



Confusion of Legal Roots: Comparative Historical Review of International Trade Law in France and Indonesia

Aurele Magnan^{1*}, Kevin John Paul Manurung², Dao Gia Phuc³, Rahmi Ayunda⁴

^{1,3}Faculty of Law, University of Economics and Law, Viet Nam

^{2,4}Faculty of Law, Universitas Internasional Batam, Indonesia

*Corresponding email: aurele.i21@st.uel.edu.vn

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Abstract

*This research discusses the history of international trade law in France and Indonesia. This research is a doctrinal research that uses normative legal research methods. The data used are data obtained indirectly, such as legislation, previous research and other secondary data relevant to the main object of the article, and several cases of the World Trade Organization. The Oxford Journal has defined the term 'International Trade' as the involvement of goods and/or services across national boundaries. In other words, it was an expansive movement. Such actions have been going on for centuries. Thanks to the *lex mercatoria* and *lex maritime* created in the Middle Ages, also to the important role of the 'silk road' which ironically connected the road between France and Indonesia, because it provided so many benefits and the development of international trade law. . After all, French regulations inspired so many rules in many countries, including the Netherlands and were applied in Indonesia as a colony. Indonesia had some similarities within France ever since so.*



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A. INTRODUCTION

The only way in which a durable peace can be created is by world-wide restoration of economic activity and international trade (Waluyo, Najicha & Hermawan, 2019), affirm James Forrestal (Memorandum sent to Clark Clifford on March 6th, 1947), shortly after World War II. It is in this optic of harmonising international trade and their mechanisms worldwide that 23 nations created the General Agreement on Tariffs and Trade (GATT) on October 30th, 1947, in Geneva, and applied it at the dawn of the following year. Since this organisation was meant to be temporary, it evolved into the World Trade Organisation (WTO) on January 1st, 1995 that we know today. Both of those organisations tend to harmonise and pacify the international trade law and its practice by its members, especially regarding the use of tariffs, quotas or other legal tools leading to protectionism and creating barriers to trade such as non-tariff regulations. Among those 23 nations

we will focus here, in this article, only on two of them: France, a civil legal system nation (Tegnan, 2017), and Indonesia, a mix legal system nation.

Before further developments, what is international trade law?. Oxford Journal defines it as ‘Trade in goods and/or services that involves the movement of goods and people across national boundaries, which, in expansionist and anti-protectionist times, increased exchange between societies of different kinds’ (Stearns, 2008). This modern definition is the result of GATT and WTO existence and actions, but to have a better understanding of it, it is better to see international trade law as the aggregate and compilation of the *lex mercatoria* (law for merchants on land) and the *lex maritime* (law for merchants on sea), rules and practice created by the Arabic merchants in the early times of the Middle Ages in inspiration from China, and then strengthened and further developed by some European nations during their expansion worldwide (for example England, Spain, Portugal, France, Netherlands).

On the first hand, Indonesian international trade started from the period of the Sriwijaya Empire (650-1477 AD). Prior to that, it was limited to trade on land between two kingdoms which occupied Java Island. This Empire took advantage of the Malacca Strait as a strategic location in order to do maritime trade, which led to an expansion of its market. It developed a tax policies for the vessels from China and India : this rule is called the *Paksaan Menimbun Barang* (Pradhani, 2017). Around 840 AD, the Perlak Empire developed the first Islamic Empire in Indonesia. On the other hand, France opened itself to international trade as a province of the Roman Empire (Reniere & el al, 2016), after Julius Caesar finished its conquest in 51-50 BC, since this empire was established all over the Mediterranean Sea, far in the actual Germany and almost all over the actual Great Britain.

It is thanks to one of the most famous international trade road that France and Indonesia made their first contact : The Silk Road. This mostly landed trade axis was opened around 130 BC and closed by the Ottoman Empire in 1453 AD. It is the first example of international trade worldwide as we know it today. Linking China to Western Europe via India, Arabic nations, and others, the Silk Road was not only spreading goods, people or services but it also permitted the flux of ideas, practices, laws and customs across the world. The Silk Road spread common legal concepts and knowledge in both France and Indonesia throughout its existence. Ironically, it is the closure of the Silk Road that led to a new contact between France and Indonesia. When this land road of international trade closed, its actors found new ones by strengthening the maritime aspect of the international trade. Around the middle of the 15th century, Western Europe’s nations tried to find new roads to the far East by going West across the sea. To their surprise they discovered a “New World” that they started to conquer and colonise. Different Western Europe nations started to impose their domination and legal system all over the

world around the 16th century. Indonesia was deeply impacted by colonialism and the European presence.

Indeed, when the Dutch arrived in Indonesia, they brought their own laws and legal system, especially their civil code (*Burgerlijk Wetboek*) and code of commerce (*Wetboek van Koophandel*). That's the second and most impactful contact between France and Indonesia because those Dutch codes of laws were strongly influenced by the French ones especially the civil code (called the *Code Napoléon*) (Tegnan, 2017), which is almost just a translation. This special link between those two nations has been strengthened when Indonesia declared its independence in 1945 (Rinardi, 2017). Indonesia maintained the use and legal strength of those codes and had extended the scope of their influence because, prior to the independence only the Dutch, Japanese, Chinese and natives that married a Dutch or converted to Christianity were concerned by it. After that every Indonesian were submitted to it.

Previous research related to this research is research that focuses on "International trade law and domestic policy in Indonesia as a developing country-lesson learned from the Indonesian mining policy" (Halomoan, 2019); research that focuses on "dispute settlement of anti-dumping legal aspect in Indonesia based on GATT/WTO provisions (allegations case study of dumping wood free copy paper between South Korea and Indonesia)" (Sari, 2020); and Research that focuses on "health issues in the WTO dispute concerning the importation of chicken meat and products between Indonesia and Brazil" (Siswanto, 2020). In this article our main objective is to demonstrate that Indonesia and France shared common legal roots regarding international trade law prior to the work of harmonisation that the GATT, then the WTO operated over international trade law through a legal historical reviews focusing on three principles.

B. RESEARCH METHOD

In order to make a comparison between legal principles in Indonesia and France, we attached ourselves to find legal norms that existed in both legal systems and have exact or similar meaning and principle in both systems. By focusing on international trade law to find similarities and/or differences, we used primary datas such as *Mare Liberum (the freedom of the Sea)* from Hugo Grotius in 1609 (Yunus, & Sholeh, 2019), consumer laws and the French consumer code ("*Code de la consommation*"), and both French and Indonesian civil codes and commerce codes, both current, and in their latest form, and the ones of 1804/1807 and 1838. Also some secondary datas such as some journals about international trade law history such as *Oxford Reference* or *Cambridge Core* for example, legal principles, and some case-law from GATT, WTO and other international courts as the evidences. Regarding the analysis method, we used a systemic comparative technique in order to highlight

the fact that those principles exist in both legal systems and serve the same idea in each system.

C. RESULTS AND DISCUSSION

Legal researchers agreed that there is four legal systems in the current world: Civil law, Common law, Islamic law, and Customary law (Siems, 2016). But in reality a fifth legal hybrid system exists: it is called a mix system. Historically, Indonesia and France are grouped in the same legal system – the civil law one. In reality, Indonesia has been proved to be a mix legal system inspired by Civil law, Common law and Islamic law (Aditya, 2019). However, regarding international trade law, the Civil law system is predominant. Similarities of laws in France and Indonesia will be classified into three main sub-titles, alongside certain evidences and references to international trade dispute settlements in this article.

Fairness and Good Faith in Trade

In France, good faith has always been an important legal principle. Created by the Roman *ius gentium* (law of people) that applied to all Roman citizens and strengthened by the Canonical law issued by the pope, the head of the Christian Church. It is not a surprise to find it in the French first civil code of 1804 ordered by Napoleon since the Roman law and the Canonical law were two of the main sources of inspiration for this code. In the “*Code Napoléon*” of 1804, therefore in the “*Burgerlijk Wetboek*” applied in Indonesia too, multiple direct occurrences of the principle of good faith can be found in this code, such as in the articles 2268 (see Civil code, Book III, Title XX, Chapter V, article 2268 - **La bonne foi** (good faith) *est toujours présumée, et c'est à celui qui allègue la mauvaise foi à la prouver*) or 1238 (see Civil code, Book III, Title XX, Chapter V, article 1238, alinea 2 - *Néanmoins le paiement d'une somme en argent ou autre chose qui se consomme par l'usage, ne peut être répété contre le créancier qui l'a consommée de **bonne foi** (good faith), quoique le paiement en ait été fait par celui qui n'en était pas propriétaire ou qui n'était pas capable de l'aliéner*). Good faith is a principle used in every aspect of private law and is the only excusable defense for disrespect of the law.

A close principle to good faith is the one of fairness and it is also present in the French civil code of 1804 even if, to find it, you have to be a bit more creative. Indeed, fairness exists in that code under the standard of the “family man” (“*bon père de famille*”), derived from the Roman standard *pater familias*, which is used to determine how a person should react in order to be in accordance with the law in some specific cases. This standard is mentioned in a profusion of articles such as 1728 (see Civil code, Book III, Title VIII, Chapter II, article 1728 - *Le preneur est tenu de deux obligations principales : 1° D'user de la chose louée en **bon père de famille** (family man), et suivant la destination qui lui a été donnée par le bail, ou suivant celle présumée d'après les*

circonstances, à défaut de convention) or 627 (see Civil code, Book II, Title III, Chapter II, article 627- *L'usager, et celui qui a un droit d'habitation, doivent jouir en bons pères de famille*/family man) in that code. In France even if the standard terminology evolved into the one of “reasonable person” it is still enforced and part of the law. Furthermore the fairness and good faith’s weigh and impact keep growing every year. Nowadays, it reaches every aspect of the law : law for firm, urban law, consumer law, environment law, trade law, and international trade law.

For instance, the GATT’s dispute between France and Australia in 1956 named “*French Assistance to Exports of Wheat and Wheat Flour*” (see French Assistance to Exports of Wheat and Wheat Flour to Exports of Wheat and Wheat Flour GATT Panel Report, *French Assistance*, L/924, adopted 21 November 1958, BISD 7S/46). Australia files a lawsuit against France in front of the GATT arguing that the later killed the market by reducing the price too drastically in order to challenge this new market. However, it was recognized that France respected fairness and good faith in its trade practice, since the strong reduction was a one time occurrence from which France had already taken care of and made sure that it won’t happen again in the future. Since Indonesia has identical laws as France’s regarding those specific principles, in a historical review perspective, it is definitely more interesting to observe if Indonesia kept those principles and how it applied them. We will particularly focus on the contract establishment. Under Article 1338 of *Burgerlijk Wetboek* (Indonesian civil code), manufacturing a contract should be done according to those principles. However, good faith is not only implemented in personal contract establishment or regional but also in bigger scopes, like in international scaled ones. In the WTO dispute (see WTO DS529 Australia/Indonesia) between Indonesia and Australia named “*Anti-Dumping Measures on A4 Copy Paper*” in 2019, Indonesia demonstrated that they acted all in good faith along and in a fair mind set even if they conquered a market over Australia.

National Maritime Zone Laws

Regarding the possible legal definition of the term “maritime zone”, there are two main legal doctrines. One lead by Grotius a 15th century Dutch jurist and legal philosopher who affirms that the seas should be free to be used by all nations. The other one, the *mare clausum* (*closed sea*), was derived from the Roman custom *mare nostrum* (our sea) which was used to forbid navigation in the dangerous period that was winter at the time, mainly supported by the Portuguese and British with the support of the pope of Roma, especially the bull *Romanus Pontifex* of 1455 of Pope Nicholas V (Tomlins, 2010). It prohibited other nations to cross the seas under the Portuguese jurisdictions without the permission of the king of Portugal. This legal school affirmed that the sea could and should belong to nations and should be

regarded as land. This doctrinal dispute was closed in favor of Grotius and the Dutch, from whom the French aligned with regarding this doctrinal issue, through the work of Cornelius Bynkershoek, another Dutch jurist, in his *De dominio maris* of 1702 where he proposed that all the seas were free, except the ones within a canon range that could effectively protect it. It will be internationally developed and become the three-miles limit principle enforced nowadays.

Indonesian maritime territories are divided under the Law Number 1 of 1973. In the dispute named *Natuna Sea* (Suryowati, 2020), between Indonesia and China, a conclusion occurred through the use of the *Mare Liberum* principles and definitions of national and international maritime zones. Grotius' doctrine led to the actual definition of international water in opposition of national waters and it is an important issue in international trade law, especially regarding fishing rights and national barriers.

This legal doctrine was also strictly applied by the French. For example the *Camouco* (see The “Camouco” (Panamav. France) (Judgment). ITLOS Case No. 5, Cambridge University Press, 27 February 2017, *AJIL* (*American Journal of international Law*), Bernard H. Oxman and Vincent P. Bantz, Cambridge Core), case of 1999 involving Panama and France in front of the International Tribunal for the Law of the Sea. Even if France finally lost here, the legal issue debated was if the Panamanian boat named Camouco conducted illegal fishing in the French waters and had been therefore legally arrested or if the waters in where she conducted her activity were international waters. Disregarding the material issue, it proved that France recognises and enforces Grotius' doctrine as well as Indonesia.

Customer Rights

The sharing of common principles throughout history for France and Indonesia is not only linked to their common civil codes and their evolution, but also through a rather modern branch of the law : consumer rights. Developed in the seventies during the hellish growth of the consumer society, consumer rights, and therefore protection of consumer laws, were created in both France and Indonesia around the same period and with the same spirit : a very strong, some could say too strong, need to protect the consumer from the professionals (see *Consumer Protection Rights in Europe*, 2019.)

In Indonesia, Law Number 8 of 1999 concerning Consumer Protection (Indonesian Consumer Protection) is an important rule used in every aspect of the society (Wibowo, 2020). Likewise, the consumer rights are highly respected within trade relations involving Indonesia. For example, the WTO dispute between Indonesia and Korea in 2007, named “Anti-Dumping Duties on Imports of Certain Paper from Indonesia” (see WTO DS312 Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia) is a perfect example of the strong protection of the consumer rights in Indonesia. Dumping is a process which has

the purpose to make the price of one product cheaper in other countries. But since dumping causes some negative impacts for consumers, because it makes the final product more expensive in the country, then under Article 4 Indonesian Consumers Protection the consumers should be given the opportunity to have access to products with different or multiple values.

In France the first occurrence of consumer rights laws was the cold calling law of 1972 (see law No 72 1137 of December 22^{sd} 1972 law relative to the protection of the consumer against door-to-door selling and cold calling), but after that, this specific kind of laws kept multiplying. France was the first European nation to create a Consumer code ("*code de la consommation*") (March 25 of 1993 creation of the first French Consumer Code) which inspired its neighbours, the future (European Union (EU), and other global organisations and foreign nations in 1993. This code still exists and has been "rewritten and modernised to be up to the new technologies challenges and the worldwide market economy" analysed the UNAF (see UNAF journal *Réalités Familiales* (family reality) No. 126-127 - *Défense des consommateurs* /defence of consumers). France strongly applies it in international trade and it can be viewed by some nations as a way to erect non tariff barriers or new quotas to protect the European market, but WTO allows the vast majority of the protective law regarding consumers. The WTO dispute named "Measures Related to Price Comparison Methodologies" (WTO DS516 European Union/China-*Measures Related to Price Comparison Methodologies*) between France and China in 2016 is a good example of it, even if China withdrew its complaint before the panel could express its opinion. It implies that China prefers to withdraw its complaint before the WTO panel could find its wrong in its claim.

D. CONCLUSION

It can be said that even if France and Indonesia are distant nations with different legal systems regarding international trade law, they shared similar roots regarding their principles, laws, spirits and approach of this specific branch of the law. We will conclude this comparison of those two legal systems on the idea that those similarities have grown even further under the harmonisation of the GATT and WTO, that both of them joined early on. It is worthy to note that this harmonisation is mostly done through the implementation of principles and concepts issued from the Common law system into the Civil law system which were the main similarities for France and Indonesia as we had seen previously in this article.

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F. COMPETING INTERESTS

The authors declared that they have no competing interests.

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