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MAKING PROGRESS: HOW ERIC BERGSTEN AND THE VIS MOOT ADVANCE THE ENTERPRISE OF UNIVERSAL PEACE

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* Mark R. Shulman is the Assistant Dean for Graduate Programs and International Affairs and an Adjunct Professor of Law at Pace University School of Law, White Plains, New York. © 2012 Mark R. Shulman. Comments on this article are warmly invited: MShulman@law.pace.edu. The author is profoundly grateful to long-time Pace colleagues Eric Bergsten and the late Albert H. Kritzer for their years of exemplary leadership as educators, scholars, and public servants. He is also grateful to Ronald Brand of the University of Pittsburgh School of Law, to David Bigge of the Department of State's Office of Legal Counsel, and Pace Law School colleagues James Fishman, Marie S. Newman, Vikki Rogers, Braden E. Smith, Michelle S. Simon, and Deborah Zipf for their helpful comments on this article or a previous version of this work that appeared in INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION – LIBER AMICORUM ERIC BERGSTEN (Stefan Kröll, L.A Mistelis, P. Perales Viscasillas & V. Rogers eds., 2011). In thanking the editors of that book for permission to publish a revised version of his chapter, the author recognizes with appreciation the initiative, encouragement, and editorial work of these four distinguished leaders in the fields of international commercial law and arbitration.

> Es ist der Handelsgeist, der mit dem Kriege nicht zusammen bestehen kann, und der früher oder später sich jedes Volks bemächtigt.[1]

I. INTRODUCTION

This article recognizes Pace Professor Eric Bergsten's enduring accomplishments by illuminating his signature contribution, the Willem C. Vis International Commercial Law Moot (the "Vis" or the "Moot"), as an instrument of progress toward a more robust and fair global system in which the rule of law guides the pace and path of peaceful change. While highlighting Professor Bergsten's matchless contributions, this article also notes the roles that many other individuals have played in the shaping of the Vis because of their shared conviction that people of vision can—and should—build educational and legal institutions to improve the human condition.

Eric Bergsten's professional opus embodies two important elements of this imperative: first, he is a "transnational norm entrepreneur" in the best sense of the term.[2] He has husbanded the rules and norms of the traditional *lex mercatoria*, promoting them, most notably, through the drafting, implementation, interpretation, and teaching of the United Nations Convention on Contracts for the International Sale of Goods (the "CISG" or the "Convention") and by fostering the craft of international commercial arbitration. Second, his work continues a proud tradition of promoting prosperity and peace through fair and unfettered trade. His work on the CISG and the Vis seems intended to decrease barriers to trade in ways that promote peaceful cooperation across borders. This article will return to these claims in the conclusion section after laying the groundwork by discussing Professor Bergsten's particular contributions.

The thesis of this article is simple: the Vis plays distinctive and significant roles in promoting dynamic legal education and

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[1] IMMANUEL KANT, PERPETUAL PEACE: A PHILOSOPHICAL ESSAY (M. Campbell Smith ed. & trans., Swan Sonnenschein & Co. Lim. 1903) (1795) ("The commercial spirit cannot co-exist with war, and sooner or later it takes possession of every nation.").

[2] *See* Harold H. Koh, *Opening Remarks: Transnational Legal Process Illuminated*, *in* TRANSNATIONAL LEGAL PROCESS 327, 328 (Michael Likosky ed., 2002).

a more equitable and robust rule of law around the world. Following an introductory section, Part II describes some of the ways that the Vis offers unique opportunities to learn legal doctrine and skills through the writing and practice of oral advocacy before some of the world's most sophisticated lawyers. Part III of this article argues that the Vis itself cultivates a more diverse and representative community of skilled lawyers around the world. Part IV discusses ways in which the Moot and such related enterprises as Pace's unique CISG Database serve to foster a more robust rule of law. Part V briefly concludes by explaining how Eric Bergsten's life's work advances the Kantian enterprise of a democratic peace.

Since joining Pace Law School in 2004, I have been fascinated by the Moot.[3] While it culminates each spring in Vienna, this peerless enterprise was launched in New York City and nearby White Plains. Professor Bergsten has deftly sketched out the early history of the Moot in the first chapter of Janet Walker's indispensable, *The Vis Book: A Participant's Guide to the Willem C. Vis International Commercial Arbitration Moot*.[4] To make a long story short, Michael Sher, a New York lawyer, first proposed an international commercial moot at a spring 1992 meeting of the United Nations Commission on International Trade Law ("UNCITRAL") in the General Assembly Hall of the United Nations.[5]

Seizing upon Mr. Sher's compelling proposal, three Pace Law School professors almost immediately set out to establish the world's first international commercial law moot. Because of his prior experience as an international sales lawyer for the

[3] Mark R. Shulman, Op-Ed, *Moot Court in Global Language of Trade*, N.Y. L.J., Apr. 2, 2007; *see also* Mark R. Shulman, *Moot Court Diplomacy*, INT'L HERALD TRIB., Apr. 14, 2006.

[4] Eric Bergsten, *The History and Purpose of the Moot*, *in* THE VIS BOOK: A PRACTICAL GUIDE TO THE WILLEM C. VIS INTERNATIONAL COMMERCIAL ARBITRATION MOOT 1–14 (Janet Walker ed., 2008) [hereinafter THE VIS BOOK].

[5] UNIFORM COMMERCIAL LAW IN THE TWENTY-FIRST CENTURY: PROCEEDINGS OF THE CONGRESS OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW, NEW YORK, 18–22 MAY 1992, at 94–103 (1992). Michael Sher was representing the Association of the Bar of the City of New York at this Silver Anniversary Congress, but speaking in his personal capacity. Over the ensuing years, Mr. Sher remained a key supporter of the Moot, organizing social events and otherwise building support for the enterprise. When he passed away in January 2010, he generously left the bulk of his estate to support the Vis.

General Electric Company ("GE"), Albert H. Kritzer was a strong advocate for the CISG's adoption and use by state and commercial parties. Upon his retirement from GE, Kritzer came to Pace in order to edit an *International Contract Manual*.[6] He then built a database devoted to the relatively new International Sales Convention.[7] Professors Willem C. Vis and Eric Bergsten were the immediate past Secretaries of UNCITRAL and, as such, had been greatly responsible for drafting what became the CISG. During the 1992–1993 academic year, Professors Bergsten, Kritzer, and Vis planned the new moot, drafted the underlying problem, and made arrangements to hold the first competition in Vienna, home of UNCITRAL. Tragically, just before the first round of arguments, Willem Vis passed away. Bergsten and Kritzer quickly decided to name the competition in memory of his professional service and personal character.

Dedicated to the education of practice-ready lawyers, Pace University School of Law was already a leader in the teaching of doctrine and skills through participation in moot courts. All United States law schools offer or require participation in an intramural moot court. The past two decades have also seen a proliferation of extramural moot competitions, typically for advanced law students. Each year since 1989, Pace has convened the renowned National Environmental Law Moot Court Competition (the "NELMCC").[8] From modest beginnings over two decades ago, the NELMCC now draws teams from all across North America. The 2010 competition drew a record number of participants, with 250 competitors coming to White

[6] *See* ALBERT H. KRITZER, INTERNATIONAL CONTRACT MANUAL: GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATION CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Albert H. Kritzer ed., 1st ed. 1989). Kluwer published the first edition in 1989. The third edition was published in 2007. *See* ALBERT H. KRITZER, INTERNATIONAL CONTRACT MANUAL: GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATION CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (Albert H. Kritzer et al. eds., 3d ed. 2007) [hereinafter KRITZER, INTERNATIONAL CONTRACT MANUAL]. Annual updates are available at: http://west.thomson.com/productdetail/144609/40503941/product detail.aspx.

[7] *Albert H. Kritzer CIGS Database*, PACE L. SCH. INST. OF INT'L COM. L., http://www.cisg.law.pace.edu (last visited Jan. 10, 2012).

[8] *National Environmental Moot Court Competition Oral Argument Dates: February 23-25, 2012*, PACE L. SCH., http://www.pace.edu/school-of-law/NELMCC (last visited Jan. 10, 2012).

Plains from eighty-four different law schools.[9] In 2005, Pace also launched the world's first International Criminal Court moot.[10] I know of no law school more dedicated to teaching through mooting.

The growth of the Vis Moot testifies to this commitment as well as its appeal. The 2008 hearings required over 1,400 appointments of the 600 arbitrators present in Vienna for the week leading up to Easter.[11] The 2011 Vis Moot received memoranda from 264 teams, heard oral arguments from 254 teams hailing from at least sixty-two different countries, and involved an even larger corps of arbitrators.[12] The Vis Moot is justly renowned for assembling more law students and lawyers in one place at one time than any other such competition. Although the Phillip C. Jessup (Public) International Law Moot Court Competition draws more participants, the rounds are organized such that participants are prevented from assembling in one place at one time.[13] Consequently, the Jessup's participants do not appear to develop the same strong sense of community and common purpose as do the participants of the Vis Moot.

II. THE VIS AS AN INSTRUMENT FOR TEACHING THE LAW, LEGAL SKILLS, AND LEGAL CULTURE

The thrilling week of Vis competition may overshadow an

[9] *2010 Competition*, PACE L. SCH., http://www.pace.edu/school-of-law/node/166 (last visited Jan. 10, 2012).

[10] *Pace / ICLN International Criminal Court Moot Regional Round for the Americans and Caribbean (formerly the Pace International Criminal Moot Court Competition)*, PACE L. SCH., http://www.pace.edu/school-of-law/ICC (last visited Jan. 10, 2012).

[11] Hew R. Dundas, *The Willem C. Vis International Commercial Arbitration Moot,* 1 STOCKHOLM INT'L ARB. REV. 157, 158 (2008) (providing a thorough overview of the mechanics of the Moot and an analysis of the 2008 problem).

[12] The figures for the 18th Moot are based on the projections included in the REPORT TO THE VEREIN: FINANCIAL RESULTS FOR 17TH MOOT (2010) (on file with author); PROSPECTS FOR THE 18TH MOOT (2010) (on file with author). The 19th Moot is projected to have 285 teams from 71 countries. *Eighteenth Annual Willem C. Vis International Commercial Arbitration Moot: 2011-2011 Registered Teams,* PACE L. SCH., http://cisgw3.law.pace.edu/cisg/moot/participants 19.html (last visited Feb. 26, 2012).

[13] *Philip C. Jessup International Law Moot Court Competition*, INT'L L. ASS'N, http://www.ilsa.org/jessuphome (last visited Jan. 10, 2012).

equally important educational function that the Moot performs even before people travel to Vienna: teaching substantive law through the process of writing briefs. As Pace Professor and current Dean of the Law School, Michelle Simon, noted twenty years ago, just as the Vis Moot was being launched: "the benefits of teaching substance through the process of writing are extraordinary."[14] Law students benefit greatly from the kind of active learning they experience while conducting research and writing their moot court briefs. This benefit is particularly notable for the Vis participants because so many come from countries that offer few of such opportunities—in contrast to the United States, where law students have many opportunities to participate in moot courts.

In the months prior to convening in Austria, each Vis team prepares written briefs for the putative claimant and respondent. Preparation of these briefs demands that each student invest countless hours of research, study, analysis, discussion, drafting, and editing. Submitted prior to the competition, the briefs are scored by legions of volunteer professors and practicing lawyers. Quite appropriately, many students receive significant academic credit for work related to their participation in the Vis.[15] This is notable in part because it effectively means that law schools are giving credit for work being done for, and evaluated by, people other than faculty members.

As befitting a global competition, the quality of these briefs varies and is, overall, impressively and unsurprisingly high. This fact is unsurprising because students are taught to write as part and parcel of the process of learning the substance of the law. The students sharpen their analytic skills and learn

[14] Michelle S. Simon, *Teaching Writing through Substance: The Integration of Legal Writing with All Deliberate Speed*, 42 DEPAUL L. REV. 619, 623 (1992).

[15] *See* Jack Graves & Stephanie Vaughan, *An Extraordinary Educational Opportunity*, 10 VINDOBONA J. INT'L COM. L. & ARB. 173, 183 (2006) (describing and analyzing receipt of academic credit for work related to participation in the Vis). Professors Graves and Vaughan based their analysis on the data generated through a survey that they prepared and that Eric Bergsten circulated during the summer of 2006 to individual team contact persons for the Thirteenth Annual Vis Moot. With a response rate a little over fifty per cent, Professors Graves and Vaughan conclude that the information yielded is fairly representative.

how to formulate effective arguments by actively reading and applying the scholarship, advocacy, and decisions of others. They are then required to reframe their arguments in response to points made or questions raised in oral argument. In this project, at least, legal writing is not treated as an enterprise secondary to learning substantive law. Rather, "teaching substance through writing communicates to the students that legal writing is a means towards synthesizing the law and a skill that is integral to the development of a proficient attorney."[16] The "fully integrated approach accomplishes this purpose by concurrently teaching students the law, teaching students the skills of analysis and organization, and providing students with an understanding of the connection between law school and the practice of law."[17] The connection could not be more evident than at the moment when students declaim and defend their arguments before panels of arbitrators.

Notwithstanding their admirable quality, the briefs themselves are unsuited for publication because of their practical orientation and hypothetical nature. Their authors, however, frequently do go on to publish products of their related scholarship in law reviews, including, most notably, the *Vindobona Journal of International Commercial Law and Arbitration* produced by the (Vis) Moot Alumni Association (the "MAA"). The MAA launched the journal after only four years of moots. It continues nearly fifteen years later to turn out cutting edge scholarship that helps to anchor the Vis community by providing helpful and substantive dialogue on the topics that alumni had so zealously explored as student

[16] Simon, *supra* note 14, at 625 (arguing, in another context, that the teaching of substantive law through the process of teaching legal writing is highly effective, especially when compared to more traditional methods).

[17] *Id.* at 625–26. As a former coach of the Harvard team observes, this form of research forces participants to conduct research on topics—such as private international law, arbitral procedure and the CISG—that are outside most law schools' core curriculum, or indeed, outside the curriculum entirely. Moreover, they must use research tools—such as treaties, treatises, and the CISG website—that they would not otherwise experience. This gives the participants significant advantages when they move into practice. Email from David Bigge, Former Coach of the Vis Moot Team, Harvard Law Sch., to Mark R. Shulman, Assistant Dean for Graduate Programs and Int'l Affairs & Adjunct Professor of Law, Pace Univ. Sch. of Law (July 12, 2011, 10:45 AM) (on file with author).

participants (as "Mooties").[18] Some students involved in the Vis subsequently submit articles to compete in the Clive Schmitthoff Essay Competition sponsored annually by Pace's Institute of International Commercial Law.

In addition to the opportunities it offers for learning substance through writing, the Vis may be best known for developing oral advocacy skills through the highly iterative process of mooting. Many students begin with a law school course on commercial arbitration or on alternative dispute resolution. Virtually all the student competitors will have the opportunity to work with a coach, often a one-time Mootie herself. They will formulate oral arguments long before traveling to Vienna. They will practice their arguments, first, with each other and, second, before faculty or in pre-moots, at each stage receiving and reacting to feedback on substance and style.

One of the advantages offered by a moot on commercial law over public law topics is that the emotional appeal of both sides is roughly equal, so students are not too tempted to become attached to sentimental arguments. This gives them further encouragement to focus on making compelling *legal* arguments by taking seriously the strengths and weaknesses of both claimant and respondent. To be considered for the award of Best Oralist, in fact, a Mootie must have argued both sides. It has been my observation that in moots dealing with public law topics, the equities are often less balanced (as is the case with human rights law, criminal law, and environmental law moot competitions). This leads students to attach themselves to one side or the other and, sometimes, to frame their arguments in more emotional or public policy terms. At the Vis, the Mooties are more likely to remain focused on making arguments drawn from doctrine (dare one say "precedent?").

In preparing their oral arguments for the Vienna competition, students spend far more time collecting and pondering feedback than they do actually presenting their formal arguments. In short, like those who hope to get to

[18] *See About the VJ*, MOOT ALUMNI ASS'N, http://www.maa.net/index.php?option=com_content&view=article&id=195&Itemid=178 (last visited Jan. 10, 2012).

Carnegie Hall, they practice, practice, practice.[19] In my experience, the resulting oral arguments often appear more fully thought-through and highly polished than they would be in an actual arbitration hearing. Rather than finding irony in this observation, I merely acknowledge the demanding nature of this learning opportunity, one in which a community comes together to challenge its junior members to strive for the highest levels of proficiency.

III. FOSTERING A DIVERSE LEGAL COMMUNITY

The Vis serves as a powerful instrument for fostering a more diverse global legal community.[20] Having launched in 1993–1994 with a mere eleven schools representing nine countries in Europe, North America, and Australia, the Vis now spans the globe.[21] Growth has been inexorable and astonishing. As noted above, the 2010 Moot assembled teams from 251 universities in sixty-two countries, and the 2011 Moot included several more.[22] In 2010, the People's Republic of China sent seven teams, not including three teams from Hong Kong.[23] Recently, the Asian Pacific beyond China, as well as South Asia and South America, has been more and more fully represented.[24] In addition to the Vis itself, the Annual Willem C. Vis (East) International Commercial Law Moot at the City University of Hong Kong, is also thriving. The eighth Vis East in April 2011 included eighty-five teams, and the ninth will be capped at eighty-eight, a lucky number in China.[25]

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[19] *See generally* Ronald A. Brand, *Mr. Bergsten's Neighborhood: The Vis Moot, Legal Education, and the Rule of Law, in* INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION – LIBER AMICORUM ERIC BERGSTEN 687 (Stefan Kröll et al. eds., 2011).

[20] Shulman, *supra* note 3.

[21] *The Annual William C. Vis (East) International Commercial Arbitration Moot*, WILLEM C. VIS (EAST) INT'L COM. ARB. MOOT, http://www.cisgmoot.org/ (last visited Jan. 10, 2012).

[22] *See supra* note 9 and accompanying text.

[23] *See Vis East Moot 2009-2010*, WILLEM C. VIS (EAST) INT'L COM. ARB. MOOT, http://www.cisgmoot.org/7thVisDocs/ParticipatingTeams_rev.pdf (last visited Jan. 10, 2012)

[24] *See id.*

[25] *William C. Vis (East) International Commercial Arbitration Moot Hong Kong General Information*, WILLEM C. VIS (EAST) INT'L COM. ARB. MOOT, http:

In 2008, the Vis spawned a Spanish-language international commercial arbitration moot sponsored now by the University of Buenos Aires in Argentina and Universidad del Rosario in Colombia.[26] The 2009 Latin American moot included twenty-four teams from nine countries. Likewise, Moot Madrid makes a point of saying that it is based on the Vis. There is an arbitration moot in France at Montpellier that started after, and may have been inspired by, the Vis. The 2011 Law Asia Moot was an arbitration of a failed sales contract that also appears to have relied on the Vis experience.[27] The ICC Mediation Moot was also inspired by the Vis.[28] I would also surmise that the Vis spawned the various investment moots. This proliferation of moots expands the salubrious effects of the Vis by giving many more students opportunities to participate in international-level competitions, without all the expenses of traveling to Central Europe for a week. The regional competitions expand access to the professional development benefits that the Vis offers and generates opportunities for a more diverse group of participants.

Unfortunately, students in the Middle East and Africa have too few such opportunities and remain underrepresented at the Vis, despite occasional participation by teams from Amman and Cairo. Relative lack of awareness of the benefits of the Vis, along with a lack of a mooting tradition, skills (including high-level English language competency), and funding seem to contribute to this lag. This limitation remains the case despite laudable progress in spreading the Vis vision to the Arabian Gulf and Middle East by dedicated scholar-entrepreneurs such as Ronald A. Brand and Harry M. Flechtner.[29] For several years, University of Pittsburgh Law

//www.cisgmoot.org/general_information.html (last visited Jan. 10, 2012) [hereinafter *Hong Kong General Information*].

[26] Email from Roque J. Caivano, Professor of Law & Cofounder of the Latin Am. Moot, Heidelberg Univ., to Mark R. Shulman, Assistant Dean for Graduate Programs and Int'l Affairs & Adjunct Professor of Law, Pace Univ. Sch. of Law (June 26, 2010, 10:13 PM) (on file with author).

[27] *Hong Kong General Information, supra* note 25.

[28] *ICC inaugurates international mediation competition,* INT'L CT. OF ARB., http://www.iccwbo.org/court/arbitration/id7584/index.html (last visited Jan. 10, 2012).

[29] *See* Ronald A. Brand, *The Export of Legal Education: Its Promise and*

School Professors have been working in Bahrain and, in 2011, brought a team to Vienna. Unfortunately, they were unable to participate, as events related to the Arab Spring forced them to cancel their pre-moot and moot participation.[30]

In addition to the regional differences, and in spite of laudable progress over the past two generations, opportunity and success in the legal profession are far from equally distributed by gender,[31] race, ethnicity, and religion. The Vis Moot is helping to level the playing field and encourage more diversity within the profession. Simply by bringing together, in one place, so many law students, the Vis also encourages student exchanges and the pursuit of LL.M. study in other countries. The Mooties see the advantages of encountering other legal systems both from the skills their competitors display and also from the insights that other legal systems and legal education systems offer would-be advocates.[32]

IV. PROMOTING THE RULE OF LAW

The Vis Moot, along with related CISG and arbitration

Impact in Transition Countries, *in* THE EXPORT OF LEGAL EDUCATION: ITS PROMISE AND IMPACT IN TRANSITION COUNTRIES (Ronald A. Brand & D. Wes Rist eds., 2009) [hereinafter THE EXPORT OF LEGAL EDUCATION] (explaining his perspectives).

[30] On a related note, I should add that Albert Kritzer had proposed the first pre-moot in the Middle East. Sadly, he died while in Egypt to receive a lifetime achievement award from the Arab Society for Commercial and Maritime Law.

[31] *See* Michelle S. Simon, *Women and the Law: How Far We've Come and Where We Need to Go*, 29 PACE L. REV. 223, 224–25 (2008).

[32] Indeed, over the years Pace has distributed thousands of copies of the CISG that also included tasteful advertisements of Pace's LL.M. programs. Numerous other schools likewise take advantage of the access to large numbers of bright motivated law students to promote their programs. For the advantages of studying law in a different system, see Mark R. Shulman, *Exile or Opportunity: The Benefits of Mastering U.S. Law*, PACE L. SCH., Sept.16, 2008, *available at* http://www.cisg.law.pace.edu/cisg/Shulman.html. *See also* Milena Đjorđević, *The Export of American Legal Education and Its Impact in Serbia*, *in* THE EXPORT OF LEGAL EDUCATION, *supra* note 29, at 75 (crediting the Vis, from the perspective of a Serbian law professor, as important for her own education and for creating significant opportunities for her students in Belgrade); Vjosa Osmani, *The Big Impact of a Small Program in the Development of the Rule of Law in Kosovo*, *in* THE EXPORT OF LEGAL EDUCATION, *supra* note 29, at 99 (law school professor and Legal Advisor to the President of Kosovo crediting the Vis for opening innumerable doors).

institutions and activities, promotes the development of the rule of law in several tangible and important ways. It promotes ever-greater uniformity in interpretation of the law governing sales of goods across borders, the stated purpose of the Convention.[33] This, in turn, encourages better lawyering as well as increased volume, interconnectedness, efficiency, and equity in global trade. Even in jurisdictions where the rule of law is thin or inchoate, the existence of one sector that is regulated efficiently and resolves disputes equitably can have a ratcheting upward effect on the expectations for the rule of law in other sectors. As Lachmi Singh and I have argued elsewhere, the apparently impartial implementation of the CISG through arbitral tribunals in Beijing appears to raise Chinese lawyers' skills and clients' expectations of proficiency and justice more generally.[34]

Uniform interpretation of the CISG is central to its utility for settling the expectations of traders and, therefore, for its role in promoting a reliable rule of law system. Uniformity, however, is not necessarily self-fulfilling, even with the widespread adoption of the Convention. As Camilla Andersen observes, there "can be no actual uniformity until a certain level of similarity in result has been created."[35] In the absence

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[33] Eric E. Bergsten, *Contribution of Law Schools and Their Professors to the Promotion of Inter-American Integration and Commerce*, 20 REVUE GÉNÉRALE DE DROIT [GEN. RTS. REV.] 517, 524 (1989) ("Since its purpose is the unification of law, its interpretation and application must further that purpose").

[34] *See* Mark R. Shulman & Lachmi Singh, *China's Implementation of the UN Sales Convention Through Arbitral Tribunals*, 48 COLUM. J. TRANSNAT'L L. 242, 286 (2010) (arguing that international commercial arbitration is raising expectations of professionalism and skills among the legal profession in China).

[35] CAMILLA BAASCH ANDERSEN, UNIFORM APPLICATION OF THE INTERNATIONAL SALES LAW: UNDERSTANDING UNIFORMITY, THE GLOBAL JURISCONSULTORIUM AND EXAMINATION AND NOTIFICATION PROVISIONS OF THE CISG 7–8 (2007). Andersen also cites Michael Bridge and John Honnold to show the purposeful process of increasing the harmonization of interpretation. Bridge writes, "[i]t has to be just a stage in a continuing process of convergence of the various perceptions of the text as seen through national lenses . . . . We do not have an International Commercial Court." *Id.* at 9. Honnold writes that those interpreting the CISG "will appreciate that they are colleagues of a world-wide body of jurists with a common goal." *Id.* at 9; *cf.* J.O. Honnold, *Uniform Laws for International Trade: Early 'Care and Feeding' for Uniform Growth*, 1 INT'L TRADE & BUS. L. J. 1, 1–10 (1995). As a student competitor, Andersen took the Martin Domke Award for best

of a supreme court to reconcile differences in the interpretation of international commercial law, individuals and institutions must strive to realize uniformity.

Over nearly two decades, the Vis enterprise has proven instrumental in promoting greater uniformity of interpretation. Because of the usage, prominence, and prestige that the Moot lends the CISG Database, more people (especially Mooties and arbitrators) have been willing to contribute their efforts to provide sources, citations, and case translations, each adding to the globally available store of information upon which the *juris consultorium* can rely. Participants in the Vis, whether Mooties, arbitrators, or the other lawyers attending related conferences, quickly develop an understanding that the CISG is law shared across borders. This fact alone gives them advantages over lawyers who do not share the Vis experience, which so powerfully illuminates the benefits of uniformity in the interpretation of law for purposes of serving clients who operate in a globalized economy.[36] Mooties could not prepare their briefs or arguments without frequent reference to the CISG Database.

Having relied so heavily upon the CISG Database to form their arguments, many Mooties are delighted upon their arrival in Vienna to be invited to contribute translations or case abstracts to the database.[37] These impressments preci-

individual oralist in the general rounds of the 1997 Vis. Since that time, she has been a regular arbitrator at the Moot. So, it is somewhat surprising that her otherwise excellent book does not discuss the role of the Vis as an institution fostering greater uniformity in construction of the CISG. It does discuss the role of the CISG Database in providing relevant case law and reliable translations. *Id.* at 67-69. For more on the functions of the global *Jurisconsultorium* on uniform international sales law, see *id.* at 9–18. *See also* Vikki M. Rogers & Albert H. Kritzer, *A Uniform International Sales Law Terminology*, *in* FESTSCHRIFT FÜR PETER SCHLECHTRIEM [ESSAYS IN HONOR OF PETER SCHLECHTRIEM] (I. Schwenzer & G. Hagaer eds., 2003).

[36] *See* ANDERSEN, *supra* note 35, at 10 ("Central to any understanding of the definition of uniform law, is the understanding that *uniform law is a shared law*."). And those who share that understanding are part of the CISG *Jurisconsultorium*, which renders significant advantages to clients trading across borders. *Id.*

[37] *See The Queen Mary Case Translation Programme*, PACE L. SCH. INST. OF INT'L COM. L., http://cisgw3.law.pace.edu/cisg/text/queenmary.html (last visited Jan. 10, 2012). For many years, Albert Kritzer would sit in the *Juridicum* of the University of Vienna Law Faculty with a poster inviting Vis Moot participants to become dragon tamers by contributing to the Queen

pitate an ever greater corpus of readily-available information on interpretations of the CISG, depriving lawyers and judges of excuses for failing to consult relevant interpretations. As Charles H. Koch, Jr. relevantly observes, "only a fool would refuse to seek guidance in the work of other judges confronted with similar problems."[38]

Likewise, because it brings together so many arbitrators, the Vis cultivates—and almost demands—increased harmonization of interpretation of the CISG. Many people who teach international sales law and many arbitrators, particularly leading arbitrators, return to Vienna each spring for the Vis and the related programs that has arisen around it.[39] Assembling annually around a shared set of interests, they naturally develop a body of lore on the uniform interpretation. This community, as dispersed across the globe as it is, in fact, has generated numerous books, many with multiple authors, a tribute to their common sense of purpose and identity generated by the Vis.[40] In the process of judging the competition, they experience repeat hearings that serve to reinforce the lesson that uniformity of CISG interpretation has values above and beyond those offered by the substantive law of the Convention.

The CISG Advisory Council constitutes another of the

Mary Case Translation Programme or otherwise to supply the CISG Database with useful information that would promote comity in the development of international commercial law.

[38] Charles H. Koch, Jr., *Envisioning a Global Legal Culture*, 25 MICH. J. INT'L L. 1, 51 (2003) (quoting ANDERSEN, *supra* note 35, at 8).

[39] *See* MARTIN HUNTER, *Foreword* to THE VIS BOOK, *supra* note 4, at xiii (describing a leading arbitrator by noting that for him the Vis "has become totally addictive: . . . the first thing I do when my pocket calendar for each year reaches me is to cross out firmly in bold black ink the week before Easter for the following year, so as to ensure that nothing can stand in the way of my participation.").

[40] *Id. See also* KRITZER, INTERNATIONAL CONTRACT MANUAL, *supra* note 6; JOSEPH F. MORRISSEY & JACK M. GRAVES, INTERNATIONAL SALES LAW AND ARBITRATION, PROBLEMS, CASES AND COMMENTARY (2008); MARGARET L. MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION (2008); INTERNATIONAL ARBITRATION AND INTERNATIONAL COMMERCIAL LAW: SYNERGY, CONVERGENCE AND EVOLUTION – LIBER AMICORUM ERIC BERGSTEN (Stefan. Kröll et al. eds., 2011); SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY (Camilla Andersen & Ulrich Schroeter eds., 2008); Brand, *supra* note 19.

unique and vital Vis-related institutions encouraging uniform interpretation of the CISG. It "is a private initiative supported by the Institute of International Commercial Law at Pace University School of Law and the Centre for Commercial Law Studies, Queen Mary, University of London. The Advisory Council is in place to support understanding . . . and the promotion and assistance in the uniform interpretation of the CISG."[41] Appropriately enough, Eric Bergsten currently chairs this august body, offering yet another example of his leadership in the transnational legal process.

Harold Koh characterized his influential theory about how certain law norms are articulated, transported across borders, and institutionalized locally as transnational legal processes.[42] He formulated the:

> theory and practice of how public and private actors—nation states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora, to make, interpret, enforce, and ultimately internalize rules of transnational law. The concept embraces not just the descriptive workings of that process, but its normativity as well: not just how interaction among transnational actors takes shape, but also how law shapes and guides those transactions.[43]

Although he was referring to public international law, the basic thesis of Koh's theory is nowhere more clearly borne out than in the experience of the development of private international sales law, particularly over the past several decades. Individuals acting in their private capacity, such as Eric Bergsten, serve as norm entrepreneurs who have

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[41] *CISG-Advisory Council Opinion no 1*, PACE L. SCH. INST. OF INT'L COM. L. (Aug. 15, 2003), http://www.cisg.law.pace.edu/cisg/CISG-AC-op1.html; *see also More About the CISG Advisory Council*, CSIG ADVISORY COUNCIL, http://www.cisgac.com/default.php?sid=149 (last visited Jan. 10, 2012).

[42] Harold H. Koh, Dean and Gerard C. & Bernice Latrobe Smith Professor of Int'l Law at Yale Law Sch., Legal Theory: From International to Transnational Law (2008), *available at* http://untreaty.un.org/cod/avl/ls/Koh_IL.html. S*ee generally* TRANSNATIONAL LEGAL PROCESS, *supra* note 2; Harold H. Koh, *The 1994 Roscoe Pound Lecture: The Transnational Legal Process* 75 NEB. L. REV. 181 (1996).

[43] Harold H. Koh, *Opening Remarks: Transnational Legal Process Illuminated*, *in* TRANSNATIONAL LEGAL PROCESS, *supra* note 2, at 327.

generated institutions and communities to support the expansion of sales law. Although Bergsten has played important roles in his public capacity as Secretary of UNCITRAL, his contributions since retiring from the United Nations are in many ways even more significant because he has aided tremendously in the process of solidifying legal interpretation (in a well-informed uniform manner) and internalization (particularly within the community of arbitrators that it helps to cultivate).[44] With the creation of the Vis community, Bergsten fosters normativity. As each new class of Mooties graduates, another class of arbitrators emerges, acculturated to a uniform law of sales and able to counsel clients in ways that best conform to transnational expectations. Interestingly, and perhaps inevitably, this outcome fosters some measure of convergence among the world's legal systems.

The Moot and related activities are also leading the way in the convergence of international commercial arbitration. As the distinguished arbitrator Arthur Rovine notes of the progress generally, the procedural rules of diverse legal systems are converging, but the substantive law too often remains divergent, except in the relatively small homogenous world of investor-state arbitration. The only indications "of a slowly developing legal uniformity and harmonization in international commercial arbitration" are in issues arising out

[44] For a discussion of "transnational norm entrepreneurs," see Harold H. Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 646-47 (1998) (positing that transnational norm entrepreneurs 1) mobilize popular opinion and political support; 2) stimulate and assist in the creation of like-minded organizations; 3) elevate objectives beyond merely national interests; and 4) play a significant role in persuading foreign elites that a regime reflects a universal moral sense). The contrasts of two different approaches to international law making: top-down and bottom-up, as Janet Levit explains, means that the standard tale of international law formation features policy-makers convening to draft conventions that they then push down on the people the law affects. Janet K. Levit, *A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments*, 30 YALE J. INT'L L. 125, 126 (2005). In contrast, Levit offers the case of three trade instruments (none the CISG) that were derived from the practice of lawyers and traders and elevated to the level of international law. *Id.* at 132. While the CISG might fit into Levit's bottom-up paradigm for having originated in the practice of traders, the unique process by which it has been promoted and normativized since the 1981 adoption of the CISG suggests a variation or extension: perhaps bottom-up-and-out.

of the CISG.[45] Rovine recognizes the CISG Database for its contributions in assembling, publishing, and organizing the available decisions.[46] To Rovine's understanding, I would add that other Vis-related initiatives are working to promote convergence as well. Bergsten explicitly promotes convergence of styles by pitting students of one legal system against those of another:

In the pairings of teams for each general round of the forensic and written exercises, every effort is made to have civil law schools argue against common law schools—so each may learn from approaches taken by persons trained in another legal culture. Similarly, the teams of arbitrators judging each round are from both common law and civil law backgrounds.[47]

In this and other ways, the Vis enterprise promotes a blending of the legal systems. Convergence of procedural and substantive law reduces transaction costs and thereby fosters trade. Moreover, the process of convergence enhances opportunities for the development of the law in jurisdictions that are not already served by the most sophisticated and best-trained lawyers.

Through its contributions to the training of lawyers around the world, the Vis has an overall ratcheting upward effect on the expectations of professionalism, skill, and knowledge of lawyers.[48] This seems particularly true for jurisdictions with young and fast-changing legal systems where lawyers are searching for opportunities to develop norms and skills that will enhance their ability to compete successfully in a globalized legal marketplace. As noted above, seven teams from the People's Republic of China went to Vienna for the 2010 competition and three more went from Hong Kong.[49] Beyond that, over twenty Chinese teams participated within

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[45] ARTHUR W. ROVINE, CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS, at xix (Arthur Rovine ed., 2009).

[46] *Id.* at xx.

[47] Ass'n for the Org. of & Promotion of the William C. Vis International Commercial Arbitration Moot, *The Annual Willem C. Vis International Commercial Arbitration Moot*, PACE L. SCH. INST. OF INT'L COM. L., http://www.cisg.law.pace.edu/vis.html (last updated Oct. 17, 2011).

[48] Shulman & Singh, *supra* note 34, at 285.

[49] *See supra* note 23 and accompanying text.

their own country's regional competition to determine which teams would receive the necessary sponsorship from the Chinese International Economic and Trade Arbitration Commission ("CIETAC") that enabled them move on to Vienna or Hong Kong.[50]

In light of the pace of development of the legal profession in China since Deng Xiaoping launched the post-Mao reforms, the increasing participation of Chinese law students is particularly good news.[51] Hundreds of Chinese law students each year are striving to research private international law, develop effective arguments and advocacy skills, as well as to perfect their legal English. Win or lose, they are all better able to compete in global markets. They are also raising expectations for professional competence within their own country. They develop a transnational common sense about the level of preparation and skillfulness required to serve their clients' interests responsibly. They test their substantive knowledge against that of the best of their peers. Throughout the process, they are developing a network of professional contacts that can serve them well at every stage of their careers.[52] These contacts can provide advice or mentoring, business opportunities, insights into the practice, business, or substance of law, and various kinds of encouragement to strive to improve their professional situation.

V. CONCLUSION

This article recognizes Eric Bergsten for dedicating much of his professional life to refining and promoting two mutually reinforcing bodies of law that foster international comity by

[50] *The Seventh CIETAC International Commercial Arbitration Moot Held in Beijing*, CHINA INT'L ECON. & TRADE ARB. COMMISSION, http://www.cietac.org/index/news/4760c51f42a8a57f001.cms (last visited Jan. 10, 2012).

[51] *See* Jerome A. Cohen et al., *Report of the Mission to China of the Association of the Bar of the City of New York, December 6 to 17, 2009*, 48 COLUM. J. TRANSNAT'L L. 519, 525 (2010) (describing the increasing pressure facing rights and defense lawyers in China).

[52] Eric E. Bergsten, *Teaching About International Commercial Law and Arbitration: the Eighth Annual Willem C. Vis International Commercial Arbitration Moot*, 18 J. INT'L ARB. 481, 485 (2001) ("Moot has also become a superb opportunity to offered by Viennese law firms, at the *Heurigen*—a group dinner at a traditional Austrian vineyard—and, in general, when not hearing arguments.").

clarifying obligations and reducing transaction costs. The CISG draws on the historic traditions of *lex mercatoria*, a body of law that evolved over centuries to enable trade among diverse societies.[53] As Bergsten noted over two decades ago, "uniformity of law is not an end in itself, it is but a means to the goal of reducing barriers to international trade and other forms of international interchange."[54] Likewise, international commercial arbitration enables traders of different backgrounds to resolve disputes amicably, efficiently, and reliably. This means that trade disputes can be contained, without boiling over into wider conflicts. In this enterprise, Professor Bergsten builds on a tradition that extends back to the Era of the Enlightenment.

In 1795, Immanuel Kant articulated his vision for *Perpetual Peace*.[55] Kant's philosophical sketch offered a prescription for eradicating war, the scourge that perennially consumed Europe's sons and treasure. Kant's theory relied heavily on the notion that states would pursue an enlightened self-interest, recognizing that they would derive greater profit by increasing commerce rather than by destroying it in senseless war:

> The commercial spirit cannot co-exist with war, and sooner or later it takes possession of every nation. For of all the forces which lie at the command of a state, the power of money is probably the most reliable. Hence states find themselves compelled, not—it is true—exactly from motives of morality, to further the noble end of peace and avert war by means of mediation wherever it threatens to break out, just as if they had made a permanent league.[56]

This spirit has long animated the work of traders, scholars, statesmen, and norm entrepreneurs like Eric Bergsten. For

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[53] *See* BERNARD AUDIT, THE VIENNA CONVENTION AND LEX MERCATORIA 173 (Thomas E. Carbonneau ed., 1998); *see generally* Franco Ferrari, *CISG Case Law: A New Challenge for Interpreters?,* 17 J. L. & COM. 245 (1999) (discussing the relationship between the CISG and *lex mercatoria*).

[54] Bergsten, *supra* note 33, at 525.

[55] KANT, *supra* note 1; *see* RAJ BHALA, INTERNATIONAL TRADE LAW: THEORY AND PRACTICE 3–5 (3d ed. 2008) (summarizing the history of the philosophy of trade, potential effects on public morals, and international relations prior to the Enlightenment).

[56] KANT, *supra* note 1, at 157.

over two centuries, many have worked to promote free trade and representative forms of government in order to promote international peace.[57] And more recently, historians and social scientists have observed the truth of Kant's observation.[58]

This same spirit animates Professor Bergsten's work as he brings Vis teams from developing countries or those previously at war with one another. I remember, with palpable pleasure, Bergsten's recounting of how teams from Kosovo and Serbia amicably shared a bus ride up to Vienna several years ago. He revelled in the fact that young law students from this war-torn region overcame their nations' troubled past to start building a better future. Eric Bergsten clearly intends to do something important with the Vis. Evidence of his myriad successes abounds each spring in Vienna. No doubt, Immanuel Kant would share Bergsten's satisfaction.

[57] GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC A HISTORY OF THE EARLY REPUBLIC 1789–1815 (2009) (arguing that Jeffersonian Republicans in the 1790s intended to break down barriers to trade in order to promote a peaceful global regime in which wars).

[58] *See* STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE 165 (2011); *see also* DAVID A. BELL, THE FIRST TOTAL WAR: NAPOLEON'S EUROPE AND THE BIRTH OF WARFARE AS WE KNOW IT 73–77 (2007).