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# The UNIDROIT Principles of International Commercial Contracts and the WTO: Between an "International Restatement" and a "Globalization" of Contract Law? A Review of An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts

Imtyaz M. Sattar  
Zaid Ibrahim & Co.

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## Book Review

### **The UNIDROIT Principles of International Commercial Contracts and the WTO: Between an “International Restatement” and a “Globalization” of Contract Law?**

**A Review of *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, Michael Joachim Bonell, Transnational Juris Publications, Inc., 1994.**

REVIEWED BY IMTYAZ M. SATTAR\*

That international legal practice has taken on a transnational character is clear. Substantive rules are also now slowly attempting to acquire this quality. To this end, the 1994 *UNIDROIT Principles of International Commercial Contracts*<sup>1</sup> is the most recent and significant contribution to the international commercial community's conversation on its emerging *lingua franca*.

The UNIDROIT Principles entered the international commercial world attracting much, though specialist, academic and practitioner attention. Those unfamiliar with the Principles or disinterested in black letter rules do not fully appreciate why the completed UNIDROIT project might interest them. This is where Michael Bonell's *An International Restatement of Contract Law* steps in. Bonell's discussion generally follows the uses of the Principles, as articulated in the Preamble, which he designed. With this approach, his treatment of the Principles is very comprehensive. However, for this same reason, the discussion is nonexhaustive. He does not, therefore, adequately touch upon the possibility of the UNIDROIT Principles in concert with other successful private international trade law instruments being “universally”

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\* Research Analyst, Zaid Ibrahim & Co., Kuala Lumpur, Malaysia.

1. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS: OFFICIAL TEXTS OF THE BLACK LETTER RULES IN ENGLISH, FRENCH, GERMAN, ITALIAN AND SPANISH (1994).

supported by the World Trade Organization, the principal international trade body. Given the remarkable success and developments the Principles actually represent, this potential is not remote; rather, following from his own discussion this should be pursued as a legitimate end. Therefore, before exploring the application of the Principles in this capacity, Bonell's competent discussion of the Principles should be an informative, if not necessary, backdrop.

As Legal Consultant to UNIDROIT and Professor of Comparative Law at the University of Rome, Bonell is particularly well-suited to respond to the question "what's the point of all this?" Though Chapter 1, "Why an International Restatement of Contract Law?", directly addresses the question, Chapter 2, "History and Preparation", and Chapter 3, "The Structure and Scope", present a fuller picture of the UNIDROIT harmonization purpose and process. Important points to draw from the introductory discussions are, first, that the Principles are intended to be an "International Restatement" of contract law. They are a nonbinding international consensus on principles aimed more at creating a *lingua franca* for the international commercial community than international legislation.<sup>2</sup> The importance of this will become more apparent as literature eventually focuses on the relationship between the Principles and the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG).<sup>3</sup> Secondly, the Comments accompanying the Articles, he states, "are an integral part of the Principles, they not only explain, but to a certain extent even supplement the black letter rule."<sup>4</sup> In these respects, the similarities between UNIDROIT and their project; and the American Law Institute and their Restatements, are clearly not accidental.

The remaining bulk of the book, however, shifts to the substantive provisions and practical aspects of the Principles. Rather than an article by article review, Chapter 4, "Content of the Principles", discusses the various

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2. MICHAEL JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 14 (1994) [hereinafter BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW]. For a fuller explanation of the differences in nomenclature, see Michael Joachim Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles of International, Harmonization, Restatement, Codification, and Reform Commercial Contracts*, 40 AM. J. COMP. L. 617, 617 (1992); Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 AM. J. COMP. L. 683, 683 (1992).

3. For the author's views on the relationship see Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and CISG-Alternatives or Complementary Instrument?*, 1 UNIFORM L. REV. 26, 26 (1996) [hereinafter Bonell, *Alternatives or Complementary Instrument?*].

4. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 27.

sources of inspiration, the similarities with other projects,<sup>5</sup> and the ideas underpinning the substantive rules.

There are several advantages to this approach. First, although he refers to particular Comments, he does not regurgitate them *en masse*. The reader thereby benefits from both commentaries. Second, the reader gets a better idea of the universality and uniqueness of the Principles. Quoting the Introduction to the Principles, "[they] reflect concepts to be found in many, if not all, legal systems" and "provide a system of rules especially tailored to the needs of international commercial transactions."<sup>6</sup> Moreover, they are designed to reflect "the special conditions which exist in North-South and East-West economic relationships."<sup>7</sup> Third, the comparison between the Principles and the CISG provides a good catalogue of provisions that are substantially similar, different, or new. One should note two salient differences. First, Article 1 of the CISG limits the scope of the Convention to "contracts of [international] sale of goods," whereas the Principles are more broadly applicable to, *inter alia*, exclusively service contracts.<sup>8</sup> For example, where, as in the conclusion of the *Oberlandesgericht* of Cologne, information derived from market research but contained in a magnetic support fell outside the scope of the CISG,<sup>9</sup> such information could have been governable under the Principles. This complementary role the Principles can play with respect to the CISG, and the flexibility of the Principles, are illustrated by the transactions in the Comments apparently designed *not* to represent the typical international sale of goods.<sup>10</sup> Secondly, whereas under Article 4(a), CISG validity is expressly excluded, Chapter 3 of the Principles not only covers the typical grounds for invalidity—like fraud, mistake, or threat—but also the more controversial area of gross disparity.<sup>11</sup> It should, however, be noted that only

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5. See COMMISSION ON EUROPEAN CONTRACT LAW, THE PRINCIPLES OF EUROPEAN CONTRACT LAW, PART I: PERFORMANCE NON-PERFORMANCE REMEDIES 4, 52, 54 (1995). For a more detailed note on the similarities and differences between the Principles and the current European project see Michael Joachim Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, 1 UNIFORM L. REV. 229 (1996) [hereinafter Bonell, *Similar Rules for the Same Purposes?*]; A.S. Hartkamp, *The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law*, 2 EURO. REV. OF PRIVATE L. 341 (1994).

6. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 42.

7. *Id.* at 52.

8. *Id.* at 46.

9. Michael Joachim Bonell & Fabio Liguori, *The UN Convention on International Sale of Goods: A Critical Analysis of Current International Case Law (Part I)*, 1 UNIFORM L. REV. 147, 149 (1996).

10. See PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 1, at 4.

11. However, Art. 3.1 of the Principles expressly excludes invalidity arising from (a) lack of capacity;

rarely do the Principles depart from the CISG. These additions or departures merely reflect issues insufficiently dealt with or simply excluded by the CISG.<sup>12</sup> Indeed, not only is the CISG "an obligatory point of reference"<sup>13</sup> because it spans much of the commercial world,<sup>14</sup> but, in view of its binding nature, "whenever the requirements for the application of CISG exist [they] will normally take precedence over the UNIDROIT Principles."<sup>15</sup> However, where the two documents do overlap, one commentator was clear in saying "*Principles* is a better, more mature document."<sup>16</sup>

Where Professor Bonell does venture into substantive rules, he does so in terms of their underlying ideas, again stressing the suitability for the international commercial climate. For example, while discussing Art. 1.1 on the Freedom of Contract, he notes the Comment on the article and how there might be "Principled" limitations, for example, nonderogable provisions like Article 1.7 on good faith, or "extra-Principled" limits, like Article 1.4 on national or international mandatory rules. Moreover, he covers in the course of the chapter the seven areas comprising the Principles: general provisions, formation, validity, interpretation, content, performance—in general and hardship; and nonperformance—right to performance, termination, and damages. Despite the breadth of the discussion, it is important to note that these sections serve mainly to supplement the Comments and Illustrations in the UNIDROIT Text. The book cannot, therefore, act as a substitute for the Principles.

Importantly, Chapter 5 discusses five roles the Principles might play in practice. First, they serve as a model for national and international legislators. The Principles were an inspiration in some recent codifications, for example,

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(b) lack of authority, and (c) immorality or illegality. PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, *supra* note 1, at 20.

12. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 44. Nevertheless, they are important. The CISG's exclusion of validity has been one of the principal reasons behind Britain's opposition, and consequent nonratification of the CISG. See Barry Nicholas, *The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?* 2 (1993) (unpublished seminar paper, Centro di Studi e Ricerche di Diritto Comparato e Straniero (Rome)) (on file with author).

13. Bonell, *Alternatives or Complementary Instrument?*, *supra* note 3, at 30.

14. 48 States have Ratified the CISG. These states include the three NAFTA Members (Canada, Mexico, and the United States) and the European Union less the UK and Portugal, as well as China, Australia, New Zealand, The Russian Federation, and other Asian, African, Middle Eastern and Latin American States. UNILEX, INTERNATIONAL CASE LAW & BIOGRAPHY ON THE U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, B.1 (1996).

15. Bonell, *Alternatives or Complementary Instrument?*, *supra* note 3, at 34.

16. Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 *FORDHAM L. REV.* 281, 283 (1994).

the new Dutch Civil Code and the Mexican Commercial Code.<sup>17</sup> And currently, Indonesia, in its move toward reform, has also expressed interest in the Principles.<sup>18</sup> On Russian legal development, Alexander Komarov was very clear in the role the Principles played:

While it is difficult to assess the extent to which the Principles influenced the work on the new Civil Code, it is beyond dispute that they were often relied upon as a document best reflecting in concise form the current state of and recent tendencies in modern contract law . . . . [They] have already played the role indicated for them in the Preamble (Purposes for the Principles) . . . they have served as a model for national legislation.<sup>19</sup>

The Principles might also prove helpful in countries with insufficiently developed legal infrastructure to accommodate the progressive international commercial context. Estonia has looked to both CISG<sup>20</sup> and the Principles,<sup>21</sup> taking into account its trading partners and the "authoritative" force of the Principles. China's protracted economic reform required laws that enabled it to improve both relations with foreign companies and the climate for foreign trade and investment. In 1988, the CISG played this role by supplementing and improving upon China's 1985 Foreign Economic Contracts Law.<sup>22</sup> The Principles are currently being looked to as a source for further reforms.<sup>23</sup>

The Principles can also be employed as an interpretive tool and a gap filler for existing international legislation. An example of the former "may be found in paragraph 1 of Art. 7.4.9 (Interest for Failure to Pay Money) which, by

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17. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 105.

18. UNIDROIT, 74th Session Governing Council Report [Rome, March 28- April 1, 1995, C.D. 873], p.12.

19. Alexander S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: A Russian View*, 1 UNIFORM L. REV. 247, 248-49 (1996).

20. J. Peter Byrne & Philip G. Schrag, *Law Reform in Estonia: The Role of Georgetown University Law Center*, 25 L. & POL'Y INT'L BUS. 449, 453, 457-58 (1994).

21. See MICHAEL JOACHIM BONELL, UN "CODICE" INTERNAZIONALE DEL DIRITO DEI CONTRATTI, I PRINCIPI UNIDROIT DEI CONTRATTI COMMERCIALI INTERNAZIONALI 195 (1995) [hereinafter BONELL, UN "CODICE"].

22. Paul Von Hehn, *Sino-French Trade and the United Nations Convention on Contracts for the International Sale of Goods*, REVUE DE DROIT DES AFFAIRES INTERNATIONALES [INT'L BUS. L. J.] 565, 565 (1988).

23. BONELL, UN "CODICE", *supra* note 21, at 133.

expressly stating the right to interest, is independent of whether the non-payment of the sum of money due is excused, provides an answer to a question that Art. 78 of the CISG leaves open."<sup>24</sup> For the latter, where, as in Article 7 paragraph 2 of the CISG, judges and arbitrators are expected to determine "the general principles" on which the Convention is based, but where the Convention is expressly silent, resort could be had to the Principles if "the relevant provisions of UNIDROIT are the expression of a general principle underlying the Convention concerned."<sup>25</sup> He cites, as example, modes of payment expressed in the Principles, but not expressly settled in the CISG.<sup>26</sup>

The Principles can, thirdly, act as a guide for drafting international commercial contracts. This function, unlike the others discussed, is absent from the Preamble. The strength of the application is, however, grounded in the neutrality of the Principles: for the purposes of negotiations and drafting of contracts, neutral terminology may be more palatable for both parties.<sup>27</sup> To Bonell's discussion, Van Houtte adds that the Principles can be used as a checklist in drafting contracts and a domestic law gap filler. The multiple language versions can be employed as a glossary for lawyers drafting in an unfamiliar language. Their balanced nature can help maintain rapport between negotiating parties.<sup>28</sup>

More importantly, the Principles can be employed as rules governing the contract when expressly stipulated for or may be applied when more nebulous terminology like "general principles of law" or "lex mercatoria" are used in the contract.<sup>29</sup> The purpose of this is to put the Principles between the contract and

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24. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 112.

25. *Id.* at 113.

26. *Id.* For a comprehensive discussion on the gap-filling role of the Principles see Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles of International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149 (1995).

27. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 116.

28. Hans Van Houtte, *The UNIDROIT Principles as a Guide for Drafting Contracts*, in UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACTS: A NEW LEX MERCATORIA? 115, 115-25 (1995). Though all of this is true, others are "realistic" about this use. See Vivien Gaymer, *The UNIDROIT Principles as a Guide for Drafting Contracts: A View From an International Commercial Lawyer*, in UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACT, *supra* note 28, at 97; Giorgio de Nova, *The UNIDROIT Principles as a Guide for Drafting International Contracts*, in UNIDROIT PRINCIPLES FOR INTERNATIONAL COMMERCIAL CONTRACT, *supra* note 28, at 129.

29. The validity, indeed, the existence of "lex mercatoria" is hotly debated. Suffice it to say at this point that it has had national court recognition, but is more amenable to international commercial arbitration. It has been defined in many ways, but it essentially "incorporates the common customs and usages of the business community of each State and, where there are gaps, supplements it with equity and the creativity. . . ." Vanessa D. Wilkinson, *The New Lex Mercatoria: Reality or Academic Fantasy?*, 12 J. INT'L ARB. 103, 104 (1995). See also *infra* notes 41 & 42.

national law, but this is not without its problems. The possibility remains that the proper law of the contract will remain determinable separately on the basis of the private international law of the forum. The Principles would then bind the parties only as far as they do not affect the rules of the proper law from which the parties may not derogate.<sup>30</sup> In this respect, he discusses the innovative supporting role provisions like Article 9 of the new 1994 Inter-American Convention on the Law Applicable to International Contracts<sup>31</sup> can play when it enters into force.<sup>32</sup> It provides as follows:

If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.<sup>33</sup>

This improves greatly over the "anachronistic" provisions found in the earlier European 1980 Rome Convention on the Law Applicable to Contractual Obligations which restricts the applicable law to that of *particular states*. This innovation keeps the rules more in line with contemporary trade practice and, citing another commentator, "[a]llows decision-makers to dispense with tedious investigation into subtleties of conflicting laws and to rely instead on the rules laid down in the UNIDROIT Principles."<sup>34</sup>

Of this capacity, however, Van Houtte sharply contended "it is not up to the Principles to advance themselves as general Principles of law or as *lex mercatoria* . . . . The UNIDROIT text will only be accepted when the legal community—and not merely the some 20 or so experts responsible for drafting

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30. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 122.

31. For a note on the OAS Convention, see Friedrich Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381, 381-393 (1994). For a recent discussion on the OAS Convention and its relationship with the Principles, see A. Boggiano, *La Convention Interamericaine sur la loi Applicable aux Contrats Internationaux et les Principes d' UNIDROIT*, 1 UNIFORM L. REV. 219, 219-28 (1996).

32. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 122-23.

33. For a fuller discussion on the article see Friederich Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 499 (1995); Juenger, *supra* note 31.

34. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 123.



the UNIDROIT text, no matter how skilled and famous these lawyers may be—has recognized that the UNIDROIT document states principles which underlie most legal systems and are generally accepted."<sup>35</sup> In fact, it is difficult to see how the UNIDROIT Principles can profess to be *lex mercatoria* if the Introduction to the Principles itself confesses that they "embody what are perceived to be the best solutions, *even if still not yet generally adopted*."<sup>36</sup> Indeed, whereas it is established that widely recognized trade usages take precedence over the Vienna Convention (Article 9(2) CISG), the Principles under Article 1.8.2 slightly modify this by excluding trade usages where "application of such usage would be unreasonable."<sup>37</sup> The Principles, albeit in limited circumstances, therefore take precedence over usages. One simply cannot, therefore, say that the Principles, *in toto*, are an expression of commercial usage. Indeed, this militates against the possibility of the UNIDROIT Principles *exclusively* being employed as an expression of *lex mercatoria*.

In any case, and as recommended in Comment 4 of the Preamble, the Principles are more suited to international arbitration if the parties combine their choice of law clause with an arbitration agreement. In this respect, the April 28, 1992 International Law Association Cairo Resolution lends strong support:

The fact that an international arbitrator has based an award on transnational rules, general principles of law, principles common to several jurisdictions, international law, usages of trade, etc. rather than on one law of a particular State should not in itself affect the validity or enforceability of the award: (1) where the parties have agreed that the arbitrator may apply transnational rules; or (2) where the parties have remained silent concerning the applicable law.<sup>38</sup>

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35. Hans Van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, 11 *ARB. INT'L* 373, 382 (1995).

36. *PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS*, *supra* note 1, at 4 (emphasis added).

37. *Id.* at 14.

38. Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 *INT'L CENTRE SETTLEMENT INVESTMENT DISPUTES REV. [ICSID]-FOREIGN INVESTMENT L.J.* 208, 221-22 (1995).

On how one might draft a clause giving rise to this possibility, an example clause is given on page 124 of *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*. Finally, though in limited circumstances, the Principles can substitute applicable domestic law. The Preamble, paragraph four, suggests this only where it is impossible to establish the relevant rule of the applicable law or possibly when research would include disproportionate effort and cost, with respect to laws of a remote country.<sup>39</sup>

By way of conclusion, Chapter 6 offers the author's brief summary and view on Future Perspectives. There are two additional advantages of the book. It offers an excellent bibliography on various topics: the Principles generally, particular provisions, contract law of a wide range of states, private international law of various states, commentaries on the CISG, and references to comparative law generally. In addition, the annex contains the English, French, German, Italian, Spanish, Arabic, Chinese, and Russian language versions.

Despite the many advantages of the book, there are some drawbacks. Though the Principles as a Restatement reflect a practical need of international commerce,<sup>40</sup> the Restatement appears more academic. This is due primarily to its reliance on comparative law literature and the lack of case references. Notwithstanding the discussion of the many applications, a practitioner might expect the CISG case references where reasonably expected. For example, when discussing how the Principles support, depart from, or fill gaps in the CISG, he might have addressed how a particular case or provision may now be decided in light of the Principles. However, in another place,<sup>41</sup> such an illustrative case law approach is provided. Bonell and Liguori presented six different methods of determining the rate of interest in the CISG case law due to Article 78 of the CISG's silence on the matter. They then proceeded to show how the arbitrator expressly referred to the UNIDROIT Principles (Article 7.4.9) in support of his conclusion to adopt a certain method. In any case, the many examples in the Comments are illustrative, and departures quite

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39. BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 145.

40. See Michael Joachim Bonell, *A "Restatement" of Principles for International Commercial Contracts: An Academic Exercise or a Practical Need?*, 7 REVUE DE DROIT DES AFFAIRES INTERNATIONALES [INT'L BUS. L.J.] 873 (1988).

41. See Michael Joachim Bonell & Fabio Liguori, *The UN Convention on the International Sale of Goods: A Critical Analysis of Current International Case Law (Part II)*, 1 UNIFORM L. REV. 359, 373 (1996).

straightforward. Perhaps more importantly, the stress was to suggest an international restatement of contract law, in line with U.S. efforts, not to sell an alternative to the CISG. Nevertheless, a slight academic aftertaste persists.

However, generally ignored is the potential influence the public side of international trade might play. To some extent, within the more inclusive context of international arbitration *lex mercatoria*, to which the Principles now constitute the core, has meaning and validity.<sup>42</sup> Outside of this arrangement, there is less recognition.<sup>43</sup> As Alberto Tita rightly expressed, the mere fact of having organized and structured the *lex mercatoria* does nothing to ameliorate the "real legal nature which *lex mercatoria* is not able to acquire."<sup>44</sup> To overcome this obstacle, Tita suggests that the World Trade Organization can give the Principles together with previous achievements in the unification of private law "real legal and universal dignity as the international trade law."<sup>45</sup> This was something Bonell alluded to in 1988:

The principles being elaborated by an independent international organization in collaboration with other academic institutes and specialized agencies, could be considered as a kind of a *ratio scripta* of an emerging supranational legal order—a modern *lex mercatoria*—which

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42. When discussing the possibility of the Principles being a system of rules of contract law, Van Houtte stresses that "only when arbitration is used to settle disputes is there a possibility for the Principles to be considered a legal system—as the Comment [4, Preamble] also recognizes." This he explains is because "national courts will not (yet) accept the Principles as the proper law for contracts" and, alternatively, that arbitrators deciding as *amiables compositeurs*, i.e., *ex aequo et bono*, "do not have to apply a specific national law and can thus use the Principles as autonomous standards." Van Houtte, *supra* note 35, at 381-82. However, some still forcefully disagree. See Wilkinson, *supra* note 29, at 103.

43. In support of "lex mercatoria" by national courts, four judgments recognizing it are generally referred to: *Norsolor SA v. Palbalk Ticaret Ltd. Sirketi* (France v. Turkey), 1983 Y.B. COM. ARB. 362 (CA Paris 1981) (discussing an arbitral award that was based on "lex mercatoria" and was recognized by both the Cour d' Appel in Paris and the Supreme Court of Vienna); *Fourgeroulle v. Banque du Proche-Orient* (France v. Lebanon), 1982 REV. ARB. 183 (enforcing an arbitral award based on "general principles of obligation generally applicable in international trade" was upheld by the French *Cour de Cassation*); the London Court of Appeals in *Deutsche Schachtbau-und Tiefbohrergesellschaft GmbH (DST) v. Ras Al Khaimah Nat'l Oil Co.*, 1968-1987 2 Lloyd's Rep. 246 (1987) (enforcing a Swiss arbitral award based on "internationally accepted principles of law governing contractual relations."); the Italian Supreme Court expressly recognized "lex mercatoria" in *Damiano v. Topfer*, 105 Foro. It. 2285, 2288 (Cass. 1982). See Wilkinson, *supra* note 29, at 113-14. See also BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW, *supra* note 2, at 130 n.7 for the same cases followed by references to commentaries on the cases.

44. Alberto Tita, *A Challenge for the WTO: Towards a True Transnational Law*, 29 J. WORLD TRADE 3, June 1995, at 86.

45. *Id.* at 87.

governs international transactions either because the parties themselves referred to it as the applicable law or because of their recognition by arbitration practice.<sup>46</sup>

As noted above, the Principles have more than adequately proved their influence on domestic legislators and to some extent regionally.<sup>47</sup> Can they now entice universally?

A number of reasons suggest an affirmative response. First, under the new WTO, GATT has been improved horizontally by accommodating the new areas of intellectual property (TRIPs),<sup>48</sup> investment (TRIMs)<sup>49</sup> and services (GATS).<sup>50</sup> Here, the Principles<sup>51</sup> can govern the private contracts presupposed

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46. Bonell, *An Academic Exercise or a Practical Need?*, *supra* note 40, at 874.

47. The Principles have had an influence on the current Principles of European Contract Law Project and the Organization of American States' 1994 Inter-American Convention on the Law Applicable to International Contracts. On the former see Bonell, *Similar Rules for the Same Purposes?*, *supra* note 5 at 229; Hartkamp, *supra* note 5, at 341. For the latter see Hernany Veytia, *The Requirements of Justice and Equity in Contracts*, 69 TUL. L. REV. 1191 (1995); Juenger, *supra* note 31, at 601; Boggiano, *supra* note 31, at 219.

48. The Trade Related Aspects of Intellectual Property Rights aims to establish standards in national law for the protection of intellectual property and increased internal enforcement. This reduces trade distortions thereby increasing trade, protection, and enforcement.

49. The Agreement on Trade Related Investment Measures recognizes that some national investment measures distort trade. The Agreement, applying only to goods, states that no party shall apply investment measures inconsistent with Articles II (National Treatment) and XI (General Elimination of Quantitative Restrictions) of GATT 1994. See generally Pierre Sauve, *A First Look at Investment in the Final Act of the Uruguay Round*, 28 J. WORLD TRADE 5, October 1994, at 5.

50. The General Agreement on Trade in Services is an attempt to liberalize the increasingly burgeoning trade in services: international transactions involving such fields as distribution, tourism, construction, and highly skilled people. See Pierre Sauve, *Assessing the General Agreement on Trade in Services: Half-Full or Half-Empty?*, 29 J. WORLD TRADE, August 1995, at 125; Mary Footer, *The International Regulation of Trade in Services Following Completion of Uruguay Round*, 29 INT'L LAW 453 (1995). There is also an indirect supporting role that GATS can offer the Principles. In the context of facilitating transnational legal services, GATS concomitantly facilitates the diffusion of predominant legal ideas. This diffusion will realistically spread from an area of high concentration, to those familiar with the Principles and CISG (large Western law firms), to areas with less familiarization or participation in these projects; (Asian countries and their markets).

51. Though Tita recommends the Principles and other previous achievements in private international trade should be transnationalized, it should be noted that some of these contracts cannot be governed by the CISG by explicit exclusion, but can under the Principles. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art 3-4, 19 I.L.M. 671, 672. In this sense, they are compliments. However, a problem might exist where the two main instruments overlap [CISG and UNIDROIT Principles]. Which takes precedence? The conflict is more acute if an issue is governed by both, but handled differently or provide for different solutions. In other words, do the two instruments complete *lex mercatoria* or compete for it? So, despite the necessary "challenge" to the WTO of incorporating *lex mercatoria*, there is a "prerequisite" challenge to the private international trade community to clean up its own house *before* transnationalizing: defining *lex mercatoria*.

by these agreements through *substantive* compliments. Second, through its vertical improvements, by judicializing the dispute resolution mechanism<sup>52</sup> and enhancing its surveillance mechanism (TPRM),<sup>53</sup> the Principles can be given universal effect and monitored through *procedural* compliments. However, since the Principles are considerably younger and important states like Japan remain outside the scope of even the CISG, the call is perhaps still premature. Third, by placing this code amongst the plurilateral agreements,<sup>54</sup> the real interstitial quality that *lex mercatoria* currently possesses will be more accurately reflected and supported in an agreement on private law of international trade. The Principles in conjunction with other developments in international trade would in a very real sense be legitimately between a restatement and a globalization of international contract norms.

Such a code would not be incongruous with the WTO framework. The agreement, for example, can broadly play the same role as the TRIPs. In some instances, TRIPs obligates members to comply with the provisions of the Berne Convention, the principal international copyright treaty, even where the WTO Contracting Party is not party to the Convention.<sup>55</sup> Whereas TRIPs is

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52. The Dispute Settlement Understanding greatly enhances the judicial character and remedies procedural deficiencies that plagued earlier dispute settlement frameworks. See Edwin Vermulst & Bart Driessen, *An Overview of the WTO Dispute Settlement System and its Relationship with the Uruguay Round Agreements: Nice on Paper But Too Much Stress For the System?*, 29 J. WORLD TRADE, Apr. 1995, at 131; Norio Komuro, *The WTO Dispute Settlement Mechanism: Coverage and Procedures of the WTO Understanding*, 29 J. WORLD TRADE, Aug. 1995, at 5, 39-40; Lei Wang, *Some Observations on the Dispute Settlement System in the World Trade Organization*, 29 J. WORLD TRADE, Apr. 1995, at 173, 174-76.

53. The Trade Policy Review Mechanism has three main objectives: to improve adherence by all contracting parties to GATT rules, disciplines, and commitments; increased transparency of trade practice and policy of the contracting parties; and appreciation and evaluation of individual party practices and policy and their impact on the multilateral trading system. The TPRM therefore falls somewhere in between a transparency and enforcement mechanism. On the former, see Roderick Abbott, *GATT and the Trade Policy Review Mechanism: Further Reflections on Earlier Reflections*, 27 J. WORLD TRADE, June 1993, at 117, 118. On the latter, see Asif Qureshi, *The New GATT Trade Policy Review Mechanism: An Exercise in Transparency or "Enforcement"?*, 24 J. WORLD TRADE, June 1990, at 147, 149-53. See also Asif Qureshi, *Some Reflections on the GATT TPRM, in Light of the Trade Policy Review of the European Communities-A Legal Perspective*, 26 J. WORLD TRADE, Dec. 1992, at 103, 104.

54. Plurilateral agreements, in Annex 4 of the WTO Agreement, are binding only upon those who are party to them. They cover the Agreement on Trade in Civil Aircraft, Agreement on Government Procurement, International Dairy Agreement, and the Agreement Regarding Bovine Meat. It should be noted that the aim of this incorporation is *not* to unify the law, though unification may ensue, but simply to allow National Courts recourse to *lex mercatoria*. The primary function is, therefore, to legitimize *lex mercatoria*. So, even if WTO Contracting Parties do not adopt the Code, *lex mercatoria* still has sufficient validity by virtue of its incorporation in the WTO framework. *But see*, Tita, *supra* note 44, at 88-89.

55. Though the Berne Convention has been followed in the United States since 1989, certain provisions, for example Article 18, were not implemented. Such legislation soon followed. See General Provisions-Restoration of Certain Berne and WTO Works, 60 Fed. Reg. 7793 (1995).

mandatory, the agreement would initially serve as a model for contracting parties or Regional Integration Areas in an attempt to harmonize international contractual trade norms. Moreover, that the UNIDROIT Principles are not a binding convention should not pose an insurmountable problem. As Codex Alimentarius<sup>56</sup> plays a significant role in the *harmonization* process envisaged for the Standards Code, in which the possibility of supplementation is clearly foreseeable, UNIDROIT, UNCITRAL, and the International Chamber of Commerce can similarly supplement the Agreement. Finally, the premise for this position finds support in the *Punta del Este Ministerial Declaration on the Uruguay Round*. In an effort "to reduce the distortions and impediments to international trade . . . the negotiations shall aim to clarify GATT provisions and elaborate as appropriate new rules and disciplines."<sup>57</sup> Since it has been widely recognized for some time now that a diversity of law impedes international commercial activity,<sup>58</sup> perhaps Tita's suggestion is less fantasy than fact.

In short, as commercial activity is already global, should international contractual trade norms not reflect this fact? Though international legislation was *not* UNIDROIT's intention for the Principles, they are "a significant step forward in the globalization of legal thinking."<sup>59</sup> Considering the WTO and the Principles share the same nature (transnational) and purpose (to facilitate international trade) and compliment each other in substance and process, there appears to be much overlap with little friction. The WTO could, in principle and fact, globalize the restatement by packaging it as "un codice".

In the meantime, however, any foreseeable globalization will have to occur as UNIDROIT intended—*de facto*. In this sense, "[the] future has to show to which extent international practitioners will make use of [the Principles] while negotiating or drafting contracts and to which extent parties, courts and

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56. "United Nations Codex Alimentarius Commission was established in 1962 by the Food and Agriculture Organization and the World Health Organization. Among its purposes is the harmonization of standards through the development of food standards which enhance consumer protection and fair practices in food trade. Codex articulates advisory guidelines, codes of practice and recommendations from experts, scientists and members." See Marsha A. Echols, *Sanitary and Phytosanitary Measures*, in THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTATION LEGISLATION 191, 218 n.98 (Terrence P. Stewart ed., 1996).

57. Ministerial Declaration on the Uruguay Round, Sept. 20, 1986, GATT B.I.S.D. (33d Supp.) at 19 (1987).

58. See Part One, *History: the Creation of the United Nations Commission on International Trade Law (UNCITRAL)-II. Action in the General Assembly, B. Progressive Development of the Law International Trade: Report of the Secretary-General, [1968-1970]* 1 Y.B. INT'L TRADE COMM'N 21, U.N. Doc. A/6396.

59. Perillo, *supra* note 16, at 282.

arbitrators will rely on them to interpret international contracts."<sup>60</sup> Recent arbitral reference to the Principles, on their own and in relation to the CISG, regional bodies looking to them for inspiration, and the increasing number of states consulting them for domestic revision suggest a remarkably warmer reception than most anticipated. For these reasons, a fuller understanding of the them and their utility should become more important, if not—as the probably surprised English company in the recent ICC arbitration might attest—necessary. Further, as Bonell's *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* is the first complete commentary on the UNIDROIT Principles, it should be of greater interest to international trade lawyers, arbitrators, academics, and *inter alia*, students in both the "public" and "private" camps.<sup>61</sup>

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60. Van Houtte, *supra* note 35, at 390.

61. For other reviews of Michael Joachim Bonell, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (1994), see generally Denis Tallon, Book Review, 47 *REVUE INTERNATIONALE DE DROIT COMPARE* 1044, 1046 (1995); A.D. Rose, *A Fresh Approach*, 9 *L. INSTRUMENT. J. [Australia]* 1995, at 928; A.D. Rose's, Book Review, 69 *AUSTRALIAN L.J.* 841, 842 (1995) (providing a short review of the book, but also gives a brief history of the Principles and the work conducted by the Governing Council).