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Abstract

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My ambition is to tell a success story — that States can co-operate and deliver results in a reasonable time, and that sometimes small is beautiful. My story is about the Greater Mekong Subregion, and particularly the Cross-Border Transport Facilitation Agreement (CBTA), which supports the East West Economic Corridor (EWEC).

Keywords

East west economic corridor, Greater Mekong subregion

TRADE AND DEVELOPMENT: AN INCREMENTAL RELATIONSHIP

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It is a particular pleasure and privilege to contribute to this issue of the Bond Law Review, honouring the late John Kearney and also remembering his wife, Alison. Because John had been a contemporary of my brothers at school in Melbourne, I had been aware of his existence for a long time. But when my husband, David Allan, and I came to Bond 20 years ago, we developed a friendship with John and Alison. They not only gave us personal support, they also supported our work, as they did the Law School at Bond, and the University. One special example of this was in 1998 when I was President of the International Academy of Commercial and Consumer Law, a scholarly group drawn from all continents and legal systems. The Academy had its Biennial Meeting at Bond. John and Alison not only contributed to its financial support, but also entertained all the delegates for an evening at their house, 'Jabiru', in Mudgeeraba. My fellow Members recall this still.

John and Alison have shown a concern for the values of education, for the support of the disadvantaged, and for the environment. This has been done within the broad compass of planning and regulation, especially in relation to land and development. So I have chosen a striking example of some of these themes within Asia. I dedicate this to them.

My ambition is to tell a success story — that States can co-operate and deliver results in a reasonable time, and that sometimes small is beautiful. My story is about the Greater Mekong Subregion, and particularly the Cross-Border Transport Facilitation Agreement (CBTA),¹ which supports the East West Economic Corridor (EWEC).

The Greater Mekong Subregion consists of Cambodia, Lao PDR, Myanmar, Thailand, Vietnam and two provinces of China, Yunnan and Guangxi Zhuang. It is an area about the size of Western Europe and has a combined population larger than that of the United States. There is projected development of trillions of dollars in the coming decades. The primary purpose of the EWEC, which runs from Da Nang in Vietnam to Tamu in Myanmar, is to facilitate trade and investment by a single cross border transport route. This Corridor and the Subregion itself is part of a program financed by the Asian Development Bank (ADB), which was first proposed in the early 1990s.

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¹ Agreement on Cross-Border Transport Facilitation (entered into force December 2003).

Although its primary purpose is to assist trade and investment by facilitating movement of people and goods, the EWEC is a platform for a number of development projects that are assisted by this improved communication. Current work is the furtherance of a radius of proposals, as the beginning of an enlarged program of regional development planning. The areas chosen are education, health, labour and migration, and social development directed toward the creation and equitable distribution of human and social capital.² The paradox is that because it is easier now to move along the EWEC there has been an initial increase in problems of public health and the movement of unauthorised workers. Improved educational standards are needed to maximise the trade and investment benefits, to mitigate health issues and to reduce the large scale movement of those seeking work.

The ADB exists to finance development. In the four decades since I began working in Asia, initially closely with the ADB, each of the concepts of trade and development has undergone a radical transformation, whether judged by the criteria of the lawyer, the economist or the political scientist. The international regulation of trade through the World Trade Organisation has expanded the scope of trade from trade in goods to trade in services and intellectual property rights, and its membership has grown to three-quarters of the world's states and customs unions. There is a substantial majority of developing countries in the WTO membership, and some least developed countries. The link between trade and investment is acknowledged in the Trade-Related Investment Measures (TRIMS), in one of the modes of service delivery regulated under the General Agreement on Trade in Services (GATS), and the ever-increasing number of preferential trade and investment agreements. These Agreements between States regulate investment as well as trade. The older forms are called Bilateral Investment Agreements (BITs), and the contemporary forms are described as Preferential Trade Agreements (PTAs). They are estimated to exceed 6000.³

Some scholars now accept that the international right to development is a 'workable and vital aspect of contemporary investment treaty design'.⁴ Scholarly opinion is, however, sharply divided as to whether the concept of development is an integral part of the concept of investment,⁵ at least insofar as is necessary to establish the

² 'The Greater Mekong Subregion Economic Cooperation Program Strategic Framework 2012-2022' (Report, Asian Development Bank, 2011) 1.

³ See 'World Investment Report 2011' (Report, United Nations Conference on Trade and Development, 2011) 100.

⁴ For example, see Diane Desierto, 'Development as an International Right: Investment in the new Trade-based IIAs' (2011) 3(2) *Trade, Law and Development* 296, 300.

⁵ Mary Hiscock, 'The Emerging Legal Concept of Investment' (2009) 27(3) *Penn State International Law Review* 765 (2011).

jurisdiction of the International Centre for the Settlement of Disputes between Governments and Nationals of Other States (ICSID) to settle investment disputes under the terms of its Convention. There is no consensus to be found in arbitral decisions.⁶

⁶ See *Malaysia Historical Salvors Sdn Bhd v Malaysia (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/10, 10 May 2007); *Bayindir Insaat Turizm Ticaret ve Sanayi A S v Pakistan (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/29, 14 November 2005); *Helnan International Hotels A/S v Egypt (Decision on Objection to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/19, 15 October 2006); *Saipem SpA v Bangladesh (Decision on Jurisdiction and Recommendation on Provisional Measures)* (ICSID Arbitral Tribunal, Case No ARB/05/07, 21 March 2007); *Jan de Nul NV and Dredging International NV v Egypt (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/04/13, 16 June 2006); *Noble Energy Inc. and MachalaPower Cia Ltd v Ecuador and Consejo Nacional de Electricidad (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/12, 5 March 2008); *Joy Mining Machinery Ltd v Egypt (Award on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/03/11, 30 July 2004); *Mitchell v The Democratic Republic of the Congo (Decision on the Application for Annulment of the Award)* (ICSID Arbitral Tribunal, Case No ARB/99/7, 27 October 2006); *Inmaris Perestroika Sailing Maritime Services GmbH and ors v Ukraine (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/08/8, 8 March 2010); *Bureau Veritas, Inspection, Valuation, Assessment and Control, BIVAC BV v Paraguay (Decision on Objection to Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/9, 29 May 2009); *Pantechniki SA Contractors and Engineers v Albania (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/21, 28 July 2009); *Fakes v Turkey (Award)* (ICSID Case No ARB/07/20, 12 July 2010); *Abaclat and ors v Argentina (Decision on Jurisdiction and Admissibility)* (ICSID Arbitral Tribunal, Case No ARB/07/5, 4 August 2011); *Societe Generale v Dominican Republic (Award on Preliminary Objections to Jurisdiction)* (LCIA, Case No UN 7927, September 2008); *Romak SA v Uzbekistan (Award)* (PCA, Case No AA280, 26 November 2009); *Consortium RFCC v Morocco (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/00/6, 16 July 2001); *Ceskoslovenska Obchodni Banka As (CSOB) v Slovakia (Decision on Objections to Jurisdiction 2)* (ICSID Case No ARB/97/4, 24 May 1999); *Alpha Projektholding GMBH v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/07/16, 20 October 2010); *Phoenix Action Ltd. v Czech Republic (Award)* (ICSID Arbitral Tribunal, Case No ARB/06/5, 9 April 2009); *Malicorp Ltd. v Egypt (Award)* (ICSID Arbitral Tribunal, Case No ARB/08/18, 31 January 2001); *Global Trading Resource Corp and Globex International Inc. v Ukraine (Award)* (ICSID Arbitral Tribunal, Case No ARB/09/11, 23 November 2010); *Lemire v Ukraine (Decision on Jurisdiction and Liability)* (ICSID Arbitral Tribunal, Case No ARB/06/18, 14 January 2010); *F-W Oil Interests Inc. v Trinidad and Tobago (Award)* (ICSID Arbitral Tribunal, Case No ARB/01/14, Feb 2006); *RSM Production Corporation v Grenada (Award)* (ICSID Arbitral Tribunal, Case No. ARB/05/14 11 March 2009); *Consortio Groupement LESI and ASTALDI v Algeria (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/3, 12 July 2006); *Toto Costruzioni Generali SpA v Lebanon (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/07/12, 8

The substance of what is meant by ‘development’ was incorporated in the UN Declaration on the Right to Development, as an inalienable right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.⁷

This also extends to the ‘right of full sovereignty over all natural wealth and resources’.⁸ Furthermore, the Declaration imposes primary duties on States to:

1. formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom...;
2. [create] national and international conditions favourable to the realization of the right to development...;
3. co-operate with each other in ensuring development and eliminating obstacles to development...promote a new international economic order based on sovereign equality, interdependence, mutual interest and co-operation among all States as well as to encourage the observance and realization of human rights...;
4. take steps, individually and collectively, to formulate international development policies with a view to facilitating the full realization of the right to development...;
5. take resolute steps to eliminate the massive and flagrant violations of the human rights of peoples and human beings affected by situations such as those resulting from apartheid, all forms of racism and racial discrimination, colonialism, foreign domination and occupation, aggression, foreign interference and threats against national sovereignty, national unity and territorial integrity, threats of war and refusal to recognize the fundamental right of peoples to self-determination...; [and]

September 2009); *Kardassopoulos v Georgia (Decision on Jurisdiction)* (ICSID Arbitral Tribunal, Case No ARB/05/18, 6 July 2007); *Alps Finance and Trade AG v Slovakia (Award)* (Ad hoc arbitration, 5 March 2011); *Mytilineos Holdings SA v Serbia and Montenegro (Partial Award on Jurisdiction)* (UNCITRAL, 8 September 2006).

⁷ *Declaration on the Right to Development*, GA Res 41/128, UNGAOR, 41st sess, 97th plen mtg, Agenda Item 101, UN Doc A/RES/41/128 (4 December 1986) annex I art 1(1).

⁸ *Ibid* art 1(2).

6. undertake, at the national level, all necessary measures for the realization of the right to development.

Access to this definition would have been very useful at the time that my colleagues and I began the Credit and Security research project in Asia in 1969.⁹ This research was funded by the Asian Development Bank and the Ford Foundation. Its objective was to discover why the flow of capital for the financing of development was impeded in some 10 countries of the Asia Pacific region. The definition of development was agreed in our terms of reference as being confined to the growth of private sector industry, giving industry an economy-wide meaning, and including trade. However, as lawyers, we concluded after the years of our survey that development meant more than this; it included the national capacity to generate internally the resolution of issues, and then to renew this pressure at a higher and more sophisticated level. This conclusion was largely the result of seeing simplistic efforts to achieve modernisation by westernisation as the key to making Asian systems receptive and supportive of development. It was summed up by a Korean colleague of great eminence, who described the result as 'living under the law of somebody else's grandfather'!

In this elemental sense, both law and an economy can develop. But this will not mean both are contained in national development, unless both are contained within a goal of making available to a whole nation a broader and better distribution of material and non-material wealth and resources. Each nation must choose its own path to that goal, and must mark its path and articulate its goals in whatever way it chooses. In all development, national, legal, economic or industrial, the government must therefore play a substantial role.¹⁰

The conclusions of the research were not only a lengthy law reform agenda, but a programme of education for all involved in the process of development to change attitudes, enhance sensibilities, and to acquire new skills. It was daunting indeed, and more so because this was the pre-computer age. The sheer scale and cost of transformation of the legal infrastructure meant that in many cases progress has been slow if not glacial. Crises have acted as catalysts. Some success stories show that development comes in spite of an absence of change. But it is so much harder. Progress is accelerated by regional and bilateral efforts and the attainment of benchmarks needed for entry to such organisations as the WTO. But in cases where

⁹ The results of our research were published in a series of 11 volumes by the University of Queensland Press between 1973 – 1980.

¹⁰ David E. Allan, Mary Hiscock and Derek Roebuck, *Credit and Security: the Legal Problems of Development Financing* (University of Queensland Press, 1974) 16.

States are vulnerable to pressure, some agreements have been unequal in the old imperial sense. Other States still muddle along with a divorce between a formal system and a pragmatic operating system on the ground. The working of these agreements is often built around an elite group, who have the keys to understanding it. It is all too easy to change the law without changing anything that happens. Corruption is a pervasive and corrosive poison.

The significance of the CBTA underlying the EWEC is that it is a success story. The CBTA is a model structure for a cross-border agreement. It contains a metric of success. Since the activation of the agreement, there has been an eleven-fold increase in intra-regional trade.¹¹ This has been achieved by a methodology of merging markets rather than by merging institutions. The latter tends to invoke all of the endemic resistance to change. As a cross-border agreement, it has also been produced largely by persons employed at a much lower level of government than is often the case, working closely with the private sector. These are the people who do the job and have the problems every day of the week. It was, however, characterised at a higher level by the support of political will. The project, financed and supervised by the Asian Development Bank (ADB), falls squarely within (2) of the UN Declaration: 'to create' national and international conditions favourable to the realization of the right to development'.

There is not the same data for the provinces of China that there is for the other constituents, and so my initial remarks relate to the other countries.¹² Over 20 years, this area, once ridden with conflict, has grown at a faster rate than the whole of East Asia and the Pacific. In particular, in terms of development, the GDP of Cambodia, Lao PDR and Vietnam has trebled, growing at a rate of about 8% per year. Its infant mortality rate per 1000 live births has halved in almost every case. Its literacy rate has sharply increased throughout as its poverty rate as a percentage of the population has declined, though there is a stutter in Thailand, following 2008 and the global financial crisis. Overall investment has been about \$14 billion.

Against this background, let us examine the structure and contents of the CBTA. The negotiations began in 1998 for the main part of the Agreement between Lao PDR, Thailand and Vietnam, and were concluded for the Annexes and Protocols in 2006 by

¹¹ Jayant Menon and Anna Cassandra Melendez, 'Trade and Investment in the Greater Mekong Subregion: Remaining Challenges and the Unfinished Policy Agenda' (Working Paper Series on Regional Economic Integration No 78, Asian Development Bank, May 2011) 7.

¹² These figures come from World Bank, *World Trade Indicators* 2009/2010 (2012): <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/TRADE/0,contentMDK:22421950~pagePK:148956~piPK:216618~theSitePK:239071,00.html>>.

all six governments (including China, Cambodia, and Myanmar who had acceded in the interim).

Under the CBTA, an East West Economic Corridor (EWEC) has been established with specified border crossing points covering Lao, Thailand, and Vietnam. PRC and Cambodia have added specified crossing points. Commercial trucks are fast tracked with minimum inspections and charges, and goods can be picked up and delivered along the way if the truck and driver have CBTA documentation. Public private partnerships have been established to deal with customs clearances. The EWEC is now being extended to Bangkok, Vientiane, and Hanoi, so there is a link to all the capitals and also to the deep sea ports of Haiphong and Laem Chabang. Further corridors are proposed from north to south, across the centre, and crossing the region along the coast. The objective is to have a single window and a single check. Apart from this, traffic can flow unimpeded across borders.

What makes the CBTA unique is that it combines in 'a single legal instrument all of the key non-physical measures for efficient cross-border land transport'.¹³ It designates open routes, licenses drivers (with mutual recognition of licences and visas), and establishes regimes governing the carriage of perishable and dangerous goods. This reduces the time at borders by introducing single stop and single window inspections, and by having authorised checkpoints under the CBTA. It eliminates the need for trans-shipment of goods by providing customs transit areas and a guarantee system for goods, vehicles and containers. Its objectives are to facilitate by simplifying and harmonising measures relating to the transport of goods and people, and to promote multi-modal transport. Each country retains the right to deal with import, export, and transit of goods, and the entry, exit and transit of people unless expressly stated otherwise in the CBTA. Any amendments must be unanimously agreed through the Joint Committee.

Many of these areas are the subject of international conventions, few of which had been agreed to by the constituent States. In 1992, UNESCAP had recommended a suite of seven core conventions on international land transport.¹⁴ But the relevant standards and procedures have been incorporated where possible into the CBTA through a series of eight annexes. This makes the CBTA a stepping stone to full membership of these Conventions without the disharmony caused by different speeds of accession reflecting different considerations in each State. A similar approach was taken with WTO obligations, as not all States were members of WTO

¹³ Greater Mekong Subregion Cross-Border Transport Facilitation Agreement Instruments and Drafting History (Asian Development Bank, 2011) 2.

¹⁴ *Economic and Social Commission for Asia and the Pacific, Road and Rail Transport Modes in Relation to Facilitation Measures*, 48th sess, UNESCAP Res 48/11 (23 April 1992).

during the period of the CBTA negotiations. The scope and coverage of these obligations are not identical,¹⁵ but there are no inconsistencies. Furthermore, all border charges were agreed between states using GATT principles. The CBTA does not affect any rights or obligations that contracting parties already had under existing conventions.

There is an assignment of responsibilities among the states. For example, in terms of technical requirements, vehicles and containers must satisfy requirements in their Home countries, but comply with Host country standards in respect of weights, axle loads, and dimensions. There is recognition of technical inspection certificates between the Home country and the Host countries, so problems such as those created by allowing left-hand-drive vehicles to be driven in countries that operate right-hand-drive vehicles (and vice versa) are neutralised. There is a free market basis for the prices for cross-border transport, subject to monitoring by a Joint Committee and subject to general principles of competition policy.

There is an overriding general obligation in terms of transparency of legislation and any other relevant information. There is also a general overriding obligation of non-discriminatory treatment among peoples, goods and vehicles of other contracting parties to the CBTA.

The basic principles agreed in the first part of the CBTA relating to documentation are of particular importance. Apart from the fundamental undertaking to reduce the number and complexity of documents on a continuing basis, it is agreed that the documents will be aligned to the UN system for trade documents. Commodity codes will be harmonised and measurements adjusted in accordance with the international system of modern metric units. All documents, however, need to have an accompanying English translation if not originally in English.

The provisions for dispute resolution between the contracting parties or about the interpretation of the CBTA envisage direct settlement or amicable negotiation in the Joint Committee set up to manage and supervise the CBTA. There is a provision for suspension of obligations in the event of a national safety emergency.

In addition to this agreed general framework, there are twenty annexes and protocols, all agreed in 2007, which are well into a process of ratification by each

¹⁵ This process is an interesting contrast in styles of law making with the WTO Trade Related Intellectual Property Agreement (TRIPS). There, with little consultation with those developing countries affected, WTO Members were obliged by developed country Members to agree to standards in a range of intellectual property treaties as part of a required Single Undertaking to accept all WTO Agreements.

contracting party.¹⁶ This has been done on a prioritised basis, so that the Road Transport and Customs Permits are already operational. The CBTA will come into effect on a more comprehensive and agreed basis as each protocol comes into effect.¹⁷ This calls for a great deal of co-operation between public transport services and private operators. Three of the annexes are directed to obtaining a balance between public and private sectors. Obtaining this result has been the slowest part of the whole process.

The structure of the CBTA has meant that the detailed technical matters can be agreed and amended without detracting from the clarity and significance of the driving principles in the general part. The problems of integrating very different legal systems and a great range of administrative controls of cross-border transport of goods and people are reduced by this structure and the incremental procedure of negotiation. The single strongest unifying force is the existence of the market for cross-border transport.

In 2011, at Greater Mekong Subregion Summit, a new 10-year plan was agreed to boost growth and development and poverty reduction. A Declaration of all the leaders endorsed the plan, but stressed the importance of a more careful balancing of development with environmental concerns.

The progress of the CBTA set within a developing region such as the Greater Mekong will be an interesting model to observe and perhaps to emulate. There do remain systemic problems. There is a need to multilateralise trade preferences to avoid trade diversion and deflection as an ambitious program of membership of bilateral and regional PTAs takes effect over the next ten years. There is also a need to bring national laws regulating investment into harmony with cross-border obligations, and to generate the legal and economic infrastructure to support their justiciability and

¹⁶ Agreement on Cross-Border Transport Facilitation, (entered into force December 2003), Annex 1 Carriage of Dangerous Goods; Annex 2 Registration of Vehicles in International Traffic; annex 3 Carriage of Perishable Goods; annex 4 Facilitation of Frontier-Crossing Formalities; annex 5 Cross-Border Movement of People; annex 6 Transit and Inland Clearance Customs Regime; annex 7 Road Traffic Regulation and Signage; annex 8 Temporary Importation of Motor Vehicles; annex 9 Criteria for Licensing of Transport Operators for Cross-Border Transport Operations; annex 10 Conditions of Transport; annex 11 Road and Bridge Design and Construction Standards and Specifications; annex 12 Border Crossing and Transit Facilities and Services; annex 13a Multimodal Carrier Liability Regime; annex 13b Criteria for Licensing of Multimodal Transport Operators for Cross-Border Transport Operations; annex 14 Container Customs Regime; annex 15 Commodity Classifications System; annex 16 Criteria for Driving Licenses.

¹⁷ Protocol 1 Designation of Corridors, Routes, and Points of Entry and Exit (Border Crossings); Protocol 2 Charges Concerning Transit Traffic; Protocol 3 Frequency and Capacity of Services and Issuance of Quotas and Permits.

further development. As the larger regional programs develop, the need is for continuing comprehensive economic and technical analysis, especially on the balance of investment expansion and environmental protection – a need for ‘green development’.

In a relatively short space of time, the countries linked by the corridor have moved from warfare amongst themselves and internal upheaval to a period of increased economic benefits and a higher standard of living facilitated by closer and easier communication. The nature of the issues of public health and of increased movement of those seeking employment was foreseeable at the beginning of the planning of the EWEC, but not the extent of the social dislocation so caused. On the other hand, awareness of the importance of environmental protection and enhancement was virtually non-existent. The struggle for survival was transcendent, and the consequences of the damage of war to that environment were felt less than the human and other economic damage. But determined programs of education have lifted standards that can now be seen to be attainable, not only by governments as formal policy but also by local communities. This is the example of the Kearney vision of education enhancing human capital and the environment in which it flourishes.