50 of 2020 regarding Provisions on Business Licensing, Advertising, Guidance and Supervision of Businesses Trading Trade through Electronic Systems.) *See also* Akset, *A New Regulatory Framework for Indonesia's E-Commerce Sector: Licensing Requirement and Threshold of Foreign E-commerce Business* (June 29, 2020), <https://aksetlaw.com/news-event/newsflash/a-new-regulatory-framework-for-indonesias-e-commerce-sector-licensing-requirement-and-threshold-of-foreign-e-commerce-business/>; SSEK, *Indonesia Introduces New Requirements for E-Commerce Companies* (June 19, 2020), <https://www.ssek.com/blog/indonesia-introduces-new-requirements-for-e-commerce-companies>.

²¹⁴ Baker McKenzie, *Indonesia Now Has Specific E-commerce Regulation* (Dec. 18, 2019), <https://www.bakermckenzie.com/en/insight/publications/2019/12/indonesia-specific-e-commerce-regulation>; Akset, *Indonesian Government introduces a More Developed E-Commerce Regulation* (Dec. 12, 2019), <https://aksetlaw.com/news-event/newsflash/indonesian-government-introduces-a-more-developed-e-commerce-regulation/>; Ayman Falak Medina, *Indonesia's Law on E-Commerce: Clear Guidelines and Compliance by November 2021*, ASEAN BRIEFING, (Jan. 3, 2020), <https://www.aseanbriefing.com/news/indonesias-law-on-e-commerce-clear-guidelines-and-compliance-by-november-2021/>.

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ ASEAN Briefing, *supra* note 214.

The Directorate of Consumer Empowerment (under Ministry of Trade of Indonesia's Directorate General of Consumer Protection and Trade Compliance) is the Indonesian national consumer protection agency, which the Law on Consumer Protection established.²¹⁸ The Directorate of Consumer Empowerment is tasked with making policies, enforcing laws, receiving consumer complaints, educating consumers, and raising awareness.²¹⁹ Indonesia has diverse NGOs for consumer protection, e.g., the Indonesia Consumer Association, the Institute For Consumer Development and Protection, and the Yogyakarta Consumer Institute.²²⁰ They all have a general role of cooperating with government agencies on consumer protection, promoting consumer protection, providing counsel to consumers, and receiving and settling consumer complaints.²²¹

B. MALAYSIA

Malaysians are active internet users, which has resulted in the rapid growth of the country's e-commerce.²²² The primary law governing e-commerce and online businesses is the 2006 Electronic Commerce Act, which pertains to the legal recognition and validity of electronic contracts and signatures.²²³ The Electronic Commerce Act, however, does not contain any consumer protection provisions.²²⁴

Regarding consumer protection, the 1999 Consumer Protection Act is the main law that protects Malaysian consumers against unfair practices and enforces minimum product standards.²²⁵ The Consumer Protection Act was amended in 2007 to extend its scope to cover e-commerce transactions.²²⁶ The 2012 Consumer Protection (Electronic Trade Transactions) Regulations were enacted to further strengthen consumer protection in e-commerce.²²⁷ The 2012 regulations directly apply to online business traders and online marketplace operators by imposing certain obligations on them such as disclosing required information on websites or online marketplaces, providing appropriate means to rectify errors, and maintaining records.²²⁸ The 2012

²¹⁸ DIRECTORATE GENERAL OF CONSUMER PROTECTION AND TRADE COMPLIANCE, MINISTRY OF TRADE, <https://www.kemendag.go.id/id> (last visited Feb. 12, 2022).

²¹⁹ ASEAN, HANDBOOK, *supra* note 202, at 40.

²²⁰ *Id.* at 41.

²²¹ *Id.*

²²² INT'L TRADE ADMIN., *eCommerce* (Aug. 19, 2020), <https://www.trade.gov/country-commercial-guides/malaysia-ecommerce>.

²²³ Electronic Commerce Act, 2006 (Malay.).

²²⁴ Naemah Amin & Roshazlizawati Mohd Nor, *Online shopping in Malaysia: Legal Protection for E-consumers*, 5 EUR. J. BUS. & MGMT 79, 81 (2013).

²²⁵ Consumer Protection Law, 1999 (Malay.); UNCTAD, *supra* note 197 at 30; Tham Siew Yean, *Development of E-commerce in Malaysia*, in E-COMMERCE, COMPETITION AND ASEAN ECONOMIC INTEGRATION 169, 178 (Cassey Lee & Eileen Lee eds., 2019).

²²⁶ *Id.*; Amin & Nor, *supra* note 224 at 81; Sheela Jayabalan, *E-Commerce and Consumer Protection: The Importance of Legislative Measures*, 16 JURNAL UNDANG-UNDANG DAN MASYARAKAT 93, 97 (2012).

²²⁷ Consumer Protection (Electronic Trade Transactions) Regulations, 2012 (Malay.) [hereinafter Regulation].

²²⁸ UNCTAD, *supra* note 197 at 30; Amin & Nor, *supra* note 224 at 85; Yean, *supra* note 225, at 179.

regulations aim to increase consumers' confidence in online shopping and trading which encourages the development and growth of e-commerce in Malaysia.²²⁹

The Ministry of Domestic Trade and Consumer Affairs (MDTCA) is the primary government agency responsible for policy-making and enforcing consumer protection law in Malaysia.²³⁰ Also, MDTCA is in charge of receiving consumer complaints and acts as a secretariat to the National Consumer Advisory Council (NCAC) to advise the Minister of Domestic Trade and Consumer Affairs about relevant consumer issues and the implementation of the Consumer Protection Act.²³¹ Furthermore, in Malaysia, the most notable and influential NGO in the sphere of consumer protection is the Federation of Malaysian Consumers Associations (FOMCA).²³² FOMCA coordinates the activities of 13 other non-governmental consumer protection associations in Malaysia.²³³ FOMCA also provides dispute settlements services (mediation and arbitration), educational services (training and awareness-raising), advice, and advocacy to consumers.²³⁴

C. THE PHILIPPINES

The Philippines has a large growing number of internet users, especially via mobile phone, but its e-commerce is still at a nascent stage.²³⁵ The Philippines enacted the Electronic Transaction Act in 2000 to assure the validity and legal effect of electronic documents or messages and to end discrimination between different types of technology.²³⁶ The Philippines does not have a separate consumer protection law for e-commerce. Technically, the 2000 Electronic Commerce Act does not provide additional or tailored consumer protections for e-commerce.²³⁷ The act merely refers to consumer protection law and reaffirms that the application of consumer protection law shall be extended to electronic transactions.²³⁸

The Philippines's main consumer protection law is the 1992 Consumer Act to protect the interests of consumers, promote their general welfare, and establish standards of conduct for businesses and industries.²³⁹ Furthermore, for better compliance of activities in e-commerce relating to consumer protection, three departments (the Department of Trade and Industry, the Department of Health, and the Department of Agriculture) issued the Joint Department Administrative Order regarding rules and regulations for consumer protection in a transaction

²²⁹ UNCTAD, *supra* note 197 at 30; *New Rules for Safer Elec. Transactions*, MALAYSIAN BAR (Apr. 8, 2013, 12:00 AM), <https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/new-rules-for-safer-electronic-transactions>.

²³⁰ ASEAN, HANDBOOK, *supra* note 202, at 48.

²³¹ *Id.*

²³² THE FED'N OF MALAY. CONSUMERS ASS'NS, <http://www.fomca.org.my/v1/> (last visited Feb. 12, 2022).

²³³ ASEAN, HANDBOOK, *supra* note 202, at 48; NOTTAGE ET AL., *supra* note 31, at 255.

²³⁴ *Id.*

²³⁵ Shanti Aubren T. Prado & Meg L. Regañon, *Competition and E-commerce in the Phil.*, in E-COMMERCE, COMPETITION AND ASEAN ECON. INTEGRATION 232, 232 (Cassey Lee & Eileen Lee eds., 2019).

²³⁶ Republic Act No. 8792 of June 14, 2000, An Act Providing for The Recognition and Use of Elec. Com. and Non-Com. Transactions, Penalties for Unlawful Use Thereof, And Other Purposes (Phil.).

²³⁷ UNCTAD, *supra* note 197, at 35.

²³⁸ *Id.*

²³⁹ Republic Act No. 7394 of April 13, 1992, The Consumer Act of the Phil., art. 2. (Phil.).

made through electronic means in 2008.²⁴⁰ This administrative order aims to protect consumers doing online transactions particularly when purchasing goods and services.²⁴¹ It provides several consumer protection provisions, such as information requirements for online disclosures.²⁴² The Department of Trade and Industry²⁴³ plays a central role in implementing and enforcing the 1992 Consumer Act.²⁴⁴ It also pushed for a new law regulating Filipino online platforms in 2020 and a proposed bill.²⁴⁵ The department is well-known in the regional arena and promotes consumer education.²⁴⁶

The Philippines has a different structure for its consumer protection agency than other ASEAN state members; it is in the form of a council consisting of representatives from governmental and non-governmental agencies.²⁴⁷ The 1992 Consumer Act established the National Consumer Affairs Council (NCAC) to manage, make effective, and coordinate consumer programs and policies of relevant government agencies (e.g., Department of Trade and Industry, Department of Health, Department of Agriculture, Department of Education), private organizations, and business/industry sectors.²⁴⁸ Besides the NCAC, the Philippines has a number of consumer organizations in which the Department of Trade and Industry is in the process of revisiting its guidelines for consumer movement in the country.²⁴⁹

D. SINGAPORE

Singapore has the highest GDP in the ASEAN,²⁵⁰ and its people have become more sophisticated and receptive towards e-commerce as online shoppers.²⁵¹ Without doubt, Singapore is home to the most unicorns in ASEAN, i.e., Sea, Grab, Razer, Lazada, Trax, Bigo Live, and PatSnap.²⁵² The principal law governing e-commerce in Singapore is the Electronic Transaction

²⁴⁰ Joint Dep't Admin. Order No. 1, Rules and Reguls. for Consumer Prot. in a Transaction Covered by the Consumer Act of the Philippines (R.A. 7394) through elec. means under the E-Commerce Act (R.A. 8792) [hereinafter "Joint Order"]; DEP'T OF TRADE & INDUS. PHIL. 1-23 (2008), <https://www.wipo.int/edocs/lexdocs/laws/en/ph/ph157en.pdf>.

²⁴¹ UNCTAD, *supra* note 197, at 35.

²⁴² Joint Order, sec. 5.

²⁴³ REPUB. OF THE PHIL., DEP'T OF TRADE AND INDUS., <https://www.dti.gov.ph/> (last visited Feb. 12, 2022)

²⁴⁴ ASEAN, HANDBOOK, *supra* note 202, at 55.

²⁴⁵ An Act Prot. Consumers and Merch. engaged in Internet Transactions, Creating for this Purpose the E-commerce Bureau and Appropriating Funds Therefor, S.B. No. 1591 of June 9, 2020 (Phil.).

²⁴⁶ ASEAN, HANDBOOK, *supra* note 202, at 55; *Bureau of Trade Regul. and Consumer Prot. – Dep't of Trade and Indus.*, CONSUMERS INT'L, <https://www.consumersinternational.org/members/members/the-department-of-trade-and-industry-dti/> (last visited Feb. 12, 2022).

²⁴⁷ ASEAN, HANDBOOK, *supra* note 202, at 54.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 55. The examples of the Phils.' consumer orgs. include the Consumer Union of the Phil., the Coal. for Consumer Prot. and Welfare. Inc., the Nationwide Ass'n of Consumers, Inc., and Laban Consumer, Inc. For more details please see the previous version of ASEAN, HANDBOOK (2018), [https://aseanconsumer.org/file/post_image/Handbook%20on%20ASEAN%20Consumer%20Protection%20Laws%20and%20Regulations%20\(1\)-ilovepdf-compressed.pdf](https://aseanconsumer.org/file/post_image/Handbook%20on%20ASEAN%20Consumer%20Protection%20Laws%20and%20Regulations%20(1)-ilovepdf-compressed.pdf), at 45.

²⁵⁰ STATISTIC TIMES, *supra* note 30.

²⁵¹ Kala Anandarajah et al., *E-Commerce in Singapore: Current States, Policies and Regulations*, in E-COMMERCE, COMPETITION AND ASEAN ECON. INTEGRATION 193, 217 (Cassey Lee & Eileen Lee eds., 2019).

²⁵² Hananto, *supra* note 139.

Act.²⁵³ Singapore amended the Electronic Transaction Act in 2010 in order to align with the Electronic Communications Convention, which it signed and ratified as the first ASEAN member state.²⁵⁴ The Electronic Transaction Act covers the legal recognition and legal effect of electronic information and electronic contracts²⁵⁵ without incorporating provisions on consumer protection in e-commerce.²⁵⁶ Thus, Singapore does not have separate legislation to regulate issues concerning consumer protection that the online environment raises.²⁵⁷

Nevertheless, Singapore still has the Consumer Protection (Fair Trading) Act (CPFTA) that generally applies to all kinds of transactions, including electronic transactions.²⁵⁸ CPFTA was first enacted in 2003 and has gone through amendments on several occasions until the latest one in 2016.²⁵⁹ CPFTA's main objectives are to protect consumers against unfair practices and to give consumers additional rights relating to the conformity of goods in sales contracts.²⁶⁰ For instance, Lemon Law²⁶¹ protects consumers in Singapore against defective products exhibited within six months with effective forms of redress, i.e., repair, replace, reduce the price, or provide a refund from sellers.²⁶² In addition, Enterprise Singapore and the Singapore Standards Council launched the first national standard for all stages of e-commerce transactions (pre-purchase, purchase, and post-purchase) in 2020 called Technical Reference 76 (TR 76).²⁶³ Though TR 76 is basically a guideline that is not legally binding, it offers a checklist for online businesses to develop their e-commerce processes and policies and to ensure that they provide comprehensive information available to consumers so that they can make more informed purchases.²⁶⁴

The Ministry of Trade and Industry is in charge of policy matters of the CPFTA, whereas the Competition and Consumer Commission of Singapore (CCSC) is the administering agency for the CPFTA with the authority to investigate businesses and their practices, ensure their compliance, and enforce the law against unlawful business.²⁶⁵ The key NGO in Singapore is the Consumers Association of Singapore (CASE).²⁶⁶ Although CASE is in the form of an NGO, in

²⁵³ The Electronic Transactions Act of 1st July 2010 (Sing).

²⁵⁴ UNCTAD, *supra* note 197, at 38.

²⁵⁵ Anandarajah et al., *supra* note 251, at 207-08.

²⁵⁶ UNCTAD, *supra* note 197, at 38.

²⁵⁷ *Id.*

²⁵⁸ The Consumer Protection (Fair Trading) Act (2004) (Sing.); UNCTAD, *supra* note 197, at 38; Anandarajah et al., *supra* note 251, at 211.

²⁵⁹ ASEAN, HANDBOOK, *supra* note 202, at 56

²⁶⁰ *Id.*

²⁶¹ Lemon Law was inserted in the amendment of CPFTA in 2012.

²⁶² For more information, please see, Ministry of Trade and Industry, Singapore, *General Advisory on Amendments to the Consumer Protection (Fair Trading) Act and Hire Purchase Act (Lemon Law)*, <https://www.mti.gov.sg/en/Legislation/Legislation/General-Advisory-on-Amendments-to-the-Consumer-Protection-Fair-Trading-Act-and-Hire-Purchase-Act> (last visited Feb. 12, 2022).

²⁶³ Technical Reference 76 (2020) (Sing.) [hereinafter "TR 76"].

²⁶⁴ Ayman Falak Medina, *Singapore Introduces New Guidelines for E-commerce Transactions* (June 16, 2020), <https://www.aseanbriefing.com/news/singapore-introduces-new-guidelines-e-commerce-transactions/>; Elleen Yu, *Singapore Releases Guidelines Covering all Stages of E-commerce Transactions*, ZDNET (June 12, 2020, 08.06 AM), <https://www.zdnet.com/article/singapore-releases-guidelines-covering-all-stages-of-e-commerce-transactions/>.

²⁶⁵ ASEAN, HANDBOOK, *supra* note 202, at 59; NOTTAGE ET AL., *supra* note 31, at 251.

²⁶⁶ CONSUMERS ASS'N SINGAPORE, <https://www.case.org.sg/> (last visited Feb. 12, 2022).

practice it has a very close relationship with the government, which is useful in law reform and enforcing newly enacted legislation.²⁶⁷ Also, it has a strong proactive role in educating both consumers and traders about their rights and responsibilities.²⁶⁸ CASE provides advice, assistance, and mediation services to consumers, so CASE is the first stop out-of-court that consumers can reach out to when disputes arise.²⁶⁹ In effect, CASE has a vital role in Singaporean consumer protection because the governmental approach is predominantly based on consumer empowerment for greater consumer responsibility and pro-activity.²⁷⁰ The Singaporean government encourages consumers to seek civil remedies against unlawful business without relying on or waiting for the government to take action.²⁷¹

E. THAILAND

E-commerce in Thailand has progressively grown, especially B2C e-commerce, which generates the highest value in ASEAN; therefore, the Thai government has actively promoted the country's digital economy in response to this considerable potential for its e-commerce.²⁷² The main Thai law regulating e-commerce is the Electronic Transactions Act B.E. 2544, which was first enacted in 2001.²⁷³ The Electronic Transactions Act has gone through three additional rounds of amendments, mostly to be in line with UNCITRAL instruments, i.e. both Model Laws on Electronic Commerce and Electronic Signatures and the Electronic Communications Convention, and the latest amendment was in 2019.²⁷⁴ The Electronic Transaction Act focuses mainly on providing equal legal validity, formalities, and evidentiary status between paper-based or electronic transactions.²⁷⁵ Moreover, a new draft of the Royal Decree on Regulating the Digital Platforms Services has recently been proposed for enactment under the Electronic Transactions Act in 2021.²⁷⁶ The draft Decree aims to regulate and control most digital platforms in Thailand, including some provisions geared towards consumer protection.²⁷⁷

²⁶⁷ NOTTAGE ET AL., *supra* note 31, at 25.

²⁶⁸ *Id.* at 251.

²⁶⁹ ASEAN, HANDBOOK, *supra* note 202, at 59.

²⁷⁰ Singapore Parliamentary Debates, Official Report, vol. 76, (Nov. 10, 2003), https://sprs.parl.gov.sg/search/topic?reportid=025_20031110_S0004_T0002.

²⁷¹ *Id.*

²⁷² ELECTRONIC TRANSACTIONS DEV. AGENCY (PUBLIC ORGANIZATION), MINISTRY DIGITAL ECON. AND SOCIETY, VALUE E-COMMERCE SURVEY IN THAILAND 2019, 10, 16, 20 (2020), https://www.etda.or.th/th/Useful-Resource/publications/Value-of-e-Commerce-Survey-in-Thailand-2019_EN.aspx.

²⁷³ The Electronic Transactions Act B.E. 2544, (2001) (Thai.).

²⁷⁴ The Electronic Transactions Act (No. 1) B.E. 2544, (2001) and the Electronic Transactions Act (No. 2) B.E. 2551, (2008) are based on UNCITRAL Model Laws on Electronic Commerce and Electronic Signatures. The Electronic Transactions Act (No. 3) B.E. 2562, (2019) is based on Electronic Communications Convention to which Thailand is considering becoming a party. The Electronic Transactions Act (No. 4) B.E. 2562, (2019) covers legal issues related to identity management and trust services.

²⁷⁵ UNCTAD, *supra* note 197, at 41.

²⁷⁶ A draft of Royal Decree on Regulating the Digital Platforms Services B.E. ... (Thai.), <https://www.etda.or.th/getattachment/7f142a03-3ca1-4a35-aa62-3889fbae51e2/Digital-Service-Platform-Decree-for-Hearing.aspx>.

²⁷⁷ *Id.* at sec. 16; Nont Horayangura, *The Electronic Transactions Development Agency ("ETDA") of Thailand is proposing a new draft Royal Decree on Regulating the Digital Platforms*, BAKER MCKENZIE (July 20, 2021),

Since the Electronic Transaction Act does not contain any consumer protection provisions, consumers engaging in e-commerce will fall under the scope of the Consumer Protection Act B.E. 2522 (1979),²⁷⁸ a principal law for consumer protection in Thailand.²⁷⁹ The Consumer Protection Act has been revised several times, most recently in 2019, to provide comprehensive protection for Thai consumers.²⁸⁰ The Consumer Protection Act provides fundamental rights, such as the right to be informed, the right to expect safety in the use of goods and services, or the right to receive a fair contract.²⁸¹

Apart from the Consumer Protection Act, more provisions related to consumer protection in e-commerce can be found in two other relevant laws. The first law is the Direct Sales and Direct Marketing Act B.E. 2545 (2002) (DSDM),²⁸² most recently amended in 2017, which has been applied to certain small and medium-sized enterprises (SMEs) that conduct electronic transactions under the scope of this Act.²⁸³ The DSDM provides consumers the right to terminate a contract for sale of products within a cooling-off period of seven days from the date consumers receive products²⁸⁴ and to receive a full refund within fifteen days of businesses receiving a notice from consumers.²⁸⁵

The second law is the Notification No. 70 of 2020, issued by Ministry of Commerce's Central Committee on Prices of Goods and Services,²⁸⁶ which requires all online businesses to display prices and descriptions of goods and services.²⁸⁷ The Notification was created to address an issue in which many online businesses, particularly those selling products and services on social

<https://viewpoints.bakermckenzie.com/post/102h3d1/the-electronic-transactions-development-agency-etda-of-thailand-is-proposing>.

²⁷⁸ The Consumer Protection Act B.E. 2522, (1979) (Thai.) [hereinafter "CPA"]. Thailand is the first ASEAN member state that have the consumer protection law. See NOTTAGE ET AL., *supra* note 31, at 31.

²⁷⁹ Orabhund Panuspatthna, *The Laws and Policies of Thailand in Supporting Electronic Commerce*, 16 THAI. L.J. 1, 2 (2013); Aunya Singsangob, *Thailand's Consumer Protection in Electronic Commerce: Laws and Regulations*, 13 INT'L J. COMPUTER, INTERNET & MGMT. 19.1, 19.5 (2005).

²⁸⁰ CPA (No. 4) B.E. 2562, (2019) (Thai).

²⁸¹ CPA, sec. 4, (1979) (as amended in 2019) (Thai.).

²⁸² The Direct Sales and Direct Marketing Act B.E. 2545, (2002) (Thai.) [hereinafter "DSDM"].

²⁸³ According to the DSDM (No. 3) B.E. 2560 (2017), not all businesses who sell goods and services in e-commerce will fall under the scope of this Act. Section 3 of this Act refers to Ministerial Regulation B.E. 2561, (2018), excluding certain businesses from this Act. For example, an *individual person* who is not registered as a direct marketing business with annual income less than 1.8 million Thai baht from selling goods and services in e-commerce is not under the scope of the Act.

²⁸⁴ DSDM, sec. 33, (2002) (as amended in 2017) (Thai.).

²⁸⁵ *Id.* at sec. 36.

²⁸⁶ The Price of Products and Services Act B.E. 2542, (1999) (Thai.). Minister of Commerce is a chairperson and Permanent Secretary of the Ministry of Commerce is a vice chairperson of the Central Committee on Prices of Goods and Services.

²⁸⁷ The Notification of the Central Committee on Price of Goods and Services (No.70) B.E. 2563, (2020) (Thai.) (regarding the Display of Price and Description about the Sale of Goods and Service via E-commerce or Online) [hereinafter "Notification"].

media platforms (e.g. Facebook and Instagram), intentionally choose not to display the prices of their products but rather invite customers to inquire about the information through private chats.²⁸⁸

The primary government agency responsible for protecting consumers in Thailand is the Office of the Consumer Protection Board (OCPB).²⁸⁹ The OCPB was established by the Consumer Protection Act and has been attached to the office of the Prime Minister.²⁹⁰ With the special feature of being the only executive body in Thailand, the OCPB can receive complaints, mediate disputes, and bring cases to court on behalf of consumers.²⁹¹ Also, the OCPB can coordinate with Thai police forces to advise whether certain conduct constitutes a prosecutable offense.²⁹² The work of the OCPB under a government mandate strengthens Thai consumer protection because it leads to better enforcement by assisting in prosecuting businesses and more streamlined information processing.²⁹³ This unique function of the OCPB is different from other ASEAN member states.²⁹⁴

Moreover, Thailand's current 2017 Constitution affirms consumer rights by allowing the establishment of an organization to represent consumers and protect their rights.²⁹⁵ As such, the Thailand Consumers Council (consisting of 152 consumer organizations) was formed in 2020 to focus on consumer engagement and education.²⁹⁶ Although the Thailand Consumers Council is an independent consumer body, it is also entitled to seek redress for consumers in the courts on behalf of consumers in addition to the OCPB.²⁹⁷ In fact, Thailand stands out as having several of the strongest consumer NGOs in the ASEAN dating back to the 1970s,²⁹⁸ the prominent one being the Foundation for Consumers (FFC), established in 1994.²⁹⁹ FFC actively works with consumers to formulate policy and provide advocacy.³⁰⁰

²⁸⁸ Phusadee Arunmas, *Disclose Prices or Face Fines, Warns DIT*, BANGKOK POST (July 17, 2019, 5:30 PM), <https://www.bangkokpost.com/business/1714080/disclose-prices-or-face-fines-warns-dit>; John Mendiola, *Online Sellers in Thailand Who Fail to Display Prices & Product Details Face Hefty Fines* (Oct. 7, 2020), <https://silklegal.com/online-sellers-in-thailand-who-fail-to-display-prices-product-details-face-hefty-fines/>.

²⁸⁹ OFF. OF THE CONSUMER PROT. BD., <https://www.ocpb.go.th/index.php?filename=index> (last visited Feb. 12, 2022).

²⁹⁰ *Id.*

²⁹¹ The Consumer Protection Act B.E. 2522, sec. 10, (1979) (as amended in 2019) (Thai.).

²⁹² *Id.*; NOTTAGE ET AL., *supra* note 31, at 257.

²⁹³ NOTTAGE ET AL., *supra* note 31, at 257-58.

²⁹⁴ *Id.* at 259.

²⁹⁵ CONSTITUTION OF THE KINGDOM OF THAILAND B.E. 2560 Apr. 6, 2017, sec. 46.

²⁹⁶ Thailand Consumer Council was formed on October 8, 2020 under the Establishment of Consumers Council Act B.E. 2562 (2019). See THAILAND CONSUMERS COUNCIL, <https://tcc.or.th/> (last visited Feb. 12, 2022).

²⁹⁷ The Establishment of Consumers Council Act B.E. 2562 (2019) (Thai.), sec. 14.

²⁹⁸ NOTTAGE ET AL., *supra* note 31, at 24; Frank Munger, *Revolution Imagined: Cause Advocacy Consumer Rights and the Evolving Role of NGOs in Thailand*, 9 ASIAN J. COMPAR. L. 29, 29-64 (2014).

²⁹⁹ FOUND. FOR CONSUMERS, <https://www.consumerthai.org/> (last visited Feb. 12, 2022).

³⁰⁰ ASEAN, HANDBOOK, *supra* note 202, at 62.

F. VIETNAM

As e-commerce has grown in Vietnam, businesses have become increasingly competitive in the Vietnamese market and have, as a result, attracted domestic and foreign investment.³⁰¹ Vietnam enacted the 2005 Law on E-Transactions,³⁰² providing broad provisions on e-commerce and e-signatures.³⁰³ After that, the government issued several decrees regulating e-commerce, including Decree No. 52/2013 on E-commerce (Decree 52) in 2013 to control e-commerce activities.³⁰⁴ Special emphasis should be given to Decree No. 52 because, in addition to controlling e-commerce, it also provides some consumer protection provisions, for instance, information requirements for e-commerce websites before the conclusion of contracts.³⁰⁵ Nevertheless, after Decree 52 was enacted, several underlying issues surfaced; therefore, the Ministry of Industry and Trade recently released a draft decree (Draft Decree) on January 4, 2021, to amend and supplement certain articles of Decree 52, especially regulating e-commerce platforms and activities.³⁰⁶ One unique feature of Decree 52 is that the scope of this Decree also covers social networking websites as e-commerce platforms if they meet the necessary conditions; this law is unlike the laws of any other states.³⁰⁷

In addition, Vietnam's National Assembly passed the Law on Protection of Consumers' Rights in 2010 (Consumer Protection Law).³⁰⁸ The Law broadens the legal framework to protect consumers, including those who engage in electronic transactions.³⁰⁹ To guide the implementation of a number of articles of the Consumer Protection Law, the government issued Decree No. 99/2011 (Decree 99).³¹⁰ Decree 99 incorporates a specific provision for a distance contract, a contract concluded between consumers and traders via electronic means or telephone.³¹¹ Decree No. 99 requires specific information to be included in such a contract and provides a cooling-off period for consumers.³¹² To sum up, unlike other selected member states, Vietnam has Decree 99

³⁰¹ Nguyen Van Thuan & Nguyen Thi Hong Van, *Vietnam E-commerce Market Overview and Trends*, in E-COMMERCE, COMPETITION AND ASEAN ECONOMIC INTEGRATION 271, 271 (Cassey Lee & Eileen Lee eds., 2019); Linh Bui et al., *Vietnam: Stricter E-commerce Regulations to Be Issued* (Nov. 19, 2020), <https://www.allens.com.au/insights-news/insights/2020/11/vietnam-stricter-e-commerce-regulations-to-be-issued/>.

³⁰² Law no. 51/2005/QH11 of November 29, 2005 on E-transactions (Viet.).

³⁰³ UNCTAD, *supra* note 197, at 44.

³⁰⁴ Decree No. 52/2013/ND-CP dated May 16, 2013 of the Government on E-commerce (Viet.) [hereinafter "Decree 52"].

³⁰⁵ *Id.* arts. 15, 16, and 18.

³⁰⁶ Yee Chung Seck & Manh Hung Tran, *Vietnam: Updated draft regulations that affect e-commerce platforms* (Feb. 16, 2021), <https://www.globalcompliancencnews.com/2021/02/16/vietnam-draft-regulations-affecting-e-commerce-platforms280121/>; Vietnam Briefing, *Vietnam's Draft Decree on E-commerce: Impact on Foreign Investors* (June 9, 2021), <https://www.vietnam-briefing.com/news/vietnams-draft-decree-e-commerce-impact-on-foreign-investors.html/>.

³⁰⁷ *Id.*

³⁰⁸ Law No.59/2010/QH12 of November 17, 2010 on Protection of Consumers' Rights (Viet.).

³⁰⁹ UNCTAD, *supra* note 197, at 44.

³¹⁰ Decree No. 99/2011/ND-CP of October 27, 2011, Detailing and Guiding a Number of Articles of the Law on Protection of Consumer Rights (Viet.) [hereinafter "Decree 99"].

³¹¹ Mayer Brown, *Consumer Rights Protection Law in Vietnam* (March 30, 2012), https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2012/03/consumer-rights-protection-law-in-vietnam/files/consumer-rights-protection-law-in-vietnam/fileattachment/consumer_rights_protection_law_vietnam.pdf.

³¹² *Id.*

that provides consumer protection for e-commerce with a supplement of more detailed e-commerce rules under Decree 52.

The Vietnam Competition and Consumer Authority (VCCA) under the Ministry of Industry and Trade is the state agency responsible for implementing the Consumer Protection Law.³¹³ It is also in charge of making policy, governing standard contracts and general trading conditions, receiving and mediating consumer complaints, undertaking consumer education, and raising awareness among consumers.³¹⁴ Vietnam's most notable NGO for consumers is Vietnam Consumer Protection Association (VICOPRO).³¹⁵ It is a central association established in 2018 after the restructure of the former Vietnam Standards and Consumers Association (VINASTAS).³¹⁶ VICOPRO has closely cooperated with VCCA to implement the 2010 Consumer Protection Law and relevant legislation.³¹⁷

In summary, without a uniform consumer protection law in ASEAN, member states have different types and substances of domestic laws following their traditional legal structures. Apart from Singapore, which issues a non-legally binding guideline, the other five states enact laws that specifically govern consumer protection in the e-commerce context. They have *sui generis* laws in various types, i.e., an act, a decree, a regulation, a joint department administrative order, a notification, separately from their main consumer protection and e-commerce laws.

IV. PRE-CONTRACTUAL INFORMATION DUTIES: AN EXAMPLE OF THE INCONSISTENCY AND INEFFICIENCY OF LAWS IN ASEAN

After observing laws (both soft law and hard law) of the selected six member states, we have seen that all states have at least one law regulating consumer protection for e-commerce despite different styles and types of laws. This part goes into a deep dive on the substance of one selected principle to protect consumers in order to examine the consistency and adequacy of member states' laws.

Governments worldwide use many legal principles as a market intervention to protect consumers, such as governing unfair contract terms, providing the right of withdrawal, or regulating digital products. Nevertheless, I choose the principle of "pre-contractual information duties" to demonstrate the problem arising out of no uniform consumer protection law in ASEAN. These duties are based on the fundamental right of consumers: "the right to be informed," which is deep-rooted in the realm of consumer protection law. Pre-contractual information duties are very impactful because they give consumers protection even before the conclusion of contracts. Also, it provides clear evidence of the reason why ASEAN should start to think about a concrete plan for harmonizing consumer protection laws of its member states.

³¹³ VIET. COMPETITION & CONSUMER AUTHORITY, <http://en.vcca.gov.vn/> (last visited Feb. 12, 2022).

³¹⁴ ASEAN, HANDBOOK, *supra* note 202, at 66.

³¹⁵ *Id.*

³¹⁶ *Id.*

³¹⁷ *Id.*

Pre-contractual information duties are simply explained as duties imposed on a business to disclose certain material information to a consumer before the conclusion of a contract.³¹⁸ Pre-contractual information duties have been used to rectify asymmetries,³¹⁹ promote transparency, support informed consent in contract making decisions,³²⁰ and enhance competition and innovation.³²¹ Recently, the consumer protection law paradigm has shifted from post-redress to pre-protection to avoid international consumer litigation, which is time-consuming, costly, and ineffective.³²² In this light, pre-contractual information duties are a crucial dimension of any e-commerce activity. It has been a center of interest from scholars all over the world in multiple fields.

Many international organizations issued soft laws—non-legally binding instruments—yet influential regarding pre-contractual information duties. One of them is the United Nations (UN), which set a milestone for developing consumer protection law in the United Nations Guidelines for Consumer Protection (UNGCP).³²³ The UNGCP suggests that the UN member states continuously develop transparent and effective consumer policies to enhance consumer confidence³²⁴ and ensure that businesses and consumers know about their rights and obligations in e-commerce.³²⁵ More importantly, the 2015 UNGCP, the most recent one, refers to another significant international guideline and standard, the Guidelines for Consumer Protection in the Context of Electronic Commerce of the Organization for Economic Cooperation and Development (OECD).³²⁶ The OECD guidelines ensure, like the UNGCP, that online consumers benefit from the same protection as those buying from physical stores.³²⁷ Online disclosure is one of eight general principles suggested in the OECD guidelines.³²⁸ The guidelines recommend businesses provide “clear and easily accessible information”³²⁹ about businesses themselves,³³⁰ goods and

³¹⁸ David Kästle-Lamparter, *Pre-Contractual Information Duties*, in COMMENTARIES ON EUROPEAN CONTRACT LAWS 383, 384-85 (Nils Jansen & Reinhard Zimmermann eds., 2018).

³¹⁹ Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 635 (1979); Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & ECON. 491, 492 (1981).

³²⁰ OECD, CONSUMER POL’Y TOOLKIT 78, 82 (2010), <https://read.oecd.org/10.1787/9789264079663-en?format=pdf>.

³²¹ Christoph Busch, *The Future of Pre-contractual Information Duties: from Behavioural Insights to Big Data*, RESEARCH HANDBOOK ON EU CONSUMER & CONTRACT L. 221, 223 (Christian Twigg-Flesner ed., 2016).

³²² *Id.* at 19.

³²³ GA. RESOL. 39/248 (1985). The first one was launched in 1985. The UN revised the UNGCP in 1999 and then in 2015. *See* ECON. & SOCIAL COUNCIL RES. E/1999/INF/2/Add.2 (July 26, 1999); GA. RESOL. 70/186 (2015).

³²⁴ *Id.* sec I, No. 63.

³²⁵ *Id.* sec I, No. 64.

³²⁶ OECD, GUIDELINES FOR CONSUMER PROTECTION CONTEXT ELECTRONIC COM. (2016), <https://www.oecd.org/sti/consumer/ECommerce-Recommendation-2016.pdf> [hereinafter “OECD, THE GUIDELINES”] The OECD Guidelines were first adopted in 1999 and updated in 2016.

³²⁷ I. Benöhr, *The United Nations Guidelines for Consumer Protection: Legal Implications and New Frontiers*, 43 J. CONSUMER POL’Y 105, 106-7, 111 (2020).

³²⁸ OECD, THE GUIDELINES, *supra* note 327, at principle III.

³²⁹ *Id.* at 15.

³³⁰ *Id.* The information includes, for example, identifications (legal name of the business and name under which it trades), appropriate and effective resolution of any disputes that may arise, principal geographic address, including an e-mail address, a telephone number or other electronic means of contact, any relevant government registration or license information.

services,³³¹ and transactions.³³² The UN and the OECD guidelines confirm that consumer protection has gradually transformed from being constrained on a national topic to becoming a core supranational law subject.³³³

At the regional level, the EU launched the two most recent directives specifically on consumer protection that impose significant pre-contractual information duties applied to online contracts. They are the 2011 Consumer Right Directive³³⁴ and its amendment provisions under the 2019 Directive on Better Enforcement and Modernization of EU Consumer Protection, in short, the Omnibus Directive.³³⁵ At the national level it is impossible not to mention the US, the world's most influential e-commerce country which is home to many influential online marketplaces and online stores. The Federal Trade Commission (FTC), the US government agency for consumer protection, has promulgated and created many FTC rules, guidance documents, and advice to properly accommodate online activities. For example, 2000's Electronic Commerce: Selling Internationally, A Guide for Businesses³³⁶ and 2013's Dot Com Disclosures: How to Make Effective Disclosures in Digital Advertising (hereinafter Dot Com Disclosures Guidance)³³⁷ both have some similar provisions under the same concept with EU directives. In fact, the FTC Dot Com Disclosures Guidance has even more complex principles regarding efficient methods for disclosing information than the EU directives.

The EU and the US have different approaches towards pre-contractual information duties in consumer contracts. The EU represents the legislature's *ex-ante* law model through directives that explicitly provide pre-contractual information duties at the outset for protecting consumers. In contrast, the US has the judiciary's *ex-post* law model. The courts specify that an omission of material information is deceptive and list pieces of information that satisfy the materiality list of

³³¹ *Id.* at 16. The information should describe goods or services offered that is sufficient to enable consumers to make informed decisions regarding transactions.

³³² *Id.* The information includes for example, initial price; terms, conditions, and methods of payment, including contract duration; terms of delivery or performance; details of and conditions related to withdrawal, termination or cancellation, after-sales service, return, exchange, refunds, warranties and guarantees; information on available dispute resolution and redress options.

³³³ Geraint Howells et al., *Consumer Law in its International Dimension*, HANDBOOK RES. ON INT'L CONSUMER L. 1, 1-15 (2d ed. 2018).

³³⁴ Directive 2011/83 of the European Parliament and of the Council of 25 October 2011 on Consumer Rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council, 2011 O.J. (L 304) [hereinafter "the Consumer Rights Directive"].

³³⁵ Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019 amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the Better Enforcement and Modernization of Union Consumer Protection Rules, 2019 O.J. (L 328) [hereinafter "the Omnibus Directive"].

³³⁶ FED. TRADE COMM'N, ELECTRONIC COMMERCE: SELLING INTERNATIONALLY, A GUIDE FOR BUSINESSES (2000), <https://www.ftc.gov/system/files/documents/plain-language/alt067-electronic-commerce-selling-internationally-guide-businesses.pdf>.

³³⁷ FED. TRADE COMM'N, DOT COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital> [hereinafter "FTC, DOT COM DISCLOSURES GUIDANCE"].

these duties.³³⁸ Despite the apparent differences in these models, the substance of EU and US laws has converged such that they actually regulate and require disclosure of similar material information. The convergence of laws in protecting consumers of e-commerce is probably because of the cross-border nature of e-commerce that connects the world and creates a singular market. This is the reason why governments around the world impose the same types of laws to protect consumers. As such, pre-contractual information duties for businesses to disclose material information to consumers have long been recognized at the national, regional, and international levels as the best tool to protect consumers from information asymmetry which is the root cause of fraud in e-commerce.

Despite the absence of regional legislation, there is a movement to create pre-contractual information duties for e-commerce at the national level showing a trend for legal development in this region. Most member states have general consumer protection laws that provide consumers with the right to information.³³⁹ However, because of the nature of e-commerce wherein consumers rely largely on the information given online, all six states have issued separate laws in addition to their general consumer protection laws about pre-contractual information duties in e-commerce³⁴⁰ (although Thailand has a few provisions³⁴¹ and Singapore has a non-binding guideline). It is useful to analyze the terms that the selected six member states use to refer to the principle of mandatory information disclosure when concluding a contract. Singapore and Vietnam (and the EU Directives) use the exact wording, *pre-contractual information duties*.³⁴² The laws of the remaining four states—Indonesia, Malaysia, the Philippines, and Thailand—do not use this precise wording for these duties.³⁴³ Regardless of the word choice referring to this principle, the legal implication and effect are the same. These states all come to the same conclusion that pre-contractual information duties require information disclosure before the conclusion of a contract,

³³⁸ A consumer protection term that refers to “a failure to disclose” under US contract law. See also NAT’L CONSUMER L. CTR., *Unfair and Deceptive Acts and Practices* [hereinafter “UDAP”] § 4.2.15 (10th ed. 2021), updated at www.nclc.org/library.

³³⁹ For example, Law No. 8 of 1999’s on Consumer Protection, art. 4 “The rights of the consumers are: (c.) to obtain correct, clear and honest information on the condition and warranty of the goods and/or services...”; R.A. 7394 (Indon.), The Consumer Act of the Philippines, art. 2 “...the State shall implement measures to achieve the following objectives: (c.) provision of information and education to facilitate sound choice and the proper exercise of rights by the consumer ...”; CPA, sec. 4 “A consumer has the rights to be afforded the following protection: (1) the right to information including correct and adequate description of quality as to the goods or services (Thai); Law No.59/2010 on Protection of Consumers’ Rights, art. 8 “Consumer Rights (2.) Being provided accurate and complete information about organizations or individuals trading goods or services; contents of transaction of goods and/or services; the source and origin of goods; being provided with invoices and vouchers and documents relating to the transactions and other necessary information about goods and/or services that consumers purchase and/or use.” (Viet.).

³⁴⁰ GR 80 (Indon.); Regulations (Malay.); Joint Order (Phil.); TR 76 (Sing.); Decree 99 and 52 (Viet.).

³⁴¹ Thailand does not enact comprehensive law with several provisions applied for consumer protection in e-commerce like other states. Instead, Thailand has pre-contractual duties to disclose information only about price and description of goods and services in its Notification. Broad protection still resides in the CPA and the DSDM, which applies to e-commerce businesses (except for some kinds of individuals or businesses under the SMEs regime).

³⁴² TR 76, rule no. 3 “Pre-purchase activities” (Sing.); Decree 52, art. 28(2)(d) “Such information must satisfy the following requirements: Being displayed clearly to customers before the time they send a proposal for conclusion of contract.” (Viet.).

³⁴³ The Consumer Rights Directive, arts. 6.

for example, in an electronic offer (Indonesia),³⁴⁴ on a website (Malaysia),³⁴⁵ on businesses' e-commerce or online systems (Thailand),³⁴⁶ or to enable consumers to make an informed decision (the Philippines).³⁴⁷

The legal measure from the selected six ASEAN member states offers clear evidence of how pre-contractual information duties have developed in order to protect consumers in e-commerce. An analysis of these existing pre-contractual information duties supports the claims that a uniform law with comprehensive rules is feasible and that cooperation among member states is essential. This is because without a unified or harmonized consumer protection law in the region, each ASEAN member state, no doubt, ends up with different substance for its legal measures. This substantive difference extends to a member states' policy, source of laws, and application of consumers' right to information.

To highlight the differences and similarities between legislation in ASEAN member states, I use provisions of the 2011 Consumer Right Directive (hereinafter "the CRD") with its amendment from the 2019 Omnibus Directive (hereinafter "the OD") as a base for a comparative study. This is because the CRD provides the most comprehensive rules on pre-contractual information duties. Even the US leading online marketplaces, such as Amazon and eBay, also follow the strictest rules of the CRD to sell their products worldwide, including in Europe. Therefore, most pre-contractual information duties under the CRD can be considered an international standard that other countries should follow. Additionally, I will bring US' FTC Dot Com Disclosures Guidance into the conversation when it relates to efficient methods for disclosure since it is the most detailed rule at present.

For a clear setting, I grouped and divided the pre-contractual information duties of the CRD into three main topics: information to be disclosed, methods for disclosing information, and enforcement and sanctions. The analysis of these topics contains not only an explanation of the legal provisions of these selected six states but also a comparative analysis of these laws and the international standard.

A. INFORMATION TO BE DISCLOSED

Pieces of information that are required to be pre-contractually disclosed in this section are based on 21 pieces of information under the EU directives.³⁴⁸ They are grouped into five categories, which are information about products,³⁴⁹ businesses,³⁵⁰ contracts,³⁵¹ the right of withdrawal,³⁵² and code of conducts and ADR.³⁵³ In brief, all selected six states have at least two

³⁴⁴ GR 80, art. 39. (Indon.).

³⁴⁵ Regulation, sec. 3(1) (Malay.).

³⁴⁶ Notification, clause 4 (Thai.).

³⁴⁷ Join Order, sec. 5(3) (Phil.).

³⁴⁸ The Consumer Rights Directive, art. 6(1).

³⁴⁹ *Id.* at arts. 6(1)(a),(e),(ea),(f),(r), and (s).

³⁵⁰ *Id.* at arts. 6(1)(b),(c), and (d).

³⁵¹ *Id.* at arts. 6(1)(g),(l),(m),(q),(o), and (p).

³⁵² *Id.* at arts. 6(1)(h),(k),(i), and (j).

³⁵³ *Id.* at arts. 6(1)(n), and (t).

kinds of basic information requirements for online contracts, i.e., information about products and businesses. Interestingly, all the states (except Thailand, which has a broad provision concerning the right to information) prioritize information about traders before other kinds of information, unlike the EU's CRD. The reason behind this prioritization is that ASEAN is facing widespread online fraud in the region.³⁵⁴ Online fraud cases occur because consumers lack information and awareness about the identity of online businesses—the counterparty to a contract. Consequently, these governments use the mandated disclosure to locate the responsible party online in a dispute and fight against online fraud.

Regarding the information about products, all six states basically require disclosure of the main characteristics of goods and services so consumers can specify correct goods or services.³⁵⁵ Only Singapore's TR 76 Guidelines for e-commerce transactions, the latest to come out among the other states in 2020, has a provision in accordance with the latest rule of the EU in 2019, the OD,³⁵⁶ concerning the disclosure of functionality and interoperability of digital products.³⁵⁷ Another important piece of information about products is about its price.³⁵⁸ All selected six member states share a focus on the price of a product.³⁵⁹ Thailand, to provide an example, issued a separate law requiring online businesses to display prices and descriptions of goods and services to prevent online businesses, especially those selling products via social media, from inviting customers to inquire about information through private channels; a practice that allows online businesses to intentionally hide the price.³⁶⁰ Additionally, only Vietnam has a similar provision as the EU's CRD concerning disclosure of the costs for the use of communication, i.e., internet, to conclude distance contracts, including online contracts.³⁶¹ Regarding the information about traders, all states require the disclosure of this kind of information.³⁶² Interestingly, all of them even order the disclosure of identities of businesses first before other kinds of information, which is different than the CRD.³⁶³ The Philippines' law has the most detailed requirements for identities and contact details of online businesses, followed by Vietnam, Singapore, and Malaysia. The required information of these four states, such as registration number or representative agent, even goes beyond the requirement in the CRD.³⁶⁴ In terms of traders' contact details, the Philippines, Vietnam, and Singapore require geographical address, email, and telephone number,³⁶⁵ whereas

³⁵⁴ Odonkor, *supra* note 17.

³⁵⁵ The Consumer Rights Directive, art. 6(1)(a); GR 80, art. 39(1)(a) (Indon.); Regulation, sec. 3(1) sched. 4 (Malay.); Joint Order, sec. 5(2) (Phil.); TR 76, no. 3.2.3 (Sing.); Notification, clause. 4 (Thai); Decree 99, art 17(1)(b) and Decree 52, art. 30 (Viet.).

³⁵⁶ The Consumer Rights Directive, arts. 6(1)(r) and (s) amended by the Omnibus Directive, art. 4(4)(a)(iv).

³⁵⁷ TR 76, no. 3.2.3 (Sing.).

³⁵⁸ The Consumer Rights Directive, arts. 6(1)(e),(ea), and (f).

³⁵⁹ GR 80, art. 39(1)(b) (Indon.); Regulation, sec. 3(1) sched. 5 (Malay.); Joint Order, sec. 5(3.4) (Phil.); TR 76, no. 3.2.3 (Sing.); Decree 52, art. 31 (Viet.).

³⁶⁰ Notification, clause 4 (Thai.).

³⁶¹ Decree 99, art 17(1)(f) (Viet.); The Consumer Rights Directive, arts. 6(1)(f).

³⁶² GR 80, art. 39(1)(a) (Indon.); Regulation, sec. 3(1) sched. 1, 2 (Malay.); Joint Order, sec. 5(1) (Phil.); TR 76, no. 3.2.2 (Sing.); CPA, sec. 4 (Thai.); Decree 99, art 17(1)(a) (Viet.); Decree 52, arts. 29 (1)(2) (Viet.).

³⁶³ The Consumer Rights Directive, arts. 6(1)(b), (c), and (d).

³⁶⁴ Joint Order, sec. 5(1) (Phil.); Decree 99, art 17(1)(a) (Viet.); Decree 52, arts. 29 (1)(2) (Viet.); TR 76, no. 3.2.2 (Sing.); Regulation, sec. 3 sched. 1, 2 (Malay.).

³⁶⁵ Joint Order, secs. 5(1.3) and (1.4) (Phil.); Decree 99, art 17(1)(a) (Viet.); Decree 52, arts. 29 (Viet.); TR 76, no. 3.2.2 (Sing.).

Malaysia requires only the latter two.³⁶⁶ Indonesia and Thailand require only the identities of online businesses.³⁶⁷

Regarding the information about contracts, all five states except Thailand provide rules demanding disclosure of information about payment and delivery, which are very substantial for a sales contract.³⁶⁸ Thailand does not have a single provision related to the arrangement of payment and delivery. Singapore is the only state that requires online businesses to display information about their complaint handling policy.³⁶⁹ Another important piece of information for a sales contract is a legal guarantee of the conformity of products.³⁷⁰ Most states, i.e., Indonesia, the Philippines, Singapore, and Vietnam, explicitly require this pre-contractual disclosure about the conformity of products.³⁷¹ In fact, the Philippines, Singapore, and Vietnam even include disclosure of any available warranties, which is beyond the EU's CRD.³⁷² Additionally, only the Philippines and Singapore require pre-contractual disclosure about after-sale services.³⁷³ Moreover, regarding the disclosure of the duration of a contract,³⁷⁴ although the Philippines does not have a direct provision about it, the Philippines is the only state that requires e-commerce sellers to disclose any conditions relating to contract renewal or extension.³⁷⁵ It should be noted that no state mentions the disclosure of commercial or financial guarantees.³⁷⁶

Regarding the information about the right of withdrawal, Vietnam has the most comprehensive and similar rule to the CRD,³⁷⁷ followed by Singapore and the Philippines. Vietnamese law imposes a duty for online sellers who own e-commerce websites to disclose information concerning return or exchange policies; terms, methods, and cost of this return; and methods for obtaining refunds on their websites.³⁷⁸ Vietnam even has a provision regarding liability to pay in service contracts provided to consumers before they exercise the right of withdrawal, similar to the CRD rule.³⁷⁹ Singapore also has a clear provision requiring e-retailers and e-marketplaces to provide information about return, refund, and exchange policies available to customers before any online transactions take place.³⁸⁰ The Philippines simply states that sellers

³⁶⁶ Regulation, sec. 3 sched. 3 (Malay.).

³⁶⁷ GR 80, art. 13(1)(a) (Indon.); CPA, sec. 4 (Thai.).

³⁶⁸ The Consumer Rights Directive, art. 6(1)(g); GR 80, arts. 39(1)(d),(e) (Indon.); Regulation, sec. 3(1) sched. 6, 8 (Malay.); Joint Order, secs. 5(3.5.2), (3.5.3) (Phil.); TR 76, no. 3.2.4 (Sing.); Decree 99, art 17(1)(b), (c) (Viet.); Decree 52, arts. 33, 34 (Viet.).

³⁶⁹ TR 76, no. 6.1 (Sing.).

³⁷⁰ The Consumer Rights Directive, arts. 6(1)(l).

³⁷¹ GR 80, art. 13(1)(b) (Indon.); Joint Order, secs. 5(3.5.8) (Phil.); TR 76, no. 3.2.3 (Sing.); Decree 53, art 32(1)(c) (Viet.).

³⁷² The Consumer Rights Directive, art. 6(1)(l); Joint Order, secs. 5(3.5.8) ("any available warranties and guarantees") (Phil.); TR 76, no. 3.2.3 ("guarantees and warranties available for the product") (Sing.); Decree 53, art 32(1)(c) ("Product warranty policy") (Viet.).

³⁷³ The Consumer Rights Directive, art. 6(1)(m); Joint Order, secs. 5(3.5.8) (Phil.); TR 76, no. 3.2.3 (Sing.).

³⁷⁴ The Consumer Rights Directive, arts. 6(1)(o) and (p).

³⁷⁵ Joint Order, secs. 5(3.5.7) (Phil.).

³⁷⁶ The Consumer Rights Directive, art. 6(1)(q).

³⁷⁷ *Id.* at arts. 6(1)(h), (k), (i), and (j).

³⁷⁸ Decree 52, art. 32(1)(b) (Viet.).

³⁷⁹ *Id.* at art. 32(1)(d) (Viet.).

³⁸⁰ TR 76, no. 5.5 (Sing.).

in e-commerce must disclose details about returns, refunds, cooling-off periods, and the right of withdrawal in order to allow consumers to make informed decisions.³⁸¹ Indonesia does not specifically mention disclosure of a cooling-off period or the withdrawal right before the conclusion of a contract. It only requires that the information about returning mismatched goods or services must be in electronic contracts and in accordance with the given offers.³⁸² Both Malaysia and Thailand do have legal provisions regarding the right of withdrawal and cooling off period (ten days for Malaysia and seven days for Thailand), not in a pre-contractual stage, but rather after the conclusion of a contract.³⁸³

Regarding the information about a code of conduct and ADR,³⁸⁴ no state has a provision about a code of conduct, but two states have rules regarding the ADR, the out-of-court redress mechanism. The first state is the Philippines, whose law requires online sellers to clearly and conspicuously specify the information about the applicable law and forum to govern any contractual disputes at the earliest possible stages of interaction with consumers.³⁸⁵ The second state is Vietnam, whose requirement covers not all online businesses but only e-commerce trading floors (online marketplaces) to display information about a mechanism to settle complaints and disputes between contracting parties.³⁸⁶

At present, most states (except the Philippines and Thailand)³⁸⁷ not only explicitly impose pre-contractual information disclosure on online sellers but also online marketplaces.³⁸⁸ The governments of the Philippines and Thailand are currently working on enacting new laws that mainly regulate e-commerce platforms, including online marketplaces.³⁸⁹ During this period, Vietnam also released a draft law in 2020 to amend its current law, Decree 52, that added more stringent rules for activities of e-commerce platforms and foreign investment in addition to its existing rules for e-commerce trading floors (online marketplaces).³⁹⁰

³⁸¹ Joint Order, secs. 5(3.5.5) and (3.5.6) (Phil.).

³⁸² GR 80, art. 53(1)(g) (Indon.).

³⁸³ Direct Sales and Anti-Pyramid Scheme Act 1993, arts 25-27 (Malay.); see also Amin & Mohd Nor, *supra* note 224, at 85; DSDM, art. 33 (Thai.). Again, for Thailand, all e-commerce sellers must comply with the right of withdrawal and cooling off period except individuals or SMEs businesses with certain conditions, which are outside the scope of the law.

³⁸⁴ The Consumer Rights Directive, arts. 6(1)(n) and (t).

³⁸⁵ Joint Order, secs. 5(3.5.11) (Phil.).

³⁸⁶ Decree 52, arts. 38(2)(h) (Viet.).

³⁸⁷ Joint Order sec. 1 states that “this order shall apply to all retailers, sellers, distributors, suppliers or manufacturers engaged in electronic commerce with consumers.” (Phil.); CPA, sec. 4(1) provides only broad provision applying to both offline and online transactions that consumers have “the right to information including correct and adequate description of quality as to the goods or services,” and the law does not mention about the online marketplace.

³⁸⁸ GR 80, art. 5 (Indon.), Regulation, sec. 3(1) (Malay.), TR 76, no. 3.2.2 (Sing.), Decree 52, arts 3(8)(9) (Viet.).

³⁸⁹ An Act Protecting Consumers and Merchants Engaged in Internet Transactions, Creating for this Purpose the E-commerce Bureau and Appropriating Funds, S.B. No. 1591 of June 9, 2020 (Phil.); A draft of Royal Decree on Regulating the Digital Platforms Services B.E. ... (Thai.).

³⁹⁰ Vietnam Briefing, *supra* note 306; Linh Bui et al., *supra* note 301; Linh Bui, *Stringent E-commerce Rules for Vietnam Coming Up Ahead*, VIR (May 8, 2021, 09:00 AM), <https://vir.com.vn/stringent-e-commerce-rules-for-vietnam-coming-up-ahead-84030.html>.

In addition, of the three rules under the EU's CRD that are specifically applied to online marketplaces,³⁹¹ most states have one out of three similar rules to the CRD. The Philippines, Vietnam, Singapore, and Malaysia (these states are placed in order of more to less detailed rules) have their laws or a legal instrument that require a business to incorporate its identification in terms of registration number, head office, or representative agent, for the purpose to help consumers determine whether the person with whom they are concluding a contract is a business or not.³⁹² Nevertheless, no state has added a further rule for online marketplaces to explicitly disclose the person responsible for obligations related to the contract, either for online sellers or a marketplace.³⁹³ Hence, consumers need to check the details of sellers, particularly their identification, on their own. For the last rule in the CRD regarding the disclosure of a method for ranking offers (e.g., by price, consumer ratings) on online marketplaces, among the selected six states, this rule can only be found in the new draft law of Thailand.³⁹⁴

B. METHODS FOR DISCLOSING INFORMATION

None of the states have a comprehensive rule providing several methods for disclosing information that is similar to the EU's CRD³⁹⁵ or a detailed rule concerning how to effectively disclose required information in a clear and comprehensible manner as provided in the US' FTC Dot Com Disclosures Guidance.³⁹⁶

With the exception of Malaysia, the other states have general and broad provisions for disclosing information. In essence, despite the different wordings of the laws in the five states, online businesses must disclose pre-contractual information in a clear and comprehensible manner.³⁹⁷ Singapore and Vietnam have more detailed rules that are closer to the US' FTC Dot Com Disclosures Guidance. Singapore stands out from other states because it offers some detailed rules in addition to the CRD and has the closest rules to the FTC Dot Com Disclosures Guidance. Singapore is the only state that highlights the importance of pre-contractual information disclosure, and many rules in this regard can be found in several places throughout its TR 76.³⁹⁸ Not only does Singapore's TR 76 provide the kinds of pre-contractual information that must be disclosed in general, but another provision also specifies thirteen pieces of information that online businesses must clearly provide when customers place products in a shopping cart or at any point before customers make payment.³⁹⁹ This rule is more comprehensive than those found in either the EU

³⁹¹ The Consumer Rights Directive, art. 6a.

³⁹² Compare to the Consumer Rights Directive, art. 6a(1)(b).

³⁹³ *Id.* at art. 6a(1)(d).

³⁹⁴ A draft of Royal Decree on Regulating the Digital Platforms Services B.E. ... (Thai.), sec. 16(1)(2).

³⁹⁵ The Consumer Rights Directive, arts. 6(1) and 8.

³⁹⁶ FED. TRADE COMM'N, DOT COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital>.

³⁹⁷ GR 80, art. 13(2) (Indon.) "valid, clear and truthful"; Joint Order, secs. 5 "accurate, clear and easily accessible" (Phil.); TR 76, no. 3.3.1 "accurate, unambiguous, precise, easy to understand (Sing.); Notification, clause 4 "clear, complete, accessible, easy to read" (only for information about products and prices) (Thai.), Decree 52, art. 28(2)(a) "obvious, accurate, searchable and understandable" (Viet.).

³⁹⁸ TR 76, no. 4.2 (Sing.).

³⁹⁹ *Id.*

or the U.S.⁴⁰⁰ Moreover, Singapore's TR 76 is similar to the FTC Dot Com Disclosures Guidance in that its TR 76 suggests the method for disclosure should relate to (1) the proximity and placement of information and (2) the consistency and uniformity of structure and layout to avoid confusion and misrepresentation.⁴⁰¹ Nevertheless, it should be noted that while TR 76 specifically governs pre-contractual information disclosure with the same scope of the EU directives, it is different from the FTC Dot Com Disclosures Guidance that applies only to online advertisement.⁴⁰²

Another member state that should be pointed out is Vietnam because it also has similar rules to the FTC Dot Com Disclosures Guidance, despite these rules not always containing as many details as in Singapore's TR 76. Vietnam's Decree 52 requires the placement of required information to be accessible online and arranged in corresponding sections on relevant websites. Moreover, all required information must be clearly displayed to customers before a contract is concluded.⁴⁰³

With regard to the requirement about which language is used to provide information, although the working language of ASEAN is English,⁴⁰⁴ some states still maintain their national language requirement. For instance, Thailand clearly specifies that information concerning price must always be in Thai (but allow additional languages as per the preference of businesses).⁴⁰⁵ Vietnam explicitly states that languages expressing general trading conditions must always include Vietnamese.⁴⁰⁶ In contrast, Indonesia does not impose a language requirement in the pre-contractual process. Instead, it requires that e-contracts with "consumers in Indonesia must use the Indonesian language."⁴⁰⁷ Singapore does not have a language requirement, but its guideline suggests that e-businesses determine which languages are likely to provide consumers the best opportunities, and, if they offer language options, these options should be clear and easily accessible for customers to switch to their preferred languages.⁴⁰⁸ Rules of these states are similar to the CRD, which also allows member states to maintain or introduce rules in their national language.⁴⁰⁹

Concerning delivery and payment restrictions, only the Philippines, Singapore, and Vietnam demand pre-contractual disclosure of delivery restrictions before the conclusion of a

⁴⁰⁰ Compare TR 76 with Consumer Rights Directive, art. 8(2) and the FTC Dot Com Disclosures Guidance

⁴⁰¹ See *id.* at no. 3.3.1 "prominently disclosed with ease of navigation with the website or mobile platform, consistent and uniform in terms of structure and layout to avoid confusion and misrepresentation as much as possible" (Sing.).

⁴⁰² FTC, DOT COM DISCLOSURES GUIDANCE, *supra* note 338, at 8-21 (The Guidance provides six considerations for helping evaluate whether a disclosure is clear and conspicuous or not) "1) proximity and placement; 2) prominence; 3) distracting factors in the advertisement; 4) repetition; 5) multimedia messages and campaigns; 6) understandable language".

⁴⁰³ Decree 52, arts. 28(2)(b), (d) (Viet.).

⁴⁰⁴ ASEAN Charter, art. 34.

⁴⁰⁵ Notification no. 70, clause 4 para. 2 (Thai.).

⁴⁰⁶ Decree 52, art. 32(2) (Viet.).

⁴⁰⁷ GR 80, art. 55 (Indon.).

⁴⁰⁸ TR 76, no. 3.3.4 (Sing.).

⁴⁰⁹ The Consumer Rights Directive, art. 6(7) (EU).

contract.⁴¹⁰ However, unlike the CRD, these states do not fix the exact time at the beginning.⁴¹¹ Additionally, unlike the provisions in the CRD, no state mentions information about an obligation to pay before placing an order, or provides legible words on an activating button that indicates the consumers are placing an order with an obligation to pay.⁴¹² Likewise, no state mentions a provision requiring disclosure of selected information in the case of limited space or time to display information.⁴¹³

For the last formal requirement, almost all states (except Malaysia and the Philippines) have provisions concerning confirmation of concluded contracts. Among the four states, Singapore has more requirements than other states and even the CRD.⁴¹⁴ Singapore's TR 76 suggests both confirmations of payment and an order.⁴¹⁵ In any event, the order confirmation should contain certain information, such as an order date and number, the quantity of products, an estimated time of delivery, and methods of contacting online businesses (customer support).⁴¹⁶ Indonesia's GR 80 requires e-confirmation sent to consumers within a certain timeframe, and such e-confirmation must contain the same information as provided in an e-offer.⁴¹⁷ Accordingly, e-confirmation should include minimum information about the specifications of products and their prices, the payment and delivery mechanism and system, as the payment deadline, and any limitation on liability in the event of the occurrence of unexpected risks, for example.⁴¹⁸ Similarly, Vietnam's Decree 52 requires businesses to provide a confirmation of orders that contains the list of information, such as a list of products consumers have ordered, the quantity and price of each product, the total value of the contract, the time of delivery, and contact information for further inquiries to consumers.⁴¹⁹

In Thailand, although DSDM does not contain any pre-contractual information duties, it has a provision that specifically requires that the order confirmation be sent to consumers after the conclusion of a contract.⁴²⁰ The details of information include: names of buyers and sellers; dates of purchase and delivery of products; due dates; places and methods of payments and deliveries of products; procedures regarding contract termination; warranties; the right of withdrawal and cooling-off periods; return methods; and exchange policies in case of damage or defect.⁴²¹ Looking at the list above, it is important to note that a Thai confirmation of an order contains information that is required by other states and the CRD in the pre-contractual stage. This shows that Thailand also has the same concern that certain information should be disclosed to consumers. However,

⁴¹⁰ Joint Order, sec. 5 (3.5.1) "any restrictions, limitations or conditions of purchase, such as geographic limitations..." (Phil.); TR 76, no. 3.2.3 "shipping restrictions" (Sing.); Decree 52, art. 32(c) "geographical limits of the delivery of goods or provision of services, if any" (Viet.).

⁴¹¹ The Consumer Rights Directive, art. 8(3) (EU).

⁴¹² *Id.* at art. 8(2).

⁴¹³ *Id.* at art. 8(4).

⁴¹⁴ *Id.* at art. 8(7).

⁴¹⁵ TR 76, nos. 4.3.3 and 4.3.5 (Sing.).

⁴¹⁶ *Id.* at no. 4.3.5 (Sing.).

⁴¹⁷ GR 80, art. 46 (Indon.).

⁴¹⁸ *Id.* at art. 39 (Indon.).

⁴¹⁹ Decree 52, art. 19 (Viet.).

⁴²⁰ DSDM, art. 30-31. (Thai.).

⁴²¹ *Id.*

Thailand considers the process of disclosure suits in the post-contractual rather than pre-contractual stages.

C. LEGAL EFFECTS AND SANCTIONS

The selected six states are silent on the issue of the legal effects of pre-contractual information duties. They do not have a specific provision allowing information in disclosure to be incorporated in a concluded contract.⁴²² One reason this specific provision is absent is that, if such information has already been included in an offer, it would automatically become a part of a contract by virtue of the general principle of contract law. Then, this legal matter would fall under the scope of contract law in each state. From observing another enforcement rule regarding the burden of proof,⁴²³ consumer protection laws of the selected six member states provide different rules for who bears the burden of proof in consumer contracts, especially circumstances that shift the burden of proof to businesses.⁴²⁴

Concerning sanctions, that this section explores all the five states except for Singapore because Singapore's TR 76 guideline is not legally binding. For the rest of the five states, some states have provisions related to sanctions for violating pre-contractual information duties within their specific laws concerning consumer protection in e-commerce, whereas other states refer to their main laws. Indonesia and Vietnam are in the former group, while Malaysia, the Philippines, and Thailand are in the latter group. Each of these five states have sanctions in the form of a fine, which is consistent with the EU approach.⁴²⁵ Nevertheless, Vietnam is distinct from the other states because its sanction gives consumers the unilateral right to terminate contracts for noncompliance with pre-contractual information duties.

For the first group of states having sanctions within their specific laws, Indonesia's GR 80 indicates that the non-disclosure of information about identities of businesses, characteristics, conditions, and guarantees of goods and services will be subject to administrative sanctions.⁴²⁶ The administrative sanctions can take the form of a written reprimand, putting businesses who fail to disclose information on a priority list of oversight, a black list, or a temporary blockade, or could lead to a revocation of business licenses.⁴²⁷

⁴²² The Consumer Rights Directive, art. 6(5).

⁴²³ *Id.* at art. 6(9).

⁴²⁴ For examples, businesses shall have burden of proof for faults in the compensation claims. Law No. 8 of 1999 on Consumer Protection, art. 28 (Indon.); Suppliers shall have burden of proof that a contract or a term of the exclusion of rights, duties, and liabilities or restriction of liability made by businesses is not without adequate justification. Consumer Protection Act, art. 24E (Malay.); The burden of proof shall be on the supplier that the supplier has complied with any specified requirement of this Act or the regulations made thereunder. CPFTA, art. 18 (Sing.); Businesses shall have burden of proof for facts regarding manufacturing, assembling, design, or ingredients of products or services, or operations, where the court considers those facts are known to businesses. Consumer Case Procedures Act, B.E. 2551 (2008), art. 29 (Thai.); Burden of proof about the fault of the organization or individuals trading of goods and/or services shall be on such organization or individuals. Consumer Protection Law, art. 42 (Viet.).

⁴²⁵ The Consumer Rights Directive, art. 24, *supra* note 422.

⁴²⁶ GR 80, art. 80(1) (Indon.).

⁴²⁷ *Id.*

Vietnam's Decree 99 provides many detailed rules about the sanction imposed for noncompliance with pre-contractual information duties. It gives a consumer the right to terminate a contract unilaterally if a trader fails to properly or fully provide the required information in distance contracts, including online contracts, under this law.⁴²⁸ A consumer can unilaterally exercise the right to terminate a contract within ten days after the conclusion of a contract by notifying a business without paying any costs related to that termination unless such a cost is for using goods or services.⁴²⁹ Once a consumer unilaterally terminates a contract, a trader must refund the consumer's paid money within thirty days after being notified of the termination.⁴³⁰ Also, a trader is subject to pay interest on delayed payment beyond the timeframe.⁴³¹ The refund must be made by the same payment used by a consumer unless a consumer agrees otherwise.⁴³² In addition, if the termination of a contract causes damage to a consumer, the law requires that a trader pays damages under the Vietnamese civil law.⁴³³

For the second group of states referring sanctions to their main laws, Malaysia and the Philippines refer to the sanction provisions in their main consumer protection laws. According to the Malaysian Consumer Protection Act, online businesses or marketplaces that fail to comply with pre-contractual information duties are subject to a fine or imprisonment, or both with different amounts and time depending on whether a person or a company commits the offense.⁴³⁴ Moreover, any person or company will be imposed an additional fine of up to 1,000 Malaysian Ringgit for each day during the time that the offense continues after conviction.⁴³⁵ Apart from the above criminal penalties, a consumer may bring a claim to the Tribunal for Consumer Complaints for civil remedies against such a business.⁴³⁶

The Philippines's Joint Order clearly states that any violation under this Joint Order will fall under the scope of the Consumer Protection Act related to administrative penalties.⁴³⁷ These administrative penalties vary in many forms; for example, the issuance of a cease and desist order, the acceptance of a voluntary assurance of compliance, restitution or rescission of the contract without damages, or the imposition of administrative fines (between 500-300,000 Philippines pesos but no more than 1,000 Philippines pesos for each day of continuing violation).⁴³⁸

⁴²⁸ Decree 99, art. 17(3) (Viet.).

⁴²⁹ *Id.*

⁴³⁰ *Id.* at art. 17(4).

⁴³¹ *Id.*

⁴³² *Id.*

⁴³³ *Id.*

⁴³⁴ Consumer Protection Law, art. 145 (Malay.). A person is subject to a fine of up to 50,000 Malaysian Ringgit or imprisonment up to three years or both, and for a second or subsequent offense, a fine of up to 100,000 Malaysian Ringgit or imprisonment up to five years or both. A company is subject to a fine of up to 100,000 Malaysian Ringgit, and for a second or subsequent offense, a fine of up to 200,000 Malaysian Ringgit or imprisonment up to five years or both.

⁴³⁵ *Id.* at art. 145(3).

⁴³⁶ Jane Tan Chiu Yen, *New Rules for Safer Electronic Transactions*, MALAYSIAN BAR (Apr. 8, 2013, 12:00 AM), <https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/new-rules-for-safer-electronic-transactions>.

⁴³⁷ Joint Order, *supra* 240, at sec. 12.

⁴³⁸ Consumer Protection Act, *supra* 239, art. 164.

Thailand neither has a provision of sanctions for noncompliance with pre-contractual information duties in a specific law, nor does it refer back to the main consumer protection law like the other two aforementioned states. Nevertheless, the specific law as secondary law that imposes pre-contractual disclosure duties about prices and descriptions of products refers back to its primary law, the Price of Products and Services Act B.E. 2542 (1999), for the sanction. The Price of Products and Services Act penalizes a business that does not disclose information about the price and description of products with a fine not exceeding 10,000 Thai baht.⁴³⁹ More significantly, to incentivize the Thai community to help with this enforcement, if a business is penalized with such a fine, a person who helps the government (Department of Internal Trade) by pointing out the non-disclosure of products' prices and descriptions of businesses will be awarded 25% of that fine.⁴⁴⁰ In sum, each member state has different rules and approaches that it sees appropriate in response to noncompliance with pre-contractual information duties.

V. LESSONS LEARNED FROM THE ANALYSIS OF E-COMMERCE IN ASEAN

ASEAN's most recent economic integration as the AEC has immense potential since its e-commerce market combines over half a billion people who are prospective internet users and online shoppers. People's readiness in this region to engage in online transactions is obviously an important driving force to develop the e-commerce market. With this great potential for growth in the e-commerce realm and ASEAN consumers' ever-increasing online habits, the AEC aims to build consumer confidence in online transactions and support good business practices. The AEC envisions its ultimate goal of cross-border e-commerce transactions in the region as expanding its full capacity that in turn makes the AEC a more competitive economic region.

However, ASEAN has attracted criticism for reluctantly cooperating with the economic integration without securing the actual compliance of its member states.⁴⁴¹ One main factor that impedes this integration is that ASEAN lacks the genuine political will to intensify its cooperation. This is because sometimes member states are in direct competition with each other. Several complications have occurred, including member states having conflicting interpretations and avoiding regional compliance.⁴⁴² As of 2021, ASEAN has progressively implemented 54.1% of

⁴³⁹ Price of Goods and Services Act, B.E. 2542 (1999), art. 40 (Thai).

⁴⁴⁰ *Id.* at art. 32.

⁴⁴¹ Tan Hsien-Li, *New Approaches to Achieving ASEAN Regionalism*, 9 EAST ASIA F. Q. 10, 10 (2017).

⁴⁴² One example is the agreement from the past economic integration—AFTA—where ASEAN member states had to reduce the AFTA tariff rates from 0%-5%. However, many member states had conflicts which delayed their ability to reduce tariffs on certain goods, such as Malaysia for automobiles, Indonesia and Philippines for rice and sugar, and Thailand for palm oil. Please see Singapore Declaration Of 1992, ASEAN, (Jan. 28, 1992), http://asean.org/?static_post=singapore-declaration-of-1992-singapore-28-january-1992; US-ASEAN, *Common Effective Preferential Tariff (CEPT)*, <https://www.usasean.org/regions/asean/afta/common-effective-preferential-tariff> (last visited Feb. 12, 2022); Petchanet Pratuangkrai, *Regional Trade Pressure on Malaysia*, PRESSREADER (Aug. 15, 2009), <https://www.pressreader.com/thailand/the-nation/20090815/282359740727453>; International Center for Trade and Sustainable Development, *News from the Regions: ASEAN Free Trade Area Faces Delay* (Apr. 2, 2000), <https://www.ictsd.org/bridges-news/bridges/news/news-from-the-regions-asean-free-trade-area-faces-delay>.

sectoral work plans in an effort to meet the goals under the AEC Blueprint 2025.⁴⁴³ Still, many scholars are skeptical about the success of the AEC, the most recent regional integration.⁴⁴⁴

Despite criticism and skepticism, I take the optimistic view that the development of AEC e-commerce, with a high potential for growth and support from the ASEAN people, would ultimately strengthen the political will of ASEAN member states and create stronger and better cooperation. Unlike other regional integration such as the E.U., ASEAN would have a bottom-up structure that such will would originate in the private sector, starting with consumers and businesses and advancing to governments. Then, this political will would concretize the AEC instead of a supranational organization making a top-down policy.

Over fifty years of establishing ASEAN, member states have maintained their positions for refusing a supranational organization and strictly followed ASEAN Way to dominate working style, policies, and frameworks. This firm position tells us that the focus of developing laws should be shifted away from creating a supranational institution to enact a community law to promoting the cooperation of member states through its legal instruments. Unlike other economic integrations, ASEAN can have an ASEAN style of issuing legal instruments soft law yet influential for member states to gradually implement them into their domestic laws without a supranational organization. Since ASEAN has recognized that achieving greater development of AEC e-commerce depends on the ongoing cooperation of member states to modernize their legal infrastructures, especially consumer protection, ASEAN should emphasize this point. ASEAN should continue facilitating AEC e-commerce by harmonizing consumer protection and consumer rights.⁴⁴⁵

Indeed, the AEC Blueprints set out only broad concepts and strategic measures for the AEC integration process. Nevertheless, we have seen the upcoming trend that ASEAN sectoral bodies have issued more detailed and specific initiatives and working plans to support the AEC Blueprints; for example, the Guideline on Accountabilities and Responsibilities of E-marketplaces⁴⁴⁶ and the Online Business Code of Conduct.⁴⁴⁷ They are a good starting point for the acceptance of ASEAN to harmonize consumer protection laws in e-commerce among member states. However, these legal instruments rely heavily on businesses to behave without concrete rules for member states to implement them in their domestic law, so they have a long way from uniform and comprehensive rules of consumer protection. Clear evidence is that they do not even provide efficient rules for pre-contractual information duties for online sellers, which are well developed in other parts of the world as mentioned earlier.

⁴⁴³ ASEAN, THE MID-TERM REVIEW REPORT OF THE ASEAN ECONOMIC COMMUNITY BLUEPRINT 2025 (Apr. 28, 2021), <https://asean.org/asean2020/launched-asean-mid-term-review-of-the-aec-blueprint-2025/>.

⁴⁴⁴ Lee Jones, *Explaining the Failure of the ASEAN Economic Community: the Primacy of Domestic Political Economy*, 29 PACIFIC REVIEW 647, 647–70 (2016); Sanchita Basu Das, *Mind the Gap: Explaining Implementation Shortfalls in the ASEAN Economic Community* 1, 1-31 (ISEAS Econ., Working Paper No. 2017-7); Joshua Kurlantzick, *The Failures of the ASEAN Economic Community*, COUNCIL ON FOREIGN RELATIONS (Sept. 12, 2014, 3:43 PM), <https://www.cfr.org/blog/failures-asean-economic-community>.

⁴⁴⁵ ASEAN, ASEAN ECONOMIC COMMUNITY BLUEPRINT 2025, at 24, https://asean.org/wp-content/uploads/2021/08/AECBP_2025r_FINAL.pdf.

⁴⁴⁶ ASEAN, THE GUIDELINE, *supra* note 176.

⁴⁴⁷ ASEAN, CODE OF CONDUCT, *supra* note 193.

In detail, the Guideline on Accountabilities and Responsibilities of E-marketplaces governs the conduct of online marketplaces and allows these big companies operating online marketplaces to control individual sellers on their platforms.⁴⁴⁸ However, businesses are designed to make profits, so giving them control of other businesses for the purpose of protecting consumers may not be appropriate and practical. They could easily take advantage of consumers. Besides, businesses cannot completely control sellers acting in bad faith because they do not have the power to enforce compliance. Thus, ASEAN cannot and should not rely mainly on online marketplaces to protect consumers. More importantly, a significant number of online sellers are doing business on their own without using online marketplaces. Even though ASEAN has already issued the Online Business Code of Conduct, which provides a limited number of pre-contractual information duties for online sellers, the outlined duties are broad, inadequate, and incomprehensible.⁴⁴⁹

It is obvious that member states are willing to implement the AEC frameworks and policies of e-commerce because they all want to enjoy the full benefit from it. All member states have developed national laws to protect consumers and foster their digital economies. The selected six states are the leading players in ASEAN and can present a feasible direction for the laws in this region. With the example of pre-contractual information duties, these six states have already promulgated laws regulating online businesses by requiring them to disclose material information, many of which are similar to those in the E.U. and the U.S. This finding brings about the concrete conclusion that because of the nature of cross-border transactions in e-commerce, people are connected worldwide and thus experience the same problems which competent authorities try to solve.

Nevertheless, two serious problems can be identified because of the absence of a harmonized law across the region. First, the nonexistence of a common legal framework causes discrepancies and inconsistencies between the laws of member states with practical consequences. Every state has its own consumer protection law, a mandatory law that governs B2C contracts following the state's policies, cultures, and preferences. The lack of harmony of laws in member states poses a serious problem for the AEC since it is supposed to have a single law that applies in a single market. At present, the selected six member states only have three pieces of information in common: the characteristics of products, prices, and identities of businesses. Consumers have already intuitively been hesitant to conduct cross-border transactions because they are governed by legal systems outside their home country that has different and unfamiliar rules. Consumers are typically concerned about the protection they will receive for any disputes arising out of transactions in foreign countries.⁴⁵⁰

More importantly, let us imagine a business that wants to sell products online in member states with, for example, different lists of information requirements as appear in the previous part. This means such a business has to set up different webpages to legally sell in each state. It is an obvious nightmare for any business to enter the ASEAN e-commerce market. To address further, researching information about various laws in different legal systems creates an additional cost for

⁴⁴⁸ ASEAN, THE GUIDELINE, *supra* note 176.

⁴⁴⁹ ASEAN, CODE OF CONDUCT, *supra* note 193.

⁴⁵⁰ Gerhard Wagner, *The Economics of Harmonization: the Case of Contract Law*, 39 COMMON MKT. L. REV. 995, 1016-17 (2002).

businesses.⁴⁵¹ This additional cost reduces opportunities for SMEs to be competitive in the market because of such a financial burden.⁴⁵² Consumers also suffer from this additional cost because in practice, businesses raise the prices of products to cover the additional expense. Consequently, the different laws among member states often pose obstacles to cross-border e-commerce,⁴⁵³ which are impractical and challenging for both consumers and businesses engaging in online transactions and they ultimately create disincentives for investment.

Second, although most ASEAN member states have provisions regarding pre-contractual information duties, these provisions are still incomplete and often inadequate when compared to other parts of the world. ASEAN does not have a common minimum requirement to govern general online sellers. The analysis of the selected six member states showed that each member state lacks some rules regarding pre-contractual information duties compared to other countries such as the E.U. and the U.S. For example, Thailand does not have any legislation to directly govern consumer protection in e-commerce, resulting in inadequate rules to protect consumers. Indonesia, Malaysia, the Philippines, and Vietnam have already enacted specific legislation to cover this area; but, as we have seen in the previous section, some important rules are still missing in each state. Singapore's TR 76 is a guideline, which is merely a soft law that is not legally binding, so it cannot impose a concrete legal consequence of noncompliance like the hard laws of other states.

It is true that harmonizing diverse laws has never been ASEAN's strong suit. Yet, the AEC frameworks and policies and the current laws of ASEAN member states all support the central claim of this Article—that the ASEAN needs to harmonize consumer protection laws in online transactions of member states in accordance with the worldwide standard so that all parts of ASEAN, i.e., consumers, businesses, and states, can gain the greatest benefits of its e-commerce under the huge project of economic integration as the AEC. ASEAN must have a uniform consumer protection law with many features, including pre-contractual information duties, to promote growth of e-commerce in the region.

CONCLUSION

This Article has highlighted ASEAN, a prominent player in the Asian market. Under ASEAN's most recent economic integration, the AEC, it has combined ten Southeast Asian countries' markets. ASEAN's enormous collective market has considerable potential for e-commerce, which is significantly enhanced by the readiness of people in the region—who are willing to engage in e-commerce—and the support from AEC frameworks and policies at the regional level. In recognition of this potential, ASEAN has set a goal to boost AEC e-commerce to reach its full capacity and thus become a competitive economic region.

The historical background and the great diversity of ASEAN member states make it challenging for the establishment of a supranational organization to impose hard laws. In spite of these challenges, ASEAN has issued many regional frameworks as soft laws—non-legally binding

⁴⁵¹ *Id.* at 1013-15.

⁴⁵² *Id.*

⁴⁵³ *Communication from the Commission to the Council and the European Parliament on European Contract Law*, Sept. 13, 2001, 2001 O.J. (C 255/1) 5 ¶10; Christian Twigg-Flesner, *Comment: the Future of EU Consumer Law – The End of Harmonization?*, in *EUROPEAN CONSUMER PROTECTION: THEORY AND PRACTICE* 6–20 (James Devenney & Mel B. Kenny eds., 2012).

agreements that ask for the cooperation of member states—to create fruitful and good governance of the e-commerce ecosystem. Nevertheless, one salient feature to facilitate e-commerce is missing. ASEAN still lacks a comprehensive legal instrument to govern consumer protection, despite its ability to facilitate e-commerce and promote the digital economy. For this reason, all ASEAN member states have developed their own national legislation in the area of consumer protection for e-commerce based on their preferences, as shown in the most current data of the selected six ASEAN member states in this Article.

I chose pre-contractual information duties, one of the most vital tools to protect consumers in online transactions, as a concrete example to show that the legal provisions of member states are inconsistent and inefficient due to the absence of a uniform ASEAN law. These problems profoundly impact ASEAN because they can harm consumers, businesses, member states, and even ASEAN's own economic development related to e-commerce. Therefore, this Article urges ASEAN to harmonize consumer protection law if it wants to reap the benefits of e-commerce to the fullest extent. This Article aims to be a starting point for larger questions. For example, how should harmonization of consumer protection laws in ASEAN be pursued? What legal principles should be contained in such harmonizing law? These questions are waiting for future research and studies to provide the appropriate answers.

PUBLIC POLICY NORMS AND CHOICE-OF-LAW METHODOLOGY ADJUSTMENTS IN INTERNATIONAL ARBITRATION

*Hossein Fazilatfar**

ABSTRACT

Arbitration agreements draw the legal relationship not only between the parties but also are the contractual source of authority for arbitrators to resolve parties' dispute. To respect the principle of party autonomy, arbitrators must serve parties' will and consider their interests in issuing the arbitral award. However, there is one caveat: respect public policy norms of the states that have an important stake in the outcome of the arbitration. Indeed, application of public policy norms in international arbitration is a challenge due to their mandatory character. The law chosen by the parties, or the otherwise applicable law chosen by the tribunal is where the first and foremost public policy norms must be applied and respected. The limitations would be overriding public policy norms of the place of arbitration on the issue of arbitrability and such procedural norms of the place of arbitration over the procedural aspect of the arbitration. Another overriding public policy norms possibly involved (that may override parties' choice of law) are those of the foreign states to the chosen law and to the *Lex arbitri*, which have a close connection to the case, such as places of enforcement of the award and performance of the transaction. This Article suggests that in addition to the traditional conflicts methods of determining the applicable law, arbitrators could make adjustments in approaching public policy norms in arbitration. Arbitrators do not have to necessarily reject application of public policy norms, in particular ones with an overriding character or directly applicable in disputes. Possibly, they have the option to apply the applicable norm to particular issues in the dispute (*dépeçage*) or award and respect party autonomy in all other aspects of the case. This may be done *ex officio* or through mediation within the arbitration process conducted by the same arbitrator most familiar with the dispute, with active participation of the parties.

INTRODUCTION

Public policy norms present scenarios that complicate choice of law determinations for arbitrators in international arbitration.¹ This complexity generally derives from the imperative nature of such norms and the unique position of arbitrators as private adjudicators, compared to judges.² Arbitration, whether domestic or international, provides a venue for contracting parties to govern, quite freely, the resolution of their disputes by appointing experts in the field to act as arbitrators, choosing the applicable law to their interest (or leaving it for the arbitrators to decide), and by selecting or designing the procedure according to which the resolution of the dispute should take place whether ad hoc or institutional.³

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¹ See Pierre Mayer, *Mandatory Rules of Int'l Arb.*, 2 *Arb. Int'l* 274, 276 (1986).

² See George A. Bermann, *The Origin and Operation of Mandatory Rules*, 18 *Am. Rev. Int'l Arb.* 1, 2 (2007); Marc Blessing, *Mandatory Rules of Law versus Party Autonomy in Int'l Arb.*, 14 *J. Int'l Arb.* 23, 27 (1997).

³ See Yeshnah D. Rampall and Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbs. to Determine the Applicable L.: The Quest for an Arbitral Equilibrium*, 26 *Harv. Negot. L. Rev.* 345, 348 (2018).

Indeed, limitations apply when parties' private interests become so entangled with states' public interests. The arbitrator being appointed by the parties has the duty to resolve the conflict of interest before her. On the one hand, she gains her authority from the parties, and on the other hand there are public policy norms external to her source of authority (the arbitration agreement) that claim application; this is because the public policy behind them is potentially at risk.⁴ Also, the arbitrator should aim to resolve the conflict between the states that their public policy norms are at stake and may claim application at different stages of arbitration.⁵

Thus, due to the principle of party autonomy, she must first respect the parties' choice in any decision they make.⁶ Second, she has to assure that at the end of the proceedings, her award is in line with public policy of the place of arbitration to avoid annulment and in accord with public policy of the potential place(s) of enforcement to avoid refusal of enforcement by those courts.⁷ Third, in addition to the question of whether arbitrators should apply public policy at all, the question of what criteria should arbitrators take into account in applying such norms must be considered. Finally, if there is a conflict between the applicable public policy norms, then dispute resolution becomes even further complicated for the arbitrator. This challenging issue in arbitration is not addressed in the main arbitration conventions such as the New York Convention (1958) or the Geneva Convention (1961).⁸ In practice, however, public policy norms are a challenge for arbitrators. There is an abundance of academic literature that have proposed solutions in dealing

⁴ Although there are distinctions regarding public policy and mandatory rules in theory, in this Article they are used interchangeably. See Hossein Fazilatfar, *Overriding Mandatory Rules in Int'l Com. Arb.* 26-29 (Edward Elgar Pub. 2019) (discussing distinctions and interplay between mandatory rules and public policy).

⁵ See *infra* Part II.

⁶ See *infra* Part I.

⁷ See Art. V. 2(b) and V. 1(e) of the NY Convention, respectively.

⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention of 1958); European Convention on International Commercial Arbitration (Geneva Convention of 1961).

with such norms both in litigation and arbitration.⁹ These solutions tend to address public policy norms from both the contractual and jurisdictional nature of arbitration or a hybrid of both.¹⁰

However, this article approaches public policy norms from a conflict of laws perspective by applying *dépeçage* to the transaction on their own initiative or through a multistep alternative dispute resolution (ADR) mechanism. Part I discusses the contractual source of authority of the arbitrator in applying the law applicable to the dispute, which is chosen by the parties and followed by a discussion on party autonomy. It further addresses the jurisdictional aspect of arbitration, the link between general mandates and concerns of an arbitral tribunal with regard to the enforcement of their awards, and laws that are overridingly mandatory and foreign to their source of authority. Part II shifts the discussion to the approaches taken by arbitral tribunals in practice when dealing with public policy norms applicable to the merits of a dispute and the methods of determining the applicable law in arbitration. Parts III and IV, respectively, analyze the roles that public policy norms of the *lex arbitri* (place of arbitration) and those foreign to the law chosen by the parties

⁹ See e.g., Zeller, B., Mohanty, G., Garimella, S.R. (2021). The Law on the Public Policy Exception in International Arbitration—State Practice in South Asia. In: Enforcement of Foreign Arbitral Awards and the Public Policy Exception. Springer, Singapore. https://doi.org/10.1007/978-981-16-2634-0_5; Jan Kleinheisterkamp, The Myth of Transnational Public Policy in International Arbitration, *Am. J. Comparative L.* (In press 2021); Symposium articles on Overriding Mandatory Provisions in Private International Law and Arbitration, 1 *ELTE Law Journal* (2020) available at https://eltelawjournal.hu/wp-content/uploads/2020/12/ELJ-2020-1_WEB.pdf; Jean-Michel Marcoux, Transnational Public Policy as an International Practice in Investment Arbitration, 10 (3) *Journal of International Dispute Settlement* 496 (2019); Hossein Fazilatfar, OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION (Edward Elgar Publishing 2019); Ibrahim Mohamed Nour Shehata, Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis, 11 *World Arbitration and Mediation Review* 383 (2017); Meng Chen, Empirical Research on Mandatory Rules Theory in International Commercial Arbitration, 19 *Int'l Trade & Bus. L. Rev.* 245 (2016); Josh B. Martin, Contractualists Versus Jurisdictionalists: Who Is Winning the Mandatory Law Debate in International Commercial Arbitration? 27 *Am. Rev. Int'l Arb.* 475 (2016); Fifi Junita, Public Policy Exception in International Commercial Arbitration – Promoting Uniform Model Norms, 5(1) *Contemp. Asia Arb. J.* 45 (2012); Allen B. Green and Josh Weiss, Public Policy and International Arbitration in The European Union, 22 *Am. Rev. Int'l Arb.* 661 (2011); Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 (4) *Penn State L. Rev.* 1227 (2009); Jan Kleinheisterkamp, The Impact of Internationally Mandatory Laws on the Enforceability of Arbitration Agreements, 3(2) *World Arbitration & Mediation Review* 91 (2009); Jeff Waincymer, International Commercial Arbitration and the Application of Mandatory Rules of Law, 5 *Asian Int'l Arb. J.* 1, 38 (2009); See also edited versions of number of papers delivered at a colloquium on Mandatory Rules of Law in International Arbitration held at Columbia Law School in June 2007 in *MANDATORY RULES IN INTERNATIONAL ARBITRATION* (George A. Bermann and Loukas A. Mistelis eds.) (Juris 2011), originally published in Vol. 18, issues 1-2 of *The American Review of International Arbitration* (2007); Andrew Barraclough, and Jeff Waincymer, Mandatory Rules of Law in International Commercial Arbitration, 6 *Melb. J. Int'l. L.* 205 (2005); Homayoon Arfazadeh, In the Shadow of the Unruly Horse: International Arbitration and the Public Policy Exception, 13 *Am. Rev. Int'l Arb.* 43 (2002); Andrew T. Guzman, Arbitrator Liability: Reconciling Arbitration and Mandatory Rules, 49 *Duke L. J.* 1279 (2000); Marc Blessing, Mandatory Rules of Law versus Party Autonomy in International Arbitration, 14 *J. Int'l Arb.* 23 (1997); Nathalie Voser, Mandatory Rules of Law as a Limitation to the Law Applicable in International Commercial Arbitration, 7 *Am. Rev. Int'l Arb.* 319 (1996); Serge Lazareff, Mandatory Extraterritorial Application of National Law, 11 *Arb. Int'l* 137 (1995); Mohammad Reza Baniassadi, Do Mandatory Rules of Public Law Limit Choice of Law in International Commercial Arbitration, 10 (1) *Berkeley J. Int'l L.* 59 (1992); Pierre Mayer, Mandatory Rules of Law in International Arbitration, 2 *Arb Int'l* 274 (1986).

¹⁰ See generally Josh B. Martin, Contractualists Versus Jurisdictionalists: Who Is Winning the Mandatory Law Debate in International Commercial Arbitration? 27 *Am. Rev. Int'l Arb.* 475 (2016). See also Hossein Fazilatfar, International Arbitration and the Mandatory Law Problem: A Mixed Mode ADR Approach, 33 (3) *Am. Rev. Int'l Arb.* (Forthcoming Winter 2022), at Part II.

(often norms of the place of enforcement and performance) play in determining the applicable law. Part V suggests that arbitrators should be flexible in coping with public policy norms. No rigid formula can provide an appropriate solution in dealing with norms of such multidimensional nature in international trade, especially in a venue such as arbitration. Finally, this article states that in addition to other legally based solutions from the literature and practice of arbitration, another solution that can be applied by arbitrators is a conflicts adjustment to determine the applicable law. *Dépeçage* is a concept rooted in conflict of laws where different bodies of law may be applied to different parts or issues in an international transaction.¹¹ Arbitrators, when appropriate, could on their own initiative apply the concept to the transaction before them rather than excluding an overriding public policy norm from application. *Dépeçage* could also be applied through a more collaborative method: a mixed mode alternative dispute resolution (ADR) mechanism where parties and the arbitrator will actively negotiate and mediate application of *dépeçage*. An arbitral award based on party consent would be the result of the mixed mode processes.

I. AUTHORITY AND MANDATE IN DETERMINING THE APPLICABLE LAW

Party autonomy, the mandate to issue an enforceable award, and the mandate to protect the integrity of arbitration are the sources of an arbitrator's authority and points of concern when it comes to the law applicable in international arbitration.

A. PARTY AUTONOMY: THE CHOICE-OF-LAW CLAUSE IN ARBITRATION

Arbitration is contractual in nature and as a private dispute resolution mechanism begins with the will of the parties like any other contract.¹² The arbitration agreement confers power to a tribunal to arbitrate a particular dispute. Therefore, any decision made by the tribunal on its composition, jurisdiction, and issues with regard to scope, remedies, and of course the applicable law ought to be in accord with the arbitration agreement. This all derives from the principle of party autonomy, well recognized in arbitration, however not limitless.¹³

¹¹ See *infra* Part V.

¹² See *AT&T Techs., Inc. v. Commo'n's Workers of Am.*, 475 U.S. 643, 648-49 (1986) (“[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.” This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.” (quoting *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960))); *First Options of Chi., Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) (“[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have agreed to submit to arbitration.”); *Volt Info. Scis., Inc. v. Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989) (“[A]rbitration under the [Federal Arbitration] Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit.”). See also Hossein Fazilatfar, *In Defense of Separability: Pima Paint, Buckeye, & Rent-A-Center*, 54 (2) TEX. TECH L. REV. (Forthcoming Spring 2022).

¹³ It has been emphasized that there are only a few principles well recognized in private international law, including the principle “according to which the law of the contract is the law chosen by the parties,” see ICC Case No. 1512 (*Preliminary Award*) in 1 Y.B. of Com. Arb. (1971) at 128-9. However, there are limitations to the principle. For example, Maniruzzaman states: “Although the parties’ freedom of choice is a general principle, it should operate within the limits imposed by such equally important general principles of law or subject to any restraint of public policy.” A. F. M. Maniruzzaman, *International Arbitration and Mandatory Public Law Rules in the Context of State Contracts: An Overview*, 7(3) J. INT’L. ARB. 52, 54 (1990). See also the decision of an Arbitral Tribunal sitting in Geneva and hearing a dispute arising out of an agreement governed by Swiss law pursuant to the parties’ choice-of-law stipulation decided to exclude the application of mandatory law regarding commercial agency contracts not

With respect to international arbitration, party autonomy is provided in Article V(1)(c) of the New York Convention and Articles 34(2)(a)(iii) and 36(1)(a)(iii) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law.¹⁴ Article V(1)(c) basically establishes that an award's recognition and enforcement may get refused if "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . ." The UNCITRAL Model Law contains a similar language, thus an award may be set aside or refused recognition and enforcement if the arbitrators have exercised power beyond what they were authorized by the parties.

After the adoption of the New York Convention and the commitment of the States to recognize arbitration awards, one could say, "arbitration is usually held out to be the paradise of party autonomy and not particularly prone to the furthering of state interests."¹⁵ Party autonomy assures parties that the arbitration will be conducted according to their plans and legitimate expectations, but the autonomy is not unlimited and is in fact subject to public policy norms of possibly multiple jurisdictions.¹⁶ Of course, the difficulty is in deciding exactly where, how, and to what extent party autonomy may be limited.¹⁷

belonging to the chosen law. After finding that Article 19 of the Swiss PILA was not relevant and that Article 187 of such statute providing for party autonomy in choice-of-law should prevail, the Tribunal reasoned that the freedom of the parties to choose the applicable law was a generally recognized principle enabling the parties to:

Exclude the national law which would otherwise apply. Therefore, provisions of the law which is excluded can only be recognized within the chosen law to the extent they are a part of the *ordre public international*. Examples of this are provisions to fight corruption and bribery. In the permanent practice of international arbitration, national provisions governing the law of agency are not considered to belong to the *ordre public international*.

See ICC Case No. 7047 (1994); XXI Yearbook Comm. Arb. (1996). *See also* Yeshnah D. Rampall and Ronán Feehily, *The Sanctity of Party Autonomy and the Powers of Arbitrators to Determine the Applicable Law: The Quest for an Arbitral Equilibrium*, 26 HARV. NEGOT. L. REV. 345, 399 (2018); Giuditta Cordero-Moss, *Limits on Party Autonomy in International Commercial Arbitration*, 4 PENN ST. J. L. & INT'L AFF. 186 (2015).

¹⁴ UNCITRAL Model Law states:

The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

¹⁵ *See* H. Watt and L. Brozolo, *Party Autonomy and Mandatory Rules in a Global World*, 6 INT'L L.F. D. INT'L 90, 91 (2004).

¹⁶ *See, e.g.*, section 1(b) of the English Arbitration Act (1996): "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." In other words, public interest will have an overriding effect over the party autonomy rule. Section 4(1) of the Act provides that: "The mandatory provisions of this Part are listed in Schedule 1 and have effect notwithstanding any agreement to the contrary." *See also* C. Chatterjee, *The Reality of The Party Autonomy Rule in International Arbitration*, 20(6) J. INT'L ARB. 539, 544 (2003); BARRACLOUGH & WAICYMER, *supra* note 9, at 206 ("However, such party autonomy is not without limits, as a private commercial behavior will invariably be subject to various national rules and policies. Many of the contentious areas in the theory and practice of arbitration relate to the inevitable tensions between party autonomy and state legal controls.")

¹⁷ *See, e.g.*, HORACIO GRIGERA NAON, CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 194 (Recueil des Cours, vol. 289 2001). Grigera Naon observes that some international arbitrators ignore domestic mandatory law chosen by the parties or even by "transnational legal rules or principles without interference of mandatory or supplemental provisions of the proper law inappropriate to govern, for example, an international dispute."

Under the sources mentioned above, there are also provisions that recognize the limitations to party autonomy, where if the arbitrator ignores public policy of the place of arbitration, the place of enforcement, or both, national courts may rule for annulment of the award or refuse enforcement on the grounds of public policy violation.¹⁸ An award might be against forum's public policy if parties' choice of law is some law other than that of the forum's. Usually, that is where the conflict appears to exist between party autonomy and public policy norms and where the arbitrator plays a significant role balancing the legal paradox: party autonomy versus public policy norms.

From the text of the New York Convention and the Model Law, it appears that mere application of a law other than parties' choice would not disqualify the arbitral award. Also from a practical stance, reported cases concerning the UNCITRAL Model Law and the New York Convention show that the defense of excess of power is seldom given effect for the purpose of sanctioning the arbitral tribunal's application of the law.¹⁹ However, if the outcome of applying parties' chosen law and a foreign law are different, and by applying a foreign law the decision turn out to be over issues other than those submitted by the parties, then it is conceivable to raise the issue of excess of power, where arbitrators went beyond their authority in applying a foreign law.²⁰

Although arbitrators take all instructions from the parties, in cases where parties might be against public policy norms of a particular state, they may still disregard parties' choice of law.²¹ One may label such a decision an excess of power,²² and consider it an act beyond an arbitrator's authority and, thus, an award rendered without a valid basis. However, as it shall be illustrated further, under certain circumstances an arbitral tribunal's application of a law different from the law chosen by the parties may not be seen as ignoring parties' choice of law and against party autonomy.²³

Relying merely on the practice of arbitration has led some to conclude that there are "virtually no cases where the arbitrators have relied on the application of a mandatory rule to justify a decision other than that would have resulted from the application of the law chosen by the parties."²⁴ However, others have argued that "the fact that the parties have chosen a certain governing law does not exclude the relevance of all rules of any other laws."²⁵ Arbitrators are reluctant in applying public policy norms that are not part of the governing law of the contract, but there are sufficient examples of cases where they have displaced the governing law (chosen by the parties) with an overriding public policy norm.²⁶

¹⁸ See, e.g., Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V(2)(b), June 10, 1958, 9 U.S.C.A. 305, 330 U.N.T.S. 3.

¹⁹ Giuditta Cordero-Moss, *Can an Arbitral Tribunal Disregard the Choice of the Law Made by the Parties?* 1 STOCKHOLM INT'L ARB. REV. 1, 6 (2005).

²⁰ Giuditta Cordero-Moss, *Can an Arbitral Tribunal Disregard the Choice of the Law Made by the Parties?*, 1 Stockholm Int'l Arb. Rev. 1, 4 (2005).

²¹ See Mayer, *Mandatory Rules*, at 275.

²² See Cordero-Moss, at 4.

²³ *Id.* at 2.

²⁴ See Fouchard, at 856-57; See also D. Donovan and A. Greenawalt, *Mitsubishi After Twenty Years: Mandatory Rules Before Courts and International Arbitrators*, in *PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION* (Loukas Mistelis & Julian Lew eds., 2006), at 54.

²⁵ See Cordero-Moss, at 8.

²⁶ See generally Grigera Naon, at 200 *et seq.* and 296 *et seq.*

B. ARBITRATION SOURCES REFLECTING THE MANDATE TO RENDER AN ENFORCEABLE AWARD

Generally, rendering an award worthy of recognition and enforcement is a duty of an arbitrator. This important duty has been expressed in a variety of sources such as national laws,²⁷ ethical codes,²⁸ and institutional rules. Arbitrators have also recognized their duty to issue an enforceable award.²⁹ On the one hand, parties' reasonable expectation is to have a valid award that is enforcement worthy. If an award on its face satisfies parties' expectations but later gets annulled or rejected for enforcement by national courts it shows that the tribunal failed to afford its contractual duty towards the parties.³⁰ On the other hand, the institutional rules and national laws, where applicable, may also further strengthen the tribunal's mandate to issue a valid award. Arbitration institutions reflect this duty in their rules perhaps for the sake of upholding their business and reputation. States, however, do so not only to welcome arbitration and spread the word of being known as arbitration friendly venues, but also to have taken pre-enforcement measures to protect their public policies. Therefore, if arbitrators fail to comply with their mandate, both aforementioned purposes are frustrated.

Arbitrators are obliged to comply with institutional rules of the institution which parties have referred to in the arbitration clause to govern the procedural aspects of the dispute resolution process. For example, Article 42 of the ICC Rules (2021), as a general rule state that "[i]n all matters not expressly provided for in the Rules, the Court and the arbitral tribunal shall act in the spirit of the Rules and shall make every effort to make sure that the award is enforceable at law." The same provisions can be found in Article 32.2 of the LCIA Rules (2020), which states that "[f]or all matters not expressly provided in the Arbitration Agreement, the LCIA, the LCIA Court, the Registrar, the Arbitral Tribunal, any tribunal secretary and each of the parties shall act at all times in good faith, respecting the spirit of the Arbitration Agreement, and shall make every reasonable effort to ensure that any award is legally recognized and enforceable at the arbitral seat."

Application of public policy norms is confirmed in Article 1.4 of the UNIDROIT Principles of International Contracts, which are addressed to both arbitrators and judges. Article 1.4, which is reinforced by Article 3.3.1 on the illegality deriving from violation of public policy norms, states that "[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, supranational or international origin, which are applicable in accordance with the relevant rules of private international law." To the same effect, Article 11.5 of the proposed Hague Principles on Choice of Law in International Commercial Contracts declares: "[T]hese principles shall not prevent an arbitral tribunal from applying public policy (*ordre public*), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so."³¹

²⁷ If the national laws are somehow applicable in the dispute, for examples are part of the *lex contractus*, then they are considered as a source for determining the extent of tribunal's power; but see e.g., the Austrian Code of Civil Procedure (Zivilprozeßordnung or "ZPO") s. 584.

²⁸ See Gunther Horvath, *The Duty of the Tribunal to Render an Enforceable Award*, 18 (2) J. Int'l. Arb. 135, 136 (2001).

²⁹ *Id.* at 136.

³⁰ *Id.* at 138.

³¹ See http://www.hcch.net/upload/wop/contracts_rpt_june2011e.pdf. [last visited 09/21/2021]; see also Brozolo, at 66-67.

What these provisions confer, perhaps, is that the international practice has as much respect for party autonomy as it does for forum's public policy norms, and arbitration may not be used as a venue to contract around such norms while such norms should be applied exceptionally in arbitration.³² Although arbitrators and judges function differently due to their private and public allegiance, respectively, there is a shared respect for public policy norms of the forum for judges and arbitrators at the very least. Radicati di Brozolo well states their position and shared concern over public policy norms:

Judges are organs of the state with an unquestionable duty to apply the mandatory rules of the forum and in most cases are entitled to disregard those of other countries, given that neither the enforceability of their judgments abroad nor the enforcement of foreign mandatory law is their concern. Conversely, arbitrators are not organs of any state and have no forum; moreover, they owe their primary allegiance to the parties who, in most cases, will not have specifically agreed to the application of mandatory rules. Yet, there is an expectation, perhaps even a requirement, that arbitrators apply mandatory rules.³³

1. The limits of the tribunal's mandate

Limitations apply to arbitrators' duties of issuing enforceable awards. In cases where the arbitration is ad hoc, normally the applicable national laws or procedural rules will govern the termination of an arbitrator's mandate, and if institutional, then the rules of the institution, determined by the parties, apply.³⁴ These rules are default rules—meaning if parties have not specified otherwise, they apply. Such rules also contain a replacement mechanism in certain cases where an arbitrator dies, ceases to act, withdraws, refuses to accept his office, refuses to fulfill his obligations or delays unreasonably in their fulfillment. However, for reasonable causes an arbitrator may decline to comply with his duties and even to accept the appointment in the first place. In such instances where arbitrators resign, a court usually accepts the resignation. Under some circumstances an arbitrator may in fact be unable to perform his functions or fail to act based on the authority he has been provided by the parties. For instance, “if the parties would have expressly or implicitly agreed that antitrust provisions of European Law shall not apply, the arbitrators should declare themselves incompetent since otherwise they would be enforcing an illicit obligation.”³⁵

2. The mandate to protect the integrity of arbitration

Survival of arbitration as an institution depends on states' recognition and support for private dispute resolution. National legislators may pass laws that provide a minimal or maximal approach towards recognition and enforcement of international arbitral awards. The less court intervention an award receives, the more efficient arbitration becomes as a system to resolve disputes. Thus, it must be recognized that states' interests have some relevance in the practice of

³² See generally Zeller, B., Mohanty, G., Garimella, S.R. (2021). The Law on the Public Policy Exception in International Arbitration—State Practice in South Asia. In: Enforcement of Foreign Arbitral Awards and the Public Policy Exception. Springer, Singapore. https://doi.org/10.1007/978-981-16-2634-0_5; See also Meng Chen, Empirical Research on Mandatory Rules Theory in International Commercial Arbitration, 19 Int'l Trade & Bus. L. Rev. 245 (2016); Ibrahim Mohamed Nour Shehata, Application of Overriding Mandatory Rules in International Commercial Arbitration: An Empirical Analysis, 11 World Arbitration and Mediation Review 383 (2017).

³³ See *id.* at 66.

³⁴ See Horvath, at 154.

³⁵ See Grigera Naon, *supra* note 17 at 326; Horvath, *supra* note 28 at 154-55.

arbitration.³⁶ If arbitration is going to be used as a back door to avoid intervention of national public policy, courts will not respect arbitration in the long run.

Therefore, when public policy norms are at stake, arbitrators have a general duty to safeguard the survival of international arbitration.³⁷ Some parties may use arbitration to escape mandatory laws. This may be attempted by stipulating a governing law that is not related to the transaction, and one which ultimately ignores other mandatory laws that have a close connection to the transaction. Of course, in such a case the arbitrator is faced with a two-fold problem: whether to give effect to the parties' choice of an unrelated law in order to respect party autonomy, or to protect the reputation of the arbitral process by refusing to allow its abuse by the attempt to evade the mandatory laws of countries with a vital interest in the case.³⁸ Where parties choose a law to circumvent or escape a foreign mandatory rule which would have applied to the agreement in the absence of the choice, arbitrators may disregard the parties' choice and take into account the mandatory norm;³⁹ thus, only contractual stipulations that do not violate fair dealing and good faith deserve protection.⁴⁰

II. PUBLIC POLICY NORMS APPLICABLE TO THE MERITS

There are only a few situations where application of public policy in arbitration is uncontroversial; public policy norms of the law chosen by the parties governing the contract qualify as one. Various arbitration cases support application of such norms.⁴¹ One caveat is

³⁶ See Barraclough and Waincymer, *supra* note 9 at 214.

³⁷ See Mayer, *supra* note 1 at 285-86; *see also* D. Hochstrasser, Choice of Law and Foreign Mandatory Rules of Law in International Arbitration, 11 J. INT'L ARB. 57, 70 (1994).

³⁸ See D. Vagts, National Legal Systems and Private Dispute Resolution, 82 AM. J. INT'L. L. 616, 620 (1988).

³⁹ *See also* Rome I Regulation, Articles 3(3-4) and 9(2-3). It should be noted that exclusion of a mandatory law by the parties does not necessarily give arbitrators the right to disregard parties' exclusion. The norm and its relevance or connection to the case ought to be evaluated by the tribunal. For example, in ICC Case No. 7528 (1993), the tribunal respected exclusion of a specific mandatory rule of the proper law chosen by the parties. The parties were French, while the employer was the government of Pakistan, as it was also the place of performance. The French law applied to the dispute while arbitration taking place in France. To the tribunal, it was clear that the parties intended to avoid the provisions of French law 75-1334 of 31 December 1975 as a result of which the sub-contract giving rise to the dispute and submitted by the parties to French law would be null and void or at least lead to the dismissal of Respondent's counterclaim. The tribunal in its evaluation of the French mandatory norm stated:

...No reported French decision has been put before the Tribunal where an international contract was avoided for noncompliance with Art. 14. This does not necessarily mean that it could not happen. But if Art. 15 were to be applied to this international contract, as claimant requests, such application would have to be warranted by a specific contact with France. In the present situation, the common nationality of the parties is important; but the place of performance of the contract is of equal significance... In order to tip the scales, it is useful to take into consideration the purpose of Art. 14 and the consequences of its application or non-application in the present situation. The purpose of the Article is to protect the sub-contractor against the consequences of the contractor's bankruptcy. This purpose simply does not have any scope of application here...

See Award of 1993 in ICC case 7528, XXII Yearbook Comm. Arb., 125 (1997).

⁴⁰ *See* Hochstrasser, *supra* note 37 at 63-64; *see also* R. von Mehren, From Vynior's Case to Mitsubishi: The Future of Arbitration and Public Law, 12 BROOK. J. INT'L. L. 583, 672 (1986).

⁴¹ *See* Bernd von Hoffmann, Internationally Mandatory Rules of Law before Arbitral Tribunals, in Karl-Heinz Böckstiegel (ed.), Acts of State and Arbitration (1997), at 3. *See also* Mayer, Mandatory Rules, at 280.

contradiction of the chosen norm with transnational public policy.⁴² Some have submitted that “it is uniformly accepted that arbitrators must apply any public policy norm that reflects transnational public policy to maintain minimum standards of conduct and behavior in international commercial relations.”⁴³

Another caveat is contradiction with public policy norms of the place of performance where the conditions to apply *force majeure* are met.⁴⁴ Mandatory norms of the place of performance may provide performance of a contract impossible as *force majeure* events. Thus, for instance, if such norms were not foreseeable (e.g., the legislature suddenly passes a law banning import of particular goods from a country), then arbitrators must apply them. However, applying *force majeure* has to be provided under the law chosen by the parties, or *lex contractus* (in case of lack of choice), as arbitrators must first see if their source of authority allows them to apply the laws of place of performance as a valid ground for *force majeure*.⁴⁵

A. PUBLIC POLICY OF THE LAW CHOSEN BY THE PARTIES

In international arbitration “arbitrators are very slow to derogate from the principle of party autonomy”,⁴⁶ and “the reported cases show that the arbitrators invariably apply the law selected by the parties.”⁴⁷ Thus, arbitrators apply the law specified in the choice of law clause, including its public policy norms, even if the norm is not truly related to the dispute.⁴⁸ However, it is argued that if the parties have excluded a specific public policy norm of the chosen law, then the tribunal ought to ignore that norm,⁴⁹ unless the norm is categorized as a transnational one.⁵⁰ In case the public policy norm that parties have excluded address “negative externalities” (where third party

⁴² Transnational public policy is a narrow concept in scope. It generally refers to the very common notions of public policy among civilized nations (e.g., illegalizing corruption and bribery).

⁴³ See Barraclough and Waincymer, *supra* note 9 at 219; see also Grigera Naon, *supra* note 17 at 322, fn. 355.

⁴⁴ See Barraclough and Waincymer, *supra* note 9 at 218; see also Mayer, Mandatory Rules, *supra* note 1 at 281-82.

⁴⁵ *Id.*

⁴⁶ See Julian D M Lew, *Determination of Applicable Substantive Law*, 25 INT’L BUS. LAW. 157, 158 (1997).

⁴⁷ See Ole Lando, *The Law Applicable to the Merits of the Dispute*, in: Sarcevic (ed.), *Essays on International Commercial Arbitration* 129, 135 (1991).

⁴⁸ See e.g., the language of the tribunal in the ICC Case No. 11307, in 29 YB. Com. Arb. (2008), at 59, (“The law that governs the substantive matters in dispute in this arbitration in the law of South Africa, as the law chosen by the parties themselves...”); see also ICC Case No. 6474, in 27 YB. Com. Arb. (2000), at 283, (“in international commercial arbitration, the first and foremost duty of the arbitrator is undoubtedly to base his decisions, whether relating to jurisdiction or to the merits of the dispute, on the common will of the Parties, regarding for instance the applicable law...”); and ICC Case No. 4145, in 12 YB. Com. Arb. (1987), at 101, (“the principle of autonomy widely recognized- allows the parties to choose any law to rule their contract, even if not obviously related with [the dispute].”)

⁴⁹ See Linda Silberman and Franco Ferrari, *Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting It Wrong*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (eds. Franco Ferrari and Stefan Kröll), 257, 275 (2011) (“Embracing the general philosophy of extending broad autonomy to parties in international commercial arbitration, parties should be permitted to exclude not just one, but various laws, from being applied to the substance of the dispute. However, parties should not be allowed to exclude all national legal systems from application.”), citing ICC Arbitral Case No. 15089; and the decision of the *Tribunale di Padova* (Italy), 11 Jan 2005.

⁵⁰ See Barraclough and Waincymer, at 219, citing Yves Derains, *Public Policy and the Law Applicable to the Dispute in International Arbitration*, in Pieter Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration* (1987) at 227-28.

rights are involved), then due to conflict of interest, arbitrators should weigh the interests, i.e. public policy norms at stake, and apply one over the other.⁵¹

B. THE LAW CHOSEN BY THE TRIBUNAL

Parties may occasionally fail to determine the law applicable to their transaction. In that case, either arbitration Acts of the seat of arbitration or the arbitration rules, in case of institutional arbitration, may dictate an approach in determining the applicable law.⁵² When parties fail to make a choice, the tribunal will choose the law applicable to the transaction and the dispute, either directly or indirectly.

Parties implicitly provide the authority to determine the applicable law to arbitrators by their lack of choice of law. As a result, since arbitrators make the choice for the parties, they practice more flexibility in replacing public policy norms of the chosen law in favor of a stronger norm of a foreign jurisdiction (those of the place of enforcement of the award), which contradict with the arbitrators' direct or indirect choice of law.⁵³ The following illustrates how arbitrators select the otherwise applicable law and its public policy norms accordingly.

1. *Direct selection*

When parties fail to choose laws applicable to their contractual relationship, arbitrators may directly select national laws or general principles of law, trade usages, and *lex mercatoria* to govern parties' disputes. If parties have failed to provide for the substantive law of the contract, and the arbitrator has not made a choice yet, then all laws that affect the contract seem to have equal weight.⁵⁴ Most national and international legislation allow arbitrators to directly choose the law applicable they find most appropriate,⁵⁵ without going through the mediation of a choice of law rule.⁵⁶

One possibility is the laws of the place of arbitration. Although it has been argued that parties may choose a seat for various reasons, (they may not have even had its laws in mind to apply substantively to their contract) it may still remain a possible direct choice for the

⁵¹ See Barraclough and Waincymer, at 220; some legislations have explicitly pointed out areas which parties cannot waive mandatory laws. See e.g., Art 6(2) of the Rome I Regulation regarding non-waivability of mandatory consumer protection laws. It should be noted that, however, some authors believe that it is not for the parties to exclude the application of mandatory laws of the *lex contractus*. It would be for the Arbitral Tribunal to evaluate whether its application is appropriate on the basis of the mandatory law criteria of application, including exogenous factors such as transnational public policy (a functional choice-of-law approach). See Yves Derains, Application of European Law by Arbitrators – Analysis of Case Law, in *Arbitration and European Law*, 67-78 (1997).

⁵² See Silberman and Ferrari, at 264.

⁵³ See Barraclough and Waincymer, at 222, citing ICC case No. 4123 (1985) 10 Yearbook of Commercial Arbitration 49, at 50-51, where “Mandatory rules of the *lex contractus* were placed on the same footing as all foreign mandatory rules claiming to be applied.” Of course, the authors mention that “once the substantive law has been determined, the orthodox approach is for arbitrators to then automatically apply all of this law’s mandatory rules.”

⁵⁴ See Baniassadi, at 78.

⁵⁵ See e.g., Article 35(1) of the UNCITRAL Arbitration Rules (with new article 1, paragraph 4, as adopted in 2013), stating: “The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate.” See also Art. 21(1) of the ICC Rules (2021) and Art. 22.3 of the LCIA Rules (2014).

⁵⁶ See Silberman & Ferrari, *supra* note 49 at 265. However, the authors are “skeptical as to whether conflict of laws methodologies can ever be avoided completely.”

arbitrators.⁵⁷ An arbitrator should, however, limit the application of the substantive law (whatever it may be, such as national, international, general principle, etc.) by excluding from its operation those questions which she considers to be subject to public policy norms of another relevant law.

The other relevant law she should consider is generally public policy norms of the country where the contract is going to be performed. A reasonable view would be, however, considering the application of public policy norms with reference to legitimate expectations of the parties, as it explains an arbitrator's decision in applying norms of the place of performance.⁵⁸

With respect to public policy interventions, arbitrators should also take into account the appropriate trade usage or *lex mercatoria* when there are valid reasons to do so since *lex mercatoria* or transnational law originated and was developed within the permissive sphere traced by public policy norms as a choice-of-law methodology.⁵⁹ Thus, they may not override or supplant the applicable public policy norms.⁶⁰

2. *Indirect Selection via Conflicts Rules*

With respect to the applicable law, the New York Convention is silent in case of lack of choice of law by the parties; however, the UNCITRAL Model Law and the UNIDROIT Principles provide a direct application.⁶¹ The European Convention though has adopted the “indirect approach”. In Article VII(1) after giving priority to the law chosen by the parties, it states: “Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable.”⁶² Under the indirect approach, arbitrators should first determine which PILA (private international law act) they find suitable

⁵⁷ See, e.g., Restatement (Second) of Conflict of Laws, §218 cmt. at b (Am. Law Inst. 1971) (which observes that where the parties provide that arbitration take place in a certain place, it constitutes “some evidence of an intention on their part that the local law of this state should govern the contract as a whole.”).

⁵⁸ See Baniassadi, *supra* note 9, at 78-79.

⁵⁹ See Grigera Naon, *supra* note 17, at 333.

⁶⁰ See e.g., Case No. 13954 of 2010, in XXXV YB. Comm. Arb. (Int’l Comm. Arb.).

⁶¹ See U.N. Comm. On Int’l Trade, *Model Law*, Article 28(2): “Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.” The first step of this approach requires deciding what set of conflict-of-laws rules are applicable. The second step would apply those conflict-of-laws rules to determine the applicable law. See also, to the same effect, U.N. Comm. On Int’l Trade, *Arbitration Rules*, Art. 33 (1976) (the latest version adopts the “direct approach”; see U.N. Comm. On Int’l Trade, *Arbitration Rules*, Art. 35(1) (revised in 2010)). Applying a conflict-of-laws analysis is also recommended in Article 1.4 of the UNIDROIT Principles of International Commercial Contracts (2004), stating: “Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.” However, neither Article 1.4, nor Comment 4 attached to it resolves the mandatory substantive rule problem. The UNIDROIT “black-letter rules” and comments are available at <http://www.unidroit.org>. Comment 4 to Article 1.4 states:

4. Recourse to the rules of private international law relevant in each individual case, both courts and arbitral tribunals differ considerably in the way in which they determine the mandatory rules applicable to international commercial contracts. For this reason, the present article deliberately refrains from entering into the merit of the various questions involved, in particular whether in addition to the mandatory rules of the forum and of the *Lex contractus* those of third States are also to be taken into account and if so, to what extent and on the basis of which criteria. These questions are to be settled in accordance with the rules of private international law which are relevant in each particular case (see, for instance, [Art. 9 of the Rome I Regulation;] Art. 7 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations; Art. 11 of the 1994 Inter-American Convention on the Law Applicable to International Contracts).

⁶² See Silberman & Ferrari, *supra* note 49, at 266.

based on a conflicts analysis, and through applying its rules, they shall determine the applicable law to the merits.⁶³

In practice, arbitrators enjoy a wide range of discretion determining the applicable law absent a choice by the parties.⁶⁴ Their choices may be an application of the conflict rules or the seat of arbitration.⁶⁵ They may also apply the conflict rules of the country most closely connected with the dispute, though without recourse to any conflict of laws rules.⁶⁶

Another possibility is applying the cumulative approach: “a comparative analysis of several bodies of private international law and thereby simultaneously on the conflict of laws rules of the countries connected with the dispute.”⁶⁷ Arbitrators have also resorted to conflict of laws rules contained in international legislation, or even recourse to general principles of conflict of laws, “finding common or widely- accepted principles in the main systems of private international law.”⁶⁸

Due to the diversity and complication of disputes in arbitration, providing this level of flexibility regarding determination of the applicable law absent a choice by the parties to international arbitrators in the Swiss PILA seems to be more suitable for arbitration as a transnational venue for resolving international commercial disputes. For instance, with regard to the application of public policy norms, it is submitted that this flexibility allows arbitrators to look into multiple conflicts of law rules in order to determine if any specific public policy norm must

⁶³ See English Arbitration Act § 46(3), (1996).

⁶⁴ See Silberman & Ferrari at 281, fn. 142.

⁶⁵ If the parties have chosen a seat, then the arbitrators are supposed to and welcome to apply the conflict rules of the seat, but if the parties choose no seat, then the tendency is not to apply the rules of the seat, *see, e.g.*, ICC Arb. Award Case No. 9771 (2001), in IXXX YB. Com. Arb. 52-53 (2004) at pp. (where the conflict rules of the seat were applied); *see also* ICC Arb. Award Case No. 2930 (1982), in IX YB. Com. Arb. 105 (1984) (“the most authoritative present-day doctrine and international commercial arbitration jurisprudence admit that in determining the substantive law, the arbitrator may leave aside the application of the conflict rules of the forum.”); the leading exponent of this view was F.A. Mann, who believed in the application of the conflict rules of the seat by arbitrators, *see generally* F.A. Mann, The UNCITRAL Model Law – Lex Facit Arbitrum, 2(3) Arb. Int’l. 241, 251 (1986) (“Just as the judge has to apply the private international law of the forum, so the arbitrator has to apply the private international law of the arbitration tribunal’s seat, the *lex arbitri*. Any other solution would involve the conclusion that it is open to the arbitrator to disregard the law.”).

⁶⁶ *See, e.g.*, ICC Arbitral Award Case No. 8113 (1995), in XXV YB. Com. Arb. 325 (2000), the arbitral tribunal applied Syrian conflict of laws rules recognizing “several connecting factors”:

The claimant is a Syrian citizen whose place of business is Syria, and the services corresponding to his ‘monetary dues’ are supposed to have been performed in Syria, with a view to obtain a Syrian contract with a Syrian authority. Therefore, the tribunal finds that the Syrian rules of conflict of laws are the most appropriate to apply to this dispute.

⁶⁷ *See* Beda Wortmann, Choice of Law by Arbitrators: The Applicable Conflict of Laws System, 14(2) Arb. Int’l. 97, 110 (1998).

⁶⁸ *See, e.g.*, the final award in ICC Case No. 6527 (1991); Austrian Buyer v. Turkish Seller, Collection of ICC Arbitral Awards 1991-1995 at 185, 197 (Kluwer 1997), where the arbitrator refused to apply the conflict rules of the place of arbitration because the international arbitrator has no *Lex fori*, and instead applied general principles of international private law as stated in international conventions, specifically the Hague Convention on the Law Applicable to the International Sale of Goods. For further commentaries and citations regarding the possibilities of the choice of conflict of law rule by arbitrators absent a choice by the parties, *see*, Silberman & Ferrari, *supra* note 49, at 282-293. Authors also mention the conflict rules of the country that would have jurisdiction absent an arbitration clause or even the conflict of laws rules of the arbitrator’s home state, but as authors point this out in their research such possibilities have no support in practice, *see also id.* at 104-111.

be applied.⁶⁹ Even when parties have stipulated a choice, the tribunal may still consider the PILA rules of a state to resolve a conflict regarding application or nonapplication of a foreign public policy norm.⁷⁰

Tribunals, however, are not obliged to apply states' PILA rules.⁷¹ Arbitrators, unlike judges, have no forum and are not obligated in the same way to protect local public policy.⁷² Therefore, there is no uniform answer to the question of which PILA rule is applicable to an arbitral dispute. However, some assert that "arbitrators nevertheless have to choose certain conflict of laws rules, at least to determine the mandatory rules [public policy norms] which are decisive for the dispute in question because in this case the same principle is relevant as if the arbitrators had applied the substantive law without any recourse to private international law."⁷³

III. APPLICABLE PUBLIC POLICY NORMS IN CONNECTION WITH THE SEAT

Parties are free to agree on the seat of arbitration. Failing such an agreement, the arbitral tribunal shall make this determination.⁷⁴ Domestic arbitration acts apply only if the parties choose the enacting state as the seat of arbitration— "*lex loci arbitri*." *Lex loci arbitri* may refer to the arbitration rules, conflict-of-laws rules applicable in the place of arbitration, or even to the arbitration institution's procedural rules. However, the most important relevancy of the seat to

⁶⁹ See Silberman & Ferrari, *supra* note 49, at 279:

The direction to use a specific choice-of-law rule, such as "the closest connection" does have a limitation; like the situation in which arbitrators are to apply the law or the rules of law chosen by the parties, a specific choice-of-law rules is not exhaustive in that it does not deal with all the conflict of laws issue that may arise. Thus, it might be necessary to look to other conflict of laws rules, for example to determine what specific mandatory rules might need to be applied.

⁷⁰ See Grigera Naon, *supra* note 17, at 302-305.

⁷¹ Statutes and arbitration rules also indicate that resort to a conflict of laws analysis is not mandated, even if it is not prohibited and some sort of guidance is provided, see Marc Blessing, *Choice of Substantive Law in International Arbitration*, 14 J. INT'L ARB. 39, 55 (1997).

⁷² See Catherine Kessedjian, *Determination and Application of Relevant National and International Law and Rules*, in PERVASIVE PROBLEMS IN INTERNATIONAL ARBITRATION, 71, 81 (Loukas A. Mistelis & Julian D.M. Lew eds., 2006).

⁷³ See Wortmann, at 103-04, 111.

⁷⁴ See New York Convention, *supra* note 7, at art. V(1)(d), which gives priority to the parties agreement "and failing such agreement" it shall be "in accordance with the law of the country where the arbitration took place."; see also UNCITRAL Model Law, *supra* note 14, at art. 1(2): "The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State." and UNCITRAL Arbitration Rules, *supra* note 61, at art. 18; for an example in national arbitration law, see the English Arbitration Act of 1996, *supra* note 16 at sec. 2(3):

"In this Part 'the seat of the arbitration' means the juridical seat of the arbitration designated- (a) by the parties to the arbitration agreement, or (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or (c) by the arbitral tribunal if so authorized by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

arbitration is mainly its procedural laws, which govern the procedure in arbitration, unlike the *lex causae* or the *lex contractus*, which apply to the merits of the dispute.⁷⁵

As mentioned earlier, the seat may also function as a connecting factor in conflict of laws. In arbitral practice, however, the connection of the dispute to arbitration laws of the seat is considered as gap-filler, as most provisions of modern arbitration laws are default norms and may be replaced by agreement of the parties, for example by reference to a set of institutional arbitration rules.

Indeed, under the New York Convention, application of procedural public policy norms of the place of arbitration are recognized.⁷⁶ Courts of the place of arbitration are the only authorities that have jurisdiction to set aside an arbitral award on the grounds of forum's procedural public policy violations by the arbitral tribunal (e.g., due process violations). In other words, courts of the place of arbitration "have a residual power to permit, enjoin, or supervise the conduct of any local arbitration."⁷⁷ In case of annulment, the arbitral award may not get enforced elsewhere, and thus, may leave the parties with nothing.⁷⁸ That is a valid reason for the arbitral tribunal to be sensitive with regard to the application of procedural public policy norms of the *Lex arbitri*, and give these norms priority over other applicable public policy norms.⁷⁹ That being said, however, a judgment of a court at the place of arbitration, setting aside an award, may have no effect in other states, if the municipal laws of enforcement state still authorize to enforce annulled awards (e.g., a trend recognized in France, with reservations).⁸⁰

⁷⁵ See, e.g., ICC Case No. 11307, *supra* note 48: "the law that governs the substantive matters in dispute in this arbitration is the law of South Africa, as the law chosen by the parties themselves. But the arbitration proceedings are governed both by the ICC Rules and by the law of England, as the seat of the arbitration; and English law itself, in the Arbitration Act 1996, confers powers and duties on arbitral tribunals."

⁷⁶ See New York Convention, *supra* note 74, which states that an arbitral award may not get recognized or enforced if: "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

⁷⁷ See Alan Rau, *The Arbitrator and "Mandatory Rules of Law"*, 18 AM. REV. INT'L ARB. 51, 75 (2008), at fn. 84.

⁷⁸ See New York Convention, art. V(1)(e), 1958; See also Geneva Convention, 1961 (referencing the *lex loci arbitri*, Art. IX(1)(a)).

⁷⁹ See generally Karsten Thorn & Walter Grenz, *The Effect of Overriding Mandatory Rules on the Arbitration Agreement*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION (Franco Ferrari & Stefan Kröll eds., 2011).

⁸⁰ See Cour de Cassation, 23 March 1994, *Société Hilmarton Ltd v. Société Omnium de Traitement et de Valorisation (OTV)*; See also Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17(1) ARB. INT'L. 19, 28 (2001).

The laws of the seat also apply to the validity of the arbitration agreement under Article V(1)(a) of the New York Convention when parties have not stipulated any other law, as is usually the case in practice.⁸¹ Further, the laws of the place of arbitration also apply to the issue of arbitrability.⁸²

The more controversial side of *lex loci arbitri* is whether public policy norms of the seat are applicable to the merits of a dispute. For instance, if an arbitrator is applying a law that permits punitive damages, may he award this type of relief, even if he is sitting in a jurisdiction that punitive damages are forbidden? In ICC Case No. 5946, a distribution agreement between a French seller and an American buyer contained a New York choice-of-law clause and called for ICC arbitration in Geneva. The arbitrator found that the seller had improperly terminated the agreement and issued an award of lost profits in favor of the buyer. But he denied the buyer's claim for punitive damages. It stated that “[d]amages that go beyond compensatory damages to constitute a punishment of the wrongdoer are considered contrary to Swiss public policy, which must be respected by an arbitral tribunal sitting in Switzerland even if the arbitral tribunal must decide a dispute according to a law that may allow punitive or exemplary damages as such.”⁸³ Apparently, New York law did allow punitive damages, but the fact that the tribunal was sitting in Geneva, rejected application of the choice of law clause being in contradiction with Swiss public policy. That decision saved the award from getting annulled in Switzerland, as it may still be enforceable in the United States. Another way to analyze the scenario is that the nature of the law permitting punitive damages was not overridingly mandatory in the United States. Hence, one cannot say that any public policy norm was violated, but in fact the public policy of the place of arbitration were given priority over a non-mandatory norm governing the distributorship agreement chosen by the parties.⁸⁴ As to the function public policy norms play, here the Swiss norm which prohibited punitive damages in an early termination of a distributorship agreement, forced its negative function and blocked the parties’ choice of law from application under the circumstances of this case.⁸⁵

⁸¹ Based on the principle of ‘Separability/Severability’ of the arbitration clause, the arbitration clause, as an independent agreement between the parties, survives any attack directed to the validity of the main contract. *See generally* Hossein Fazilatfar, *In Defense of Separability: Pima Paint, Buckeye, & Rent-A-Center*, 54 (2) TEX. TECH L. REV. (Forthcoming Spring 2022). However, if the subject-matter of the dispute is inarbitrable, then the arbitration clause is “inoperative or incapable of being performed” (Art. II (1) and (3) of the New York Convention) with respect to that subject-matter. Indeed, the arbitration clause is still operative and capable of being performed to the disputes that are within the scope of the arbitration clause under the law of the seat. According to the principle of ‘*Kompetenz-Kompetenz*’ the arbitrator may rule on his own jurisdiction, i.e., whether she is allowed, under the *lex loci arbitri*, to rule on that particular dispute/subject-matter. *See generally*, Hossein Fazilatfar, *Adjudicating “Arbitrability” in the Fourth Circuit*, 71 (4) S.C. L. REV. 741 (2020).

⁸² *See* British Glass Company (U.K. v. It.), Case No. 14046 of 2005, XXXV Y.B. Comm. Arb. 241 (ICC Int’l Ct. Arb.), at p. 243, where the Italian parties had chosen ICC arbitration to take place in Geneva and had stipulated Italian law governing their concentration agreement, although lacking a choice on the law applicable to the arbitration clause. Under Swiss law (being the place of arbitration the arbitrators had found the arbitration clause valid regarding both form and substance (referring to Art V(1)(a) of the NY Convention). They also found that they could decide on their own initiative to consider their jurisdiction over the case, as under Swiss law they had jurisdiction to decide competition law (breach of non-competition clause in the case before them).

⁸³ *See* ICC Case No. 5946, XVI Y.B. COM. ARB. ¶ 97 (1990); *See also* *Soleimany v. Soleimany*, [1999] Q.B. 785 (C.A. 1998); *Westacre Investments Inc. v. Jugoimport-SPDR Holding Co. Ltd.*, [2000] Q.B. 288 (C.A. 1999); and *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd.*, [1999] 2 Lloyd’s Rep. 222 (Q.B.)

⁸⁴ *See* ICC Case No. 5946, XVI Y.B. COM. ARB. ¶ 97 (1990).

⁸⁵ *See* Hossein Fazilatfar, *OVERRIDING MANDATORY RULES IN INTERNATIONAL COMMERCIAL ARBITRATION*, 26-29 (Edward Elgar Publishing) (2019).

In discussing the relevance of arbitrability to *Lex loci Arbitri*, one observer has noted that: “the arbitrators should take the *lex loci arbitri* into account only when the pending dispute has a territorial connection with the seat of the arbitration.”⁸⁶ Should there be a territorial connection between the seat, its public policy norms, and the dispute? A glance at the wording of the New York Convention would support this contention. The courts – and perhaps arbitral tribunals – should only be concerned with procedural public policy violations of the seat. Article V(1)(d) of the Convention expressly states that any decision by the tribunal regarding “the composition of the arbitral authority or the arbitral procedure” must be in line with the law chosen by the parties, and in case of lack of choice of law, the law of the state where arbitration took place. It seems that under the Convention, procedural laws of the seat are relevant and applicable in arbitration as default laws. Therefore, in order to limit the application of any and all public policy norms in arbitration, there should be a higher threshold upheld to qualify substantive public policy norms of the place of arbitration for application (e.g., a territorial connection).⁸⁷

IV. APPLICABILITY OF FOREIGN PUBLIC POLICY NORMS

A foreign public policy norm is a law other than parties’ choice of law and the *Lex arbitri*.⁸⁸ It generally claims application when it is overriding and has been given an extraterritorial effect by the legislator.⁸⁹ Indeed, to arbitrators and judges, there must be a legitimate and strong connection between the state that promulgated the norm and the case at hand.⁹⁰ After an initial determination of such connection, the issue in the process of applying or at least considering the norm is whether arbitrators should address the issue *ex officio* or based on one of the parties’ initiative. The answer can be a mix of both.

The issue mainly revolves around two factors: norm connection and party initiative.⁹¹ It is submitted that, if one party requests application of a public policy norm and there is an apparent connection between the case and the country that promulgates the norm, the arbitrator should take that foreign public policy norm into account.⁹² In the absence of the close connection factor, an arbitrator must ignore the norm, regardless of a request by one of the parties.⁹³ However, it is within arbitrators’ discretion to inquire on their own initiative, in case of apparent close connection

⁸⁶ Stavros Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited lex fori*, Queen Mary U. of London, Sch. of L., 99, 111 (2009).

⁸⁷ *See Id.* at 111.

⁸⁸ *See generally* Christopher S. Gibson, Arbitration, Civilization and Public Policy: Seeking Counterpoise between Arbitral Autonomy and the Public Policy Defense in View of Foreign Mandatory Public Law, 113 (4) PENN STATE L. REV. 1227 (2009).

⁸⁹ *Id.*

⁹⁰ Laurence Shore, *Applying Mandatory Rules of Law in International Commercial Arbitration*, 18 AM. REV. INT’L ARB. 91 (2007).

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*; *see also* Luca Brazolo, *Antitrust: A Paradigm of the Relations between Mandatory Rules and Arbitration -- A Fresh Look at the "Second Look,"* 7(1) Int’l Arb. L. Rev. 23 (2004) (giving the same proposition regarding judges, stating that if “a given defense is not raised by the party having an interest . . . , and if for whatever reason the issue is not addressed *ex officio* by the court, irrespective of the mandatory or public policy nature of the purportedly violated rule the matter can no longer be raised once the case is finally decided or the statute of limitations has elapsed. There is no apparent reason why things should be different when arbitration is involved”).

between the third country's public policy norm and the dispute.⁹⁴ Commentators have further suggested that then "it is the arbitrator's duty to apply the mandatory procedural rule of due process and give the parties a reasonable opportunity to set out their positions on the applicability of the mandatory substantive rule."⁹⁵

In terms of tribunals dealing with foreign public policy norms in practice, there are three general observations: reject application, direct or indirect application of the norm, and taking the norm into account as datum.⁹⁶

In an ICC case No. 6320,⁹⁷ a contract on the construction of a power plant in Brazil contained a choice of law clause. It provided for Brazilian law as the governing law and an arbitration clause that had France as the seat of arbitration. The Brazilian company (the claimant) brought a claim against the contractor, a U.S. company, for defective product quality (fraudulent act). The case escalated into a claim for treble damages under the RICO Statute.⁹⁸ Although the parties agreed that the tribunal had jurisdiction over RICO claims and to award damages accordingly,⁹⁹ (the U.S. courts had already permitted arbitrability of similar statutes),¹⁰⁰ the tribunal held that RICO claims were inadmissible.

The tribunal reasoned that application of RICO would be contrary to the law to which the parties agreed¹⁰¹ because the substantive Brazilian law provided an exclusion of RICO claims.¹⁰² Also, there is a lack of United States' "strong and legitimate interest" in the case, as the performances related to the contract neither took place in the United States nor had any impact on the American market.¹⁰³ Finally, the tribunal found that RICO applied to domestic cases, without any extraterritorial reach when the transaction lacks significant contact with the United States.¹⁰⁴

Admittedly, arbitrators often consider an award's compatibility with the law of the likely place(s) of enforcement. Belgian distributor was named exclusive agent for the Benelux countries, in a distribution agreement that Italian law governs, providing arbitration in Italy.¹⁰⁵ A Belgian statute provides damages for early termination of a distribution agreement that has an impact on the Belgian market. Also, the statute provides all rights to the distributor to bring the dispute before Belgian courts to be decided under Belgian law. After early termination by the manufacturer, the distributor-initiated court proceedings in Belgium, while the manufacturer filed a demand for arbitration. The arbitrator held that "according to the principle of the parties' contractual

⁹⁴ See Marc Blessing, *Impact of the Extraterritorial Application of Mandatory Rules of Law on International Contracts*, 35-38 (1999) (citing ICC Case No. 7181 (1992), ICC Case No. 7181 (1992), and ICC Case No. 7539 (1996)).

⁹⁵ See Laurence Shore, *Applying Mandatory Rules of Law In International Commercial Arbitration*, 18 INT'L ARB. L. REV. 91 (2007).

⁹⁶ See generally Rau, *The Arbitrator* *supra* note 77.

⁹⁷ Case No. 6320, XX Y.B. COM. ARB. 62 (ICC Int'l Ct. Arb. 1992); see also commentaries by Rau, *The Arbitrator* *supra* note 77, at 55-58.

⁹⁸ Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970).

⁹⁹ See Rau, *The Arbitrator* *supra* note 77, at 55-58.

¹⁰⁰ See e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (recognizing arbitrability of Anti-trust disputes (the Sherman Act)).

¹⁰¹ See Case No. 6320, 20 Y.B. Comm. Arb., *supra* note 97, at 153-154.

¹⁰² *Id.* at 170; (The tribunal, on the basis of the governing law states: "the [c]ontract and the intentions of the parties must be interpreted as intended to exclude claims such as a RICO claim").

¹⁰³ *Id.*; See also NAON, *supra* note 17, at 297-302.

¹⁰⁴ See Rau, *supra* note 77, at 55-58.

¹⁰⁵ See Case No. 6379 of 1990, 17 Y.B. Comm. Arb. 212 (ICC Int'l Ct. Arb.).

autonomy,” Italian law shall govern the dispute and it “cannot be disregarded in the present case.” Therefore, the validity of both the overall contract and of the arbitral clause itself was to be ascertained according to Italian law. The three-month notice given by the manufacturer was in line with Italian law, despite the longer mandatory notice period under the Belgian statute, protecting agents. The distributorship agreement had thus been validly terminated, and the distributor’s claim for compensation was denied. Also, according to Italian law, “the arbitration clause in the Contract is not null and void, inoperative or incapable of being performed,” based on the New York Convention.¹⁰⁶ In this case, arbitrators insisted on party autonomy and applied parties’ law to the issue of arbitrability and rendered award applying Italian law to the arbitration clause and the dispute in general. Since Belgium was not a potential place for enforcement, it seems that there were no enforcement concerns. Perhaps the outcome would have been different if parties had to enforce the award in Belgium, or if Belgium was the place of arbitration.

Arbitrators, almost rarely, replace the applicable law with a foreign public policy norm and apply it directly to the merits. This application is usually authorized either under the law the parties chose (or *Lex contractus*) or based on the connection between the dispute and the foreign norm. In the famous Hilmarton case, OTV (a French company) entrusted Hilmarton (an English company) with the task of providing advice and coordination for a bid to obtain and perform a contract for works in Algeria (the place of performance).¹⁰⁷ Hilmarton relied on the ICC arbitration agreement in order to obtain payments of the remaining balance of its fees. The parties chose Swiss law. The award rendered in Geneva dismissed this claim due to an Algerian prohibition (the foreign mandatory law) on the use of intermediaries and declared the contract void. This case may be a clear indirect application of the mandatory rules approach, under which the arbitrator was entitled to give effect to the mandatory rules of a law of the place of performance. However, the main point is that arbitrators applied the Algerian prohibition on the use of intermediaries to invalidate a contract, not because they had independent authority to directly apply that norm but because the parties’ choice of Swiss law required them to honor public policies of the place of performance.¹⁰⁸ Among very few cases is the decision in ICC Case No. 8626 – where the tribunal sitting in Geneva, Switzerland decided to apply European antitrust law although New York law was the chosen law.¹⁰⁹ The tribunal found under New York law that a foreign tribunal must “take into account on the grounds of international public policy, the anti-trust law of the United States.¹¹⁰” Thus, it held that “it appears to us that the law of New York requires that an arbitral tribunal wherever situated should take into account the anti-competition provision of the Treaty of Rome and the relevant regulation made thereunder.”¹¹¹ The tribunal also relied on decisions of the Swiss Federal Tribunal, whereby Arbitral Tribunals sitting in Switzerland “are competent” to decide whether the contract is valid or not under European antitrust law. Since the contractual

¹⁰⁶ See Rau, *supra* note 77, at 83; See also The New York Convention Guide, UNCITRAL, Article II (July 2016); See also Italian Grantor of Distributorship v. Belgium Exclusive Distributor, Case No. 6752 of 1991, 28 Y.B. Com. Arb. 54-57 (ICC Int’l Ct. Arb.) (detailing Belgian public policy provides that distributors may always file a lawsuit in Belgium. Upon termination of the distributorship must yield on the basis of the New York Convention to Italian law, which was selected by the parties and which validates the arbitration agreement (for more, see COLLECTION OF ICC ARBITRAL AWARDS 1991-1995 at 195-6-97 (Kluwer 1997).

¹⁰⁷ OTV v. Hilmarton, Case No. 5622 of 1994, 19 Y.B. Comm. Arb. 112 (ICC Int’l Ct. Arb.).

¹⁰⁸ See LEW, MISTELIS & KROLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 422 (Kluwer L. Int’l 2003), (agreeing that the issue was one of correctly applying the parties’ own choice of Swiss law).

¹⁰⁹ Case No. 8626 of 1996 (ICC Int’l Ct. Arb.).

¹¹⁰ *Id.*

¹¹¹ *Id.*

clauses at stake restrained competition, with a direct impact on the European Union's market, it concluded that European antitrust law applied and that choice of law clauses in favor of New York law was invalid.

In reaching this conclusion, the tribunal pointed out that "an Arbitral Tribunal should always be concerned with the effectiveness of its decision" and referred in that connection to Article 26 of the ICC arbitration rules of 1988 (the same text is found in Article 41 of the 2012 ICC rules) according to which the arbitrator "shall make every effort to make sure that the award is enforceable at law."¹¹² Should claimant succeed in its claims, the award would "in all probability" be sought to be enforced in the country of respondent – a member of the European Union.¹¹³ The tribunal believed courts of such country would deny enforcement of the award, if the latter gave effect to the contractual clauses – the validity of which were challenged.¹¹⁴

Arbitration proponents have noticed that public policy norms do not necessarily have to be applied or even rejected. A third approach is to take such norms into account as datum or fact when they are a legal impediment to the performance of the transaction at stake.¹¹⁵ Therefore, if they are qualified under the law the parties chose or the *lex loci contractus* as acts of force majeure, then the foreign norm should be taken into account indirectly to prevent performance and not necessarily applied to the case as the applicable law.¹¹⁶ The arbitral tribunal made a decision based on this approach in *Northrop Corp. v. Triad Int'l Marketing S.A.*¹¹⁷ Northrop, a U.S. firefighter jet manufacturer, entered into a marketing agreement with Triad, a Liechtenstein company wholly owned by a Saudi citizen and Northrop's exclusive agent, to sell fighter aircrafts to Saudi Arabia.¹¹⁸ Triad, in exchange for commissions on sales, solicited contracts for aircraft to the Saudi Air Force.¹¹⁹ The agreement, containing an arbitration clause, was to be governed by California law.¹²⁰ After a few years, the Saudi government issued a decree prohibiting the payment of commissions in connection with armaments contracts, which required that existing obligations for the payment of commissions be suspended.¹²¹ Northrop ceased paying commissions, and thus Triad submitted the dispute to arbitration.¹²² What the tribunal considered here was the Saudi decree as a point of fact and the Californian Civil Code as the applicable law which the parties chose.¹²³ Under California law, performance is excused when prevented by law. Here, however, payment of the commission to Triad is far from being impossible or impracticable, making the

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ See Rau, *supra* note 77, at 55-58.

¹¹⁶ See *Northrop Corp. v. Triad Int'l Marketing S.A.*, 811 F.2d 1265 (9th Cir.1987).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ See *id.* at 1267.

¹²² *Id.* at 1267-68.

¹²³ See Rau, *supra* note 77, at 71 ("The arbitrators were not expected to apply the Saudi Decree as regulatory law *ex proprio vigore*, but merely to 'take it into account' in order to judge the nature of the defendant's promised performance determining whether the *lex contractus*, as properly understood, imposed liability for the defendant's conduct.").

force majeure defense inapplicable.¹²⁴ Therefore, the tribunal awarded in favor of Triad.¹²⁵ The tribunal took the foreign public policy norm, the Saudi decree, into account as an event of force majeure based under the law that governed the contract, California law, “without actually applying it because it was unnecessary to do so.”¹²⁶

V. MAKING ADJUSTMENTS IN APPROACHING PUBLIC POLICY NORMS

The discussion so far reveals that arbitrators can treat public policy norms from either a contractual, jurisdictional, or a hybrid perspective. Indeed, no rigid formula can guarantee proper application of public policy norms in all cases.¹²⁷ In addition to the traditional conflicts or independent approaches arbitrators could take towards this issue, there are other adjustments they could also take into account to determine the appropriate public policy norm(s) applicable in the dispute before them. Here it is suggested that arbitrators: (a) consider application of *dépeçage* and apply multiple bodies of law to each part of the transaction; and (b) the arbitrator may act as a mediator within the arbitration proceeding and mediate the conflict between the parties.

Application of *dépeçage* where multiple laws are applied to different parts of the contract to accommodate the immediate application some public policy norms deserve.¹²⁸ *Dépeçage* results everywhere because of issues such as procedural characterization, rejection of parts of foreign law on public policy grounds or, for that matter, when a public policy norm displaces a part of foreign law.¹²⁹ American Restatement (Second), Conflict of Laws adopts that as a general approach where “it *directs* the court to divide the case into its component parts – ‘issues’ - and to make a separate choice of law determination with respect to each of them.”¹³⁰ In Europe, *dépeçage* is accepted in a more limited scope where only in exceptional cases the issue-by-issue approach is adopted and labeled “principled *dépeçage*” that requires express party stipulation.¹³¹ The assumption there is

¹²⁴ *Id.* (citing Restatement (Second) Contracts, § 261) (“Discharge by Supervening Impracticability.”) *But cf. id.* at § 264, comment a. (“The fact that it is still possible for a party to perform if he is willing to break the law and risk the consequences does not bar him from claiming discharge.”).

¹²⁵ *Northrop*, 811 F.2d at 1267.

¹²⁶ *See* Mayer, *supra* note 1, at 281.

¹²⁷ *See* Jeff Waincymer, *International Commercial Arbitration and the Application of Mandatory Rules of Law*, 5 ASIAN INT’L ARB. J. 1, 38 (2009) (“Any attempt to present a rigid formula as to the applicability of mandatory laws is fraught with danger.”).

¹²⁸ RESTATEMENT (SECOND) OF CONFLICT OF LAWS §188 cmt. d (1971) (“Each issue is to receive separate consideration if it is one which would be resolved differently under the local law rule of two or more of the potentially interested states”); It seems the European approach is more limited than that of the American *dépeçage*; *See* Peter Hay, *European Conflicts Law after the American “Revolution” – Comparative Notes*, 2015 U. ILL. L. REV. 2053, 2066 (2015) (“European law does not follow the Second Restatement’s general issue-by-issue approach. Its rules provide for the law applicable to ‘THE contract’ or to ‘THE tort.’”). *See also* Peter Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law*, 226 RECUEIL DES COURS 281, 377 (1991).

¹²⁹ *See* Hay, *supra* note 128 at 375.

¹³⁰ *Id.* *See also* Hay, *European Conflicts of Law After the American “Revolution” – Comparative Notes*, *supra* note 128, at 2065-66 (“The Second Restatement directs courts to determine the applicable law to the ‘particular issue’ in a tort or contract case on the basis of its ‘most significant relationship’ test.”)

¹³¹ Hay, *European Conflicts of Law After the American “Revolution” – Comparative Notes*, *supra* note 128, at 2066; *See also* Rome I Regulation, *supra* note 39, at Art. 3(1): (“By their choice the parties can select the law applicable to the whole or to part only of the contract”); *see also* Article 4(1) of the Rome Convention (“a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.”).

that parties are not willing to have multiple bodies of law split and govern their transaction.¹³² However, some have urged that a broader application of *dépeçage* (issue-by-issue, the American style) better serves the international character and aspects of multistate cases.¹³³ The principled *dépeçage* brings certainty to choice of law and dispute resolution (that requires party stipulation), while the American style provides flexibility. However, possibly, applying *dépeçage* in the European style seems to be a better approach when the norms involved are default norms. The question is when overriding public policy norms of particular states claim immediate application in a given scenario, why is there a need for party stipulation (‘principled *dépeçage*’) for them to be applied? In certain situations where a transaction has been performed in multiple states and their public policy norms are at stake, arbitrators may apply *dépeçage* as a final method to justify application of such norms. However, the limit can be a late application and specific to public policy norms of the place of performance, unlike a general approach under the American Restatement.

Finally, in addition to the various legal-based solutions for the application of public policy norms in arbitration, mediation by the same arbitrator(s) within the arbitration process, as a non-legal-based approach, can also be an efficient way to resolve a public policy issue in arbitration.¹³⁴ As this research has revealed thus far, public policy norms can bring a complex situation to an international dispute. In case the contractual stipulations the parties drafted or the laws the arbitrator applies are unable to address the dispute, then an option outside the legal paradigm can be settlement of that dispute through mediation. An arbitrator, due to his understanding and knowledge over the dispute, can well act as a mediator when faced with a challenging issue such as public policy norms. But the mediation can only be successful with willing and cooperative parties. This so-called ‘arb-med-arb’¹³⁵ solution is a trend in line with the general arbitration process.¹³⁶ Indeed, like arbitration, mediation is also contractual and based in party-consent.¹³⁷ Thus, for the arbitrator to proceed with mediation he must have the parties’ agreement. The arbitrator may, at any stage, mention the possibility of mediation to mediate all or parts of a dispute. The arb-mediator would recognize parties’ choice of law, and discuss potential impact or application of public policy norms of that state and other foreign states involved with the

¹³² Hay, *European Conflicts of Law After the American “Revolution” – Comparative Notes*, *supra* note 128, at 2066, fn. 63.

¹³³ Hay, *Flexibility Versus Predictability and Uniformity in Choice of Law*, *supra* note 128, at 376; See also Arthur T. von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974).

¹³⁴ For a thorough application of this approach, see generally Hossein Fazilatfar, *International Arbitration and the Mandatory Law Problem: A Mixed Mode ADR Approach*, AM. REV. INT’L ARB. (forthcoming Winter 2022).

¹³⁵ See Thomas J. Stipanowich, *Arbitration, Mediation and Mixed Modes: Seeking Workable Solutions and Common Ground on Med-Arb, Arb-Med and Settlement-Oriented Activities by Arbitrators*, 26 HARV. NEGOT. L. REV. 265, 277 (2021) (Hybrid processes are also referred to as Multitier or Mixed Mode.) See also Singapore International Mediation Center (SIMC), *SIAC-SIMC Arb-Med-Arb Protocol* (2014), <http://simc.com.sg/v2/wp-content/uploads/2019/03/SIAC-SIMC-AMA-Protocol.pdf>.

¹³⁶ See Gabrielle Kaufmann-Kohler, *When Arbitrators Facilitate Settlement: Towards a Transnational Standard*, 25 ARB. INT’L. 187 (2009).

¹³⁷ See UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation, Art. 5(1), 2018 (amending the UNCITRAL Model Law on International Commercial Conciliation (2002)).

transaction, including places of arbitration, performance, and enforcement.¹³⁸ She would also have an opportunity to share with the parties the impact of public policy violations on foreign judgments and enforcement of awards in the jurisdictions involved in the case.¹³⁹ The arb-mediator could then, on a case-by-case basis and where proper, suggest that parties make post-dispute changes to the existing choice of law, or adopt a particular body of law to apply to part of their transaction (*dépeçage* discussed above).¹⁴⁰ Indeed, there will be laws more favorable to one party. In that case, the arb-mediator, depending on the issues at stake and parties' interests rather than position, should urge parties in making compromises.¹⁴¹

CONCLUSION

Arbitration agreements draw the legal relationship not only between the parties but also are the contractual source giving authority to the arbitrators to resolve parties' commercial disputes. To respect the principle of party autonomy, arbitrators must serve parties' will and consider their interests in issuing the arbitral award. However, there is one caveat: respect public policy norms of the states that have an important stake in the outcome of the arbitration. This reservation in respecting such norms is not far from arbitrators' mandate to issue an enforceable at law.

Indeed, application of public policy norms in international arbitration is a challenge. The law chosen by the parties, or the otherwise applicable law chosen by the tribunal is where the first and foremost public policy norms must be applied and respected. The limitations would be overriding public policy norms of the place of arbitration on the issue of arbitrability (if the *Lex arbitri* has a territorial connection with the dispute) and such procedural norms of the place of arbitration over the procedural aspect of the arbitration. Another overriding public policy norms possibly involved (that may override parties' choice of law) are those of the foreign states to the chosen law and to the *Lex arbitri*, which have a close connection to the case. In practice arbitrators have reacted to foreign public policy norms in three ways: either they have only taken such norms into account as matters of fact, or have applied them as a matter of law, or have ignored them with no consideration.

When it is said that public policy norms are taken into account as a matter of fact, the public policy behind the norm is considered as a force majeure event preventing the transaction from getting legally performed, and if already performed, in violation of that state's public policy. Where foreign public policy norms are applied directly, however, the law chosen by the parties is governing all parts of the transaction, but not where that law contradicts with the overriding foreign public policy norm. Thus, only in that issue, the foreign norm replaces the law chosen by the parties and applies assertively.

¹³⁸ See Veronique Fraser & Kun Fan, *Working Group 3: Mediators using non-binding evaluations and proposals*, INTERNATIONAL MEDIATION INSTITUTE, 33, <https://imimmediation.org/about/who-are-imi/mixed-mode-task-force/> (“[...] the neutral is mandated to help the parties find solutions and reach agreement, which may take into account the parties' subjective interests, but he or she is also expected to act evaluatively. This can take the form of advising on objective parameters and norms, such as the applicable law or other norms such as financial, industrial, technical, tax-related, social, etc., or predicting the result of an adjudicative outcome (court, arbitration, or others).”).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 35,41.

In cases where foreign public policy norms are ignored by the tribunal is either because the norm lacked an overriding character, or there was a lack of close connection between the case and the country promulgating the norm. However, in cases where all the right circumstances are met and the tribunal still ignores the overriding public policy norm, the award may face possible annulment or refusal of enforcement by courts of the enforcement state and eventually replacement of the chosen law by overriding norms of the forum.

As this Article illustrates, arbitrators do not have to necessarily reject application of public policy norms, in particular ones with an overriding character or directly applicable in disputes and endanger the fate of their award. On a case-by-case basis, they have the opportunity to apply the applicable norm to particular issues in the dispute or award (*dépeçage*) and respect party autonomy in all other aspects of the case. This may be done *ex officio* or through mediation within the arbitration process conducted by the same arbitrator most familiar with the dispute, with active participation of the parties.

INTERNATIONAL SPACE LAW: HOW RUSSIA AND THE U.S. ARE AT ODDS IN THE FINAL FRONTIER

Matthew G. Looper

INTRODUCTION

The dual-purpose of this article is to 1.) provide insight into the history of Russian-American space relations through the lens of international law, and 2.) show how cooperation between these two world powers is beginning to wane. In particular, the arrival of China on the space scene has finally given Russia a non-Western minded partner in space. Advancements in military technology in space have also raised concerns for the future of space relations, as we see the importance of satellites for on-the-ground operations continue to grow and become commonplace for the U.S., Russia, and now China. This article will show that as Russia and the U.S. grow further apart in space, they risk breaking with a tradition of cooperation that has sustained peace for decades.

I. THE INTERNATIONAL SPACE STATION: A PRODUCT OF U.S.-RUSSIA COOPERATION

The U.S. and Russia have been long-time partners in space. Russians and Americans have been working together in space for over two decades, and have been quite literally working together in space since astronaut Bill Shepherd and cosmonauts Yuri Gidzenko and Sergei Krikalev became the first crew to reside onboard the International Space Station (ISS) in November 2000.¹ While the ISS has had visitors from nineteen countries, over its history it has principally been a joint Russian-American endeavor, exemplified by how the station itself is divided into two sections: the Russian Orbital Segment (ROS) operated by Russia, and the United States Orbital Segment (USOS) run by the United States and other partner nations.² The International Space Station Intergovernmental Agreement, or IGA, is a January 1998 international treaty signed by the fifteen governments involved in the Space Station project.³ This agreement establishes “a long-term international cooperative framework among the Partners, on the basis of genuine partnership, for the detailed design, development, operation, and utilization of a permanently inhabited civil Space Station for peaceful purposes, in accordance with international law.”⁴ The IGA marks the first of a series of agreements that govern every aspect of the ISS, ranging from jurisdictional issues to a code of conduct among visiting astronauts.⁵ Commencing

¹ *History and Timeline of the ISS*, ISS NATIONAL LABORATORY, <https://www.issnationallab.org/about/iss-timeline/> (last visited Nov. 23, 2021).

² See Peter B. de Selding, *Russia — and Its Modules — To Part Ways with ISS in 2024*, SPACE NEWS, (Feb. 25, 2015), <https://spacenews.com/russia-and-its-modules-to-part-ways-with-iss-in-2024/>. See generally Mark Garcia, *Visitors to the Station by Country*, NASA, <https://www.nasa.gov/feature/visitors-to-the-station-by-country/> (last visited Nov. 23, 2021).

³ *International Space Station legal framework*, THE EUROPEAN SPACE AGENCY, https://www.esa.int/Science_Exploration/Human_and_Robotic_Exploration/International_Space_Station/International_Space_Station_legal_framework (last visited Nov. 28, 2021).

⁴ The International Space Station Intergovernmental Agreement, art. 1, Jan. 29, 1998, <https://www.state.gov/wp-content/uploads/2019/02/12927-Multilateral-Space-Space-Station-1.29.1998.pdf>.

⁵ See André Farand, *Astronauts' behaviour [sic] onboard the International Space Station: regulatory framework*, INTERNET ARCHIVE,

only a few short years after the end of the Cold War and the fall of the Soviet Union, the IGA represents the beginning of a new, cooperative regime of peaceful space exploration by the United States and Russia.

II. THE OUTER SPACE TREATY

This multilateral space regime traces its roots back to Russian-American cooperation on The Outer Space Treaty of 1967 (OST), a treaty that lists the principles governing the activities of states in the exploration and use of space.⁶ The treaty serves as the foundation of international space law, namely prohibiting deployments of nuclear weapons in space, the construction of military facilities on the Moon, and the national appropriation of natural space objects, as well as requiring all off-world facilities to be open to all visitors.⁷ The exact language used in the treaty is important, as current developments in space militarization may soon threaten the once-harmonious space relationship between the U.S. and Russia.

Article IV of the OST provides that:

States Parties to the Treaty undertake not to place in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, install such weapons on celestial bodies, or station such weapons in outer space in any other manner. The moon and other celestial bodies shall be used by all States Parties to the Treaty exclusively for peaceful purposes. The establishment of military bases, installations and fortifications, the testing of any type of weapons and the conduct of military maneuvers on celestial bodies shall be forbidden. The use of military personnel for scientific research or for any other peaceful purposes shall not be prohibited. The use of any equipment or facility necessary for peaceful exploration of the moon and other celestial bodies shall also not be prohibited.⁸

The prohibition on positioning nuclear weapons or weapons of mass destruction in space is straightforward, but less straightforward is defining what “peaceful purposes” are. Asking what constitutes “peaceful purposes” is therefore the central question, as that will likely determine whether a nation is in violation of Article IV of the OST. Two popular legal interpretations have emerged to define the “peaceful purposes” language: the “non-military” interpretation and the “non-aggressive” interpretation.⁹ Proponents of the “non-military” interpretation argue that “exclusively for peaceful purposes” must exclude *any* use for military-related purposes, while

https://web.archive.org/web/20060913194014/http://portal.unesco.org/shs/en/file_download.php/785db0eec4e0cdfc43e1923624154cccFarand.pdf.

⁶ See generally Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, (Jan. 27, 1967), https://treaties.unoda.org/t/outer_space.

⁷ Lillian Posner & Evan Sankey, *The U.S. and Russia are Parting Ways in Space and That's Risky*, NATIONAL INTEREST (May 7, 2021), <https://nationalinterest.org/feature/us-and-russia-are-parting-ways-space-and-thats-risky-184506> (last visited Dec. 3, 2021).

⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies, art. 4, Jan. 27, 1967, <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/outerspacetreaty.html> [hereinafter Outer Space Treaty].

⁹ Jeremy J. Grunert, Grounding the Humā: The Legality of Space Denial and (Potential) American Interference in the Iranian Space Program, 81 A.F. L. REV. 76, 101 (2020), <https://www.afjag.af.mil/Portals/77/documents/Law%20Review/Law%20Review%2081.pdf?ver=PqiJkS0AI3-MH--aS6YcXA%3d%3d>.

proponents of the “non-aggressive” interpretation argue that the language only prohibits uses that are inherently aggressive — violations of the U.N. Charter and international law.¹⁰

It has been the longstanding approach of the United States, and indeed the majority of nations, to support the “non-aggressive” interpretation of “peaceful purposes.”¹¹ When interpreting treaties, Article 31 Section 3 Part III of the 1969 Vienna Convention on the Law of Treaties requires that, “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”¹² Thus, we must look to the ordinary or customary meaning of the words “peaceful purpose.” Dr. Alex Meyer applies this rule to the OST by looking to the Charter of the United Nations, where the term “peaceful” is ordinarily regarded to mean “non-aggressive.”¹³ To define “non-aggressive”, we look toward the General Assembly’s adoption of Resolution 3314 (XXIX) in December 1974.¹⁴

Article 3 of Resolution 3314 (XXIX) clarifies what constitutes aggressive acts:

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

The blockade of the ports or coasts of a State by the armed forces of another State;

An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

¹⁰ *Id.*

¹¹ *Id.* at 101-02.

¹² Vienna Convention on the Law of Treaties, art. 31, May 23, 1969, 1155 U.N.T.S. 331, https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

¹³ Manasa S Venkatachalam, *What does it take to violate Article IV of the Outer Space Treaty: Looking to Artemis for the celestial answer*, ILA Reporter, Aug. 27, 2021, <https://ilareporter.org.au/2021/08/what-does-it-take-to-violate-article-iv-of-the-outer-space-treaty-looking-to-artemis-for-the-celestial-answer-manasa-s-venkatachalam/>.

¹⁴ Grunert, *supra* note 9, at 103-04.

The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.¹⁵

Thus, looking to Resolution 3314 (XXIX), “aggressive” conduct in space is much more limited compared to the more broadly encompassing “military” uses, as a “military-related purpose” could be anything just slightly associated with the military.¹⁶ Many space technologies are inherently dual-use with the military, such as rocketry, satellite navigation, remote sensing, satellite observation, and so on.¹⁷ Anything that involves observing the surface of the Earth will naturally include surveillance and information gathering which then can be used for military purposes. It’s no wonder, then, that a majority of nations agree that the “non-military” interpretation is untenable; not only is it too over encompassing, it’s also just not practical. There is already extensive use of satellites for military reconnaissance, namely by the U.S., which in turn provides information to the armed services of allies like Canada, the UK, and the Netherlands, indicating an international acceptance of satellite use for military purposes that is not considered to violate the “peaceful purposes” requirement of Article IV of the OST.¹⁸

Article IV of the OST is not alone in causing a rift between the U.S. and Russia. Conflicting interpretations over Articles II and XII of the treaty have also led to the U.S. acting more unilaterally in space, such as through the Artemis Accords.¹⁹ The Artemis Accords is a component of the Artemis Program, a United States-led international human spaceflight program, the primary goal of which is to return humans to the Moon by 2024.²⁰ The Artemis Accords are a non-treaty agreement portion of the Artemis Program that asserts, among other things, signatories’ right to own mineral wealth extracted from the Moon, and declares “safety zones” around each nations’ space operations to prevent harmful interference by other space actors.²¹ Russia and China, which have become an increasingly major players in space, argue that this agreement is in violation of Articles II and XII of the OST.²² Article II provides that, “Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.”²³ Article XII provides that, “All stations, installations, equipment, and space vehicles on the moon and other celestial bodies shall be open to representatives of other States Parties to the Treaty on a basis of reciprocity.”²⁴ Although it would seem that the plain language of these provisions bans a nation from extracting and owning lunar minerals, as well as the exclusive “safety zones” that would be used to protect national interests on the Moon, under America’s specific interpretation of the language these operations would be permissible; notably, of the fourteen signatories to the agreement, only the United States

¹⁵ *Id.*

¹⁶ *Id.* at 104.

¹⁷ *Id.* at 102.

¹⁸ Ricky J. Lee & Sarah L. Steele, *Military Use of Satellite Communications, Remote Sensing, and Global Positioning Systems in the War on Terror*, 79 J. AIR L. & COM. 69, 77, (2014), <https://scholar.smu.edu/cgi/viewcontent.cgi?article=1334&context=jalc>.

¹⁹ Posner & Sankey, *supra* note 7.

²⁰ *Explore Moon to Mars*, NASA, <https://www.nasa.gov/specials/moontomars/index.html> (last visited Nov. 29, 2021).

²¹ Posner & Sankey, *supra* note 7.

²² *Id.*

²³ Outer Space Treaty, *supra* note 8, at art. 2.

²⁴ *Id.* at art. 12.

has the potential to conduct such operations.²⁵ Under the U.S. Space Resource Exploration and Utilization Act of 2015, the U.S. doesn't assert "sovereignty or sovereign or exclusive rights or jurisdiction over, or the ownership of, any celestial body", which would be in violation of the OST, but instead "provides for property rights relating to minerals *already extracted*."²⁶ Given that the exclusive nature of the Artemis Accords heavily favors the U.S. through this interpretation, Russia and China have refused to sign the agreement.²⁷

III. SOVIET-ERA SPACE TREATIES

Although Russia challenges the U.S.'s interpretation of Articles II and XII of the OST, historically the U.S. and Russia have seen eye to eye on international space law and are signatories to the same international treaties that govern state behavior in space: the Partial Test Ban Treaty of 1963, the Outer Space Treaty of 1967, the Rescue Agreement of 1968, the Liability Convention of 1972, and the Registration Convention of 1976.²⁸ Neither Russia, the U.S., nor China (i.e., the three countries that engage in self-launched human spaceflight) are signatories to the 1984 Moon Treaty; as such, the treaty holds little to no relevancy in international law.²⁹ These remaining treaties combine to form the present-day rule of law in space, an accomplishment which wouldn't have been possible without U.S.-Russia cooperation.

Prior to the OST, which has already been discussed at length, the only international law on space activity was the Partial Test Ban Treaty of 1963. This treaty, signed one day short of the eighteenth anniversary of the first atomic bomb falling on Hiroshima, prohibited nuclear weapons testing under water, in the atmosphere, or in outer space.³⁰ This treaty proved that the United States and Russia (then the USSR) could cooperate in space, an important accomplishment in of itself, considering that it was signed just a year after the Cuban Missile Crisis brought the two nations dangerously close to nuclear war.³¹

After the OST came the Rescue Agreement of 1968, the shortest of the international space treaties at only ten articles, which is primarily concerned with ensuring astronauts (here, referring to American astronauts and their Soviet/(Russian) counterparts, cosmonauts) are returned safely

²⁵ Posner & Sankey, *supra* note 7; Jeff Foust, *Mexico joins Artemis Accords*, SPACE NEWS (Dec. 10, 2021), <https://spacenews.com/mexico-joins-artemis-accords/> (last visited (Dec. 20, 2021)).

²⁶ Paul Arthur Berkman et al., *OUTER SPACE LAW: RUSSIA – UNITED STATES COMMON CHALLENGES AND PERSPECTIVES*, 1 MOSCOW J. INT'L L. 20, 23 (2018),

https://www.researchgate.net/publication/326948007_OUTER_SPACE_LAW_RUSSIA_-_UNITED_STATES_COMMON_CHALLENGES_AND_PERSPECTIVES (quoting Space Resource Exploration

and

Utilization Act of 2015, H.R. 2262, 114th Cong. § 51303 (2015) www.congress.gov/bill/114th-congress/house-bill/2262/text).

²⁷ *Id.*

²⁸ See generally *Space Law Treaties and Principles*, UNITED NATIONS OFF. FOR OUTER SPACE AFF., <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties.html> (last visited Nov. 29, 2021).

²⁹ Jonathan Sydney Koch, *Institutional Framework for the Province of all Mankind: Lessons from the International Seabed Authority for the Governance of Commercial Space Mining*, 16 INT'L J. SPACE POL. & POL'Y 1, 3 (2018).

https://www.tandfonline.com/doi/pdf/10.1080/14777622.2017.1381824?casa_token=F_azMKp0HWQAAAAA:ApEjnuFXQhkXvOkEa-8Dcrrxb5VtdD5W6gEuS6TdAEzhpR8XNh8yKRkzJPS1iN8RnlGm-KP1V4eV.

³⁰ *NUCLEAR TEST BAN TREATY*, JOHN F. KENNEDY PRESIDENTIAL LIBRARY AND MUSEUM, <https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/nuclear-test-ban-treaty> (last visited Nov. 29, 2021).

³¹ *Id.*

to Earth.³² “Currently it has 90 states parties and a further 24 states as signatories”—quite a large basis of support considering that at the time it was signed only two states, the U.S. and Russia, had astronauts; an example of how Russian-American cooperation has historically dominated international space relations.³³

Next came the Liability Convention of 1972, which in Article II declares that a “launching State shall be absolutely liable to pay compensation for damage caused by its space object on the surface of the earth or to aircraft flight.”³⁴ Article III explains that in the slightly different context of damage caused to a space object by a space object of another launching State, “the latter shall be liable only if the damage is due to its fault or the fault of persons for whom it is responsible.”³⁵ The Liability Convention’s terms have only been invoked once, during “the Cosmos 954 fiasco of 1978”, “when a Soviet satellite inadvertently fell to Earth in uninhabited Canadian territory.”³⁶ Ultimately, the Canadian claims against the USSR were not brought before a claims commission established under the Liability Convention.³⁷ Instead, the countries found a diplomatic solution where the U.S. would assist Canada in debris cleanup and transfer the Soviet satellite remnants to the U.S.³⁸ This avoided a messy legal dispute between one of America’s closest allies and its great-power rival. Because Canada’s claim was for the cost of cleanup, rather than property damage, it was not clear whether the Liability Convention was the controlling authority.³⁹ This diplomatic solution on the part of the U.S. shows how important healthy relations with Russia in space have been for the international community, even when the initial incident didn’t directly involve the U.S.

Lastly, there is the Registration Convention of 1976. Ratification of this treaty was not as widespread as the previous ones: “only 44 states are parties to the Convention, with a further 4 states having signed but not ratified.”⁴⁰ This is likely due to the fact that ratification is really only relevant to states launching objects into outer space, which is still a minority of countries.⁴¹ Like the Rescue Agreement and the Liability Convention, the Registration Convention is essentially elaborating on one specific Article of the OST.⁴² That Article is Article VIII, which already provides the framework for the registration of space objects and the possibility to exercise jurisdiction over such objects once they’ve been registered.⁴³ The primary motivation for states to ratify this treaty stems from the fact that only states party to the Convention are entitled to formally

³² Frans G. von der Dunk, *A SLEEPING BEAUTY AWAKENS: THE 1968 RESCUE AGREEMENT AFTER FORTY YEARS*, 34 J. SPACE L. 411, 411 (2008)

<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1028&context=spacelaw>.

³³ *Id.* at 418-19.

³⁴ Trevor Kehrer, *Closing the Liability Loophole: The Liability Convention and the Future of Conflict in Space*, 20 CHICAGO J. INT’L L. 180, 183 (2019)

<https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1756&context=cjil>.

³⁵ *Id.* at 183-84.

³⁶ *Id.* at 185.

³⁷ *Id.* at 185-86.

³⁸ *Id.* at 186.

³⁹ *Id.*

⁴⁰ Frans G. von der Dunk, *THE REGISTRATION CONVENTION: BACKGROUND AND HISTORICAL CONTEXT*, AM. INST. AERONAUTICS AND ASTRONAUTICS 450, 450 (2003),

<https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1031&context=spacelaw>.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 451.

protest and bring forward legal claims in case another party to the Convention fails to comply with its duties under it.⁴⁴ This is because, under general public international law, only states parties to a treaty may consider their rights to be violated if another party does not fulfil the relevant obligations.⁴⁵

These treaties are very real legal obligations that the U.S. and Russia have to each other as fellow signatories, but they also serve as reminders of how, despite decades of hostile relations with one another, these two countries have been able to come to an agreement (in this case, many agreements) that hold one another accountable for their actions in space. However, complacency is dangerous. Considering that the last of these treaties entered into force in 1976, it should come as no surprise that those forty-five years of inactivity have led to peaceful relations beginning to chill. There's a paradigm shift happening in space, and as the rift between the U.S. and Russia widens, it can only spell disaster for the international space community.

IV. RUSSIAN SPACE LAW

To understand the paradigm shift happening in space, we must first understand domestic space law in Russia. Russian space law is largely governed by Federal Law No. 5663-1.⁴⁶ “This law is directed at ensuring the legal regulation of space activities for the purpose of developing the economy, science and technology, strengthening the defense and the security of the Russian Federation[,] and furthering the international cooperation of the Russian Federation.”⁴⁷ Adopted in 1993, this law highlights that the exploration and use of outer space is the “highest priority of the [state’s] interests,” and outlines the scope of space activities, including such activities as scientific research, technology uses, manned space flights, etc.⁴⁸ This federal law codifies that Russian space activities are subject both to Russian domestic law and international treaties signed by Russia, and that Russia will defer to relevant international agreements to settle issues such as the jurisdiction and control over space objects, the registration of such objects, and ownership rights.⁴⁹ Federal Law No. 5663-1 also covers how space activities are related to Russian national security. Discussed in the purpose statement and reiterated again in Article II, one of the areas covered by space activities is “the use of space technology, space materials and space technology in the interests of the defense and security of the Russian Federation.”⁵⁰ Article IV notes that space activities, “shall be implemented with the observation of the requirements, as established by law, for the protection of state secrets, military and commercial secrets[,] as well as the results of

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ Seonhee Kim, *SPARC Brief: Russia*, U. WASH. SPACE POL’Y AND RES. CTR., <https://www.sparc.uw.edu/russia/> (last visited Dec. 2, 2021); *see generally* SOBRANIE ZAKONODATEL’STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation], Dec. 18, 2006, No. 5663-1 (Russ.), https://www.wto.org/english/thewto_e/acc_e/rus_e/wtaccrus58_leg_375.pdf [hereinafter Federal Law No. 5663-1].

⁴⁷ Federal Law No. 5663-1, *supra* note 46.

⁴⁸ Kim, *supra* note 46; Federal Law No. 5663-1, *supra* note 46.

⁴⁹ Kim, *supra* note 46; Federal Law No. 5663-1, *supra* note 46.

⁵⁰ Kim, *supra* note 46; Federal Law No. 5663-1, *supra* note 46, at art. 2.

intellectual activities and exclusive rights to them.”⁵¹ As such, it seems this federal law recognizes the need and intent for Russia to use space for military purposes.⁵²

Outside of the use of space for military purposes, Russia law has also allowed for the commercial use of space. As mentioned above, Article IV of Federal Law No. 5563-1 establishes use of space for the protection of commercial secrets, as well as the protection of commercial secrets of foreign organizations and citizens under the jurisdiction of the Russian Federation per Article XXVII.⁵³ Additionally, Article VI provides that the Federal Space Program “organize and coordinate the work of commercial space projects and assists [sic] in their implementations”⁵⁴ To this end, Roscosmos, the Russian Federal Space Agency, is deeply embedded in the global space market, serving as the coordinating hub for both civilian and military space activities.⁵⁵ Russia engages in the commercialized space market through Roscosmos, promoting its technologies, launch capabilities, and human capital to countries with developed space industries like the U.S.⁵⁶ For example, Russian space exports such as the RD-180 rocket engines and in-space electric propulsion technologies are vital to American customers like NASA, SpaceX, and Lockheed Martin.⁵⁷

A. AN ASCENDANT V. DESCENDANT PRIVATE SPACE SECTOR

Although Roscosmos engages in big business with governments and companies around the world, CNN reported in 2015 that the agency is plagued by shady transactions and corruption scandals. In 2014 alone, Roscosmos committed 92 billion rubles (\$1.8 billion) worth of financial violations, according to Russia's public spending watchdog agency.⁵⁸ At the center of this financial crisis is the construction of the Vostochny Cosmodrome, the new space launch site in the eastern part of Russia that was originally set to open by the end of 2015.⁵⁹ The cosmodrome is crucial for Russia's ability to independently launch rockets, as the country still relies on the Soviet-era Baikonur Cosmodrome in Kazakhstan for rocket launches. Construction for the project started in 2012, and since then it has suffered a series of setbacks due to funding problems, as Roscosmos' budget for the next decade was slashed in 2015 by 35% to 2 trillion rubles (\$37 billion).⁶⁰

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⁵¹ Federal Law No. 5663-1, *supra* note 46, at art. 4.

⁵² Kim, *supra* note 46.

⁵³ Federal Law No. 5663-1, *supra* note 46, at art. 4, 27.

⁵⁴ Federal Law No. 5663-1, *supra* note 46, at art. 6.

⁵⁵ Kim, *supra* note 46.

⁵⁶ *See supra* text accompanying note 46.

⁵⁷ *See supra* text accompanying note 46.

⁵⁸ Ivana Kottasova, *\$1.8 billion disappears in Russian space program*, CNN BUSINESS, May 25, 2015, <https://money.cnn.com/2015/05/25/technology/russia-space-corruption/> (last visited Dec. 3, 2021).

⁵⁹ *Id.*

⁶⁰ Kottasova, *supra* note 58; *Four More Jailed For Corruption At Cosmodrome Project In Russia's Far East*, RADIO FREE EUROPE/RADIO LIBERTY, <https://www.rferl.org/a/russia-vostochny-cosmodrome-corruption/31558418.html> (last visited Dec. 3, 2021).

two trillion rubles (\$37 billion).⁶¹ To add to the financial woes, Tatyana Golikova, the audit chief, said the cosmodrome's construction costs have ballooned by 20%.⁶²

The project also suffered from alleged corruption. In 2015, a crewless cargo space ship burned up in the Earth's atmosphere after a communication failure, and a Proton-M carrier rocket carrying a Mexican satellite crashed in Siberia, both of which were blamed at the time on chronic corruption in the space industry by then-deputy prime minister Dmitry Rogozin. And the corruption allegations haven't improved since then. In 2019, a Kremlin spokesman said that eleven billion rubles (\$154.2 million) had been embezzled during the construction of the Vostochny Cosmodrome.⁶³ Prosecutors said later that year that 163 probes had been launched against individuals involved in the construction, and that about 60 people had already been convicted.⁶⁴ Construction continues at the time of writing.⁶⁵

In contrast to the languishing efforts of Russia to have a space industry that can stand on its own two feet, the U.S.'s private sector companies have entered a space renaissance, spurring investment in a wide array of complementary services necessary for the success of private sector and government spacecraft alike.⁶⁶ For example, in February 2020, Maxar Technologies was awarded a \$142 million contract from NASA to develop a robotic construction tool that would be assembled in space for use on a low earth orbit spacecraft.⁶⁷ In 2019, Made In Space, Inc. received a \$74 million contract to 3Dprint large metal beams in space for use on a NASA spacecraft.⁶⁸ Future private sector spacecrafts will have similar manufacturing needs, which these space infrastructure companies will be well positioned to fulfill.⁶⁹

While the growing volume of tech companies providing essential goods and services to NASA is certainly a great achievement for the private space sector, arguably the greatest achievement for the industry has been the success of SpaceX. In 2012 SpaceX became the first company to launch a resupply mission to the ISS.⁷⁰ Three years later, it landed the first stage of an orbital rocket for the first time in history.⁷¹ The company now operates the most powerful rocket in the world, *Falcon Heavy*, and in 2019, it launched 13 of the 21 U.S. flights to orbit.⁷² But what is the achievement that has received the most coverage? SpaceX was the first company to fly humans into orbit on its own spacecraft and was followed in July 2021 by two more American

⁶¹ See Kottasova, *supra* note 58; see also *Four More Jailed For Corruption At Cosmodrome Project In Russia's Far East*, RADIO FREE EUROPE/RADIO LIBERTY (Nov. 12, 2021), <https://www.rferl.org/a/russia-vostochny-cosmodrome-corruption/31558418.html>.

⁶² Kottasova, *supra* note 58.

⁶³ *Four More Jailed For Corruption At Cosmodrome Project In Russia's Far East*, *supra* note 61.

⁶⁴ *Id.*

⁶⁵ *See id.*

⁶⁶ Mehak Sarang & Matt Weinzierl, *The Commercial Space Age Is Here*, HARV. BUS. REV. (Feb. 12, 2021), <https://hbr.org/2021/02/the-commercial-space-age-is-here>.

⁶⁷ *Id.*

⁶⁸ *Id.*; Karen Northon, *NASA Funds Demo of 3D-Printed Spacecraft Parts Made, Assembled in Orbit*, NASA, <https://www.nasa.gov/press-release/nasa-funds-demo-of-3d-printed-spacecraft-parts-made-assembled-in-orbit> (last visited Dec. 3, 2021).

⁶⁹ Sarang & Weinzierl, *supra* note 66.

⁷⁰ Jay Bennett, *How SpaceX became NASA's go-to ride into orbit*, NAT'L GEOGRAPHIC (Nov. 12, 2020), <https://www.nationalgeographic.com/science/article/how-spacex-became-nasas-go-to-ride-orbit>.

⁷¹ *Id.*

⁷² *Id.*

companies who ventured into space—Virgin Galactic and Blue Origin.⁷³ Virgin Galactic launched 53.5 miles above the Earth’s surface on one of the company’s rocket-powered planes, while Blue Origin launched 62 miles aboard its *New Shepard* rocket. Both planes landed at the edge of space and achieved zero-gravity.⁷⁴ In November 2021, SpaceX successfully brought four astronauts to the *ISS*, who joined three inhabitants already on the space station: a NASA astronaut and two Russian cosmonauts, who were in the middle of a nearly yearlong mission.⁷⁵ The arrival of four American astronauts on a commercial spaceflight, rendezvousing with two Russian cosmonauts whose country doesn’t have a fully constructed space center to launch rockets, is indicative of just how far the split between Russian and American space capabilities has become.⁷⁶

This paradigm of success between two equally old space programs perhaps further entrenches the idea in U.S. policy makers that America doesn’t need cooperation with Russia to be successful in space. Yet, hope is not lost. An agreement is in the works for an astronaut exchange program, where a Russian cosmonaut will fly aboard a SpaceX mission to the *ISS* in September 2022 in exchange for a future flight with a NASA astronaut onboard Russia’s *Soyuz* spacecraft.⁷⁷ While hope remains for future Russian-American space cooperation, the militarization of space signals that soon the partnership that birthed the *ISS* may be replaced by a space arms race.

V. THE MILITARIZATION OF SPACE

That the U.S. and Russia, who have engaged in great power competition for decades, subject themselves to the same international laws in space and have historically good-working relations is an often underappreciated fact. But that relationship has taken a hit as the world looks toward space as the next and final stage for how nations wage war. The 2006 U.S. National Space Policy authorized the United States to actively defend its interests in space and to deny access to space to nations that the United States determined were using space in a way hostile to U.S. national interests.⁷⁸ Russia, along with China, criticized the U.S. for this aggressive, unilateral approach.⁷⁹ The 2006 U.S. National Space Policy states in relevant part that the United States will “preserve its rights, capabilities, and freedom of action in space; dissuade or deter others from either impeding those rights or developing capabilities intended to do so; take those actions necessary to protect its space capabilities; [and] respond to interference.”⁸⁰ This policy, which George W. Bush issued as a presidential directive, largely reiterates the rights that international space treaties already granted to the U.S., namely the OST, and how the U.S. will take “actions

⁷³ *Id.*; Tim Levin, *Jeff Bezos just launched to the edge of space. Here's how Blue Origin's plans stack up to SpaceX and Virgin Galactic.*, BUS. INSIDER (July 20, 2021, 10:28 AM) <https://www.businessinsider.com/elon-musk-jeff-bezos-branson-spacex-blue-origin-virgin-2021-5>.

⁷⁴ *Id.*

⁷⁵ Joey Roulette, *SpaceX Delivers NASA's Crew-3 Astronauts to Space Station*, N.Y. TIMES (Nov. 12 2021) <https://www.nytimes.com/2021/11/11/science/spacex-nasa-docking.html>.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ Todd Barnet, *United States National Space Policy*, 23 FLA. J. INT’L L. 277, 282 (2011), <https://activityinsight.pace.edu/tbarnet/intellcont/UNSNP%2020062012-1.pdf>.

⁷⁹ *Id.*

⁸⁰ *Id.* at 282-83.

necessary” to defend these rights.⁸¹ However, Russia’s criticism of this policy stems from it implying the potential for the U.S. to engage in military action to protect U.S. national interests in space—a possible violation of the OST.⁸² This implication is made especially clear in the portion of the policy that states that the U.S. may “deny, if necessary, adversaries the use of space capabilities hostile to U.S. national interests.”, which would necessarily involve military power.⁸³ Article I of the OST provides that space “shall be free for exploration and use by *all* States without *discrimination of any kind*, on a basis of equality and in accordance with international law.”⁸⁴ Exclusion of a nation from space would likely constitute discrimination, and thus enforcement of this provision of the policy is likely prohibited by the OST.⁸⁵

The 2006 U.S. National Space Policy also provides that “the United States will oppose the development of new legal regimes or other restrictions that seek to prohibit or limit US access to or use of Outer Space.”⁸⁶ This rejection of any new multilateral treaty that seeks to limit American activities in space was the beginning of the U.S.’s march toward unilateralism, as ever since, the U.S. has avoided negotiating on any new international space laws and has doubled down on protecting its existing rights, like the 2015 U.S. Space Resource Exploration and Utilization Act’s protection of property rights to minerals in space.⁸⁷

In June 2010, President Barack Obama issued a new presidential directive on National Space Policy (NSP10) that echoed many of the same goals as the NSP06 but with a more cooperative tone.⁸⁸ In contrast to the language found in the NSP06, which implied the necessary use of military force as a means of discriminating against nations hostile to U.S. interests, the language of the NSP10 focuses more on self-defense, an uncontested right, and deviates from the previous nationalistic tone by applying this to allied space systems: “[C]onsistent with the inherent right of self-defense, [the United States may] deter others from interference and attack, defend our space systems and contribute to the defense of allied space systems, and, if deterrence fails, defeat efforts to attack them.”⁸⁹ Another stark contrast with the NSP06 can be found in the new policy’s call for openness and transparency—signaling a move away from the Bush Administration’s more unilateral attitude.⁹⁰ Additionally, the more hostile language of the NSP06, like denying a nation access to space, was removed, signaling how the U.S. may now be more amenable to stricter international space armament laws.⁹¹ Still, the NSP10 is ultimately a continuation of the strong national security stance taken in the NSP06.

Although the U.S. has pulled back on the strong language found in the NSP06, the level of space cooperation very well could be dependent on the presidential administration, with Republican administrations following the militaristic posture found in Bush’s national space policy, and Democratic administrations following the cooperative posture found in Obama’s directive. Evidence seems to point toward this space policy flipflopping being a predictable

⁸¹ *See id.*

⁸² *See id.* at 283.

⁸³ *Id.* at 284.

⁸⁴ *Id.* (emphasis added).

⁸⁵ *See id.*

⁸⁶ BERKMAN ET AL., *supra* note 26, at 25.

⁸⁷ *Id.* at 23.

⁸⁸ Barnet, *supra* note 78, at 278.

⁸⁹ *Id.* at 285.

⁹⁰ *Id.*

⁹¹ *Id.* at 285-86.

pattern, including the Trump Administration's establishment of the United States Space Force, an overt move toward preparing for military action in space.⁹² This frequent change by the world's strongest military in an area as important as space warfare toys with international expectations of how the U.S. will react to dilemmas in space. Will the United States pursue a legal solution when confronted with possible threats in space, or will it exercise its "right" to deny hostile nations space access? This unpredictability can only lead to miscalculation. If current trends progress, there is a very real possibility that Russia will be the one making the miscalculation.

Speaking at a disarmament conference in Geneva in February 2019, Russian Foreign Minister Sergei Lavrov expressed Moscow's concern over the militarization of space, saying, "The plans of the United States, France and the North Atlantic Alliance as a whole to launch weapons into space are gaining more and more real shape."⁹³ Clearly, the U.S.'s increased military interest in space has not gone unnoticed. But the U.S. is not alone. As of 2018, according to the Union of Concerned Scientists, the U.S. military uses over 170 satellites, while the Russian military operates 97 satellites.⁹⁴ American and Russian military use of satellites have played a part in their recent conflicts in the Middle East—conflicts where the two sides have supported opposing factions, using intel from their respective satellites to further their military goals on the ground.⁹⁵ As Russia and the U.S. increasingly use space for opposing military actions planet-side, Russia has begun looking elsewhere for partnership in space.

VI. THE RUSSIA-CHINA SPACE GANG

The split in American-Russian space relations has led Russia to seek out a more equal partnership with China.⁹⁶ Where the ISS once served as a symbol of U.S.-Russia cooperation, with American astronauts often launched there aboard Russian Soyuz spacecraft, that cooperation is now breaking down.⁹⁷ "The success of NASA's commercial crew partnership with SpaceX and Boeing means that American astronauts will increasingly fly to low Earth orbit on American spacecraft rather than the Russian Soyuz[.]" the National Interest reports.⁹⁸ The most expensive object ever constructed at over \$100 billion, the ISS will likely run out of U.S. funding by 2030, and Russia has announced that it is considering withdrawing from the ISS in 2025 to develop its own space station.⁹⁹

Not only does Russia have plans to build its own space station, but in March 2021 Russia also announced that it and China have agreed to jointly construct a lunar space station dedicated

⁹² Establishment of the United States Space Force, 84 Fed. Reg. 6049 (Feb. 19, 2019), <https://www.govinfo.gov/content/pkg/FR-2019-02-25/pdf/2019-03345.pdf>.

⁹³ Roger McDermott, *Russia's Military Exploitation of Outer Space*, JAMESTOWN FOUND., <https://jamestown.org/program/russias-military-exploitation-of-outer-space/> (last visited Dec. 10, 2021).

⁹⁴ KEHRER, *supra* note 34 at 191.

⁹⁵ See Joe Pappalardo, *How a Syrian Airstrike Got Help From Space*, POPULAR MECHANICS, <https://www.popularmechanics.com/military/weapons/a19980968/syrian-airstrike-from-space/>. (last visited Dec. 14, 2021).

⁹⁶ Posner & Sankey, *supra* note 7.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*; *Most expensive man-made object*, GUINNESS WORLD RECORDS, <https://www.guinnessworldrecords.com/world-records/most-expensive-man-made-object> (last visited Dec. 14, 2021).

to “strengthening research cooperation and promoting the exploration and use of outer space for peaceful purposes in the interests of all mankind.”¹⁰⁰ This international lunar scientific research station (ILRS), despite having no completion timeline, is perhaps the biggest wake-up call to American politicians and military leaders to China’s rise in space capabilities, which it has accomplished without U.S. assistance thanks to an American law known as the Wolf Amendment, which bans cooperation with China in space.¹⁰¹ This means that Russia and other nations outside the close inner circle of American allies may now form their own space bloc with China.¹⁰² The China National Space Administration said in its statement that the ILRS would be “open to all countries,” and Roscosmos said that the two space agencies planned to “promote cooperation on the creation of an open access ILRS for all interested countries and international partners. . . .”¹⁰³ Despite the promises of being an internationally open space station dedicated to peaceful research and exploration, a joint Russia-China space station is a threat to America’s position in space. As we covered above, space is becoming increasingly important militarily, and as tensions ramp up with China planet-side, a stronger China in space partnering with Russia raises grave national security concerns.

The Wolf Amendment, named after Congressman Frank Wolf (R-Va.) who introduced it in 2011, has arguably led to a more powerful, independent China in space.¹⁰⁴ The amendment was included in the NASA authorization bill and prohibits the space agency and the White House Office of Science and Technology Policy from spending any appropriated money on cooperation with China.¹⁰⁵ In order to work with China, the agency would have to get permission from the FBI, who would have to certify that there were no risks to sharing information and that none of the Chinese officials involved had committed human rights abuses.¹⁰⁶ Though admirable in its attempt to punish China for human rights abuses, the Wolf Amendment is mutually damaging to the U.S. because it forced China to not rely on American cooperation in space, leading to Chinese advancements that threaten to rival American space dominance. Such advancements since 2011 include: the launch of a Chinese space station, the deployment of new heavy-lift rockets, and successful robotic missions to the Moon and Mars.¹⁰⁷ Additionally, in December 2020, China’s unmanned Chang’e mission brought lunar samples back to Earth, making it only the third country to have successfully collected rocks from the moon.¹⁰⁸ China also has plans underway to send astronauts to the moon by the 2030s; if successful, China would become only the second country after the U.S. to put a citizen on the moon.¹⁰⁹

Despite Wolf’s retirement from Congress in 2015, the Wolf Amendment language has been included in each year’s appropriations bills.¹¹⁰ Given that the ISS is expected to retire by 2030,

¹⁰⁰ Jessie Yeung, *China and Russia agree to build joint lunar space station*, CNN, <https://www.cnn.com/2021/03/09/asia/russia-china-lunar-station-intl-hnk-scli-scn/index.html> (last visited Dec. 14, 2021).

¹⁰¹ *Id.*; Posner & Sankey, *supra* note 7.

¹⁰² *See* Yeung, *supra* note 100.

¹⁰³ *Id.*

¹⁰⁴ Jacqueline Feldscher, *Biden space advisers urge cooperation with China*, POLITICO, <https://www.politico.com/news/2020/12/20/biden-china-space-448529>. (last visited Dec. 14, 2021).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Posner & Sankey, *supra* note 7.

¹⁰⁸ Yeung, *supra* note 100.

¹⁰⁹ Yeung, *supra* note 100.

¹¹⁰ Feldscher, *supra* note 104.

unless an American company like SpaceX launches a space station, the Chinese station that Beijing is expected to finish building in 2022 may soon be the only choice for Russia, the EU, and Japan, who have all expressed a desire to conduct experiments in low-Earth orbit.¹¹¹ Even if a new American space station is built, there is good reason to believe that the flip-flopping of presidential administrations on space issues would serve as a deterrent for nations who would otherwise seek American space cooperation.¹¹²

Partnered with an ascendent China, Russia has proposed a “Treaty on the Prevention of the Placement of Weapons in Outer Space, the Threat or Use of Force against Outer Space Object (PPWT), which would ban conventional weapons in space.”¹¹³ American commentators have decried this proposal as intended to restrict the U.S.’s capabilities “while doing nothing to address Chinese and Russian ground-based anti-space capabilities.”¹¹⁴ Bradley Bowman, the senior director of the Center on Military and Political Power at the Foundation for Defense of Democracies, wrote in *Foreign Policy* how Russia would use this treaty to tie the U.S.’s hands and then simply continue to test weapons in space. A July 2020 incident indicated that when a Russian satellite fired what appeared to be an anti-satellite space torpedo during a weapons test.¹¹⁵ Bowman believes Russia’s conduct following the PPWT would be similar to how for more than a decade before its demise in 2019, Moscow used the Intermediate-Range Nuclear Forces Treaty to constrain the United States while Russia produced, flight-tested, and fielded a ground-launched intermediate-range cruise missile in direct contravention of the treaty.¹¹⁶ Even if Russia doesn’t blatantly disregard the PPWT, the treaty lacks any verification plan to ensure compliance and contains no restrictions on the development and stockpiling of anti-satellite weapons on the ground.¹¹⁷ Meaning, if a nation like Russia or China decides to withdraw from the treaty, it could readily deploy space-based weapons previously developed on the ground.¹¹⁸

There is a real fear that a Chinese-Russian space alliance will lead to the continual militarization of space as two blocs form, with countries wishing to participate in space forced to pick between a North Atlantic-Japanese bloc led by the U.S., and a Chinese-Russian bloc led by an increasingly advanced China. But for the sake of not sounding alarmist, there is also good cause to believe that any significant threat Russia and China may pose in space is still years off, as right now the balance of power is heavily skewed in the U.S.’s favor.¹¹⁹ At \$40 billion, the combined U.S. civil and military space budget is nearly as large as the rest of the world combined, and of the 3,372 operational artificial satellites now in Earth’s orbit, 56% are controlled by the U.S.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Posner & Sankey, *supra* note 7.

¹¹⁴ *Id.*

¹¹⁵ Bradley Bowman & Jared Thompson, *Russia and China Seek to Tie America’s Hands in Space*, FOREIGN POL’Y (March 31, 2021), <https://foreignpolicy.com/2021/03/31/russia-china-space-war-treaty-demilitarization-satellites/>; U.S. Space Command Public Affairs Office, *Russia conducts space-based anti-satellite weapons test*, U.S. SPACE COMMAND (Jul. 23, 2020), <https://www.spacecom.mil/MEDIA/NEWS-ARTICLES/Article/2285098/russia-conducts-space-based-anti-satellite-weapons-test/> (last visited Dec. 14, 2021).

¹¹⁶ Bowman & Thompson, *supra* note 115.

¹¹⁷ Jeff Foust, *U.S. Dismisses Space Weapons Treaty Proposal As “Fundamentally Flawed”*, SPACE NEWS, Sep. 11, 2014, <https://spacenews.com/41842us-dismisses-space-weapons-treaty-proposal-as-fundamentally-flawed/> (last visited Dec. 14, 2021).

¹¹⁸ *Id.*

¹¹⁹ Posner & Sankey, *supra* note 7.

government or American entities.¹²⁰ Still, to protect national security the U.S. must be wary of the changes in space power and keep abreast of how proposed international laws like the PPWT may advocate for peace on paper, but, in reality, only serve to tip the scales in Russia and China's favor.

CONCLUSION

The United States and Russia have had a long history of space cooperation, an underappreciated fact that is often lost in the tumult of sensational news concerning potential conflicts with Russia and China. This news has its place; we've seen how Russian-Sino cooperation in space is real, and if the United States and its allies are not careful, we may find ourselves in a space-arms race between global powers. But if the United States reflects on how cooperation between Russia and the U.S. in the past has proved beneficial, it may realize that cooperation is the best path going forward, not just for dealing with Russia, but also an emergent China. The Wolf Amendment was passed in light of valid concerns of Chinese human rights abuses, but restricting the U.S.'s ability to cooperate with one of the world's preeminent powers in an area as important as space will only serve to hurt the U.S., and the international space community, in the long run. There already exists a strong base for the rule of law in space thanks to treaties like the OST. It is this mutual obligation under the law that has preserved peace in space. Addressing disputes in space through international forums and continuing to build on regulations is the best way to ensure future cooperation for research, technological advancement, and avoiding the deterioration of the rule of law. There is a hope for peace in space founded on decades of cooperation. As long as Russia and the U.S. continue this tradition, the future of our space relations will show the world that even military rivals can achieve peace in the final frontier.

¹²⁰ *Id.*

A LOOK INTO VOLUNTARY NONGOVERNMENTAL ORGANIZATION (NGO)
CERTIFICATIONS ON LABOR CONDITIONS IN INTERNATIONAL TRADE LAW:
NIKE, A CASE STUDY

Elvira Oviedo

INTRODUCTION

The purpose of this paper is to address the increasing voluntary use of non-governmental organization (NGO) certification programs by corporations to uphold some form of structural labour standards in their overseas factories. The increasing use of voluntary NGO labour-based certification programs is a direct result of the gaping holes and lack of enforcement left by the World Trade Organization (WTO), the International Labour Organization (ILO), and the laws and regulations of the lands that these unethical labour practices are taking place in. This paper deep dives into a case study of Nike, Inc. who, due to mass media attention on the unethical labour practices occurring in their overseas manufacturing factories, were forced to reevaluate and incorporate into their business model a code of standards primarily centered on remedying the labour practices that were costing them millions of dollars.

Nike exemplifies the new trend in the corporate world of using NGO labour-based certifications while also highlighting the shortcomings that such certification programs struggle with such as lack uniformity, lack of enforcement, and possible biased participation. A quick overview of alternatives to NGOs shows that while such alternatives can offer some solution, these alternatives also have their own pitfalls. The Alien Tort Claims Act is currently pending in the United States Supreme Court awaiting a decision that could either move bounds for labour activists or heighten the political and legal barriers labour activists often find themselves in front of. Additionally, state laws are few and far in between. They offer no real enforcement and the environmental, social, and governance (ESG) factors being implemented by some corporations are not yet widespread enough to have any large effect. The lingering influence of past Secretary–Generals of the United Nations who emphasized human labour practices and of the Human Rights Council and the Global Compact Initiative are just that—lingering, and have opened a gateway for participation of initiatives as proof of ethical labour practices when the reality is to the contrary.

While international agreements and organizations, national laws, and NGO labour-based certifications all have weaknesses that vary in degree, the conclusion, with the support of Nike as a case study, is that NGO labour-based certification programs do have merit and have the potential to greatly change the corporate world's operations into one that prioritizes ethical labour practices.

I. THE WTO AND ILO'S STANCES ON LABOUR STANDARDS

It is important to note that the WTO states almost no rules or regulations for labor conditions regarding international trade and production.¹ The only exception to the WTO's silence regarding labor conditions is in Article XX (General Exceptions) of the General

¹ See General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 State. A-11, 55 U.N.T.S. 197 [hereinafter GATT].

Agreement on Tariffs and Trade (GATT) which states that products made by prison labor are a general exception and are allowed in international trade and production.²

Besides this one exception allowing the use of prison labor in production practices, the WTO is of the “clear consensus: all WTO member governments are committed to a narrower set of internationally recognized ‘core’ standards—freedom of association, no forced labour, no child labour, and no discrimination at work (including gender discrimination).”³ However, the WTO has not implemented any explicit regulations or codes that would enforce these core standards in making of products that are traded internationally or are outsourced for cheaper production purposes.⁴ The WTO justifies their lack of action towards implementing any form of regulatory practices through a number of reasons. Some nations are highly in favor of adding labor standards into the WTO structure with the belief system that doing so would provide great incentive to nations to improve labor standards and would help towards fostering universal criteria for labor standards.⁵ However, many developing nations are in opposition to the WTO adding in labor standards because of the fear that the more industrial nations would actually use these labor standards to take advantage of and undermine the low wage trading partners that are available in these developing nations.⁶ Developing nations also fear that they would not be able to meet the criteria mandated by labor standards simply because they might not be able to afford it.⁷ Imposing labor standards on developing nations could greatly undermine and impair the rise of their economic development which would then possibly dismantle parts of the international trade system.⁸ Developing nations also worry that the developed nations’ eagerness to add labor standards to the WTO framework is really just a guise for protectionism instead of any real concern for bettering labor conditions.⁹ The possible conflict between member nations that initiating labor standards through the WTO could cause is the main motivation behind the WTO’s unwillingness to form any real agreement regarding labor standards.

Instead, the WTO defers to the International Labor Organization (ILO) to negotiate labor standards between nations.¹⁰ The WTO allows their secretariat to work with the secretariat of the ILO to work together on policy making with the goal of meeting some form of universal “coherence” in labor standards and to allow the WTO to indirectly have some say over decisions that impact the global economy.¹¹

² *See id.* at 37-38.

³ WORLD TRADE ORG., *Labour Standards: Consensus, Coherence and Controversy*, [https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm#:~:text=There%20is%20a%20clear%20consensus,work%20\(including%20gender%20discrimination\)](https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey5_e.htm#:~:text=There%20is%20a%20clear%20consensus,work%20(including%20gender%20discrimination)) (last visited Sept. 30, 2020) [hereinafter WTO Labour Standards].

⁴ *See id.*

⁵ *See id.*

⁶ *See id.*

⁷ *See id.*

⁸ *See id.*

⁹ *See id.*

¹⁰ *See id.*

¹¹ *See id.*

The main mission of the ILO is to “promot[e] social justice and internationally recognized human and labor rights...”¹² The ILO was established in 1919 shortly after World War I as part of the Treaty of Versailles with the intention that the ILO would operate under the belief system that “universal and lasting peace can be accomplished only if it is based on social justice.”¹³ In 1946, the ILO became the first special agency of the newly formed United Nations and eventually came to be the agency in power that the WTO deferred to when it came to matters of labor standards.¹⁴

The international labour standards set by the ILO are separated into two different forms; the standards are either Conventions (sometimes called Protocols) or Recommendations.¹⁵ Conventions are “legally binding international treaties that may be ratified by member states” while Recommendations “serve as non-binding guidelines.”¹⁶ Conventions lay down the basic principles that ratified countries are implementing, while Recommendations supplement the Convention by providing more detailed guidelines on how ratifying countries can best implement the new principles.¹⁷ Representatives of member governments, employers, and workers provide input for, and then write, both Conventions and Recommendations.¹⁸ Once a standard has been adopted, it is then up to the member government to submit to the appropriate authority within twelve months for consideration for ratification.¹⁹ Once a member state “ratifies” a Convention, that member state commits to fully applying said Convention into its national law and practice.²⁰ By ratifying, the member state is also committing to sending regular reports on the application process and results of the ratified Convention to ILO.²¹ If the Convention is approved for ratification, that member state is expected to fully implement it within one year from the date that it was ratified.²²

The ILO has identified eight Conventions the ILO considers highly important and which covers the “fundamental principles and rights at work: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.”²³ Currently, the United States has only ratified two of the eight Fundamental Conventions: the *Abolition of Forced Labour Convention, 1957 (No. 105)* and

¹² INT’L LABOUR ORG., *Mission and impact of the ILO*, <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm> (last visited Sept. 30, 2020).

¹³ INT’L LABOUR ORG., *History of the ILO*, <https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm> (last visited Sept. 30, 2020).

¹⁴ *See id.*; *see supra* WTO Labour Standards.

¹⁵ INT’L LABOUR ORG., *Conventions and Recommendations*, <https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm> (last visited Sept. 30, 2020) [hereinafter ILO Conventions and Recommendations]

¹⁶ *Id.*

¹⁷ *See id.*

¹⁸ *See id.*

¹⁹ *See id.*

²⁰ *See id.*

²¹ *See id.*

²² *See id.*

²³ *Id.*

the *Worst Forms of Child Labour Convention, 1999 (No. 182)*.²⁴ Additionally, the ILO has designated four Conventions to be Governance Conventions which are deemed high priority in an effort to encourage member states to ratify them because of their integral role in ensuring efficiency of the international labour standard system.²⁵ The four Governance Conventions cover areas such as employment policies, labour inspections, and agriculture-specific labour standards.²⁶ Compared to their participation in ratifying the ILO Fundamental Conventions, the United States has only ratified one (*Tripartite Consultation – International Labour Standards*) of the four Governance Conventions.²⁷ Although there is not as great of an emphasis on them to be ratified by member states, the ILO also currently has 178 Technical Conventions available.²⁸ Currently, the United States has only ratified eleven of the 178 Technical Conventions.²⁹ Of these eleven Technical Conventions that have been ratified by the United States, two of them are not currently in force.³⁰

It is important to delve deeper into why the United States has yet to ratify Conventions that as far as precedent and moralistic values goes to show, are Conventions that the U.S. is inherently in favor of supporting. Yet the U.S. chooses not to do so, even in the case of some Conventions which one would think would be easy to ratify in terms of logistics because many American corporate companies that outsource manufacturing or have supply overseas already have company-wide regulations set in place that match the ILO Fundamental Conventions.

For example, one of the two ILO Fundamental Conventions that the United States has ratified is the Abolition of Forced Labour, which states that any state that ratifies it agrees to “[undertake] to suppress and not to make use of any form of forced or compulsory labour” as a means of “political coercion, as a means of labour discipline, as a method of mobilizing economic development, as punishment for participating in strikes, or as a mean of racial, social, national, or religion discrimination.”³¹ However, the United States has not ratified the Forced Labour Convention, in which ratified states would undertake “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.”³² In fact, the United States is one of only nine states out of 187 ILO members to have not yet ratified the Forced Labour Convention.

²⁴ NORMLEX, *Ratifications for United States of America*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102871 (last visited Sept. 30, 2020) [hereinafter USA ILO Ratifications]

²⁵ *Conventions and Recommendations*, see *supra* note 15.

²⁶ *Id.*

²⁷ *Ratifications for United States of America*, see *supra* note 24.

²⁸ *See id.*

²⁹ *See id.*

³⁰ *See id.*

³¹ NORMLEX, *C105 - Abolition of Forced Labour Convention, 1957 (No. 105)*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312250:NO (last visited Dec. 14, 2020).

³² NORMLEX, *C029 - Forced Labour Convention, 1930 (No. 29)*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C029:NO (last visited Dec. 14, 2020) [hereinafter Forced Labour Convention].

³³ While the United States has not explicitly stated why they have not ratified the Forced Labour Convention despite ratifying the Abolition of Forced Labour Convention, one can take a few guesses by looking at the language of the Forced Labour Convention.

Article II (2) of the Forced Labour Convention seeks to define what forced or compulsory labour is by listing all the things that do *not* fall under the definition of forced or compulsory labour.³⁴ Specifically, Article II (2)(c) states that “any work...exacted...as a consequence of a conviction in a court of law, provided that the said work...is carried out under the supervision and control of a public authority and...not hired to or placed at the disposal of private individuals, companies or associations.”³⁵ In consolidation with Article XX of the WTO Agreement, Article II (2)(c) is allowing for the use of prison labour for international trade and production.³⁶ This is not peculiar in itself but the devil is in the details and in the wording “not hired to or placed at the disposal of private individuals, companies or associations.”³⁷ The United States is infamous for its mass incarceration and is the country with the highest private prison population.³⁸ In 2016, the United States had 8.5%, or 128,063, of its prison population of 1.5 million incarcerated in private prisons.³⁹ Even more drastic, 73%, or 26,249, of detained immigrants in the United States were being detained in privately-run facilities.⁴⁰ Being for-profit businesses, private prisons quite often make their prisoners engage in labour if they are physically able to do so.⁴¹ Private prisons try to avoid scandal and outcry by “paying” their workers, but this pay is dollars below the national minimum wage standard with prisoners on average getting paid \$0.14–\$0.40 an hour.⁴² When accounting for currency differences, we will later see that this pay is not much different than the amount Nike’s overseas workers were getting paid in their manufacturing factories. This calls into question whether the United States has refused to ratify the Forced Labour Convention in preference of the capitalistic pros that having a privatized prison system that partakes in manufacturing and prison work brings.

Another example includes the United States refusing to ratify the Fundamental ILO Freedom of Association and Protection of the Right to Organize Convention, which is perplexing in itself since the right to assemble is included in the First Amendment of the United States

³³ See NORMLEX, *C029 - Forced Labour Convention, 1930 (No. 29) - Countries that have not ratified this Convention*, INTERNATIONAL LABOUR ORGANIZATION, https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312174:NO (last visited Dec. 14, 2020).

³⁴ *Forced Labour Convention*, see *supra* note 32.

³⁵ *Id.*

³⁶ *Id.*; see WTO Labour Standards.

³⁷ *Forced Labour Convention*, *supra* note 32.

³⁸ See Vinay Basti and Kara Gotsch, *Capitalizing on Mass Incarceration: U.S. Growth in Private Prisons*, THE SENTENCING PROJECT (2018), <https://www.sentencingproject.org/publications/capitalizing-on-mass-incarceration-u-s-growth-in-private-prisons/>.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See *id.*

⁴² See *id.*

Constitution.⁴³ However, the First Amendment would not apply to non-U.S. citizens on foreign territory, so a plausible explanation is that United States is willing to prevent people not on U.S. soil from assembling in a call for more ethical labour practices if it allows for the continuation of capitalistic endeavors. Just as interesting is that the United States has also yet to ratify the Fundamental ILO Minimum Age Convention that states that, depending on the type of work involved, the minimum child work requirement will be fourteen or fifteen.⁴⁴ This is not much different from the United States, which sets the minimum age requirement at fourteen years old under the Fair Labour Standards Act (FLSA).⁴⁵ It seems almost hypocritical on the United States' part to not ratify such a convention, especially when it is becoming increasingly commonplace for American corporations to include the same, if not slightly higher at age sixteen, minimum age requirements in their company policies. Regardless of the cause for the United States' lack of action towards ratifying the ILO conventions, the United States government looks complacent and uncaring in the face of their corporations participating in unethical and poor working conditions overseas.

The United States is a prime example of the shortcomings a country can have despite being an active member state of the ILO and trying to ratify and implement Conventions. Implementation of ratified Conventions are not fully enforced, as exemplified by the two Technical Conventions that the United States has ratified but does not currently have in force.⁴⁶ The lack of accountability for full implementation of ratified Conventions calls into question whether the labour standards set by the ILO are being met. There is also much suspicion regarding the Conventions that countries choose not to ratify. News reporting and documentaries about sweatshops, child slavery, and unhygienic conditions within outsourced factories owned by American companies further solidifies the skepticism regarding ILO and the implementation of their labour standards.⁴⁷

II. NGO CERTIFICATIONS

As big American companies sought to maximize their profits, they began outsourcing the production of their products in factories in underdeveloped or developing countries.⁴⁸ There, American companies were able to reduce manufacturing costs due to lower labour standards, less organized labour unions, and lower employee wages.⁴⁹ In response to criticism by the media and advocacy groups, large American companies which engaged in practices that involved unethical

⁴³ See NORMLEX, *C087 - Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) - Countries that have not ratified this Convention*, INTERNATIONAL LABOUR ORGANIZATION (Jul. 04, 1950), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312232:NO.

⁴⁴ See NORMLEX, *C138 - Minimum Age Convention, 1973 (No. 138) - Countries that have not ratified this Convention*, INTERNATIONAL LABOUR ORGANIZATION (Jun. 19, 1973), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11310:0::NO:11310:P11310_INSTRUMENT_ID:312283:NO.

⁴⁵ See U.S. Department of Labor, *Age Requirements*, U.S. DEPARTMENT OF LABOR, <https://www.dol.gov/general/topic/youthlabor/agerequirements#:~:text=As%20a%20general%20rule%2C%20the,under%20the%20age%20of%2016>.

⁴⁶ See *supra* USA ILO Ratifications.

⁴⁷ See Max Nisen, *How Nike Solved Its Sweatshop Problem*, BUSINESS INSIDER (May. 9, 2013, 10:00 AM), <https://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>.

⁴⁸ See *id.*

⁴⁹ See *id.*

labour standards were forced to dramatically change their labour practices abroad or risk further boycott and negative scrutiny from the public.⁵⁰

Companies moved towards making these changes by garnering certifications by non-governmental organizations (NGOs).⁵¹ NGOs exist on both a national and international level and are a “voluntary group or institution with a social mission, which operates independently from government.”⁵² NGOs cover a broad assortment of topics such as healthcare, environmental issues, women’s rights, foreign policy, and labour conditions.⁵³ NGOs aspire to develop and implement programs and approaches that uphold the social and economic policies the NGO is trying to achieve.⁵⁴ NGO certifications provide a form of regulatory expectations for companies who choose to conform to the requirements and specifications of the desired NGO certifications they are seeking to obtain.⁵⁵ In order to dissipate scrutiny or criticism from the media and the public, companies will often alter their own corporate policies to meet the requirements that would allow them to comply with the policies of the NGO certification they are hoping to obtain.⁵⁶

Because the GATT/WTO intentionally does not mention labour conditions except for an explicit exclusion allowing for use of prison labour and because corporations are voluntarily exposing themselves to the certification programs offered by various NGOs, neither NGOs nor the corporations who choose to participate in their programs are in violation of the GATT/WTO. The only “persons” allowed to bring disputes before the WTO are WTO members, so even if corporations fail to pass or continue compliance with the certifications and accreditations that NGOs provide, there are no real legal consequences from the WTO for these corporations. In these cases, the only consequences corporations would face was loss of certification and potentially bad press from the media. However, bad press and sour public opinion can have lasting consequences on corporations, especially on issues heavily pushed by a sense of morality and ethics.

A prime example of an NGO that provides labour standards certifications is the Fair Labor Association.⁵⁷ In response to several labour condition scandals that involved overseas child labour and sweatshops within American apparel and footwear companies, President Bill Clinton put together a national task force that consisted of both NGOs and multinational companies in an attempt to resolve these issues.⁵⁸ President Clinton challenged the task force to work together to establish regulations and standards to improve labour conditions and the task force then shortly evolved into the Fair Labor Association.⁵⁹

⁵⁰ *See id.*

⁵¹ *See id.*

⁵² *FAQ: What is an NGO*, NGO SOURCE, <https://www.ngosource.org/what-is-an-ngo> (last visited Oct. 18, 2020).

⁵³ Bureau of Democracy, Human Rights, and Labor, *Non-Governmental Organizations (NGOs) in the United States*, U.S. DEPARTMENT OF STATE, (Jan. 20, 2017), <https://www.state.gov/non-governmental-organizations-ngos-in-the-united-states/>.

⁵⁴ *See id.*

⁵⁵ *See id.*

⁵⁶ *See id.*

⁵⁷ *See History*, FAIR LABOR ASSOCIATION <https://www.fairlabor.org/about-us/history>.

⁵⁸ *See id.*

⁵⁹ *See id.*

The Fair Labor Association has a Workplace Code of Conduct of “labor standards that aim to achieve decent and humane working conditions” and which are “based on International Labor Organization standards and internationally accepted good labor practices.”⁶⁰ Companies that choose to affiliate themselves and mark themselves as having been approved, so to speak, by the Fair Labor Association are “expected to comply with all relevant and applicable laws and regulations of the country in which workers are employed and to implement the Workplace Code in their applicable facilities.”⁶¹ The Fair Labor Association Workplace Code of Conduct focuses on elements such as regulating the amount of hours workers can work in a week, requiring that minimum compensation be sufficient to meet the basic needs of the workers in the nation they are employed in with some discretionary income, and that employers provide a safe and healthy work environment with contingency plans in case harm or an accident befalls an employee.⁶² Other elements also include child labor regulations, compliance with nondiscrimination practices, and a recognition of the employees’ right to association and unionization.⁶³ It is interesting to note that while Article XX of the GATT explicitly allows the use of prison labor, the Fair Labor Association Code of Conduct outwardly contradicts the GATT/WTO Agreement by stating that “there shall be no use of forced labor, including prison labor, indentured labor, bonded labor or other forms of forced labor.”⁶⁴ This is exemplary of how although the GATT/WTO Agreement lacks any substantial form of labour standard regulations, NGO certifications can fill in the gaps.

However, NGO certifications themselves have come into scrutiny as they became increasingly popular with companies in just a couple of decades.⁶⁵ The scrutiny towards NGO’s have been persistent in topic and is rooted in the duplication of certification programs which leads to wasted resources, poor coordination, a lack of professionalism, and the lack of power NGOs actually have to enforce their certification regulations.⁶⁶

The following case study dives deep into the unfair labour standards and conditions that were behind the growing worldwide success of Nike, Inc in the 1970’s through the early 2000’s. It follows the public outrage at the discovery that Nike was participating in overseas sweatshops which unfairly treated their majority female and child workers and the steps Nike took with great help from NGO programs and certifications to remedy these injustices in their labor practices and in the eyes of the strict public scrutiny. The present status of Nike’s certification compliance with labour-based NGO certifications is also reviewed as well as recent news releases that speak to the contrary.

⁶⁰ Code of Conduct, FAIR LABOR ASSOCIATION, <https://www.fairlabor.org/our-work/labor-standards> (last visited Oct. 20, 2020).

⁶¹ *Id.*

⁶² *See Workplace Code of Conduct*, FAIR LABOR ASSOCIATION, https://www.fairlabor.org/sites/default/files/fla-code_of_conduct_.pdf

⁶³ *See id.*

⁶⁴ *See id.* *See* GATT, *supra* note 2.

⁶⁵ *See* Charles-Antoine Hofmann, *NGO certification: time to bite the bullet?*, HUMANITARIAN PRACTICE NETWORK, (Nov. 1999), <https://odihpn.org/magazine/ngo-certification-time-to-bite-the-bullet/> (last visited Oct. 18, 2020).

⁶⁶ *See id.*

III. NIKE, A CASE STUDY

Originally, most of the shoes and apparel that Nike was internationally known for were manufactured in factories in Taiwan and South Korea.⁶⁷ In these countries, Nike was able to pay their workers low wages without much thought of labour standards regulation or minimum wage paying laws.⁶⁸ However, as labour unions and organizations formed and spread in amount of members in both Taiwan and North Korea, minimum employee wage prices began to be formed, enforced, and increased.⁶⁹ As a result, Nike urged their overseas manufacturing contractors to move to China, Indonesia, and Vietnam.⁷⁰ Because of a lack of organized labour unions in China, Indonesia, and Vietnam, Nike was able to pay the workers at factories mere cents an hour for their labour.⁷¹

The amount of money that Nike was saving by not paying their factory workers fair or living wages is widely regarded to be one of the main reasons why Nike's popularity and revenue steadily surged into the early 1990's.⁷² With the money Nike was saving from minimizing their manufacturing and overseas employee wages, Nike turned their business model into one that used those saved costs for aggressive marketing campaigns which included highly visible and widespread sponsorships with sports team, athletes, and celebrities.⁷³ For example, Nike spent \$200 million sponsoring American basketball player, Michael Jordan, in return for him endorsing and wearing the Nike brand during the 1992 Summer Olympics in Barcelona, Spain.⁷⁴ However, as Nike's revenue continued to increase, journalists were becoming aware of the labour injustices and inequality taking place in what they deemed to be Nike's "sweatshops" and were working towards publicly exposing Nike for their misdeeds.⁷⁵

In 1991, labour rights activist Jeffrey Ballinger, who spent three and half years in Indonesia working for a labour organization, published a report in which he was the first to report on the shockingly low wages and poor working conditions inside one of Nike's manufacturing factories in Indonesia.⁷⁶ Ballinger followed that report the following year by publishing an article, *The New Free-Trade Heel: Nike's profits jumps off the backs of Asian workers*, in *Harper's Magazine* in which he more heavily documented the lack of labour standards and unethical practices taking place in Nike's manufacturing factories in Indonesia.⁷⁷ In his article, Ballinger focused on

⁶⁷ See Nisen, *supra* note 32.

⁶⁸ See *id.*

⁶⁹ See *id.*

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.*

⁷⁴ See Jeffrey Ballinger, *The New Free-Trade Heel: Nike's profits jumps off the backs of Asian workers*, HARPER'S MAGAZINE 46-47, August 1992, <http://archive.harpers.org/1992/08/pdf/HarpersMagazine-1992-08-0000971.pdf?AWSAccessKeyId=AKIAJXATU3VRJAAA66RA&Expires=1466354923&Signature=GuzAGJL99jmQtdjxkHswI0WLZJA%3D>.

⁷⁵ See Nisen, *supra* note 32.

⁷⁶ See *id.*; see Ballinger, *supra* note 59.

⁷⁷ See Ballinger, *supra* note 59.

instances of abuses the workers faced and specifically criticized the poor working conditions, child labour, exceedingly low wages, and lack of labour organization within the factories.⁷⁸

The *Harper's Magazine* article also included a specific highlight from Ballinger on a female Indonesian worker, Sadish, who was getting paid just fourteen cents an hour, which was well below Indonesia's minimum wage at the time.⁷⁹ Sadish was working six days a week, each day being a ten and a half hour workday and working about sixty three hours of overtime for her paycheck to come out to \$37.46.⁸⁰ Every hour of overtime only added an additional 2 cents to Sadish's overtime time and although Sadish and many others took overtime work shifts primarily out of economic necessity, the workers expressed that they were also being compelled to take extra shifts by their employer.⁸¹ Ballinger highlighted Sadish in an attempt to exemplify how Nike's low wages were negatively effecting and exploiting foreign workers, with women being disproportionately on the backhand of Nike's lack of labor standards and unethical business practices.⁸²

Ballinger drew attention to the fact that while Nike had made \$3 billion dollars in sales in 1991 alone, \$200 million dollars of which went towards funding Michael Jordan's sponsorship the following year, Nike was complacent in paying their overseas workers abysmal wages in similarly abysmal working conditions.⁸³ By shifting their manufacturing factories to cheaper labor pools, Nike was also shifting their business model to be an active participant in negatively furthering the poor working conditions of workers in developing countries.

Nike's initial response was to deny that they were at fault for the conditions the overseas employees in question were working in.⁸⁴ Nike's director of compliance, Todd McKean, argued that Nike was not directly at fault and stated "our initial attitude was, 'Hey, we don't own the factories. We don't control what goes on there.'"⁸⁵ With that mindset, Nike continued to assert that they were not who should be blamed for the labor practices the owners who operated these factories chose to partake in.⁸⁶ However, Nike executives quickly realized that this rationalization didn't absolve Nike of fault in the media's eyes and quickly moved to mitigate the negative media attention they were receiving.⁸⁷ Nike's next response to the public outcry and criticism to the initial report Ballinger published prior to his article in *Harper's Magazine* was to create their own code of conduct regarding labor conditions and practices.⁸⁸ *Nike Code of Conduct* was to be implemented on a company-wide scale.⁸⁹ The *Nike Code of Conduct* was designed to lay out

⁷⁸ *See id.*

⁷⁹ *See id.*

⁸⁰ *Id.*

⁸¹ *See id.*

⁸² *See id.*

⁸³ *See id.*

⁸⁴ *See id.*

⁸⁵ Dale Miller, *Sarah Soule: How Activism Can Fuel Corporate Social Responsibility*, STANFORD GRADUATE SCHOOL OF BUSINESS, (Oct. 10, 2014) <https://www.gsb.stanford.edu/insights/sarah-soule-how-activism-can-fuel-corporate-social-responsibility> (last visited Nov. 06, 2020).

⁸⁶ *See Nisen, supra* note 47.

⁸⁷ *See id.*

⁸⁸ *See id.*

⁸⁹ *See Nisen, supra* note 47.

minimal standards Nike expected all their supplier factories and facilities to meet in order to show Nike's "commitment to the welfare of workers and to using resources responsibly and efficiently."⁹⁰

The *Nike Code of Conduct* focused on voluntary employment, compensation and benefits policies, minimum age requirements for employees that were minors, safe and clean working environments, and sustainability practices.⁹¹ Additionally, in complete contradiction to the exception made by the GATT–WTO Agreement which allows for countries to utilize prison labor, Nike explicitly stated in *Nike Code of Conduct* that employment is voluntary and that "the supplier does not use forced labor, including prison labor, indentured labor, bonded labor or other forms of forced labor."⁹² Nike excluding prison labor from their own labor regulations goes to show how companies themselves, often with the incentive to be in good standing with public opinion and in compliance with labor based NGO certifications, can enact their own labor standards and policies to be used internationally to fill in the gaping gaps that the GATT–WTO Agreement leaves open for countries and international companies to exploit for their own economic benefit.

The *Nike Code of Conduct* was distributed to all of Nike's factories and suppliers both on domestic land and in foreign countries.⁹³ Within five years of the *Nike Code of Conduct* being established and implemented, Nike had conducted more than 600 audits in their factories to ensure that factories were in compliance with the *Nike Code of Conduct*.⁹⁴

Despite Nike's efforts in enacting a labor based code of conduct, Jeffrey Ballinger's expose in *Harper's Magazine* the following year highlighting the unethical labor practices in one of Nike's Indonesian factories proved that Nike and the *Nike Code of Conduct* had yet to fully resolve the issues surrounding their "sweatshops" overseas.⁹⁵ More heightened public criticism and disgust at Nike and their low wages and poor labor conditions inside their sweatshops were immediate in the wake of Ballinger's expose.⁹⁶ Protests erupted at the 1992 Summer Olympics where Nike was undergoing a massive marketing campaign at and CBS quickly interviewed Indonesian factory workers of the abuses they were experiencing in Nike's factories which further confirmed what Ballinger had been reporting.⁹⁷

Nike's next attempt at trying to clean up their tainted brand image was to create a department whose sole purpose was to implement changes that would improve the working conditions of their factory workers.⁹⁸ However, Nike was still struggling to disassociate itself with the image of barely paid workers making Nike athletic shoes in foreign sweatshops that the media and their consumers had latched on to and refused to let go of. Groups at numerous university and

⁹⁰ Nike, Inc., *Nike Code of Conduct*, NIKE, INC., 1-3 (Sept. 2017), <https://purpose-cms-production01.s3.amazonaws.com/wp-content/uploads/2018/06/11175434/English-Nike-Code-of-Conduct-2017.pdf> [hereinafter Nike Code of Conduct].

⁹¹ *See id.*

⁹² *Id.* *See* GATT, *supra* note 1.

⁹³ *See* Nike Code of Conduct, *supra* note 90.

⁹⁴ *See* Miller, *supra* note 85.

⁹⁵ *See* Nisen, *supra* note 47.

⁹⁶ *See id.*

⁹⁷ *See id.*

⁹⁸ *See id.*

colleges throughout the United States were teaming up with the Worker Rights Consortium (WRC) to organize national hunger strikes in protest of their schools' athletics departments and teams being sponsored by Nike.⁹⁹ University students called for the college and universities to end their sponsorships with Nike.¹⁰⁰ Student activists at big reputation schools with well-known sports teams such as Duke University, the University of Michigan, and the University of Wisconsin and others staged sit-ins which garnered thousands of student participants.¹⁰¹

In some cases, this topic of unethical labour conditions became a stepping stone for the call to ethical business practices in the United States. Students at the University of Oregon stormed the entrances of the buildings that housed the school's top administrators and staged a sit-in that blocked entrance to the building.¹⁰² Signs with Nike's signature logo read in bright, bold letter's "TAKE A HIKE, NIKE."¹⁰³ Tensions became especially high at the University of Oregon because Phil Knight, the chairman of Nike, was an alum of the university and was also the school's biggest benefactor, with Knight providing funding for many of the school's new buildings, renovations for the football stadium, and for many of the school's athletics programs.¹⁰⁴ Knight was considered to be the university's most important benefactor, and because the University of Oregon was the single biggest employer in Eugene, where the university was located, the town as a whole relied heavily on the funding that Knight provided to the university.¹⁰⁵ After the University of Oregon refused to remove itself from being a part of the Worker Rights Consortium (WRC), Knight revoked his \$30 million pledge to the university.¹⁰⁶ The Worker Rights Consortium was a watchdog group that monitored the labour practices and conditions of factories.¹⁰⁷ The WRC did not allow corporations to participate in setting their terms for labour conditions and instead set their own terms without corporate participation that corporations needed to be in compliance with to obtain WRC certification.¹⁰⁸ Nike was not aligned with WRC and was instead partnered with the Fair Labor Association (FLA) which did allow to corporations to participate in setting their terms for working conditions.¹⁰⁹

Upon learning that women were disproportionately victim to Nike's poor labour conditions, feminist groups and coalitions joined in protest against Nike.¹¹⁰ The presence of these feminist groups were further amplified when Nike started an advertising campaign in an attempt

⁹⁹ See Joshua Hunt, *The Student Movement That Went Toe-to-Toe with Nike: On One of the Many Real Costs of Globalization*, LITERARY HUB (Feb. 14, 2020) <https://lithub.com/the-student-movements-that-went-toe-to-toe-with-nike/> (last visited Nov. 6, 2020).

¹⁰⁰ *See Id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See id.*

¹⁰⁶ *See* Wired Staff, *Nike Fires Back at Protesters*, WIRED (June 01, 2000, 12:00PM) <https://www.wired.com/2000/06/nike-fires-back-at-protesters/> (last visited Nov. 6, 2020).

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*

¹⁰⁹ *See id.*

¹¹⁰ *See* George H. Sage, *Justice Do It! The Nike Transnational Advocacy Network: Organization, Collective Actions, and Outcomes*, in 16 SOCIOLOGY OF SPORT JOURNAL 206 – 235 (1999).

to promote their female athletic gear.¹¹¹ In retaliation, these feminist groups started their own campaign with the slogan of “Just Don’t Do It,” a play on words on Nike’s infamous brand slogan “Just Do It” in an attempt to encourage people to boycott buying Nike athletic shoes and gear.¹¹²

Student activism did prove to be effective at some schools. Students at St. John’s University protested Nike’s sponsorship deal with the athletic department and consequently, Jim Keady, an assistant soccer coach at the university, quit his job in protest over his contract demanding he wear Nike’s athletic gear.¹¹³ Citing Nike’s poor working conditions as the cause behind his actions, Keady stated “I don’t want to be a billboard for a company that would do these things.”¹¹⁴

Nike once again attempted to fix their image by hiring civil rights activist Andrew Young to examine Nike’s working condition in their overseas factories.¹¹⁵ After inspecting numerous factories manufacturing Nike products in Asia and Latin America, Young reported that found no evidence of poor working conditions or of widespread mistreatment of any of the workers.¹¹⁶ Young admitted that although Nike needed to do more to safeguard the changes the *Nike Code of Conduct* had implemented to ensure continued compliance, that he found “Nike to be in the forefront of a global economy” and that the “[F]actories we visited that produce Nike goods were clean, organized, adequately ventilated and well lit.”¹¹⁷ Young’s only real criticism of the company’s overseas factories was that actual supervisors hired and trained by Nike to ensure quality control were noticeably absent from the factories and that the factories seemed to be largely run by expatriates who struggled to speak the local language fluently.¹¹⁸

The report by Andrew Young did not have the effect Nike intended and quickly backfired with many public outlets criticizing the report.¹¹⁹ Nike and Young were criticized for using Nike’s own interpreters during the inspections, which questioned whether there was a positive bias towards Nike in the answers Young was hearing and basing his report off.¹²⁰ Nike was also accused of trying to use Young and his report to deflect from increasing the pay of their overseas factory workers and from having to implement any real, long-lasting ethical working standards.¹²¹ In response, Nike denied any claims of deflection and asserted that they only intended to use Young’s report as “a level of oversight to its commitment to setting the standard for global workplace

¹¹¹ *See id.*

¹¹² *See id.*

¹¹³ *See* Hunt, *supra* note 84.

¹¹⁴ *Id.*

¹¹⁵ *See* Dana Canedy, *Nike’s Asian Factories Pass Young’s Muster*, THE NEW YORK TIMES (June 25, 1997)

<https://www.nytimes.com/1997/06/25/business/nike-s-asian-factories-pass-young-s-muster.html> (last visited Nov. 6, 2020).

¹¹⁶ *See id.*

¹¹⁷ *Id.*

¹¹⁸ *See id.*

¹¹⁹ *See id.*

¹²⁰ *See id.*

¹²¹ *See id.*

standards” and that Nike had every intention of fully implementing and taking into consideration all of Young’s recommendations and criticisms.¹²²

The actions of student activists, public officials, labour unions, and of customers in the face of unethical labour conditions and standards brings into focus the power the individual and the collective have as consumers. The public refused to allow Nike to not take accountability for their poor labour conditions, and Nike suffered the consequences of their actions. In the face of losing a large base of their consumer demographic, Nike was forced to reevaluate and reinvent the labour practices and standards they participated in overseas. The negative outlook on consumers and public opinion regarding Nike’s working conditions and practices was the catalyst or Nike partnering up with nongovernmental organizations in an effort to come into compliance with a higher and more ethical standard of corporate labour practices in foreign countries.

Due to weak demand for their products and unwavering criticism from the public regarding their labour practices, Nike’s profits dramatically decreased, and they were forced to lay off workers. By then, Phil Knight, the University of Oregon alum who withheld millions of donations from the school for their refusal to separate themselves from the Worker Rights Consortium (WRC), had become the new chief executive officer (CEO) of Nike and started his tenure with a call for change in the way Nike operated its overseas factories and employees.¹²³ “The Nike product has become synonymous with slave wages, forced overtime, and arbitrary abuse,” stated Knight in a speech following his new position as CEO of Nike. Knight then raised the minimum wage of their factory workers and implemented changes to increase quality control in monitoring to ensure that the *Nike Code of Conduct* regulations and standards were being enforced.¹²⁴ In an effort to make the factories a safer and more healthy workplace, Knight also announced that overseas Nike factories would adopt the United States Occupational Safety and Health Administration (OSHA) standards for clean air in manufacturing factories.¹²⁵

In collaboration with the World Bank and the International Youth Foundation, Nike helped launch their own nongovernmental organization called Global Alliance for Workers and Communities in 1999.¹²⁶ Global Alliance was an effort by Nike to better their standing in the public eye and to better the working conditions of factory workers in developing countries.¹²⁷ Global Alliance operates under two primary objectives. The first objective is “to give voice to the concerns and aspirations of factory workers, initially, those employed by the footwear and apparel industry, mostly young women in their late teens and early twenties.”¹²⁸ Global Alliance sought to meet this objective by interviewing thousands of workers in Nike factories in Vietnam, Thailand, and Indonesia about the conditions they were working in, what they sought improvements in their workplace, and about career plans they had for the future and how Global Alliance could instill a

¹²² *See id.*

¹²³ *See Nisen, supra note 32.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ *See Kevin F. Quigley, Global Alliance aims to improve factory workers’ lives, ALLIANCE MAGAZINE (Mar. 1, 2001), <https://www.alliancemagazine.org/analysis/global-alliance-aims-to-improve-factory-workers-lives/> (last visited Nov. 6, 2020).*

¹²⁷ *See id.*

¹²⁸ *See id.*

workplace environment that helped them achieve their aspirations.¹²⁹ The second objective is to “design and deliver programmes that respond to the hopes and concerns expressed.”¹³⁰ One of the biggest concerns of the factory workers was their health, and as a result, the factories began to offer training seminars on nutrition, women’s health, and basic health.¹³¹ Nike also started bringing mobile clinics into their Thailand factories which focused on women’s health and screened the female workers for cervical cancer, breast cancer, and sexually transmitted diseases.¹³² The clinics helped women through their pregnancy and counseled them on various other health issues that were common to women since their workforce consisted predominantly of women.¹³³

Corporations that sought to be in compliance with Global mission were expected not only to provide financial resources to Global Alliance in order to help Global Alliance accomplish their mission statement, but were also expected to be fully transparent with Global Alliance about the operations in their factories.¹³⁴ Corporations were also expected to give Global Alliance full access to their vendor factories so that Global Alliance could ensure they were in compliance with their labour regulations and stay current on issues that still needed to be addressed in order to improve the working and personal lives of their factory workers.¹³⁵ In return, corporations would be able to say that their labour standards were in collaboration with Global Alliance’s high standards of labour conditions for foreign factories.¹³⁶ The corporations would also have access to programs and research targeted at improving the specific labour-related issues the corporation’s factories were struggling.¹³⁷

However, it is not in Global Alliance’s practice to consistently monitor to ensure that participating companies are keeping up with labour practices that are up to par with their own code of conducts.¹³⁸ Such a practice calls into question how effective Nike’s partnership with Global Alliance really is as there is no system in place to ensure regular and updated compliance with ethical labour practices. Global Alliance has no definitive way of keeping Nike and other corporations accountable in their promise to work towards bettering the lives of their factory workers. Such issues furthered the groundwork for Nike to partner itself with other nongovernmental organizations (NGOs) that have voluntary certifications for labour practices and working conditions, which corporations could get if they met the specific and high standards required for compliance.

Nike is widely known to be in partnership with the Fair Labor Association (FLA), a nongovernmental organization that seeks to create “lasting solutions to abusive labor practices by offering tools and resources to companies, delivering training to factory workers and management, conducting due diligence through independent assessments, and advocating for greater accountability and transparency from companies, manufacturers, factories and others involved in

¹²⁹ *See id.*

¹³⁰ *See id.*

¹³¹ *See id.*

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *See id.*

¹³⁷ *See id.*

¹³⁸ *See id.*

global supply chains.”¹³⁹ However, the FLA has been publicly criticized for being “relatively toothless” in the face of corporations because the FLA allows for active corporate participation in the making of their labour standards.¹⁴⁰ This creates an opportunity for corporations to help create a labour standards certification program that leaves a lot of room for leniency in corporate compliance, which could potentially cause scenarios where corporations get accredited with a labour standards certification that lacks strict adherence to regulations and is not up to par with the standards of other labour-related NGOs that disallow corporate participation. This was the decisive reason for which, then chairman, CEO Phil Knight decided to pull a personal pledge to donate \$30 million to the University of Oregon, his alma mater.¹⁴¹ The University of Oregon was affiliated with the Worker Rights Consortium (WRC), which did not allow for corporate participation in creating the standards that the WRC based their certification programs on.¹⁴² Phil Knight was trying to sway the University of Oregon from affiliating itself with the WRC and to move towards a partnership with the FLA.¹⁴³ This situation perfectly exemplifies how even NGOs cannot fix the gaping hole in regards to labour practices in the WTO/GATT and how corporations like Nike can still find weak spots in organizations formed to try and remedy these issues.

Besides the Fair Labor Association, Nike has also partnered up with several other labour-related NGOs in an effort improve the working conditions in their factories. Specifically, Nike partnered up with the International Textile, Garment and Leather Workers’ Federation (ITGLWF), which is a global union and whose aim is to “ensure protection of workers against all dangers arising from their employment ...; support national and international action arising in the struggle against economic exploitation and political oppression of workers ...; [and] secure genuine equality for women employed in the sector to ensure their integration into trade union organizations.”¹⁴⁴ Nike is also in collaboration with the Social and Labor Convergence Program (SLCP), which aims to establish and implement an industry-wide framework to assess social and labour conditions.¹⁴⁵ In order to gain certification from SCLP, Nike had to undergo a three-step process which included data collection, verification, and data hosting and sharing.¹⁴⁶ During the verification process, experienced and accredited auditors travel to corporations’ foreign factories and assess the labour and social conditions of the factories.¹⁴⁷ Assessment includes doing thorough walk-throughs of the factories, in-depth interviews with factory workers, and a combination of self-assessment and joint-assessment of the factory by the corporations and auditors.¹⁴⁸ From the results, SCLP determines whether the corporation is adhering to the current standards of labour

¹³⁹ *Home*, FAIR LABOR ASSOCIATION, <https://www.fairlabor.org/> (last visited Nov. 6, 2020).

¹⁴⁰ Hunt, *supra* note 99.

¹⁴¹ *See id.*

¹⁴² *See id.*

¹⁴³ *See id.*

¹⁴⁴ *Int’l Textile, Garment and Leather Worker’s Fed’n (ITGLWF)*, UNION OF INTERNATIONAL ASSOCIATION, <https://uia.org/s/or/en/1100047837> (last visited Nov. 6, 2020).

¹⁴⁵ *See Home*, THE SOCIAL AND LABOR CONVERGENCE PROGRAM, <https://slconvergence.org/> (last visited Nov. 6, 2020).

¹⁴⁶ *See About SLCP: Our Tool*, THE SOCIAL AND LABOR CONVERGENCE PROGRAM, <https://slconvergence.org/tool> (last visited Nov. 6, 2020).

¹⁴⁷ *See id.*

¹⁴⁸ *See id.*

and social conditions in the industry and issues mandates for the areas where the individual factory scored lowed or was severely lacking in.¹⁴⁹

Many human and labour-rights activists acknowledged the efforts Nike was making to better the lives of their foreign workers and to improve the working conditions of the factories.¹⁵⁰ Nike became the first corporation in the apparel industry to reveal a complete list of factories they contracted with which went to show the amount of increased transparency Nike had committed to.¹⁵¹ This came after activists had spent years urging Nike to release a comprehensive list of all the overseas factories that they subcontracted to in an effort to increase the amount of independent monitoring done by NGOs, labour unions, and activists.¹⁵² Nike then went on to a publish their own comprehensive report consisting of 108 pages in which they admitted their own shortcoming and continued abuses that were still present in their factories, specifically those in Thailand, China, Vietnam, and South Korea.¹⁵³

However, the same human and labour rights activists stood firm in their belief that although increased monitoring had dramatically improved the working conditions of Nike's factories, that Nike still had a multitude of severe issues they had to confront.¹⁵⁴ These issues took place in the form of hazardous materials that workers were frequently exposed to, unsafe air quality in the workplace, and the eyebrow raising locking of factory doors during employment hours so that their workers could not leave the factory.¹⁵⁵ Activists cited Nike's own 108 page report which highlighted that many workers in a quarter of factories were still experiencing both physical and verbal abuse; that up to half of all factories engaged in restricting workers from having access to the bathroom and drinking; and that half of the factories denied workers even one day off in a seven-day work week.¹⁵⁶ In a quarter of all factories, wages were still below the minimum wage standard that Nike had committed to in their *Nike Code of Conduct*.¹⁵⁷ The majority of workers were still working over sixty hours a week and many of them were punished if they refused to work overtime.¹⁵⁸

While still working towards meeting the requirements needed to comply with various labour-based NGOs, Nike was also making efforts at their annual corporate shareholder meetings to talk about implementing more ethical labour and environmental practices in their factories.¹⁵⁹ According to their 2001 Proxy Statement that was submitted to the Securities and Exchange Commission, Nike had charged their Corporate Responsibility Committee with the task of being

¹⁴⁹ See *id.*

¹⁵⁰ See David Teather, *Nike list abuses at Asian factories*, THE GUARDIAN (Apr. 14, 2005, 5:26PM) <https://www.theguardian.com/business/2005/apr/14/ethicalbusiness.money> (last visited Nov. 6 2020).

¹⁵¹ See *id.*

¹⁵² See *id.*

¹⁵³ See *id.*

¹⁵⁴ See *id.*

¹⁵⁵ See *id.*

¹⁵⁶ See *id.*

¹⁵⁷ See *id.*

¹⁵⁸ See *id.*

¹⁵⁹ See NIKE, INC., FORM DEF 14A NIKE, INC. 6, 19-20, 23-26 (Nike, Inc., 2001) <https://sec.report/Document/0001095811-01-503848/> (last visited Nov. 6, 2020).

in charge of significant activities and policies regarding labor practices.¹⁶⁰ The proxy statement also revealed that Nike was using a portion of their funds for consulting services for labor relations.¹⁶¹ Most significantly, was a shareholder proposal by a Class B shareholder who had set up a framework of eleven principles which were designed to respect “human and labor rights of workers” in China, one of the countries where Nike’s own reports showed that ethical labour practices were still severely lacking.¹⁶² The principles were written as a joint effort between the International Labour Organization (ILO) and the United Nations Covenants on Economic, Social and Cultural Rights, and Civil, and Political Rights.¹⁶³ The proposal was signed and approved by the Chinese government and China’s national laws.¹⁶⁴ In short, the eleven principles centered around banning the manufacturing of goods through forced or prison labor; supplying fair and decent working hours and wages that could realistically meet the needs of the worker; the prohibition of child labour; and allowed for the freedom of association and unionization amongst the factory workers.¹⁶⁵ Principle three also explicitly prohibited the use of corporeal punishment and prohibited any form of physical, verbal, or sexual abuse of the workers which was an issue that Nike’s factories struggled with especially in Asian countries.¹⁶⁶

Despite being epitome of everything that Nike was supposedly doing their hardest to improve in their overseas factories, Nike’s Board of Directors voted against adoption of the U.S. Business Principles for Human Rights of Workers in China.¹⁶⁷ The Board rationalized their decision by asserting that their own *Nike Code of Conduct* already addressed most of the principles contained in the Proposal and that some of the principles were too vague in nature to make enforceable.¹⁶⁸ The Board argued that as a corporation, they were already committed to following the applicable laws of the countries their factories were located in and expected their subcontractors to abide by these laws when manufacturing Nike products.¹⁶⁹ The Board attempted to further their argument with a reminder that Nike was the first in the industry to publish a code of conduct establishing their own personal standards for labour practices and environmental responsibility, and that the *Nike Code of Conduct* requirements for Nike factories often exceed the local and national laws of the countries in which Nike’s factories were situated in.¹⁷⁰

Although Nike’s arguments against approving the Proposal were true in essence, the Board of Director’s reluctance to adopt even portions of the Proposal that were relatively reasonable and ones which Nike supposedly already upheld gave rise to the question of how far Nike was willing to bind itself to programs and agreements that would hold the company accountable to someone else’s standards, not just their promises to engage in a higher standard of working conditions. Just as questionable is Nike’s assurance that their contractors were committed to following the

¹⁶⁰ *See id.*

¹⁶¹ *See id.*

¹⁶² *See id.*

¹⁶³ *See id.*

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

applicable local and national labor laws of the countries their factories were in. Some of the local and national laws of the factories' country of origin did not have strict labor laws or strict enforcement policies. A lack of labour laws and weak enforcement of existing labour in these developing countries were the reasons Nike originally moved their manufacturing to the factories in these locations. Nike had purposely sought out areas in which they could get away with paying factory workers extremely low wages in poor and unsafe working conditions. Thus, Nike's argument that they were committed to upholding the local and national labor laws of their factories' countries is a weak one because the labor laws of the developing countries Nike was manufacturing in were not up to par with the western ideals of ethical labor practices or with the standards the International Labour Organization (ILO) held itself to. While it was clear that Nike was committed to improving the working conditions of their factory workers, their absolute commitment could be called into question by critics who choose to see Nike's Board of Directors' recommendation against the Proposal as a limit to how far Nike is willing to go as a company to ensure ethical labour conditions.

IV. NIKE'S PRESENT-DAY COMPLIANCE

Nike has been abundantly public in their constantly updated, continued efforts to improve and better the working conditions of their factory workers.¹⁷¹ Nike has rebranded itself from the company that was the face of unethical labor practices and sweatshops, into the figurehead of the industry for ethical business and labor practices.¹⁷² However, despite Nike's new image and efforts, the company has proven in recent years through multiple series of events that they are yet still far from actually abstaining from labor practices that are unethical and exploit their workers.

Most recently, public outrage exists over Nike's manufacturing factories in China.¹⁷³ The People's Republic of China has been the subject of international criticism due to their treatment of the Uyghurs, a minority ethnic group whom the majority of practicing Muslims.¹⁷⁴ Led by the Chinese Communist Party, the People's Republic of China has taken to furthering their Communist campaign by trying to assimilate the Uyghur people by placing restrictions on Uyghur's cultural, social, and religious life.¹⁷⁵ In an effort to assimilate the Uyghur people, the Chinese government detained hundreds of thousands of Uyghurs in mass detention camps which were aimed to "mass-educate".¹⁷⁶ Many of the Uyghur people were then sent by the government to work in factories that manufactured goods for more than eighty established global brands, Nike being one of them.¹⁷⁷ Familiar with facing harsh backlash for labour-related issues, Nike quickly issued a press statement stating that at Nike "we respect human rights in our extended value chain, and always strive to conduct business ethically and responsibly" and that Nike is "committed to upholding

¹⁷¹ See Nisen, *supra* note 32.

¹⁷² See *id.*

¹⁷³ See Anna Fifield, *China compels Uighurs to work in shoe factory that supplies Nike*, THE WASHINGTON POST (Feb. 29, 2020 1:30PM) https://www.washingtonpost.com/world/asia_pacific/china-compels-uighurs-to-work-in-shoe-factory-that-supplies-nike/2020/02/28/ebddf5f4-57b2-11ea-8efd-0f904bdd8057_story.html (last visited Nov. 12, 2020).

¹⁷⁴ See *id.*

¹⁷⁵ See *id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

international labor standards globally.”¹⁷⁸ Also in their press statement, a Nike spokeswoman insisted that Nike “strictly prohibited from using any type of prison, forced, bonded or indentured labor.”¹⁷⁹ Despite Nike’s assertions that their factories were not a part of the factories that the Uyghur people were being sent to work at by their government as a means of assimilation, the chief executive of the plant that owns and operates Nike’s manufacturing factories stated that about 600 Uyghurs were currently working in Nike’s factories.¹⁸⁰ While the Republic of China maintains that the labor of the Uyghur people that have been sent from their homes to work in factories far from their native land is not forced labor because they are still getting paid, many international labour organizations are still uneasy at what has been regarded as “highly disturbing coercive labor practices that [were] consistent with the International Labour Organization’s definition of forced labor.”¹⁸¹ The Australian Strategic Policy Institute (ASPI) was not able to find conclusive evidence that the labor by the Uyghurs is forced, but maintains that they do not believe the Uyghur people are working in these Chinese factories on their own volition.¹⁸² The ASPI was able to find Chinese government documents that “show that transferred workers are assigned minders and have limited freedom of movement.”¹⁸³ The ASPI urged corporations such as Nike that were currently operating factories which employed the Uyghur people to end their contracts with those factories as they potentially find themselves in breach of trade laws which prohibit the importation of goods using forced labor.¹⁸⁴ Corporations ending their contracts with manufacturing factories participating in the “employment” of the Uyghur people could also work to encourage the Chinese government from sending the Uyghur people to work in these factories as a means as “re-education.”¹⁸⁵

Nike’s reluctance to acknowledge that they could have been unknowing participants in thinly disguised forced labor, a practice they explicitly state in their *Nike Code of Conduct* that they prohibit in all their manufacturing factories and supply chains, brings further skepticism the effectiveness and continuance of Nike’s own *Code of Conduct* and of the labour-related certifications programs they are in compliance with.

V. ALTERNATIVES TO NGO CERTIFICATIONS

Although many corporations are relying on labour-based NGO compliance certifications to keep the public at bay and to show that labour standards are a priority in their business models, there still other avenues of labour justice available to not only corporations, but also as statutes and acts written for the victims of poor labour conditions. Because these alternatives are not widespread, are currently pending results, or have yet to show any long-lasting or large effect on labor practices, only a brief walkthrough is needed in order to complete the overall picture.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *See id.*

¹⁸¹ *Id.*

¹⁸² *See* Vicky Xiuzhong Xu, Danielle Cave, Dr. James Leibold, Kelsey Munro, & Nathan Ruser, *Uyghurs for Sale*, AUSTRALIAN STRATEGIC POLICY INSTITUTE (Mar. 01, 2020) <https://www.aspi.org.au/report/uyghurs-sale> (last visited Nov. 13, 2020).

¹⁸³ *Id.*

¹⁸⁴ *See id.*

¹⁸⁵ *Id.*

The first option is one which allows foreign individuals to bring civil suits against American individuals under the Alien Tort Claims Act (ATCA) in federal jurisdiction.¹⁸⁶ The Alien Tort Claims Act is quite often used for suits against corporations for international human rights violations and environmental crimes.¹⁸⁷ Most recently, the Supreme Court has heard oral hearings in the case of *Nestlé USA, Inc. and Cargill, Inc. v. John Doe et al.* which is a suit brought by six former child slaves who were trafficked out of Mali and were victims of forced labour in the cocoa fields of the Ivory Coast.¹⁸⁸ The cocoa fields the Malians worked are part of one of the major suppliers for both Nestle USA and Cargill, Inc.¹⁸⁹ Nestle and Cargill argue that while they find human trafficking and child labor to be deplorable practices that deserved to be punished, the suit the Malians bring is in the wrong forum and that applicable law does not apply to them because they are corporations—not individuals.¹⁹⁰ Nestle and Cargill’s attorneys also went so far as to argue for immunity on behalf of the American corporations; with the stance that even if their suppliers were found guilty of committing such crimes, the American companies should not be held liable for ignorantly furthering the facilitation of human trafficking and forced child labor.¹⁹¹ While the Supreme Court has yet to declare judgment on this case, if they rule in favor of the Malians, doing so would set a precedent that American corporations can be held liable for the suppliers and manufacturing plants they use who violate human and labour rights. American corporations would have to act with more diligence when going through normal ordinary business operations and would not be able to plead ignorance in the face of a third party in their supply chain violating labour and human rights.¹⁹² This would be a big win for labour activists as such a ruling would allow for the law to more formidably back them up on claims against large corporations who rarely face the consequences of the labour rights they violate overseas.

Second, is corporations who choose to continue the legacy that a past Secretary-General of the United Nations instilled through the formation of the Human Rights Council and the Global Compact Initiative which was started as an effort to promote corporate social responsibility.¹⁹³ However, criticism lies behind this approach because decades later corporations are still engaging in unethical labour practices without any real consequences and because it has created a gateway for foreign trial cases to rely heavily on their participation in such initiatives as proof that they are not in violation of labour rights.¹⁹⁴

Some states have taken matters into their hands and have enacted statutes in hope of instilling some form of corporate liability for American corporations who do not have ethical working conditions. For example, the state of California has enacted the California Transparency

¹⁸⁶ See Duane Windsor, *Alien Tort Claims Act*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Alien-Tort-Claims-Act> (last visited Dec. 16, 2020).

¹⁸⁷ See *id.*

¹⁸⁸ See David J. Scheffer, *U.S. Supreme Court Assesses Corporate Complicity in Child Slavery*, COUNCIL ON FOREIGN RELATIONS (Dec. 09, 2020), <https://www.cfr.org/article/us-supreme-court-assesses-corporate-complicity-child-slavery>.

¹⁸⁹ See *id.*

¹⁹⁰ See *id.*

¹⁹¹ See *id.*

¹⁹² See *id.*

¹⁹³ See U.N. Secretary-General, *Kofi Annan*, UNITED NATIONS SECRETARY-GENERAL <https://www.un.org/sg/en/content/kofi-annan> (last visited Dec. 16, 2020).

¹⁹⁴ See *id.*

in Supply Chains Act which requires “companies, including some companies headquartered outside of California but doing business in California, to report on their websites the activities they engage in to monitor their supply chains to prevent human trafficking and slavery.”¹⁹⁵ Although the companies covered under the Act are not required to participate in the anti-trafficking and anti-slavery activities, they are required to put out a mandatory disclosure on their website that they are not in compliance with that part of the Act.¹⁹⁶ The statute obviously lacks in any real action against the corporations for violations, but it does effect consumer perspective who could boycott companies not in compliance and that possibility could serve as encouragement to corporations to come in full compliance with the Act as a preventive measure and avoid a Nike-like scandal.

Lastly, there is the rising integration of the environmental, social, and governance (ESG) factors in corporations which seeks to implement itself in the decision-making process of corporations by taking into consideration the environmental and social impacts corporate decisions have.¹⁹⁷ The rationale behind the ESG factors is that it is beneficial for both the corporate world and society to make decisions which lead to more sustainable markets for the future.¹⁹⁸ While the ESG factors more heavily focus on environmental factors, an integration of ESG factors into the corporate decision-making process still serves to better the labour conditions of many overseas individuals since many employees are put into unsafe and unsanitary environments in the line of work.

CONCLUSION

With so much discretion left from the WTO and the GATT due to their lack of setting an international standard for labour regulations and working conditions, it was left to the International Labour Organization, nongovernmental organizations (NGOs), and international labour unions to fill in the gaping hole. American states and federal acts also worked towards filling in the gap left by the WTO and GATT, but as we have seen, these states have their weaknesses and still require much work and change in order to truly fill in the goal to a respectable and effective measure. The other alternatives to NGO certifications mentioned also leave much to be desired in terms of effectiveness, enforceability, and in remedying their own personal weaknesses.

Nike is a prime example of how a corporation, when left to their own devices, will set in place a business model that engages in unethical labour practices until a series of events happen which jeopardize their profits. Nike was not a passive player in the low wages, physical and verbal abuse, and poor and unsafe working conditions that took place in their overseas sweatshop. Nike intentionally switched the locations of the factories they outsourced to minimize their manufacturing costs as much as possible with little regard as to how their business model negatively impacted their workers. It was not until Nike’s profits started dramatically decreasing in the face of widespread public backlash that Nike chose to change their business practice to meet

¹⁹⁵ See Latham & Watkins Corp. Dep’t, *The California Transparency in Supply Chains Act (SB 657)*, LATHAM & WATKINS (Dec. 6, 2011) [https://www.lw.com/thoughtLeadership/california-transparency-in-supply-chains-act-2010#:~:text=The%20California%20Transparency%20in%20Supply%20Chains%20Act%20of%202010%20\(SB,to%20prevent%20human%20trafficking%20and](https://www.lw.com/thoughtLeadership/california-transparency-in-supply-chains-act-2010#:~:text=The%20California%20Transparency%20in%20Supply%20Chains%20Act%20of%202010%20(SB,to%20prevent%20human%20trafficking%20and).

¹⁹⁶ See *id.*

¹⁹⁷ See George Kell, *The Remarkable Rise Of ESG*, FORBES MAGAZINE (Jul. 12, 2018 at 10:09AM), <https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=50d4047c1695>.

¹⁹⁸ See *id.*

the more ethical labour practices and working conditions that consumers expected out of the brand that they were wearing.

Nike's strides towards raising the standards of their labour practices were largely helped by various NGOs they partnered with. Although arguably weak in the face of any real accountability, NGOs still instilled in Nike, and in many other corporations which faced similar issues as Nike, a form of accountability and gave the public some level of certification that helped ensure that the labour practices Nike was originally participating were being remedied.

However, as the very recent issue of the Uyghur people in China shows, NGOs are not the end all, be all solution to the lack of international labour standards that we currently have. Even combined with an aggressive corporate approach towards committing to upholding ethical and high standards of labour practices and compliance with numerous national and international labour-related nongovernmental organizations, Nike was still an operating character in an international framework that allows for the exploitation and mistreatment of factory workers.