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# THE LAW OF INTERNATIONAL TRADE

## SECOND EDITION

By

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To my wife Vera, also my companion in the law
To Anne who studied the law
To Thomas who found the law
To Jan, who still thinks law is not important

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| **Vand.J.Transnat.L.** | Vanderbilt Journal Transnational Law |
| **Wash.L.Rev.** | Washington Law Review |
| **WiB** | Wirtschaftsrechtliche Beratung |
| **W.L.R.** | Weekly Law Reports |
| **WLY** | World Leasing Yearbook |
| **World Comp.** | World Competition |
| **World Developm.** | World Development |
| **World Ec.** | World Economy |
| **Yale J.Int'l.L.** | Yale Journal International Law |
| **Yale.L.J.** | Yale Law Journal |
| **Y.Com.Arb.** | Yearbook of Commercial Arbitration |
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| **ZRV** | Zeitschrift für Rechtsvergleichung |
| **ZHW** | Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht |
| **ZVgIRWiss.** | Zeitschrift für vergleichende Rechtswissenschaft |



CHAPTER 1

# COMPONENTS OF THE LAW OF INTERNATIONAL TRADE

**Overview** The law of international trade draws from both international law as well as from the domestic law of the states concerned.[1] **1.01**

General international law governs the relationship between states and international organisations. Treaties (bilateral or multilateral) concluded between states are, however, sources of a substantial part of the law of international trade. Moreover, other sources of general international law, like resolutions of international organisations and international custom, also shape the law of international trade. Furthermore, the domestic laws of the states concerned also affect international trade. Consequently the law of international trade is partly international law, partly national law.

Within the parameters of this textbook only the aspects of international law (Part I) and national law (Part II), which are most relevant to international trade, can be highlighted. The growing role of *lex mercatoria* as an independent source of the law of international trade will be taken up in Part III of this chapter.

## PART I: INTERNATIONAL LAW

### Treaties

#### *Categories*

**Bilateral and multilateral treaties** Bilateral and multilateral treaties play an important part in international trade law. The objectives pursued, and the subject matters covered, are wide and varied. A treaty is bilateral when it is in force between only two subjects of international law (states or international organisations). A treaty is multilateral when it is in force between more than two parties—some are in fact binding on a large number of states. Sometimes a state can make a "reservation" in respect of a particular treaty provision when it enters into a multilateral treaty. If this reservation is valid, the treaty provision for which the reservation is made will not apply to that state. **1.02**

[1] See *e.g.* D. Carreau and J. Juillard, *Droit international économiques* (LGDJ, Paris, 1998), pp. 11–16; D. M. McRae, "The contribution of international trade law to the development of international law" (1996) Rec. Cours. 260, p. 99.

Bilateral treaties are concluded, for example, to avoid double taxation. Bilateral friendship treaties ("FNC treaties": friendship, navigation and commerce) involve states granting each advantages in relation to imports and exports, rights of establishment and free movement of services, trade in general and rights of carriage of goods by sea. Bilateral investment treaties ("BIT": see paragraph 7.15) are increasingly negotiated between industrialised nations and developing countries. Some bilateral treaties may frame specific transactions, such as loans from state to state.

Some multilateral treaties regulate trade between the contracting states in a more general way. Many multilateral treaties grant trade regulatory powers to particular international organisations.[2] Other multilateral treaties seek to unify the law in order to facilitate international trade and financing.[3]

**1.03** **Subject matter: liberalisation of trade or unification of law** The purpose of some treaties (for instance, those creating the IMF, the OECD, etc.) is to liberalise trade between the contracting states. Generally their further implementation has to be agreed unanimously by the Member States; majority voting is an exception.

Other treaties are aimed at economic integration by way of a customs union, a free trade zone, or an economic union (see paragraph 3.11). Such treaties generally also establish an international organisation to implement the treaty programme.

Another group of treaties aims at unification of law.[4] They introduce common substantive rules for legal relationships between private persons and companies. Many of these treaties are not yet in force, or are at present only applied by a limited number of countries. For that reason, many such treaties achieve only a limited or a regional unification.

Some law unifying treaties only introduce rules for situations with an international dimension (*e.g.* international transport); besides the unified rules for international situations, domestic law continues to apply to internal matters. Some treaties, however, introduce rules for situations that do not necessarily have an international dimension (*e.g.* the treaties introducing uniform laws on bills of exchange and promissory notes, cheques, trade marks, drawings and models).

The provisions of a treaty or uniform law become part of the national law of the contracting states concerned. However, treaties and uniform laws are often interpreted differently in each country. Usually, there is no common forum that can give a consistent interpretation. It is only exceptionally that treaty provisions

[2] *e.g.* The United Nations (see paras 2.19–2.27), World Bank (para. 7.03), European Bank for Reconstruction and Development (para. 7.05), OECD (para. 2.32), OPEC (para. 2.70).

[3] *e.g.* concerning intellectual property (see paras 3.98–3.105), bills of exchange (paras 9.27–9.31), international sale (paras 2.23, 4.05). See, *e.g.* I. Cass and R. Kidner, *Statutes and Conventions on International Trade Law* (Cavendish, London, 1999); C. J. Cheng, *Basic Documents on International Trade Law* (Kluwer, The Hague, 1999).

[4] See in the different paths towards uniform law, H. van Houtte, "La modalisation substantielle", in E. Loquin, ed., *La Mondialisation du Droit* (Litec, Paris, 2000), pp. 207–236.





empower certain bodies to give binding and uniform interpretations for all the parties to such treaties. The 1971 Protocol on the interpretation by the Court of Justice of the Brussels Convention on Jurisdiction and Enforcement of Foreign Judgments was a good example thereof.[5] The uniform laws adopted by the Benelux counties on trade marks, on drawings and models and on punitive damages are similarly subject to uniform interpretation by the Benelux Court of Justice on a prejudicial question from a national court of a Benelux Member State.

Some treaties which introduce uniform law (*e.g.* on international carriage of goods by sea) are frequently adapted to developments in international trade. This can lead to confusing situations when some states have not yet adopted all of the changes. For example, there are three different agreements in existence governing carriage of goods by sea: the Hague Rules (1924), the Hague-Visby Rules (1968), and the Hamburg Rules (1978). This is because all parties to the previous agreement did not accept some specific changes introduced by subsequent amendments. While most developed countries which were parties to the 1924 Hague Rules accepted the Visby amendments of 1968, the Hamburg Rules have been accepted predominantly by developing countries.[6] The practitioner always has to verify which states are bound by (the latest version of) a particular treaty.

**1.04** **Direct effect** A treaty binds the contracting states. However, taking into account the wording and the objectives of the treaty, certain treaty provisions may also be self-executing, *i.e.* give rights and duties to private parties *vis-à-vis* a contracting state. The national court must then enforce those treaty obligations.[7] The particular treaty provisions are in this case directly applicable: they have direct effect. Many provisions in the E.C. Treaty have direct effect.[8] Article VIII (2) (b) of the IMF treaty (see paragraph 9.03) also attributes enforceable rights to individuals and is therefore directly applicable.[9] The GATT provisions, on the contrary, are deemed to have no direct effect (see paragraph 3.05).

[5] Under this Protocol, the courts of the E.U. Member States could refer a question for a preliminary ruling on the interpretation of the Convention to the European Court of Justice; a judgment of the Court of Justice not only bound the national court that had referred the question, but also served as a guideline for later interpretations. However, as the Brussels Convention has been replaced by a Regulation, the possibility of a preliminary ruling has become part of general E.U. law (see para. 10.02).

[6] See, for a recent list of the respective contracting states, *e.g.* C.J. Cheng, *op.cit.*, 415–458. For practical problems which can arise in such situations, see for example the English judgment in the *Hollandia* case, [1982] 2 W.L.R. 556.

[7] See, *e.g.* T. Buergenthal, "Self-executing and non-self-executing treaties in national and international law" (1992) IV Rec. Cours 303; R. A. Brand, "Direct effect of international economic law in the United States and the European Union" (1996–97) NW.J.Int'l.L. & Bus. 17, pp. 556–608.

[8] See, *inter alia*, P. Kapteyn and P. Verloren van Themaat, *Introduction to the law of the European Communities* (Kluwer, The Hague, 1998), pp. 82–89 ; K. Lenaerts and P. van Nuffel, *Constitutional Law of the European Union* (Sweet and Maxwell, London, 1999).

[9] However, the rights referred to do not apply against a state that does not observe the IMF treaty, but against other individuals within the framework of a contractual relationship. See para. 9.03.

## *International standards of treatment*

**1.05** **Description** Treaty provisions often refer to specific standards of treatment, which play an essential role on the international economic regulatory scene.[10] These standards, however, only apply in so far as a treaty imposes them (with the exception of the "minimum standard", which is always applicable even in the absence of treaty provisions (see paragraph 1.06). Unless stated to the contrary in the treaty, the standards are interpreted in a way consistent with general treaty practice and jurisprudence. In general, the following standards are applied.

**1.06** **Minimum standard or equitable treatment** The "minimum standard" is the traditional standard of treatment in international law. It is the minimum norm with which all states have to comply.[11] Even if the treatment of its own citizens does not comply with the minimum standard, it must in all events be applied to foreigners.

Somewhat related to the minimum standard is the more recent "standard of equitable treatment", which requires a state to apply its law to all individuals in a fair, reasonable, equitable and adequate manner.[12] Moreover, equitable treatment applies not only to individuals, but also to states (more specifically to developing states), which are entitled to fair and equitable treatment from the other states.[13]

**1.07** **National treatment** Other treaty provisions aim at achieving some standard of national treatment.

The standard of national treatment demands that subjects of other contracting state(s) be treated in the same way as nationals. This accords with the prohibition of discrimination on grounds of nationality. Article 12 of the E.U. Treaty is a typical example of this principle.

[10] G. Schwarzenberger, "The principles and standards of international economic law" (1966) I Rec. Cours 66; P. Verloren van Themaat, *The Changing Structure of International Economic Law* (Nijhoff, The Hague, 1981) pp. 16–18.

[11] P. Verloren van Themaat, *op. cit.* pp. 16–18. This so-called international standard of civilisation is now expressed in the Universal Declaration of Human Rights (UN, General Assembly, December 10, 1948). See, *e.g.* A. Enders, "The role of the WTO in minimum standards", in P. van Dyck, *Challenges to the New World Trade Organization* (Kluwer Law International, The Hague,1996), pp. 61–75; and P. De Waart, "Minimum Labour standards in international trade from a legal perspective" in ibid, pp. 245–264.

[12] *cf.*, *e.g.* K. Hossain and M. Bulajic, "Legal aspects of the new international economic order" (International Law Association, Report of the 61st conference 1984, Paris), p.125.

[13] The Seoul Declaration of the International Law Association (1986) expresses this as follows:
"Without ensuring the principle of equity there is no true equality of nations and states in the world community consisting of countries of different levels of development. A new international economic order should therefore be developed by the United Nations and international organizations, by treaties and by State practice in conformity with the principle of equity, which means that this development should aim at a just balance between converging and diverging interests and in particular between the interest of developed and developing countries. The principle is also an integral element in the interpretation of the law by international courts or arbitration tribunals and may be applied by them to supplement the law", (1986) N.I.L.R. 326. Although the principle of formal equality is generally recognized in international law, it is difficult to enforce: see O. Chinn, P.C.I.J., Ser. A/B, No. 63, 87 (December 12, 1934).





However, the national treatment is not allowed to fall below the minimum standard.[14] If this should be the case, the minimum standard (see paragraph 7.23) will apply to foreigners, conferring a better standard of treatment than that applying to nationals.[15]

**1.08** **Most favoured nation ("MFN") clause** Under the standard of most favoured nation treatment, any advantages or favours a country grants to another country, or to the subjects, products or services of any other country have also to be granted to other states or to subjects, like products and like services of all the other parties who enjoy MFN status.[16]

The actual impact of the MFN clause upon its beneficiaries is determined by the advantages granted to third parties. The MFN clause is thus a catalyst that extents benefits granted to some states, subjects, products or services to all the beneficiaries of the MFN clause. It thus introduces a certain degree of equal treatment in international economic relations. The operation of the MFN clause, adds to the specific content of treaties whatever has to be added from other treaties.

The MFN clause is usually:

- reciprocal (both parties promise each other most favoured status);
- unconditional (the other contracting state is by right entitled to the same preferences as are granted to a third state).

This clause is found in many bilateral treaties.[17] It can also be found in multilateral treaties, for instance, under the GATT and the GATS, the most favoured nation clause operates on a multilateral basis to liberalise international trade (see paragraph 3.11); in the draft Multilateral Agreement in Investments (MAI), an MFN clause multilateralised bilateral investment treaties (see paragraph 7.15).

**1.09** **Preferential treatment** The possibility of preferential treatment forms an exception to the most favoured nation standard. It means that more preferences are granted to another contracting state (or its subjects) than to third states (or

[14] I. Seidl-Hohenveldern, *International Economic Law* (Nijhaff, Dordrecht, 1992) *op. cit.* p. 135.

[15] Art. 2 of the Paris Convention on the International Protection of Intellectual Property Rights (1883) formulates, besides the principle of national treatment, a similar minimum standard: "Nationals of any country to the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals; all without prejudice to the rights specially provided for by this Convention."

[16] See the definition of the International Law Commission: (1978) I.L.M. 1518; *cf.* also E. Sauvignon, *La clause de la nation la plus favorisée* (Presses Universetaires de Grenoble, 1972); P. Pescatore "La clause de la nation la plus favorisée dans les conventions multilaterales" (Institut de droit international 1969, Annuaire) 53, I; D. Vignes, "La clause de la nation la plus favorisée et sa pratique contemporaine" (1970) II Rec. Cours 207; S. Kramer, "Die Meistbegünstigung" (1989) R.I.W. 473.

[17] *e.g.* in recent bilateral investment treaties (see para. 7.15); C.G. Buys, "United States economic sanctions: the fairness of targeting persons from third countries" (1999) Bost.I.L.J. 17 No. 2, pp. 241–267.

their subjects). Preferential treatment usually applies between states, which are closely linked politically or economically.

The standard of preferential treatment is at present applied to trade agreements with developing countries (see paragraph 2.46) and within customs unions or free trade areas (paragraph 3.11). The GATT allows for the possibility of granting such preferential treatment.[18]

Preferential treatment is also adopted in some areas of national legislation, for example where particular geographic zones are allocated more favourable economic and fiscal regimes for foreign enterprises, in order to attract foreign investment.[19]

## Customary law

1.10 **Description** International customary law is created when a general practice, followed by a number of states (state practice), has been accepted as law *(opinio iuris)*. The right of a state to issue its own currency rules, and its obligation to punish counterfeiters of foreign currency, are for instance, based upon international customary law.[20]

However, it is not always easy to assess whether a rule of customary international economic law exists and what its specific content is.[21] For instance, what is the international custom with regard to evaluating the amount of compensation to be paid in the event of nationalisation of certain assets?[22] Opinion on this matter differs considerably between states.[23] Moreover, many states, having declared that damages may only be paid in exceptional circumstances, agree in bilateral investment treaties (see paragraph 7.15) to pay at all times a reasonable level of compensation. Such clauses appear so regularly in investment treaties that it may be argued that these treaty provisions in themselves create a rule of international customary law for reasonable damages.[24]

To take another example, there is an international custom that a state should not to sit in judgment of a foreign state, and should not enforce a judgment against this foreign state (see paragraphs 2.06–2.07). However, how far this immunity extends, and what exceptions are permitted, differs from state to state.

[18] M. Broszkamp, *Meistbegünstigung und Gegenseitigkeit in GATT* (Carl Heymans, Cologne, 1990).
[19] For the statute of the "free zones", see para. 3.11.
[20] S. Zamora, "Is there customary international economic law?" (1989) 32 G.Y.I.L. 28–30.
[21] S. Zamora, *op. cit.*, 34–42.
[22] See, *e.g.* Arbitrator J. Dupuy in *Texaco Overseas Petroleum Co. v. Libyan Arab Republic* (1978) I.L.M. 21:" The Right of a State to nationalize is unquestionable today. It results from international customary law, established as the result of general practices considered by the international community as being law."
[23] See para. 1.35.
[24] See R. Dolzer, "New foundations of the law of expropriation of alien property" (1981) Am. J. Int'l. L., p. 566; D. Verwey and N.J. Schrijver, "The taking of foreign property under international law"(1984) N.Y.I.L., pp. 60–75.





## Other sources

### *Resolutions of international organisations*

**Binding resolutions** Most resolutions passed by international organisations are not binding on their Member States.[25] In exceptional cases, however, they may have this binding character.[26] 1.11

For example, the resolutions adopted by an organisation for its internal operation (*e.g.* concerning the structure of activities, procedure of decision-making, admission of members) are always binding. The charter of an organisation may also determine that the members (and possibly their subjects) are bound by other resolutions.

Member States may also be obliged by treaty to give effect to the resolutions of the organisation. Even the so-called "Resolutions" and "Recommendations" of organisations such as, for example, the ILO or the FAO (see paragraph 2.27), are in fact binding on the Member States who must give effect to these resolutions and recommendations in their national legislation.[27] Sometimes regulations issued by international organisations may be binding on those members who did not make any reservation against them. Even non-members are, in exceptional circumstances, bound by the resolutions of an organisation. This is the case, for instance, with resolutions of organisations (*e.g.* The Rhine Commission, the International Civil Aviation Organisation) that have authority over a geographic area (*e.g.* a river, or air space). Everyone within that area has to abide by the rules of the competent authority.[28]

Some international organisations may adopt a text unanimously (a so-called "accord resolution"), that can be considered as a treaty in a simplified form. The text of such a resolution is then sometimes transposed into a treaty afterwards and presented to the Member States for signature.[29]

After these general principles, two specific illustrations: the binding force of the resolutions of the E.U. and of the UN Security Council.

The E.U. Member States are bound by the Decisions, Regulations and Directives of the E.U. Regulations are also binding for private parties; Decisions are binding on the private parties to which they are expressly addressed.[30]

Resolutions of the UN General Assembly are not binding; they only can become a starting point for the development of an international custom (see paragraph 1.10) or of "soft law" (see paragraph 1.13). Resolutions of the Security Council are similarly not binding,[31] unless they are taken in the framework of Chapter VII of the UN Charter (actions with respect to threats to peace, breaches of peace and acts of aggression) and indicate by their terminology that

[25] See, *inter alia*, J. Frowein, "The internal and external effects of resolutions by international organizations" (1989) ZaÖRV, p.778.
[26] See *e.g.* J. Verhoeven, *Droit International Public* (Larcier, Brussels, 2000), pp. 355–363.
[27] See D. Carreau, *Droit International Public* (Pedone, Paris, 1999), para. 612.
[28] See D. Carreau, *op. cit.*, paras 620–626.
[29] See D. Carreau, *op. cit.*, paras 609–611; I. Seidl-Hohenveldern, *International Economic Law* (Nijhoff, Dordrecht, 1989), p. 42.
[30] E.C. Treaty, Art. 249.
[31] J.P. Cot and A. Pellet *et al.*, *La Charte des Nations Unies* (Economica, Paris, 1999), p. 252.

they are binding.[32] In this last hypothesis, all members of the UN are bound by these resolutions of the Security Council: all UN Member States must comply with these resolutions. However, it has been argued that private persons are not bound by those resolutions unless there are implementing measures in the respective states.[33] To make such resolutions binding on citizens, *e.g.* in case of the implementation of economic sanctions, UN members must transpose them into their national laws—as was the case with the boycott resolutions of the Security Council against Iraq in 1990 following that country's invasion of Kuwait.[34]

Resolutions often precede established law. Since they are not binding, they provide an excellent base from which to launch new proposals. Thus their substance is often not a reflection of the present law (*de lege lata*), but a forerunner of future law (*de lege ferenda*). They offer a programme for the creation of new law (the so-called *droit programmatoire*).[35]

**1.12** **Contribution to the creation of law** Resolutions, which are not binding, are nevertheless often important: they are certainly of political significance (since they reflect the opinion of the majority of the members) and moreover, they contribute to the creation of law. Since they are not binding, they provide an excellent base from which to launch new proposals. They offer a programme for the creation of new law (the so-called *droit programmatoire*). Their substance is often not a reflection of the present law (*de lege lata*), but a forerunner of future law (*de lege ferenda*).

Resolutions may thus function as a catalyst for the two components of international customary law: *i.e.* established practice and *opinio iuris*.[36] The resolutions of the UN General Assembly have thus created international rules of law concerning the permanent sovereignty of states over their natural resources (see paragraph 7.29).

**1.13** **Definition** It is true that some treaties are phrased in rather vague terms and contain many escape clauses. However, a state nevertheless can be held legally responsible if it fails to perform a treaty obligation, however loose it may be.

States sometimes avoid the mandatory character of treaty obligations through their resort to "soft law", *i.e.* to resolutions, recommendations, gentlemen's agreements, guidelines, codes of conduct. Soft law stands in fact midway

[32] UN Charter, Arts 48–49. However, it is not always clear whether a Resolution of the Security Council is a recommendation or a binding decision.
[33] See, *e.g.* High Court of Australia, *Bradley v. Post-Master General* (1974) J.D.I. 865.
[34] B. Campbell, *The Impact of the Freeze of Kuwaiti and Iraqi Assets on Financial Institutions and Financial Transactions* (Graham and Trotman, 1990); E. Lauterpacht (ed.), *The Kuwait Crisis, vol. I: Basic Documents; Vol. II: Sanctions and their economic consequences* (Grotius, Cambridge, 1991).
[35] See D. Carreau, *op. cit.*, pp. 639–642.
[36] See D. Carreau, *op. cit.*, pp. 630–638; I. Seidl-Hohenveldern, *op. cit.*, para. 37–42.





between so-called hard law (*e.g.* treaty, custom) and sheer political engagement.

Certain matters many not yet, for instance, be "ready" to be adopted in a binding treaty text. In that case states may negotiate a "gentlemen's agreement" or recommend a code of conduct. For instance, many states have negotiated gentlemen's agreements for export financing (see paragraph 8.30) or co-operation in the anti-trust area (see paragraph 1.22). They have also adopted many other codes of conduct for themselves and their citizens (see paragraph 3.63).[37]

Nevertheless, soft law has *certain* legal effects.[38] It often provides guidance for the conduct of states and individuals. Furthermore, it functions as a "laboratory test" for a certain idea or behavioural pattern. Soft law can offer the framework or even the draft text for later treaty negotiations, for national legislation.[39]

### *State contracts*

**1.14** **Concepts** States, state enterprises and state organisations frequently grant exploitation contracts to foreign investors. These contracts (so-called state contracts), which establish the legal basis for the investment, are at least in part subject to international law. The role of international law for state contracts will be further discussed in Chapter 7 (see paragraph 7.09).

## Economic sanctions[40]

**1.15** **Outline** How international law may affect international trade can be best illustrated by the international law on economic sanctions and boycott.

There is no general international obligation for states to trade with each other. However, trade agreements may oblige a state to trade with the contracting states. The E.C. Treaty, the GATT (see paragraph 3.26) and the numerous FNC treaties

[37] E. Decaux, "La forme et la force obligatoire des codes de bonnes conduites" (1983) A.F.D.I. 81.
[38] See, *e.g.*, incl. A. Aust, "The theory and practice of informal international instruments" (1986) I.C.L.Q. 787; D. Carreau, *op. cit.*, paras 505–539; C. Chinkin "The challenge of soft law: development and change in international law" (1989) I.C.L.Q. 850; C. Elias, "General principles of laws: soft law and the identification of international law", (1997) N.Y.I.L 28., pp. 3–49; H. Hilgenberg, "A fresh look at soft law" (1999) E.J.I.L., pp. 499–515; J. Klabbers, "The undesirability of soft law", (1999) Nord.J.I.L., pp. 381–391; I. Seidl-Hohenveldern, *op. cit.*, p. 42; M. Virally, *La Distinction entre Textes Internationaux de Portée Juridique et Textes Internationaux Dépourvus de Portée Juridique* (Institut de droit international, Annuaire, 1983) vols 60—1, p. 166 ; K. Zemanek, *Is the term "Soft Law" convenient ?* ( Liber Amicorum I. Seidl-Hohenveldern, 1998,The Hague), pp. 843–862; E. Olufemi and C.Lim, "General principles of law, 'Soft' Law and the identification of International Law" (1997) N.Y.I.L. 28, pp. 3–49.
[39] A. Boyle, "Some reflections on the relationship of treaties and soft law" (1999) I.C.L.Q. 48, pp. 901–913.
[40] For an interesting discussion of the motives and effects of sanctions and boycott from a U.S. perspective, see Raj Bhala, "MRS. WATU and international trade sanctions", (Spring 1999) *International Lawyer* 33 (1), at 1–26.

(see paragraph 1.02), for example, prevent contracting states from prohibiting trade with other treaty parties.

Furthermore, international law prohibits so-called "economic aggression", for examples the use of a boycott against a foreign state or government. On the other hand, economic sanctions against a state may be permitted as form of reprisal against an unlawful act of that state. The United Nations Security Council can oblige the UN's Member States to take part in collective economic sanctions against a state that has breached international peace and security; the General Assembly sometimes recommends such sanctions. Legal doctrine deals extensively with the legal implications resulting from international customary law, treaty obligations and UN resolutions in relation to the application of economic sanctions and boycott.[41]

## PART II: NATIONAL LAW

**1.16** **Significance** National law gives substance to the legal relationships between private parties and regulates their behaviour. Traditionally, national law is divided into two branches, public law and private law, both of which are relevant for commercial transactions.

A transnational transaction has, by definition, links with different states. Different legal systems thus may govern the transaction. This part will examine how national law affects transnational commercial transactions.

### Public Law

#### *Substance*

**1.17** **Outline** Every state has the authority to regulate economic activity within its territory by means of public law. Public law is important for the economic order. For instance, the state has control over import and export to and from its territory through customs legislation, it has control over its currency through exchange

[41] See, *e.g.* J. Delbrück, "International economic sanctions and third states" (1992) A.V.R. 86; A. Giardina, *The Economic sanctions of the United States against Iran and Libya and the GATT security exception* ( Liber Amicorum I. Seidl-Hohenveldern, The Hague, 1998), pp. 219–231; K. Hailbronner, "Sanctions and third parties and the concept of public international order" (1992) A.V.R. 2; C. Joyner, "The transnational boycott as economic coercion in international law" (1984) Vand. J. Transnat. L. 205; E. Klein, "Sanctions by international organizations and economic communities"(1992) A.V.R. 101; J. H. Moitry, "L'arbitre international et l'obligation de boycottage imposée par un Etat" (1991) J.D.I. 349; S. Neff, "Boycott and the law of nations: economic warfare and modern international law in historical perspective" (1988) B.Y.I.L. 113; P. Szasz, "The Law of economic sanctions", in M. Schmitt, ed., *The Law of Armed Conflict* (Newport, 1998), pp. 455–481 ; H. van Houtte, "Treaty protection against economic sanctions" (1984–85) R.B.D.I. 34 and the general theme issue on trade sanctions and international relations in (1987) N.Y. U. J. Int'l. L. & Pol., pp. 781 *et seq.*; W. Meng, "Economic sanctions and state jurisdiction: some grey areas under international law" (1997) ZaoRV 57(1), pp. 324–327; R. Paroni, "UN Sanctions in EU and national law: the centro-com case" (1994) I.C.L.Q. U.K. 48, pp. 582–612; S. Karagiannis, "Sanctions internationales et droit communautaire. A propos du règlement 1901/98 sur l'interdiction de vol des transporteurs yougoslaves" (1999) R.T.D.E. 35, pp. 363–394.





rate regulations and it can raise taxes through its fiscal law. Furthermore, the state may regulate specific sectors (*e.g.* banks, insurance companies) or products (*e.g.* shares, medicines). A state may decide to nationalise private enterprises. It may use legislation on patents, copyrights, trade marks and other intellectual property rights to give certain enterprises an exclusive advantage. To maintain fair competition it can introduce competition rules. States ensure the strict observance of their economic legislation through economic criminal law and through criminal courts.

Within the European Union, Community law has to a certain extent replaced national public law for the regulation of trade and the economy.

#### *Extraterritorial application of public law*

**Territorial application** The state has authority to regulate economic life within its own territory. Its public law therefore generally has a territorial application. Thus, Belgian social security law is concerned with employees in Belgium, employed by employers established in Belgium. The U.S. custom duties apply to goods imported into the United States. The E.U. competition rules apply to competition within the E.U. A state should not regulate issues which have an insufficient connection with that state. **1.18**

**Extraterritorial application** Sometimes, states introduce legislation of a public law nature intended to regulate behaviour outside their territories. **1.19**

This extraterritorial application is, for instance, quite common when the particular behaviour, such as unfair trade practices or environmental pollution, is committed abroad but affects the territory of that state. For example, the United States as well as the E.U. apply their antitrust laws to agreements between foreign enterprises as soon as they affect competition in respectively the United States or the E.U.[42]

Moreover, states may introduce extraterritorial legislation for foreign policy objectives. During the Cold War period, the United States thus forbade foreign companies under the control of American citizens or American firms to export technology to the Soviet Union, although it affected companies in Europe and

[42] See, *e.g.*: for the USA: *U.S. v. Aluminum Co. of America (Alcoa)* 148 F 2d 416 (2d Cir. 1945); *U.S. v. Imperial Chemical Industries (I.C.I)* 105 F Supp. 215 (SDNY 1952) (British reaction: *British Nylon Spinners Ltd v. I.C.I.* (1953 1 Ch. 19); *U.S. v. Watchmakers of Switzerland Info Center* 133 F Supp. 40 (SDNY 1962); *U.S. v. First National City Bank* 396 F 2d 897 (1968); *Laker v. Sabena*, 731 F 2d 909 (D.C. Cir.1984). For the E.U.: Court of Justice, *Woodpulp* Decision, Cases 89, 104, 116, 118 and 125/85, [1988] E.C.R. 5243. Also more generally: J. Castel, "The extraterritorial effect of antitrust laws" (1983) I. Rec. Cours. 9; K. Meessen, *Völkerrechtliche Grundsätze des internationalen Kartellrechts* (Nomos, Baden-Baden, 1975); R. C. Renland, "Extraterritorial reach of US antitrust laws" (1994) Tex.Int'l L.J. 29, pp. 159–210; M. A. A. Warner, "Restrictive trade practices and the extraterritorial application of U.S. antitrust and trade legislation" (1999) NW.J.Int'l L. & Bus. 19, pp. 330–363; J. Basedow, "Souveraineté territoriale et globalisation des marchés: le demande d'application des lois contre les restrictions de la concurrence" (1997) Rec. Cours. 264, p. 9; L. Idot, "Les conflicts de lois en droit de la concurrence" (1995) J.D.I. Clunet 122, pp. 321–341.

elsewhere in the world.[43] The highly contentious "Cuban Liberty and Democratic Solidarity Act" of 1996—the so-called Helms-Burton Act—is a more recent case in point.[44]

Finally, states may also regulate behaviour in a territory that is beyond the jurisdiction of any state. National regulations governing the deep seabed mining activities by their own nationals or companies on the high seas are a good example here.[45]

The extraterritorial application of legislation is a very delicate problem for international trade and has been covered extensively. Companies must be aware that they may be subject to foreign public law rules.[46]

**1.20 International law and extraterritoriality** As early as 1927, in the *Lotus* case, the Permanent Court of International Justice decided that a state can declare

[43] The regulation applied to exports of goods produced by foreign subsidiaries of U.S. companies as well as exports by foreign firms that incorporated specific U.S. goods or that were made under licensing arrangements with U.S. companies. The U.S. measures were condemned by, *inter alia*, the E.C. as "unacceptable under international law because of their extraterritorial nature". See E.C., "Comments on the U.S. regulations concerning trade with the U.S.S.R.," reproduced in I.L.M. 891 (1982) and 855, 864 and 891, and I.L.M (1983), 353, Act of July 27, 1969, Art. 3.

[44] The Cuban Liberty and Democratic Solidarity Act, Pub. L. No. 104–114, 110 Stat. 785 (1996), hereafter the Helms-Burton Act. The Act aroused strong hostile reactions from all over the world. The E.U. in particular took two important measures in this regard. First, it brought an action under the dispute settlement rules of the WTO alleging, *inter alia*, that "U.S. restrictions on goods of Cuban origin as well as the possible refusal of visas and the exclusion of non-U.S. nationals from the U.S. territory are inconsistent with the U.S. obligations under the WTO Agreement." A Panel was established on November 20, 1996, but the case was suspended at the request of the E.C. made on April 22, 1997 and remained so until its expiry a year later. However, an understanding between the parties was reached on May 18, 1998. Secondly, the E.U. enacted a Regulation "protecting the effects of the extra-territorial application of legislation adopted by a third country, and actions based thereon or resulting therefrom" (Council Regulation 2271/96, [1996] O.J. L309/1) As stated under Art. 1, the regulation provides protection against and counteracts the effects of the extra-territorial application of the Helms-Burton law. For an interesting discussion of the Helms-Burton Act from an international law perspective, see R. Muse, "A public international law critique of extraterritorial jurisdiction of the Helms-Burton Act (Cuban Liberty and Solidarity (LIBERTAD)) Act of 1996"(1996–97) Geo.Wash. J.Int'l. L. & Econ. 30, at 207–270; M. Gebauer, "Kollisonsrechtliche Auswirkungen der U.S.– amerikanischen Helms-Burton Gesetzgebung" (1998) I.P.Rax No. 3, pp. 145–155; J. van den Brink, " Helms-Burton: extending the limits of US jurisdiction" (1997) N.I.L.R. XLIV, pp. 131–148; J. Anderson, "US Economic sanctions on Cuba, Iran & Libya: Helms-Burton and the Iran and Libya Sanctions Act" (1996) I.B.L.J., p. 1007; H. Lesguillons, "Helms-Burton and D'Amato Acts: Reactions of the European Union" (1997) I.B.L.J., pp. 95–111.

[45] See, *e.g.* (1980) I.L.M. 1003; (1981) I.L.M. 1228 and (1982) I.L.M. 867 (in respect of U.S.); (1981) I.L.M. 1218 (in respect of the U.K.); (1981) I.L.M. 393 and (1982) I.L.M. 832 (in respect of Germany); (1983) I.L.M. 102 (in respect of Japan); (1982) I.L.M. 551 (in respect of the U.S.S.R.); G. Jaenicke, "Joint ventures for deep seabed mining operations" (1995), ZaoRV 55, pp. 329–347.

[46] See, *inter alia*, M. Bazex *et al.*, *L'application extraterritoriale du droit économique* (Montchristian, Paris, 1986); J. Jacquet "La norme juridique extraterritoriale dans le commerce international" (1985) J.D.I. 327; J. Kaffanke, *Nationales Wirtschaftsrecht und internationale Wirtschaftsordnung* (Nomos, Baden-Baden, 1990); A.V. Lowe, *Extraterritorial Jurisdiction* (Grotius, Cambridge, 1983); P. Mavroidis, *Some reflexions on extraterritoriality in international economic law* ( Mélanges M. Waelbroeck, Brussels, 1999), pp. 1297–1325 ; E.J. Mestmaecker, "Staatliche Souveranität und offene Märkte, Konflikte bei der extraterritorialen Anwendung von Wirtschaftsrecht" (1988) RabelsZ 205; A. Neale and M. Stephens, *International Business and National Jurisdiction* (Clarendon, Oxford, 1988) and the critical analysis hereof by J. Westbrook, "Extraterritoriality, conflict of laws and the regulation of transnational business" (1990) 25 *Texas International Law Journal* 71; F. Rigaux, "Droit économique et conflits de souverainetés (1988) RabelsZ 104.





its laws applicable outside its own territory and exercise jurisdiction over actions, committed beyond its borders, as long as this is not prohibited by international law.[47]

It is not quite clear what limitations international law imposes. Often principles such as comity, co-operation between states, reasonableness or reciprocity are invoked to delimit the extraterritorial powers of a state. However, it remains difficult to extract clear (let alone generally accepted) criteria.[48]

Extraterritorial jurisdiction is often justified by the existence of some connection, which may generally be classified under one of the following four theories: the theory of active personality, the theory of passive personality, the protective theory, and the effects theory.

According to the theory of active personality, a state exercises jurisdiction on its nationals (whether natural persons or juridical entities) wherever they might be in the world. Nationality is for instance taken as a sufficient link for U.S. tax law to be enforced on American citizens residing outside the United States.

The theory of passive personality, on the other hand, may be invoked by a state to exercise its jurisdiction in respect of actions, which cause damage to its nationals outside its territory. The element of nationality is thus an important connecting factor for these two theories.

The protective theory allows a state to exercise its jurisdiction in respect of actions which take place outside its territory but which may threaten its security or political integrity.

Finally, the effects theory, which is very much akin to the protective theory, argues that a state may regulate actions outside its territory in so far as these actions have a "direct, foreseeable, and substantial effect" within its territory. As a result, the effects theory is often invoked as the basis for extraterritorial legislative jurisdiction on matters such as competition and environmental pollution.[49]

In any event, extraterritorial legislation can only be justified for as long as it does not conflict unreasonably with the interests of other states (principle of proportionality).[50]

[47] *The Lotus* (1927), P.C.I.J. ser. A No. 10. In this case the Turkish court was allowed to apply Turkish criminal law to the French helmsman of the French ship, the *Lotus*, which had collided with a Turkish ship on the high seas.

[48] See C. Engel, "Die Bedeutung des Völkerrechts für die Anwendung in– und ausländischen Wirtschaftsrecht" (1988) RabelsZ 271; J. Basedow, "Conflicts of economic regulation" (1994) A.J.I.C.L. 42, pp. 423–447.

[49] In its "Comments on the 1982 U.S. Regulations Concerning Trade with the U.S.S.R.", the E.C. characterised the territoriality and nationality (active and passive personality) principles as "generally accepted bases of jurisdiction in international law, while the protective and effects theories were termed possible bases of jurisdiction which have found "less than general acceptance under international law".

[50] The Restatement of the Foreign Relations Law of the United States (American Law Institute, 1987) restricts the possibility of extraterritorial legislation as follows:
"[s.] 402. Bases of Jurisdiction to Prescribe.
Subject to [s.] 403, a state may, under international law, exercise jurisdiction to prescribe and apply its law with respect to
(1) (a) conduct a substantial part of which takes place within its territory;
(b) the status of persons, or interests in things, present within its territory;
(c) conduct outside its territory which has or is intended to have substantial effect within its territory;

*Relevance of foreign public law*

**1.21** **Application** A state shall not, in principle, apply the public law rules of another state, since states conventionally refuse to act as the "policeman" for foreign powers. Courts will not therefore generally entertain claims that are directly based on the public law of another state. However, a court may, if necessary, apply foreign public law when these legal rules are not so much an expression of the sovereign, regulating authority of the foreign state. Thus, a court may, for instance, award compensation to a foreign state on the basis of the latter's own public law on administrative contracts.

A foreign public law rule may also have an effect on a private law relationship. For instance, a foreign export prohibition may make the negotiated delivery of advanced technology impossible. A foreign competition authority may block a merger between two companies, etc. In such circumstances a judge may, when considering a breach of contract, take the foreign public law prohibition into account (see paragraph 1.26).[51]

**1.22** **Concurrence** It is not excluded that the public law of more than one state is applicable to one and the same situation. After all, public law rules define their

(2) the conduct, status, interest or relations of its nationals outside its territory; or
(3) certain conduct outside its territory by persons not its nationals which is directed against the security of the state or certain state interests.

[s.] 403. Limitations on Jurisdiction to Prescribe
(1) Although one of the bases for jurisdiction under [s.] 402 is present, a state may not apply law to the conduct, relations, status, or interests of persons or things having connections with another state or states when the exercise of such jurisdiction is unreasonable.
(2) Whether the exercise of jurisdiction is unreasonable is judged by evaluating all the relevant factors, including:
(a) the extent to which the activity (i) takes place within the regulating state, or (ii) has substantial direct, and foreseeable effect upon or in the regulating state;
(b) the links, such as nationality, residence, or economic activity, between the regulating state and the persons principally responsible for the activity to be regulated or between that state and those whom the law or the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation in question;
(e) the importance of regulation to the international political, legal, or economic system;
(f) the extent to which such regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity;
(h) the likelihood of conflict with regulation by other states.
(3) An exercise of jurisdiction which is not unreasonable according to the criteria indicated in Subsection (2) may nevertheless be unreasonable if it requires a person to take action that would violate a regulation of another state which is not unreasonable under those criteria. Preference between conflicting exercises of jurisdiction is determined by evaluating the respective interests of the regulating states in light of factors listed in Subsection (2).
(4) . . . "

[51] See P.B. Carter, "Transnational recognition and enforcement of foreign public laws" (1989) C.L.J. 417; H.W. Baade, "Operation of foreign public law" in *International Encyclopaedia of Comparative law*, Part III, Chapter 12 (Mohr, Tubingen, 1991); F.A. Mann, "Conflict of Laws and public law" (1971) I Rec. Cours, pp. 166–170; F. Rigaux, *Droit public et droit privé dans les relations internationales* (Pedone, Paris, 1977), pp. 171–173.





own scope of application. As states independently and without consultation decide the scope of application of their public law it often happens that the public law rules of two states are applicable to the same facts. Sometimes the rules complement each other: for example, an agreement can be covered by American competition law as well as by E.U. competition law and can be sanctioned in both territories. (For instance, IBM has had trouble with both the American and the E.U. competition authorities.) However, it may also occur that states have opposing regulations, which can create difficulties for a private company when it cannot possibly observe both regulations at the same time. The American authorities may, for example, require that a British company co-operate with an anti-trust prosecution in the United States, whereas English law prohibits British nationals to giving effect to such demands from a foreign state.[52]

At present, states attempt to bring the scope of application of their respective public law into line. To this end, tax treaties, modelled after the 1977 OECD Model Double Taxation Convention, for instance prevent an internationally operating company or person from suffering double taxation. Other examples are bilateral and multilateral treaties to harmonise social security systems.[53] In the area of anti trust law there are only a few arrangements to bring the scope of respective competition laws into line.[54] With regard to criminal law, states usually only have their own rules to avoid double convictions for the same crime.

## Private law

**1.23** **Outline** Private law is crucial for a commercial transactions. Contract law, for instance, is part of private law and determines whether there is a contract in existence, what the rights and obligations of the parties to the contract are and to what extent the parties are liable when the contract is not performed. Company law, which is also part of private law, lays down how a company is established, how it functions, how it is dissolved, etc.

[52] See, *e.g.*, *British Airways v. Laker Airways* [1985] A.C. 58, HL; *Midland Bank v. Laker Airways*, [1986] Q.B. 689, CA. See also J. Morris (ed.), Dicey and Morris, *Conflict of Laws*, Part I, (Sweet & Maxwell, London, 1993), p. 441; Canada: "Foreign extraterritorial measures act incorporating the amendments countering the U.S. Helms-Burton Act." (1997) I.L.M. 34, p. 111; European Union: "Council Regulation 2271/96, Protecting against the effects of the extra-territorial application of legislation adopted by a third Country." (1997) I.L.M. 34, p.125.

[53] See, *e.g.* B. Von Maydell, "Der Multilaterale Effect von Sozialversicherungsabkommen" (1983) I.P.Rax. 156.

[54] See, *inter alia*, the Agreement between the European Communities and the Government of Canada regarding the application of competition law, [1999] O.J.L. 175; moreover, the Agreement between the Europeah Communities and the USA regarding the application of competition law, in [1995] O.J. L95/47 and [1995] O.J. L131/38; furthermore, the Agreement between the European Communities and the USA on the application of positive comity principles in the enforcement of their competition laws, in [1998] O.J. L173; A. Mattoo and A. Subramanian, "Multilateral rules on competition policy—a possible way forward" (1997) J.W.T. 31(5), pp. 95–115; F. Romano, "First assessment of the agreement between the European Union and the USA concerning the application of their competition rules" (1997) I.B.L.J., pp. 491–501; United States: "International antitrust enforcement assistance Act of 1994" (1995) I.L.M.34, p. 494; Canada-U.S.: "Agreement regarding the application of their competition and deceptive marketing practices laws" (1996) I.L.M.35, p. 309.

By definition, different states are involved in a transnational commercial relationship. Thus, the private law of various legal systems may have to be considered when dealing with transnational legal issues. However, private law differs from country to country. The selection of the applicable legal system is the subject of "private international law" (or "conflicts of laws", as it is also sometimes called).

States sometimes adopt uniform substantive law in respect of some issues. In that case it is less important whether the law of one or the other of those states is applicable, since their respective national laws then contain the same uniform rules for the same issue. We will look at private international law and uniform substantive law respectively.

## Private international law

### *Method*

1.24 **Conflict of law rules** Private international law seeks to "localise" a legal relationship, which touches upon more than one state within a specific national legal order. The law of this legal system will then be declared applicable to the case. Private international law chooses the applicable law by applying conflict of law rules. Each legal system has developed its own international private law. In spite of frequent similarities, there are sometimes substantial differences between the different systems.

First, it is important to know how a specific legal issue is to be classified in order to be brought under one or another category. Take for instance the conflict of law rule for corporations. This conflict of law rule concerns a specific category of legal issues: it only applies to questions concerning a company. Is the validity of the memorandum and articles of association of a company, however, "a question concerning a company", or "a question concerning a contract"? Each of these categories has their own conflict of law rule. In short, the legal issue must be characterised and assigned to a particular category. The classification into categories may be different from system to system.

Each category has a connecting factor (in exceptional situations, more than one). The connecting factor indicates in abstract terms the country, and consequently the law of that country, with which the legal issue has the closest connection.

Every country draws up its own conflict of law rules. Although these rules to a large extent run parallel from country to country, there may be differences. Within Europe, for instance, in some countries issues of company law are governed by the law of the country where that company has its seat ; in other countries by the law where the company is registered (see paragraph 1.28). Private international law is therefore not "international" and uniform in the same way as international law is international. The designation "international" only points to the fact that private international law is intended for legal relations involving more than one country.





Differences in national private international law and thus also in the choice of the applicable substantive law are hampering international trade. For many years the countries have worked towards the establishment of common conflict of law rules in treaties. Examples are the Convention of Rome of June 19, 1980 on the law applicable to contractual obligations (see paragraph 1.29), the Geneva Convention of June 7, 1930 on the regulation of certain legal conflicts concerning bills of exchange and promissory notes (see paragraph 9.28) and the Geneva Convention of March 19, 1931 on the regulation of certain conflicts of law concerning cheques. Many other treaties, which introduce substantive law for a specific legal issue , also sporadically contain conflict of law rules.

1.25 **Exception of public order** It is conceivable that the foreign law, applicable according to the conflict of law rule, leads to results, which are unacceptable to society and its courts. The application of foreign law may in some situations indeed lead to an infringement of the fundamental principles of the ethical, political or economic order of society. Under these circumstances the exception of public order comes into force and the courts will not apply the foreign law otherwise applicable. When the court has thus decided not to apply the foreign law, it may instead apply its own law, if necessary.

1.26 **Mandatory law** Some provisions, the so-called "mandatory laws" (*lois de police, lois d'application immédiate*), are considered to be of such vital importance to a country that courts of that country always apply them when there is some connection with the forum. Belgian courts, for instance, always apply the Belgian statute on the unilateral termination of an exclusive distributorship agreements when the agreement covers part of Belgian territory (see paragraph 5.07). However, the statute only concerns the termination of the concession. For other contractual disputes the conflict of law rule for contracts remains in force.[55]

Mandatory laws differ from the exception of public order rule in that they impose some substantive law, but do not otherwise prevent the application of the normal conflict of law rules.

It is traditionally accepted that courts may apply relevant rules of their own national laws when they are mandatory irrespective of the law otherwise applicable to the legal issue. Nowadays, it is also more and more being accepted that the court might also apply foreign mandatory laws when the case has a close connection with the foreign country.[56] This means for instance that when a dispute is brought before a non-Belgian court, the Statute of 1961 could be applied as Belgian mandatory law if that court decides that the concession agreement has close connections with Belgium.

[55] H. van Houtte, "La concession de vente: loi du contrat ou loi du 27 juillet 1961" (1980) R.B.D.C. 613; see para. 5.13.

[56] K. Anderegg, "Die Anwendung ausländischer Eingriffsnormen" (1988) RabelsZ 260; P. Mayer, "Les lois de police étrangères" (1988) J.D.I. 277; J. Schulsz, "Les lois de police étrangères" (1982–1983) *Comité français de droit international privé* 39; K. Siehr, "Ausländische Eingriffsnormen im inländischen Wirtschaftkollisionsrecht" (1988) Rabelsz 41. See also European Contracts Convention, Art. 7(1) (para. 1.29); Swiss Private International Law Statute, Art. 19.

However, in very exceptional cases a court may be obliged to apply the mandatory laws of another country. For instance, Article VIII(2)(b) of the Charter of the International Monetary Fund determines:

> "Exchange contracts which involve the currency of any Member and which are contrary to the exchange regulations of that Member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any Member." (See paragraph 9.03.)

**1.27** **Evasion of the law** The court may refuse to apply foreign law if it appears that the connection with a particular country, brought about by the parties, does not reflect reality. For instance, the memorandum and articles of association of a company may state that its head office is in Switzerland, because the parties want Swiss law to apply even if in reality the company operates exclusively from France. The court may then look at the real connection and apply the law of the real connection.[57]

*Applications*

**1.28** **Companies** There are mainly two alternative connecting factors (see paragraph 1.24) to find the law applicable to issues of company law. These issues can be governed by the law of the principal seat of the company, *i.e.* the place where the most important decisions are taken and from where management operates (*siège réel*); they also can be governed by the law of the country where the company has been incorporated. In Austria, Belgium, France, Germany, Greece, Luxembourg, Portugal and Spain, for instance, the courts use as the connecting factor the principal seat of the company. The Netherlands, the United Kingdom, Ireland, Denmark, Finland, Sweden and Switzerland, on the other hand, have opted for the law of the state of incorporation. In Italy a combination of both connecting factors is in operation.

Legal questions covered by the law applicable to company issues, relate for instance, to:

(a) the incorporation of the company: *i.e.* the basic requirements (*e.g.* minimum capital, number of partners), formal requirements (a deed or a private instrument to create the company), conditions for publicity and sanctions for non-observance of those requirements (*e.g.* dissolution *ex nunc* or *ex tunc*);

(b) the functioning of the company: for instance, rights and duties of the shareholders, representation of the company;

(c) the dissolution of the company (*e.g.* grounds for and manner of dissolution).

[57] See, *inter alia*, B. Audit, *La fraude à la loi en droit international privé* (Dalloz, Paris, 1974).





**1.29** **Rome Convention on the Law Applicable to Contractual Obligations** State courts within the E.U. apply the Rome Convention on the Law Applicable to Contractual Obligations (European Contracts Convention) to find which law they have to apply to a contractual issue.[58]

The main principle is that of party autonomy, i.e. that the parties are free to choose the law that will apply to their contract (Article 3). Their choice may be express or implied. They can, for instance, include in the contract a clause that clearly stipulates: "This agreement is subject to [Belgian] law." It is also conceivable that the court deduces from terms of the contract or from the circumstances of the case that there is an implied choice for a particular legal system. Thus, it may infer the choice for a particular law from the stipulation that declares a particular national court competent, from a clause for arbitration in a particular country, from the use of standard contracts which are used in a particular legal system (*e.g.* a Lloyd's insurance policy), from the reference to sections of the law or terminology of a particular country or from the choice of law made in former contracts by the same contracting parties.

However, parties are not entirely free in their choice of the applicable law.[59] For instance, parties to a purely domestic case cannot exclude the application of the mandatory laws[60] of the country with which all the other elements relevant to the situation at the time of the choice are connected, by making a choice of the law of another country.[61] This means that even when the parties have chosen the tribunal of a country as well as its law to govern their contract, the mandatory laws of the other country with which all relevant elements of the contract are connected shall be given effect to. Other restrictions on the party autonomy follow from other provisions of the Convention (see below).

Moreover, in all events, under Article 7(2) of the Convention, courts have to apply the mandatory rules which apply in that jurisdiction, regardless what law has been chosen by the parties. Article 7(1) of the Convention allows the court also to give effect to the mandatory rules of a third country with which the

[58] Convention on the Law Applicable to Contractual Obligations of June 19, 1980, Rome [1980] O.J. L266. Art. 28 of the Convention provides that it can be signed only by states party to the Treaty establishing the European Economic Community. As a result, this Convention is applicable in Belgium, Denmark, France, Germany, Greece, Italy, Luxembourg and the United Kingdom to contracts concluded after April 1, 1991; in the Netherlands to contracts concluded after September 1, 1991; in Ireland to contracts concluded after January 1, 1992; in Spain and Portugal for contracts concluded after September 1, 1993 and October 1, 1994 respectively. The latest to accede to this Convention are the three newest Members of the E.U.—the Republic of Austria, the Republic of Finland, and the Kingdom of Sweden—whose accession was adopted on November 29, 1996 [1997] O.J. C191/11. Belgium, Denmark, Germany and Luxembourg, had already incorporated the text of the Convention into their domestic legislation so that they applied the rules of the Convention concluded earlier (in Denmark by a Statute of May 9, 1984, in Luxembourg by a Statute of March 27, 1986, in Germany by a Statute of July 25, 1986 and in Belgium by a Statute of July 14, 1987).
As the 1988 interpretative protocols conferring powers on the ECJ to interpret the Convention have not yet entered into force, the envisaged uniform interpretation of the Convention in all Members States has yet to be realised.

[59] For a discussion of choice of law issues in relation to consumer and employment contracts, see below.

[60] Mandatory laws are defined as rules which cannot be derogated from by contract. (See Art. 3(3) of the Rome Convention.)

[61] See Art. 3(3) of the Rome Convention.

situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.[62] Finally, under Article 16, a court may not apply a legal rule, otherwise applicable, if such application would manifestly be incompatible with the public policy ("*ordre public*") of the jurisdiction.[63]

When parties have neither expressly nor implicitly chosen a law, the contract is governed by the law of the country with which the contract has its closest connection (Article 4.1). This closest connection is, however, not always easy to determine. There is a presumption that the contract has the closest connection with the country in which the party, who has to effect the characteristic performance, habitually resides (or in the case of a company, the country where it has its seat), (Article 4.2).

In reciprocal contracts the characteristic performance is the performance in exchange of payment. Thus, the characteristic performance in a sales contract is the delivery of goods; in a service contract it is the performance of a service. In principle, when no law is chosen, it is the law of the habitual residence of the seller or of the contractor which thus governs the contract. Similarly, as the characteristic performance in a loan is the lending of capital, it is the law of the country where the lender of the capital habitually resides, which governs the loan agreement.

There are, however, three exceptions to the general presumption in favour of the residence of the characteristic performer. First, agreements concerning immovable property are presumed to be most closely connected with the country where the property is situated (Article 4.3). Secondly, the characteristic performance rule does not apply as such to contracts for the transport of goods. The country where the carrier has his principal seat shall be presumed to be most closely connected only if that country also happens to be either the place of loading or unloading of the goods, or the place of the principal place of business of the consignor (Article 4.4). For the transport of persons, though, the general presumption still applies: the law of country where the carrier is established applies. Thirdly, the criterion of the characteristic performance only creates a presumption. Sometimes it is impossible to determine what the characteristic performance is. There may also be situations where the agreement has closer ties with another country than the country where the party, who has to effect the characteristic performance, habitually resides. In that case the law of the country with which

[62] For curious observations on the wording of Arts 3 and 7 in the French and German versions of the Convention, see R. Plender, *The European Contracts Convention: The Rome Convention on the Choice of Law for Contracts* (Sweet & Maxwell, London, 1991), at 5.21. It has also been observed that mandatory rules in Art. 3(3) "are not necessarily mandatory in an international relationship foreseen by art. 7": Marielle Koppenol-Laforce (ed.), *International Contracts: Aspects of Jurisdiction, Arbitration and Private International Law*, (Sweet & Maxwell, London, 1996), at 145.

[63] Compare this with the following: Art. 7 "permits courts to give effect to the mandatory rules of a country with which the situation has a close connection, when those courts are applying the law of another country under the Convention. Thus, mandatory rules referred to under Article 7 survive, but do not frustrate, the choice of the applicable law. Subject to the effect of Article 7, therefore, it is thought that a legal system specified by the parties, without any element of error, as the governing law of their contract, will be applied as the chosen law, even if it was selected for the purpose of circumventing statutory provisions which would otherwise apply to the situation." Plender, *op. cit.*, 5.05.





the contract has in fact the closest connection applies (Article 4.5). For instance, a contract by a Dutch contractor to build a factory in Germany for a German client may be governed by German, rather than Dutch, law.

Consumer contracts have a specific regime under the Convention, which protects the presumed weaker party.[64] Under the Convention, a consumer contract is a contract the object of which is the supply of goods or services to a person for a purpose, which can be regarded as being outside his trade or profession (Article 5(1)). A consumer, as understood here, thus refers to "a private final consumer not engaged in trade or professional activities".[65] A choice of law made by the parties to a consumer contract does not have the effect of depriving the consumer of the protection afforded him by the mandatory rules of the law of the country of his habitual residence. The only necessary conditions are either that the consumer be solicited to enter into the contract by a specific invitation or simple advertising in his country, and that he took all the steps necessary for the conclusion of the contract in that country, or that the other party received the order in that country, or that the seller arranged a trip for the consumer to another country for the purpose of inducing him to buy and that he gave his order there.[66] This means that even if the parties have expressly chosen the law of, say, the country of the seller to be applicable to their contract, the mandatory rules of the country of residence of the consumer still apply. A consumer cannot contract out these rules. This is thus one area in which the freedom of parties to choose their governing law is limited. Moreover, even in case of absence of choice of law, the rule of Article 4 on closest connection and the presumption of characteristic performance does not hold. In furtherance of the objective of protecting the interests of the weaker party, such a contract is governed by the law of the country in which the consumer has his habitual residence.

The same principles apply to employment contracts. Driven by the same wish to protect the weaker party,[67] employment contracts are governed by the law of the place where the employee habitually carries out his or her work. Even if there is a chosen law, it cannot have the effect of depriving the employee of the protection afforded to him by the mandatory rules of the law of the country in which he habitually carries out his work in the performance of the contract (Articles 6.1 and 62). In the case of an employee who does not habitually carry out his work in a specific country, the law of the country where the place of business through which he was engaged is situated applies (Article 6). However, it should always be borne in mind that this is a rebuttable presumption; if it appears from the circumstances as a whole that the contract is more closely connected with another country, the law of that country governs the contract.

The Convention also provides that mandatory rules, which are not part of the proper law of the contract, apply. Article 7(2) orders the court to apply the

[64] See, *e.g.*, F. Leclerc, *La Protection de la Partie Faible dans les Contrats Internationaux* (Bruylant, Brussels, 1999) ; C. Joustra, *De Internationale Consumentenovereenkomst* (Kluwer, Deventer, 1997).

[65] See also ECJ with regard to the analogous notion in the Brussels Judgments Convention: Case C–269/95, *Francesco Benincasa v. Dentalkit Srl* [1997] E.C.R. I–3795.

[66] See Art. 5(2).

[67] G. Lagarde, "Report on the Rome Convention" [1980] O.J. C–282/25.

mandatory rules of its own legal system, regardless of what the proper law of the contract is and what it tells. Article 7(1) specifically addresses the issue of application of the mandatory rules of countries whose law is "neither the applicable law nor the law of the forum". Accordingly, a court, when applying the law of a country, may still give effect to the mandatory laws (*lois de police*) of another country with which the contract has a close connection if, under the law of this latter country, those rules must be applied whatever the law applicable to the contract. Thus, if a contract has close connections with Germany but French law governs it, then a Belgian court which has jurisdiction over the case, while applying French law, may have to give effect to the mandatory rules of Germany on certain matters.

Finally, the Convention allows the court to set aside foreign legal rules, applicable under the Convention if they are manifestly incompatible with the public policy (*ordre public*) of the forum (exception of public order) (Article 16) (see paragraph 1.25).

The law that applies to the contract according to the conflict of law rule, *i.e.* the proper law, governs the existence and the validity of the contract (Article 8). It thus covers, for example, questions such as whether there is an offer and an acceptance; or whether the agreement has a valid object. Nevertheless, the party who claims that it did not consent may sometimes rely on the law of its habitual residence (for instance, when it appears from the circumstances that it would be unreasonable to apply a different law in this respect) (Article 8.2). So it may argue that the question whether its silence implied consent should not be judged by the proper law of the contract, but by the law of the habitual residence of the party whose consent is questioned.

Whether the contract has formal validity is as a rule determined by the law governing the contract, or by the law of the country where the contract is concluded (or when the contract is concluded between persons who are in different countries, by the law of one of those countries) (Article 9). The formal validity is thus granted by the most favourable of these laws. However, the formal validity of consumer contracts must be in accordance with the law of the country where the consumer resides. Contracts in respect of immovable property likewise must follow the formal requirements of the country where the immovable property is situated.

The law governing the contract covers its substance and effect. This law determines, for instance, questions about interpretation, performance and breach of the contract. As an exception, the manner of the performance shall be judged by the law of the place of performance (Article 10): for instance, if a sale is subject to Belgian law but the goods are delivered in England, English law will determine the time within which the purchaser must examine the goods and, if necessary, put in a claim (Article 10).

**1.30** **General contracts; private international law** When the European Contracts Convention is not applicable (*e.g.* because the court seised of the case is in a country that is not a party to the Convention), the court shall use its own conflict of law rules in respect of such contracts.





The conflict of law rules on contracts of most countries run parallel to a great extent.[68] All systems recognise, for instance, the possibility of a choice of law by the parties. However, the implied choice of law is not everywhere readily accepted. In the absence of an express choice of law some countries stop short of applying the law with which the contract has objectively the closest connection. Instead, some countries weigh up all connecting factors which the contractual relationship has with various legal systems in order to locate the contract objectively; other countries prefer to opt for the law of the place where the characteristic performance has to be effected; yet again, other countries elect—as does the European Contracts Convention—the law of the habitual residence of the party that has to effect the characteristic performance. Lastly, there are also countries where the place where the contract is finalised, still determines the applicable law.

In sum, one has to consult the private international law of each individual country to discover which law the court of that country will apply to the contract.

**Specific contracts** The question of which law is applicable to international sales (see paragraphs 4.02–4.05), distribution agreements (see paragraph 5.04), agencies (see paragraph 5.24), and licensing agreements (see paragraph 6.35) will be considered later. **1.31**

## Uniform substantive law

**Significance** Private international law indicates which national law is applicable to a question of law that involves more than one legal system. The conflict of law rules , however, are not the same in every country. Furthermore, the law, which is referred to often differs substantially from country to country. Different rules of law may therefore be applicable to one transnational legal problem, depending on the private international law of the court seised and the substantive law to which it refers. The legal unpredictability and uncertainty that this creates, are a barrier to international trade. Indeed, businessmen generally prefer to see the same rules applied to their transactions, no matter which court decides on it. **1.32**

For this reason many states have adopted uniform substantive laws in respect of matters where uniform rules were most welcome, such as international sales and international transport. Uniform laws can be introduced either by international treaty or by a model law. In the first hypothesis the treaty incorporates the uniform substantial rules which become binding as part of the treaty (if self-executing—see paragraph 1.04) or through implementation in the domestic law. In the second hypothesis, any interested country may adopt the text of the model

[68] O. Lando, "Contracts", *III International Encyclopedia of Comparative law*, (1976) Ch. 24.

law—if necessary with some amendments, as statutory text.[69] For instance, the Convention on the International Sale of Goods (see paragraph 4.07), the Warsaw Convention (1929) on the liability for air transport, the Inter-American Convention and the CMR Convention on road transport, and the CIM Convention are all successful illustrations of conventions that have introduced uniform rules for essential operations of international commerce.[70] The UNCITRAL Arbitration law (see paragraph 11.02) is another well-known example of a model law which became widely accepted.

Many treaties on the unification of international trade law have only a limited, often regional application. However, even if they are not widely in force, they are useful for the international business lawyer. Indeed, they often contain many interesting principles as they are drafted by experts from different legal systems in response to the needs of modern commercial life.

Uniform substantive law makes private international law largely superfluous. The very idea of uniformity excludes the question of choice of law. After all, the uniform law applies as soon as the transnational relationship falls within its scope. Nevertheless, private international law still remains important because, sometimes the uniform law is only applicable if it is part of a national law, which is applicable by virtue of conflict of law rules.[71] Moreover, uniform law still leaves many matters unregulated and private international law has to refer in such a case to the national law regulating these matters.

## PART III: LEX MERCATORIA

**1.33** **Concept** Many authors claim that international commercial transactions are subject to their own rules, the *lex mercatoria*, or merchant law.[72]

[69] See, on the pros and cons of treaties, model laws etc. as tools for uniform law : Hans van Houtte, "La modelisation substantielle", in E. Loquin, *La Mondialisation du Droit* (Litec, Paris, 2000), pp. 207–236.

[70] For the text of the Inter-American Convention on Contracts for the International Carriage of Goods by Road, see (1990) I.L.M. 81.

[71] The Vienna Convention on the International Sale of Goods applies, *inter alia*, when it is part of the applicable law pursuant to private international law (see para. 4.09).

[72] See on this subject the excellent work of F.De Ly, *The Lex Mercatoria* (North Holland, Amsterdam, 1992) and its extensive bibliography. F. Dasser, *Internationale Schiedsgerichte und Lex Mercatoria* (Schulthess, Zurich, 1989); F. Osman, *Les Principes généraux de la Lex Mercatoria* (L.G.D.J., Paris, 1992); *Principes généraux de la Lex Mercatoria* (L.G.D.J., Paris, 1992); M. Mustill, "The new Lex Mercatoria; the first twenty five years" (1988) Arb. Int. 86; A. Spickhoff, "Internationales Handelsrecht vor Schiedsgerichten und staatlichen Gerichten" (1992) RabelsZ 116; K.P. Berger, *The creeping codification of the Lex Mercatoria* (Kluwer Law International, The Hague, 1999); E. Gaillard, "Thirty years of Lex Mercatoria: towards the selective application of transnational rules" (1995), I.C.S.I.D. Rev. 10, pp. 208–231; E. Gaillard, "Trente ans de *Lex Mercatoria*. Pour une application sélective de la méthode des principes généraux de droir" (1995) J.D.I. Clunet 122, pp. 5–30 ; K.P. Berger, ed., *The Practice of Transnational Law*, (Kluwer, The Hague, 2001), with I.A. M.J. Bonell, "The UNIDROIT principles and transnational law"; Y. Derains, "Transnational law in ICC arbitration"; E. Gaillard, "Transnational law: A legal system or a method of decision-making"; N. Horn, "The use of transnational law in the contract law of international law and finance".





The *lex mercatoria* is said to be created spontaneously by the participants in international trade and applied by arbitrators to settle international trade disputes.[73]

The rules of the *lex mercatoria* are founded on usages developed in international trade, on standard clauses, on uniform laws, on general principles of law and on the contract negotiated by parties.

- Trade usages are important in international trade.[74] Each branch of industry has developed its own practices and usages, adapted to the needs of the business sector: thus there are specific usages in the grain trade, the oil industry, the banking sector, etc. There are very few universal commercial practices. Usually, these practices only apply within a specific industrial sector and/or a specific region.

- Standard contracts or standard clauses, which often codify the usages of the trade, are usually drawn up by the commercial organisation of a business sector and are used by the members of that sector.[75] Many standard clauses are typical for a specific sector and have no general validity. (For that reason there exists probably a variety of *lex mercatoria* systems, depending on sector or region, and no universal *lex mercatoria* as such.[76])

- Uniform laws, model laws and conventions—even if they are not in force—are often developed in response to the needs of modern commercial life; as such, they are also important for the regulation of international trade.

- General principles of law complement the *lex mercatoria*. For example[77]:

[73] See T. Carbonneau, *Lex mercatoria and arbitration* (Juris Publ. Yonkers, 1998), p. 296 ; A. Lowenfeld, "Lex Mercatoria: An Arbitrator's View" (1990) Arb. Int. 133; IPRax 281; N. Jin, "The status of Lex mercatoria in international commercial arbitration", 1996 Am.R.I.A., pp. 163–198 ; J. Paulsson, "La Lex Mercatoria dans l'Arbitrage CCI" (1990) Rev. Arb. 55; "Arbitral award ICC", para. 3267, (1980) J.D.I. 961; See also the various peripeteia of the *Norsolor* case: Oberste Gerichtshof Wien, November 18, 1982, (1983) R.I.W. 868; (1983) Rev.Arb. 514; Tribunal de Grande Instance de Paris, December 9, 1981, (1982) J.D.I. 931; Cass. Fr. October 9, 1984, (1985) Dalloz 101; (1985) I.L.M. 363. Also, *Deutsche Schachtbau-und Tiefbaugesellschaft v. Ras Al Kaimah National Oil Company* (1987) 2 All E.R. 769; Obergericht Zurich, May 9, 1985: the international bank guarantee at first demand is controlled by a "supranational Lex Mercatoria" (cited by A. Kappus, "Conflict avoidance durch Lex Mercatoria und UN Kaufrecht 1980" (1990) R.I.W., pp. 791–792).

[74] E. Loquin, "La réalité des usages du commerce international" (1989) R.I.D.E. 163; A. Kassis, *Théorie générale des usages du commerce* (L.G.D.J., Paris, 1984). M. Goode, "Usage and its reception in transnational commercial law" (1997) I.C.L.Q. 46(1), pp. 1–36.

[75] *e.g.* the standard building contracts of FIDIC (Fédération Internationale des Ingénieurs-Conseils), the standard conditions of the London Corn Trade Association, of the Grain and Feed Trade Association (GAFTA), of the International Air Transport Association (IATA), as well as the Master Agreement of Factors Chain International.

[76] See in this respect the discerning article by P. Lagarde, "Approche critique de la lex mercatoria" *Le droit des relations économiques internationales, Etudes offertes à Berthold Goldman* (Litec, Paris, 1982), pp. 125–150.

[77] See, *e.g.* K.P. Berger,*op.cit.*; P. Kahn, "Les principes généraux du droit devant les arbitres du commerce international" (1989) J.D.I. 305 ; M. Mustill, "General principles of law in international commercial arbitration", (1988) Harv.L. Rev. 1816.

(a) the contract shall be enforced according to its terms (*pacta sunt servanda*)[78]; however, good faith may require that a change in circumstances be taken into account to alter the contract terms (*rebus sic stantibus*);
(b) the performance, as well as a possible renegotiation of the contract because of changed circumstances, shall be carried out in good faith[79];
(c) one party's conduct may, under certain conditions, be assumed to be an implied change of the terms of *a* contract if not opposed by the other party;
(d) the interpretation of the contract must be pragmatic (the doctrine of the so-called *effet utile*);
(e) if the legal terminology used by the parties does not reflect their intentions, the terminology must be adapted to the parties' intentions;
(f) use of goods by the buyer creates a presumption of acceptance of the goods;
(g) the onus of proof is on the plaintiff;
(h) *force majeure* may, under certain conditions, release the parties from their contractual obligations[80];
(i) a party that has suffered a breach of contract must take reasonable steps to mitigate its loss; damages have to be mitigated[81];
(j) the contractual liability is limited to foreseeable damages;
(k) a debtor may in certain circumstances set off his own counterclaims to diminish his liability to the creditor;
(l) the *exceptio non adimpleti contractus* is generally applicable;
(m) a contract is not enforceable when it is in conflict with the "international public order" (*e.g.* in relation to corruption) (see paragraph 1.25).[82]

**1.34** **The UNIDROIT Principles:** a step forward in the development of *lex mercatoria*?

UNIDROIT, after decades of research and deliberations, in 1994 came up with a form of "international restatement of general principles of contract law", called

[78] H. van Houtte, "Changed circumstances in pacta sunt servanda" in *Transnational Rules in International Commercial Arbitration* (ICC Dossiers, 1993) pp. 105 *et seq.*; F. Diesse, "The requirement of contractual cooperation in international trade" (1999) I.B.L.J. 7, pp. 737–782.
[79] G. Morin, "Le devoir de coopération dans les contrats internationaux" (1980) D.P.C.I., pp. 13 *et seq.*; P. Pinsolle, "Distinction entre le principe de l'estoppel et le principe de bonne foi dans le droit du commerce international" (1998) J.D.I. Clunet 125, pp. 905–931.
[80] *cf.* also M. Fontaine, "Les clauses de force majeure dans les contrats internationaux" (1979) D.P.C.I., pp. 469 *et seq.*; H. Lesguillons, "Frustration, force majeure, imprévision, Wegfall der Geschäftsgrundlage" (1979) D.P.C.I., p. 507; A. H. Puelinckx, "Frustration, hardship, force majeure" (1986/7) J.I.A. 47; U. Draetta, "*Force majeure* clauses in international practice" (1996) I.B.L.J. 547.
[81] Feduci, *L'obligation de Minimiser les Dommages en cas d'Inexécution des Contrats Internationaux* (L.G.D.J., Paris, 1986).
[82] P. Lalive, "Ordre public transnational (ou réellement international) et arbitrage international" (1986) Rev.Arb., pp. 329–373.





the UNIDROIT Principles of International Commercial Contracts (hereafter the "UNIDROIT Principles").[83] The object of the exercise was "merely to restate existing international contract law".[84] However, the existence of different and at times even conflicting rules often meant that choices had to be made. The criterion adopted for the purpose was this: "which of the rules under consideration had the most persuasive value and/or appeared to be particularly well-suited for cross-border transactions".[85] Consequently, it is specifically stated in the official text of the Principles that the objective is not simply to "codify" already developed rules of custom, but to "establish" a balanced set of rules designed for use the world over regardless of specific legal traditions and economic or political situations.[86]

The Principles set forth general rules for international commercial contracts. In furtherance of the principle of party autonomy, they apply whenever the parties to a transaction have expressly agreed to subject their agreement to them. Most importantly, the preamble states that they "may be applied when the parties have agreed that their contract be governed by 'general principles of law', the '*lex mercatoria*' or the like."[87] The official commentary on this specific point provides that whenever parties agree to have their agreements governed by general principles of law, *lex mercatoria* and the like, and in view of the "vagueness" of such concepts, "it might be advisable to have recourse to a systematic and well defined set of rules such as the Principles."[88] The UNIDROIT Principles thus represent an important step forward in the development of the new international *lex mercatoria* as an autonomous body of law.

**Legal status** For some, the *lex mercatoria* is an autonomous legal system **1.35** that replaces national law (including private international law)—at least when the dispute is not decided by a national court but by commercial arbitration (see paragraph 11.26). In their view, international commercial contracts, submitted to arbitration, are no longer subject to some national law, which is inadequate for the needs of transnational transactions and only applicable by virtue of the whim

[83] UNIDROIT, Principles of International Commercial Contracts (Rome 1994).
[84] M.J. Bonnel, "The UNIDROIT Principles of International Commercial Contracts and the CISG—alternatives or complementary instruments?", 1996 R.D.U. 1, at 30; G. Baron, "Do the Unidroit Principles of International Commercial Contracts form a new *lex mercatoria?*" (2000) Arb.Int.15, pp. 115–130; C. Kessedjian, "Un exercise de rénovation des sources des droits des contracts du commerce international: Les Principes proposés par l'UNIDROIT" (1995) R.C.D.I.P. 84, pp. 641–670; M. J. Bonell, "The UNIDROIT Principles of International Commercial Contracts: towards a new *lex mercatoria*" (1997) I.B.L.J., pp. 145–161; M. Suchankova, "The UNIDROIT Principles of International Commercial Contracts and precontractual liability in the event of failed negotiations" (1997) I.B.L.J., pp. 691–702; A. Giardina, "Les Principes UNIDROIT sur les contracts internationaux" (1995) J.D.I. Clunet, Vol. 122, pp. 547–584; H. van Houtte, "The Unidroit Principles of International Commercial Contracts" (1995) Arb.Int.11, pp. 373–390.
[85] M.J. Bonnel, "The UNIDROIT Principles of International Commercial Contracts and the CISG—Alternatives or Complementary Instruments?", in R.D.U. 1996–1, at 30. Seer also K. Boele-Woelki, "Die Anwendung der UNIDROIT Principles auf internationale Handelssverträge", 1991 I.P.Rax. 161.
[86] UNIDROIT, Principles of International Commercial Contracts (Rome 1994) at viii.
[87] Para. 3 of the Preamble to the UNIDROIT Principles.
[88] *ibid.*, para 4. See K. P. Berger, "The Lex mercatoria doctrine and the UNIDROIT Principles" (1997) L.& Pol.Int'l. Bus.28, pp.943–990.

of some conflict of law rule. The *lex mercatoria* stands, as it were, substantively and procedurally apart from national laws.[89]

A few court decisions recognise the possibility for arbitrators to apply the *lex mercatoria*.[90] Others, however, doubt that the *lex mercatoria* can exist as a substantive and procedurally autonomous legal system.[91] Its components have their shortcomings: uniform laws have only a limited application as they regulate only a few matters and are adopted by only a few countries. The general principles of law are vague and often contradictory: for instance, when can *pacta sunt servanda* be set aside by *rebus sic stantibus*? In short, the *lex mercatoria* is not "self-sufficient". Its rules are insufficiently coherent or detailed to offer a solution to the legal issues, questions of law, which may come up in an international trade dispute.

Even those for whom the *lex mercatoria* is not an autonomous legal system have to recognise that there is substantial room for trade practices and usages in contract law. The Vienna Convention on International Sales of Goods (see paragraph 4.07) and the UNIDROIT Principles, for instance, expressly indicate that trade usages and practices established between the parties constitute implied obligations in a contract.[92] Parties moreover are bound not only by usages to which they have agreed, but also by the usages that are widely known and regularly observed by parties in a particular trade sector.[93] As such, there is also ample scope for regulation of trade usages within the respective national legal systems. Parties can expressly refer to trade usages in their contract. Moreover, numerous legal systems have accepted that the contract entered into by parties must be interpreted in the light of, and supplemented by, existing usages. In so far as trade usages are considered as *lex mercatoria*, the latter is also recognised as standard under national law.

[89] see, *inter alia*, B. Goldman," La lex mercatoria dans les contrats et l'arbitrage internationaux; réalité et perspectives" (1979) J.D.I., pp. 475–505; *ibid.*, *Lex Mercatoria*, Forum internationale no. 3 (Kluwer, Deventer, 1983); *ibid.*, "The applicable law: general principles of law—Lex Mercatoria" in J. Lew (ed.), *Contemporary problems in international arbitration* (London School of International Arbitration, Queen Mary College, 1986) pp. 113–125; *ibid.*, "Nouvelles réflexions sur la Lex Mercatoria" in *Etudes de droit international en l'honneur de P. Lalive* (Helbing & Lichtenhan, Basle, 1993), pp. 241–255; P.Kahn, "Droit international économique, droit du développement, Lex Mercatoria: concept unique ou pluralisme des ordres juridiques?" in *Le droit des relations économiques internationales, Etudes offertes à Berthold Goldman* (Litec, Paris, 1982), pp. 97–107; P. Lalive, "Ordre public transnational (ou réellement international) et arbitrage international" (1986) Rev.Arb., pp. 329–373.

[90] see, *e.g.* K. Berger, "Lex Mercatoria in der internationalen Wirtschaftsschiedsgerichtsbarkeit Der Fall Compania Valencian" (1993) IPRax 281; D. Rivkin, "Enforceability of arbitral awards based on lex mercatoria" (1993) Arb.Int.67.

[91] See A. Kappus, "Lex mercatoria als Geschäftsstatus vor staatlichen Gerichten im Deutschen internationalen Schuldrecht" (1993) IPRax, p.137. The Vienna Convention on the International Sale of Goods, Art. 9 (see para. 4.07) determines, *e.g.* that the parties, save other stipulations, are deemed to have incorporated existing practices into their legal relationship; this provision refers to "a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." See also in the French and Belgian civil code Art. 1135 and in English law, the doctrine of implied terms.

[92] Art. 5.2; see also Art. 4.3 on the role of such usages and customs in the interpretation of contractual obligations.

[93] Art. 1.8 of the Principles.



CHAPTER 2

# THE ROLE OF STATES AND INTERNATIONAL ORGANISATIONS IN INTERNATIONAL TRADE

## PART I: STATES

### The state as regulating body

**Overview** Most regulations of international trade have emanated from states, or have been created with state assistance. International trade transactions are governed and regulated by national law introduced by the state (see paragraph 1.16). States also enter into treaties, which affect international trade. Treaties of friendship, navigation and commerce (see paragraph 1.02) or of investment (see paragraph 7.10) are only some examples. Moreover, the numerous treaties in which states establish international organisations for economic co-operation illustrate how states influence economic life indirectly, that is through organisations. GATT, and now the WTO (see paragraph 3.02), the OECD (paragraph 2.32), the World Bank (paragraph 7.03), the E.U. and many other economic organisations exist because they were established by states. The commodity agreements, through which states attempt to co-ordinate the production and marketing of commodities and to maintain stable commodity prices, deserve a special mention (see paragraph 2.65). The issue of commodities is closely linked to that of developing countries. As such, the plethora of measures introduced so far to accommodate the special interests of developing countries is addressed in this chapter. Furthermore, states also introduce through treaties uniform rules of international trade law, as with the Vienna Convention on the International Sale of Goods (see paragraph 4.05), several conventions on the carriage of goods (paragraph 1.32) and numerous other texts of great significance to international trade law. It is also through states that international customary law and the general principles of international trade law were created (see paragraph 1.10). **2.01**

### The state as trader

**Forms of trade** States do not restrict themselves to the regulation of international trade; they often take an active part in international trade.[1] This participation can assume different forms. States purchase on the world market all that is needed for the administration, organisation and defence of a country. They commission the construction of roads to foreign private contractors; they award **2.02**

[1] J.M. Jacquet, "L'Etat, opérateur du commerce international" (1989) J.D.I. 621.

of some conflict of law rule. The *lex mercatoria* stands, as it were, substantively and procedurally apart from national laws.[89]

A few court decisions recognise the possibility for arbitrators to apply the *lex mercatoria*.[90] Others, however, doubt that the *lex mercatoria* can exist as a substantive and procedurally autonomous legal system.[91] Its components have their shortcomings: uniform laws have only a limited application as they regulate only a few matters and are adopted by only a few countries. The general principles of law are vague and often contradictory: for instance, when can *pacta sunt servanda* be set aside by *rebus sic stantibus*? In short, the *lex mercatoria* is not "self-sufficient". Its rules are insufficiently coherent or detailed to offer a solution to the legal issues, questions of law, which may come up in an international trade dispute.

Even those for whom the *lex mercatoria* is not an autonomous legal system have to recognise that there is substantial room for trade practices and usages in contract law. The Vienna Convention on International Sales of Goods (see paragraph 4.07) and the UNIDROIT Principles, for instance, expressly indicate that trade usages and practices established between the parties constitute implied obligations in a contract.[92] Parties moreover are bound not only by usages to which they have agreed, but also by the usages that are widely known and regularly observed by parties in a particular trade sector.[93] As such, there is also ample scope for regulation of trade usages within the respective national legal systems. Parties can expressly refer to trade usages in their contract. Moreover, numerous legal systems have accepted that the contract entered into by parties must be interpreted in the light of, and supplemented by, existing usages. In so far as trade usages are considered as *lex mercatoria*, the latter is also recognised as standard under national law.

[89] see, *inter alia*, B. Goldman," La lex mercatoria dans les contrats et l'arbitrage internationaux; réalité et perspectives" (1979) J.D.I., pp. 475–505; *ibid.*, *Lex Mercatoria*, Forum internationale no. 3 (Kluwer, Deventer, 1983); *ibid.*, "The applicable law: general principles of law—Lex Mercatoria" in J. Lew (ed.), *Contemporary problems in international arbitration* (London School of International Arbitration, Queen Mary College, 1986) pp. 113–125; *ibid.*, "Nouvelles réflexions sur la Lex Mercatoria" in *Etudes de droit international en l'honneur de P. Lalive* (Helbing & Lichtenhan, Basle, 1993), pp. 241–255; P.Kahn, "Droit international économique, droit du développement, Lex Mercatoria: concept unique ou pluralisme des ordres juridiques?" in *Le droit des relations économiques internationales, Etudes offertes à Berthold Goldman* (Litec, Paris, 1982), pp. 97–107; P. Lalive, "Ordre public transnational (ou réellement international) et arbitrage international" (1986) Rev.Arb., pp. 329–373.

[90] see, *e.g.* K. Berger, "Lex Mercatoria in der internationalen Wirtschaftsschiedsgerichtsbarkeit Der Fall Compania Valencian" (1993) IPRax 281; D. Rivkin, "Enforceability of arbitral awards based on lex mercatoria" (1993) Arb.Int.67.

[91] See A. Kappus, "Lex mercatoria als Geschäftsstatus vor staatlichen Gerichten im Deutschen internationalen Schuldrecht" (1993) IPRax, p.137. The Vienna Convention on the International Sale of Goods, Art. 9 (see para. 4.07) determines, *e.g.* that the parties, save other stipulations, are deemed to have incorporated existing practices into their legal relationship; this provision refers to "a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." See also in the French and Belgian civil code Art. 1135 and in English law, the doctrine of implied terms.

[92] Art. 5.2; see also Art. 4.3 on the role of such usages and customs in the interpretation of contractual obligations.

[93] Art. 1.8 of the Principles.



CHAPTER 2

# THE ROLE OF STATES AND INTERNATIONAL ORGANISATIONS IN INTERNATIONAL TRADE

## PART I: STATES

### The state as regulating body

**Overview** Most regulations of international trade have emanated from states, or have been created with state assistance. International trade transactions are governed and regulated by national law introduced by the state (see paragraph 1.16). States also enter into treaties, which affect international trade. Treaties of friendship, navigation and commerce (see paragraph 1.02) or of investment (see paragraph 7.10) are only some examples. Moreover, the numerous treaties in which states establish international organisations for economic co-operation illustrate how states influence economic life indirectly, that is through organisations. GATT, and now the WTO (see paragraph 3.02), the OECD (paragraph 2.32), the World Bank (paragraph 7.03), the E.U. and many other economic organisations exist because they were established by states. The commodity agreements, through which states attempt to co-ordinate the production and marketing of commodities and to maintain stable commodity prices, deserve a special mention (see paragraph 2.65). The issue of commodities is closely linked to that of developing countries. As such, the plethora of measures introduced so far to accommodate the special interests of developing countries is addressed in this chapter. Furthermore, states also introduce through treaties uniform rules of international trade law, as with the Vienna Convention on the International Sale of Goods (see paragraph 4.05), several conventions on the carriage of goods (paragraph 1.32) and numerous other texts of great significance to international trade law. It is also through states that international customary law and the general principles of international trade law were created (see paragraph 1.10). **2.01**

### The state as trader

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[1] J.M. Jacquet, "L'Etat, opérateur du commerce international" (1989) J.D.I. 621.

the construction of government buildings and technical installations to foreign companies; they buy weapons and ammunition abroad. Some states sell their natural resources (*e.g.* oil, ore, gas) on the world market. Furthermore, they procure goods abroad in order to secure supply of the country.

States occasionally participate directly in international trade. They themselves may enter into an investment agreement with a foreign company (see paragraph 7.09), for instance to order, say, a fleet of army helicopters.[2] Sometimes it is a state entity, *e.g.* a ministry, that conducts the business. Usually trade is conducted through a state company, which takes care of a particular sector of industry. Algeria, for instance, sells its oil through Sonatrach (*Société nationale pour la recherche, le transport et la commercialisation des hydrocarbures*); it orders turn-key factories abroad through Sonacome (*Société nationale de constructions mécaniques*). Iran exports its oil through NIOC (the *National Iranian Oil Company*). There are many more examples. States sometimes establish joint ventures with foreign companies to engage in production and trading with the benefit of foreign capital and/or know how.

The nature and characteristics of a state trading enterprise are determined by the purpose and objectives for which it is established. State trading enterprises tend to be more common in the agricultural sector than in manufacturing industry.[3] With respect to industrial goods, "state trading appears to arise either as a by-product of the nationalisation of an ailing industry or as a mechanism for pursuit of government policies pertaining to products/industries considered to have strategic importance."[4] The basic objectives for which state trading enterprises are established include income support for domestic producers, price stabilisation, expansion of domestic output, continuity in domestic food supply, increase in government revenue, decrease in government spending, rationalisation and control of foreign trade operations, protection of public health, and fulfilment of international commitments with respect to quantity and/or prices.[5]

The type of relationship between the state trading enterprise and the government covers a broad spectrum, ranging from enterprises that are fully integrated into the government administration to enterprises such as statutory and marketing boards that appear to be completely separate and distinct from the government administration.[6] State trading enterprises are generally called statutory marketing boards, export marketing boards, regulatory marketing boards, fiscal monopolies, canalising agencies, foreign trade enterprises, and boards or corporations with responsibility for nationalised industries.[7]

**2.03** **Transnational procurement** It can be tempting for states and state entities to pursue a policy of procuring supplies and services from within their country.

[2] See, *e.g. Westland Helicopters Ltd v. Arab Republic of Egypt* (1986) Y.Com.Arb. 127.
[3] WTO, *Operations of State Trading Enterprises as they Relate to International Trade: Background Paper by the Secretariat*, G/STR/226, October 1995.
[4] See WTO doc. G/STR/226, para. 5.
[5] See WTO doc. G/STR/226, para. 6.
[6] See WTO doc. G/STR/226, para. 9.
[7] See WTO doc. G/STR/226, para. 12.





Public funds would then benefit local businesses. This would improve employment. The state would even be able to recover part of the money spent through taxes. However, "buying national" does not always give the most competitive prices or the best quality. Moreover, if all states followed such a policy, international trade would be curbed dramatically. Consequently, international organisations which promote free trade, such as the WTO, NAFTA and the E.U., have limited the powers of their Member States to buy local (see paragraph 3.37).

**2.04** **Fighting against corruption** The post-Cold War era of liberalisation and privatisation of formerly state-owned enterprises in many transition and developing countries has witnessed an unprecedented growth in the incidence and depth of corruption as means of influencing governmental decision-makers. Given the damaging nature of corruption to economic growth and social stability, there is a corresponding growing urgency for action in this vital area.[8] According to the World Bank, corruption in Eastern Europe and the former Soviet Union is "developing new dimensions, reaching new heights, and posing new challenges."[9]

Corruption is by no means limited to the developing countries and transition economies; it is also a serious problem in the developed world.[10] To address this global problem, a number of global initiatives are being taken at different levels. International financial institutions are increasingly linking financial assistance to the "recipient government's readiness and ability to control corruption"[11]; the UN has adopted a resolution calling for effective measures to combat corruption[12]; and international treaties are being concluded to address the problem.[13] Perhaps the most important development in this area has been the conclusion in

[8] For an in-depth analysis of the nature, forms and extent of corruption as well as a possible multi-pronged strategy to address the problem, see World Bank, *Anticorruption in Transition: A Contribution to the Policy Debate*, September 2000. See also S.R.Salbu, "The foreign corrupt practices act as a threat to global harmony" (1999) Mich.J.I.L. 20, pp. 419–449.
[9] See World Bank, *op.cit.*, p. xiii.
[10] See Transparency International, http://www.transparency.de.
[11] See, P. van den Bossche, "A 'normal' business practice becomes a criminal offence: the 1997 OECD Convention on Combating Bribery of Foreign Public Officials in International Business", in M. Bronckers and R. Quick, *New Directions in International Economic Law: Essays in Honour of John H. Jackson* (Kluwer, 2000) 441, p. 442. See also D. Gantz, "Globalizing sanctions against foreign bribery: the emergence of a new international legal consensus" (1998) NW.J.Int'l.L&Bus. 18, pp. 457 *et seq.*; P.M. Nichols, "Are extraterritorial restrictions on bribery a viable and desirable international policy goal under the global conditions of the late twentieth century? Increasing global security by controlling transnational bribery"(1999) Mich.J.I.L. 20, pp. 451–476; P.M. Nichols, "Regulating transnational bribery in times of globalization and fragmentation" (1999), YaleJ.Int'l.L. 24, pp. 257–304; P.M. Nichols, "Outlawing transnational bribery through the World Trade Organization" (1996–97) L.&Pol.Int'l.Bus. 28, pp. 305–381; W. Goossens, "National and international anti-bribery regulations: practical implications for multinational companies and compliance programs" (1999) I.B.L.J., vol.1, pp. 19–46; A. Posadas, "Combating corruption under international law" (2000) Duke.J.C.I.L., Vol. 10, pp. 345–414; S.R. Salbu, "Extraterritorial restriction on bribery: a premature evocation of the normative global village" (1999) YaleJ.Int'l.L. 24, pp. 223–256.
[12] See United Nations Declaration Against Corruption and Bribery in International Commercial Transactions, UN doc. G.A. Res. 51/191.
[13] The "world's first anti-corruption treaty" was concluded between Members of the Organisation of American States (OAS) in 1996; see "Inter-American Convention against Corruption" (1996) I.L.M. 35, p. 724. See also P. van den Bossche, *op cit.*; p. 442.

1997 of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, under the auspices of the OECD.

The overall purpose of this Convention is to take effective measures

> "to deter, prevent and combat the bribery of foreign public officials in connection with international business transactions, in particular the prompt criminalisation of such bribery in an effective and coordinated manner . . . ."[14]

To that end, Article 1.1 of the Convention provides that each party

> "shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business."

Parties are also required to forbid the tax deductibility of private sector expenses made to bribe foreign public officials. The disciplines introduced by the Convention thus try to drain corruption from its source, *i.e.* the supply side of the problem—often called "active corruption". It does not address the so-called "passive corruption", *i.e.* the demand side of the problem. The Convention entered into force in 1999. As of June 2001, it had been signed[15] and ratified[16] by 33 countries.

[14] Para. 3 of the Preamble to the Convention. For a useful analysis of the Convention, see P. van den Bossche, *op.cit.*, pp. 441 453. See also R. D. Tronnes, "Ensuring uniformity in the implementation of the 1997 OECD Convention on combating bribery of foreign public officials in international business transactions" (2000) Geo.Wash.J.Int'l.L.&Econ. 33, pp. 97–130; P. Cavalerie, "La Convention OCDE du 17 Décember 1997 sur la lutte contra la corruption d'agents publics étrangers dans les transactions commerciales" (1997) AFDI 609–632; G.Sacerdoti, "The 1997 OECD Convention on combating bribery of foreign public officials in international business transactions" (1999) I.B.L.J., vol.1, pp. 3–18; K.Loken, "The OECD Anti-Bribery Convention: coverage of foreign subsidiarity" (2001) Geo.Wash.J.Int'l.L.&Econ. 33, pp. 325–340. The full text of the Convention is available at http://www.oecd.org/daf/nocorruption/20nov1e.htm.

[15] The 34 signatories to the Convention include all 29 OECD countries (Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Japan, South Korea, Luxembourg, Mexico, the Netherlands, New Zealand, Norway, Poland, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States) as well as five non-OECD countries (Argentina, Brazil, Bulgaria, Chile, and Slovak Republic).

[16] The following have deposited instruments of ratification/acceptance of the Convention on the dates in parentheses: Iceland (August 17, 1998), Japan (October 13, 1998), Germany (November 10, 1998), Hungary (December 4, 1998), United States (December 8, 1998), Finland (December 10, 1998), United Kingdom (December 14, 1998), Canada (December 17, 1998), Norway (December 18, 1998), Bulgaria (December 22, 1998), Korea (January 4, 1999), Greece (February 5, 1999), Austria (May 20, 1999), Mexico (May 27, 1999), Sweden (June 8, 1999), Belgium (July 27, 1999), Slovak Republic (September 24, 1999), Australia (October 18, 1999), Spain (January 14, 2000), Czech Repulic (January 21, 2000), Switzerland (May 31, 2000), Turkey (July 26, 2000), France (July 31, 2000), Brazil (August 24, 2000), Denmark (September 5, 2000), Poland (September 8, 2000), Portugal (November 23, 2000), Italy (December 15, 2000), Netherlands (January 12, 2001), Argentina (February 8, 2001), Luxembourg (March 21, 2001), Chile (April 18, 2001), New Zealand (June 25, 2001).





**State contracts** Contracts concluded between, on the one hand, states or state entities or subdivisions, and on the other hand foreign companies, often indicate that they are governed by the law of the state party thereto. This is generally the law with the closest connection, as the contract most often has to be performed on the territory of the state party. Besides, it would be politically unacceptable for the state party to accept a contract governed by the law of another state. However, as it may be easy for the state party to have its national law changed, the terms of the contract may change to the detriment of the foreign company. In order to protect the foreign company against changes in the national law, state contracts therefore often indicate that they are governed by both the national law as well as by international law or general principles of law. (See further paragraph 7.09.) **2.05**

## Immunity from jurisdiction and enforcement

**Concept of immunity from jurisdiction** The problem of immunity sometimes arises when states participate in international trade. Traditionally, the sovereign equality of states meant that one country's court could have no jurisdiction over the conduct of another state. A state thus enjoyed immunity from jurisdiction before the courts of other states. When a state was summoned before the court of another state, the court had to declare itself incompetent. This immunity, which applied not only to states but also to its organs and other entities,[17] still exists to some extent.[18] However, a foreign state that itself files a claim before a court or arbitration tribunal is deemed to have waived its immunity of jurisdiction, so that it can be the subject of a counterclaim. Similarly, the acceptance of an arbitration clause in a contract is considered a waiver of immunity of jurisdiction.[19] **2.06**

**Restrictions** In the past, the immunity from jurisdiction seldom led to difficulties; it was generally applied without restrictions. Nowadays, however, this is no longer possible: states and private persons alike now often take part in international trade. They buy and sell goods, charter ships and commission works and services. **2.07**

[17] See H. Schreuer, *State Immunity: Some Recent Developments* (Grotius, Cambridge, 1988) pp. 92–124; H. van Houtte, "Immunité de jurisdiction, in les Etats fédéraux dans les relations internationales" (1983) R.B.D.I. 461–479.

[18] See H. Schreuer, *op.cit.*; the theme issue on immunity in (1979) N.Y.I.L.; M. Sornarajah, "Problems in applying the restrictive theory of sovereign immunity" (1982) I.C.L.Q. 661; *State Immunity Cases*, 3 parts (Grotius Publications Llandysul, 1984). See also D. Nedjar, "Tendances actuelles du droit international des immunités des Etats" (1997) J.D.I. 124, pp. 59–102.

[19] See, *e.g.* J. Langkeit, *Staatenimmunität und Schiedsgerichtsbarkeit* (Recht und Wirtschaft, Heidelberg, 1989). See also, *e.g.* G. Delaume, "Contractual waivers of sovereign immunity: some practical considerations" (1990) *ICSID Review* 232.

It would be unreasonable with regard to its trading partners if the state enjoyed immunity in all these circumstances and could not be brought before a court for breach of contract. However, some countries still grant general immunity. Yet, most states restrict the possibility of immunity for a foreign state. In some countries, such as the United Kingdom,[20] the United States[21] Canada[22] and Australia,[23] statutes spell out the specific circumstances in which immunity will be granted. In other countries, courts have developed criteria for immunity of jurisdiction.

A convention on state immunity, which reflects general principles on this subject, is in force in some European countries.[24] Draft texts from international organisations,[25] which express more recent thinking, are not yet fully accepted.

Although the specific reasoning for granting or refusing immunity thus may differ from country to country, in most systems, transactions of public authority (acts *jure imperii*) have to be distinguished from commercial transactions (acts *jure gestionis*). The state maintains immunity for the first group of acts; no immunity is granted for the second group of acts. International law does not give a definition for what must be understood under acts of public authority. Many attempts have been made to provide an exhaustive list of transactions of public authority, but it turned out impossible to get agreement between the states. Each national court must give this concept substance. This inevitably leads to different opinions.[26]

Sometimes the purpose of the transaction determines whether it is an act of public authority or a commercial transaction. In this perspective the transaction, the purpose of which is to provide for the needs of the public service, is an act for which the state enjoys immunity. However, it is often the nature of the transaction that is examined: if the transaction can be characterised as one that may not only be carried out by the state, but also by a private person, then that transaction is commercial and therefore the state has no immunity; if, on the other hand, the transaction can only be performed by the state, then that

[20] See the State Immunity Act 1978, (1978) 17 I.L.M. 1123.

[21] See the Foreign Sovereign Immunities Act 1976, (1976) 15 I.L.M. 1388 and (1989) 28 I.L.M. 396. See, *e.g.*, S.R. Harjani, "Litigating claims over foreign government-owned corporations under the commercial activities exception to the foreign sovereign Immunities Act" (1999) NW.J. Int'l.L.&Bus. 20, pp. 181–201.

[22] State Immunity Act (1982), (1982) 21 I.L.M. 798.

[23] Foreign States Immunities Act (1985), (1986) 25 I.L.M. 715.

[24] The European Convention of May 16, 1972 on state immunity, in force between Austria, Belgium, Cyprus, Germany, Great Britain, Luxembourg, the Netherlands and Switzerland, (1972) 11 I.L.M. 470; C. Karczewski, "Das Europäische Ubereinkommen über Staatenimmunität vom 16.5.1972" (1990) RabelsZ 533–550.

[25] See, *e.g.* with reference to the International Law Commission "Draft articles on jurisdictional immunities of states and their property" (1991) 30 I.L.M. 1566; D. Greig, "Forum state jurisdiction and sovereign immunity under the International Law Commission draft articles" (1989) I.C.L.Q. 560; C. Kessedjan and C. Schreuer, "Le project d'articles de la Commission du Droit International des Nations-Unies sur les Immunités des Etats" (1992) Rev.gen.dr.int.pub. 299; (1992) Yearbook Institute International Law, vol. 64–II, 214.

[26] See, *e.g.* I. Brownlie, "Contemporary problems concerning the jurisdictional immunity of states" (1989) A.I.D.I. 13; J. Crawford, "International law and foreign sovereigns: distinguishing immune transactions" (1983) B.Y.I.L. 75.





transaction is, as regards its character, an act of a public authority for which immunity is granted. Depending on which criterion is used, the objective or the nature of the transaction, it is either easier or more difficult to grant immunity. The purchase of cigarettes for the army by the state is, as regards its purpose, a government transaction (the objective being providing a public service need); as regards its nature, a commercial transaction (the purchase of cigarettes).[27]

**Immunity from enforcement** The less the degree of immunity of jurisdiction enjoyed by states and state entities, the greater the possibility that they will be sanctioned by a foreign court. However, this does not necessarily mean that judgment can be enforced against them or that their assets can be seized. Indeed, under international law, states and state entities which do not enjoy immunity of jurisdiction for a specific claim, can still enjoy immunity of enforcement for assets used by the public service: a court is not allowed to seize foreign state property or to enforce judgments against foreign state property which is used for the public service. It is therefore not permitted to embargo foreign warships, which dock in port, or to seize the embassy building of a foreign state. Enforcement is only possible on the few assets that the state does not need for the functioning of its public service.[28] The borderline between assets required for the public service and other assets is not always clear. Therefore, whether, for instance, the bank account of a foreign embassy can be attached, is often open to question.[29] The European Convention on State Immunity (see paragraph 2.07) does not restrict immunity from enforcement. The Convention simply states that every state "has to give effect" to a judgment against it, but it accepts, nevertheless, that attachment measures and enforcement may be excluded. **2.08**

When a foreign state has immunity from enforcement, a creditor may still attempt to achieve enforcement by means of diplomatic pressure from his own country.

**Sovereign equality of states** One of the basic principles of international law is the "sovereign equality" of states[30]: every state is both sovereign and equal. **2.09**

Sovereignty implies that each state can determine its own state structure and economic order. The Charter of Economic Rights and Duties of States (see paragraph 7.29) recognised that every state has "the sovereign and inalienable right to choose its economic system as well as its political, social and cultural systems in accordance with the will of the people, without outside interference,

[27] See, *e.g.* C. Schreuer, *op.cit.*, pp. 10–43; Paris, January 7, 1955 (1957) J.D.I. 408.

[28] C. Schreuer, *op.cit.*, pp. 125–167. Also P. Bourel, "Aspects récents de l'immunité d'exécution des Etats et services publics étrangers" (1983–1984) Comité français de droit international privé, 1983–84 133; Cass.Fr., June 28, 1989, (1990) J.D.I. 1004.

[29] See H. van Houtte, "Towards an attachment of embassy bank accounts" (1986) R.B.D.I. 70.

[30] See XXV G.A. Res. 2626(1970), Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, sixth principle (accepted without a vote), as well as Charter of Economic Rights and Duties of States, Art. 10 (para. 7.29).

coercion or threat in any form whatsoever" (Article 1). This fundamental principle remains essential.

From a legal point of view, all states are equal, no matter what their political and social system. They are all equal members of the international community. They have the same rights and duties under international law. The Charter of Economic Rights and Duties of States specified what has to be understood under equality in economic terms: every state has the right to engage in international trade (Article 4). They have the right to participate fully and effectively in the international decision-making process in the solution of world economic, financial and monetary problems through the appropriate international organisations and to share equitably in the benefits resulting therefrom (Article 10). They have the right to benefit from the advances and developments in science and technology (Article 13). They have the right to enjoy fully the benefits of world "invisible trade" (transfer of technology, banking, insurances) and to engage in the expansion of such trade (Article 27).

The formal legal equality of states does not prevent factual inequality because of different political and economic structures.

2.10 **State-run economies and the international economic order** Since the Second World War, but more especially during the past decade, the international economic order has seen the extension of the free market economy. Some countries have fared better in this free market than others. Those states which have, or had, a state-run economy (command economy) often have had some difficulty in adjusting to the free market structure. State controlled foreign trade, operating through a restricted number of enterprises, usually impedes or prevents free import and export of goods. State ownership of the means of production often discourages foreign investments. Nevertheless, those states with command economies are making efforts to integrate into the international economic order. Membership of the WTO, for instance, is open to countries with a state-run economy provided they respect the basic principles of international free trade.

2.11 **Developed and developing countries** Differences in the development level of states have, in principle, no influence on their legal equality. All states, rich or poor, are equal under international law.

Nevertheless, those countries with less developed economies are often intended to benefit from certain advantageous arrangements that do not apply to more developed countries. Numerous organisations grant preferential treatment to developing countries. GATT has a special arrangement for developing countries (see paragraph 2.46), many UN organisations specifically care for developing countries (see paragraph 2.24), the World Bank gives them advantageous investment credits (see paragraph 7.03), MIGA insures the moneys invested in developing countries (see paragraph 7.44), and individual rich countries grant various preferences to developing countries (see paragraph 2.49). The purpose of these advantages must be to prevent the development gap between the richer and poorer nations growing any wider, and also to assist the developing countries on the road to economic development.





2.12 **International development law** It has been argued that a specific part of international law, *i.e.* international development law,[31] focuses on the position of developing countries. Although this approach is no longer much discussed, it is still worthwhile summarising the two basic principles of international development law:

1. developing countries have a "right to development";
2. developed and developing countries have a "duty of solidarity".

These principles are not yet recognised as fully fledged legal obligations. However, they may operate as guidelines for developed nations in their relations with poorer nations.

2.13 **The right to development** The right to development is mentioned in many UN texts. The most extensive text in this respect is the Declaration on the Right to Development, adopted by the General Assembly in 1986.[32]

The precise nature of the right to development, however, is not entirely defined. Every state has, of course, complete liberty to develop through its own efforts and its own economic means; but does the right to development also mean that, when the poorer countries have insufficient means, the richer countries are obliged to help them, for instance, with financial aid or trade preferences? Is the right to development a kind of human right, given to a state instead of an individual? Or is it an economic right?[33]

The richer countries have not yet accepted the right to development as a binding norm of international law,[34] although they often do recognise a moral duty to assist poorer countries. In many cases they are prepared to grant financial aid or trade preferences to poorer countries on a voluntary basis. They do not accept, however, that there is an international obligation to provide aid. This view found some expression by the International Court of Justice, when it decided in

[31] See, *e.g.* G. Abi Saab, "Le droit au développement" (1988) A.S.D.I. 9; G. Blanc, "Peut-on encore parler d'un droit du développement" (1991) J.D.I. 903; M. Flory, *Droit international du Développement* (Coll. Themis, Paris, 1977); G. Feuer and H. Cassan, *Droit international du Développement* (Dalloz, Paris, 1991); K. Mbaye, "Le droit au développement en droit international", *Essays in International Law in Honour of Judge M. Lachs* (Nijhoff, Den Haag,1984) p. 163; H. Petersmann, "The right to development in the United Nations", in *Das Menschenrecht zwischen Freiheit und Verantwortung, Festschrift K. Partsch* (Berlin, 1989); F. Snyder and P. Slinn (ed.), *International Law of Development, Comparative Perspectives* (Professional Books, Abingdon, 1987).

[32] G.A. Res. 41/128 of December 4, 1986, adopted with 146 votes for, 1 against (USA) and 8 abstentions (West Germany, Denmark, Finland, Iceland, Israel, Japan, Sweden, U.K.). See C.A. Colliard, "L'adoption par l'Assemblée Générale de la Déclaration sur le droit au développement" (1987) A.F.D.I. 614.

[33] See R. J. Dupuy (ed.), *The Right to Development at the International Level* (Academy of International Law Workshop, Den Haag, 1979); P. De Waart, P. Peters and E. Denters, *International Law and Development* (Nijhoff, Dordrecht, 1988); I. Seidl-Hohenveldern, *International Economic Law* (Nijhoff, Dordrecht, 1989) p. 6.

[34] However, see N. Poulantzas, "Development aid as a legal obligation in process of formation" (1982–3) Rev.hellenique.dr.int. 117.

the case between Nicaragua and the United States, that international aid is "rather unilateral and voluntary", so that this aid could be stopped unilaterally.[35]

**2.14** **Duty of solidarity** Richer states have to show solidarity with developing countries.[36] The Charter of Economic Rights and Duties dictated that states have to pursue a more just economic order, concerned with the needs and interests of developing countries (Art. 8). The richer countries have a duty to co-operate in the economic and social advancement of poorer countries (Arts 9 and 14). They should give tariff and other trade preferences to developing countries (Arts 18 and 19).

Article 17 summarises the duties of the developed countries in respect of the developing countries:

> "International co-operation for development is the shared goal and common duty of all states. Every state should co-operate with the efforts of developing countries to accelerate their economic and social development by providing favourable external conditions and by extending active assistance to them, consistent with their development needs and objectives."

However, the Charter is rather soft law. It does not introduce binding rules or law, merely guidelines.

**2.15** **Qualification as a developing country** Developing countries enjoy some advantages. It is, therefore, important to know which countries belong to this group. Economists have developed criteria to distinguish developing and developed countries. These criteria are in principle of an economic nature (*e.g.* national product per capita) or social (*e.g.* degree of literacy). In the end, the states have to agree with the qualification. However, generally preferential treatment for developing countries depends on auto-selection: each country that wants a specific advantage granted to developing countries may present itself as a developing country to the richer countries and is usually accepted as such.

Developing countries are sometimes subdivided into three sub-groups: the least developed countries (LLDCs, such as Burundi), the less developed countries (LDCs, such as Morocco) and the newly industrialised countries (NICs, for example, in the Far East: Taiwan, Hong Kong, Singapore; and in Latin America: Argentina, Brazil and Mexico). The advantages are often adjusted to the needs of the three groups.

The E.U. grants the LLDCs unlimited general preferences; LDCs enjoy general preferences for a certain number of goods, while the normal import regime applies for the surplus of these goods. NICs can only import a certain number of goods with general preferences, while for the remainder an import stop applies

[35] ICJ, June 27, 1986, *Nicaragua v. United States-Merits*, (1986) I.C.J. Reports, 1986, 138, paras 245 and 276.

[36] U. Scheuner, "Solidarität unter der Nationen als Grundsatz in der gegenwärtigen internationalen Gemeinschaft" in J. Delbruck (ed.), *Festschrift E.Menzel* (Duncker & Humblot, Berlin, 1975) p. 274.





(see paragraph 3.25). The IBRD finances investments in LDCs, whereas the LLDCs are supported rather by the IDA (see paragraph 7.03).

# PART II: INTERNATIONAL ORGANISATIONS

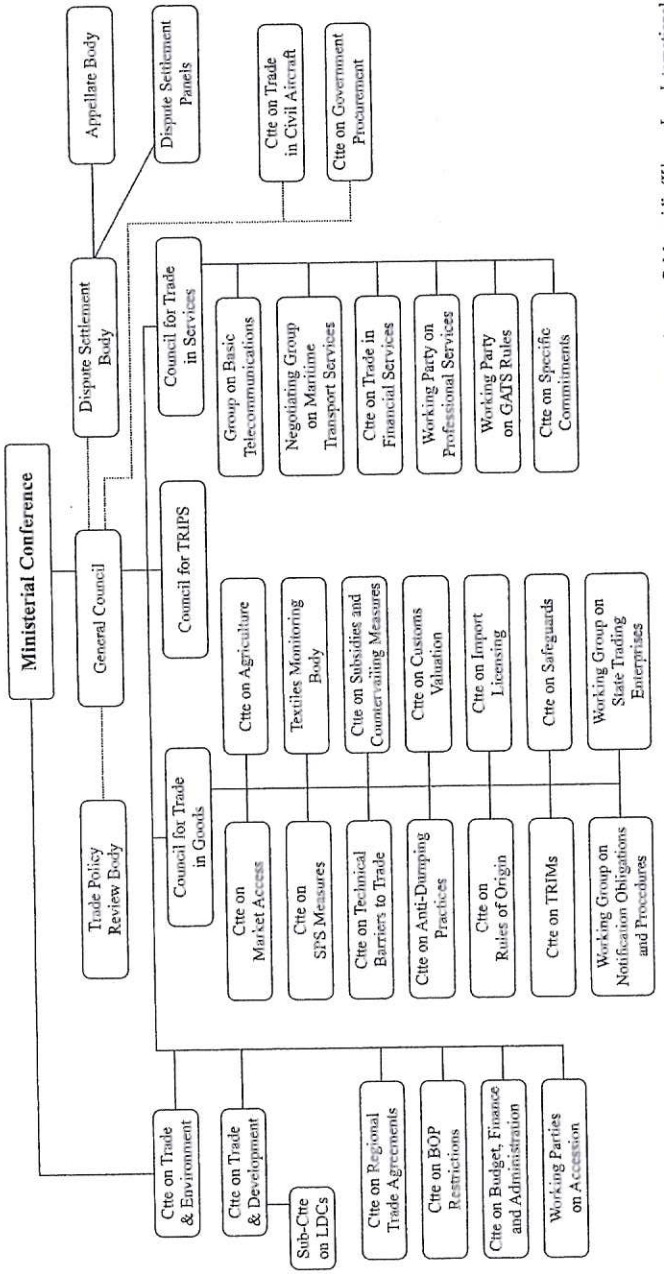
**2.16** **Outline** International organisations are very important to international trade law. We will focus successively on the multilateral trading system of the GATT/WTO (paragraph 2.17), other organisations involving all countries in the world, such as the United Nations and some dependent bodies (paragraph 2.19), institutions dealing with the harmonisation of international law (paragraph 2.28), other restricted organisations (paragraph 2.31), regional economic organisations (paragraph 2.34), and the non-governmental organisations (NGOs) (paragraph 2.42).

## GATT and WTO

**2.17** **GATT as an international organisation** In the sense of being an international organisation, GATT never had any legal foundation. With its small Secretariat in Geneva, it was only a *de facto* international organisation, with neither regulatory nor jurisdictional powers. All regulatory and jurisdictional powers were vested in the contracting states themselves, who exercised their powers through the general conference of Contracting Parties held at regular intervals. This conference can be compared with a traditional international conference. Since 1960 the day-to-day administration was handled by a GATT Council composed of representatives of the Contracting Parties. All subsequent efforts to establish an international organisation administering the General Agreement, such as the 1954 proposed charter for an Organisation for Trade Co-operation (OTC), failed. The GATT had therefore to continue as the only organisation for such purpose until the Uruguay Round (1986–1994) succeeded in establishing a full-fledged successor, the World Trade Organisation (WTO).

**2.18** **The World Trade Organisation (WTO)** The "constitution" establishing the WTO as an organisation to provide the common institutional framework for the conduct of trade relations among its Members is contained in the Marrakesh Agreement of April 15, 1994 establishing the WTO. The WTO Ministerial Conference, composed of representatives of all Member States, convenes at least every two years; the General Council, likewise composed of representatives of the Member States, conducts the function of the Ministerial Conference in the period between two conferences; the WTO Secretariat renders administrative assistance. The Council for Trade in Goods oversees the functioning of GATT, the Council for Trade in Services oversees the GATS, and the Council for TRIPS oversees the TRIPS agreement. There are also separate bodies administering the dispute settlement system (the Dispute Settlement Body) and the trade policy review mechanism (the Trade Policy Review Body). The figure overleaf shows the organisational structure of the organisation.

**WTO Structure**[36a]




[36a] This diagram first appeared in *Dispute settlement in the World Trade Organization: practice and procedure*, by David Palmeter and Petros C. Mavroidis (Kluwer Law International, The Hague, 1999), p. 14 and is reproduced with kind permission of the publishers.





Currently,[37] the WTO has 141 member countries and 33 more have observer status. Thirty of the observers (including such big players as China and Russia) have already applied for accession and are negotiating their terms. Indeed, China's accession process has entered its last phase and could take place at any time. Observers (with the exception of the Holy See) are generally required to start accession negotiations within five years of acquiring observer status.

The status of the E.U. in the WTO is somewhat ambiguous. Formally, the Member States (but not the E.U.) were the contracting parties to GATT. However, both the E.U. and the Member States had a seat in the GATT Council and in the Conference of Contracting parties. Since the creation of the WTO as well, the E.U. has always represented the Member States, except on two occasions: when the budgetary matters are discussed, and when the E.U. has given its Member States permission to speak.

## Other world organisations

**Introduction** The global organisations, which play an important role in the development of international economic law, belong to or are connected with the United Nations. The UN not only looks after international peace and security, but is also concerned with the more general economic and social situation in the world. A special chapter in the UN Charter (Chapter IX) is devoted to international economic and social co-operation organised under the auspices of the UN to improve living standards and economic and social development.[38] **2.19**

The UN operates in the economic, social and technical field through its own bodies and specialised institutions. Some of these formulate resolutions; others initiate or finance development projects. Most give each member one vote, which means that the developing countries have a majority in numbers and can, therefore, influence decision-making; other, like the World Bank, give the Member States a vote weighted in accordance with their financial contribution, so that the richer countries have more power.

## Main institutions of the United Nations

**The General Assembly** The General Assembly is one of the main institutions of the UN, holding its annual session in New York from the end of September until Christmas. Occasionally, special sessions are organised to discuss specific problems.[39] The General Assembly can discuss all issues that come **2.20**

[37] As of May 2001.

[38] See Colloque Société française pour le droit international, *Les Nations Unies et le droit international économique* (Pedone, Paris, 1986); M. Belanger, *Institutions économiques internationales* (Economica, Paris, 1987) pp. 51–63; B. Colan (ed.), *Global Economic Co-operation—A guide to Agreements and Organizations* (Kluwer, Deventer, 1994).

[39] *e.g.* 6th special session (1974): Commodities and Development; 7th special session (1975): Development and international economic co-operation; 13th special session (1986): The critical economic situation in Africa; 18th special session (1990): International economic co-operation.

within the competence of the UN. All Member States of the UN have a seat in the General Assembly. Every state has one vote. Resolutions are adopted with ordinary or two-thirds majorities. The General Assembly is the forum *par excellence* for the developing countries, often acting as the so-called Group of 77. Because of their numerical superiority, the developing countries can influence the General Assembly.

The resolutions of the General Assembly are not binding. However, if they are accepted unanimously, they may crystallise customary law (see paragraph 1.10). For instance, in 1962 when the General Assembly unanimously adopted the resolutions on the Permanent Sovereignty over Natural Resources, this concept was introduced into international law (see paragraph 7.28). On the other hand, the Charter of Economic Rights and Duties, which it adopted in 1974 without sufficient consensus, did not become customary law.

The General Assembly occasionally gets involved in the negotiation of multilateral treaties. In this case, the General Assembly usually adopts the text of such a treaty in a resolution and urges the Member States to sign the treaty.

The General Assembly may request the Security Council to impose economic sanctions on states. Since resolutions of the General Assembly do not bind the Member States, the states are not obliged to give effect to such petitions. It is not clear to what extent a Member State, having complied with a request from the General Assembly for economic sanctions, may rely on the UN Charter.[40]

The General Assembly often refers discussions to one of the committees, also representing all Member States. The sixth committee, the Legal Affairs Committee, is particularly important for international trade law.

2.21 **Security Council** The Security Council takes care of international peace and security. It consists of 15 members, of which five are permanent members (China, France, the United Kingdom, United States and Russia). The other 10 non-permanent members, coming from different regions, are appointed by the General Assembly. Procedural questions are decided by at least nine votes for; non-procedural questions are also decided with at least nine votes for, and no votes of the five permanent members against. Each permanent member has thus a right of veto.

The Security Council can impose economic measures against a state for the preservation of peace and security.[41] The Member States have to implement these economic measures.[42] The Security Council has imposed economic sanctions several times. Sanctions were imposed against Southern Rhodesia in the 1960s. In 1977, because of South Africa's policy of apartheid, the Security Council prohibited the supply of weapons, ammunition and military equipment and

[40] See, *inter alia*, P.M. Eisemann, "Article 41" in J.P. Cot and A. Pellet, *La Charte des Nations Unies* (Economica, Paris, 1991) pp. 691–704; H. van Houtte, "Treaty protection against economic sanctions" (1984–85) R.B.D.I. pp. 51–52.

[41] UN Charter, Art. 39. See *in casu* J.P. Cot and A. Pellet, *op.cit.*, pp. 645–666. The Security Council can also only recommend economic sanctions. See J.P. Cot and A. Pellet, *op.cit.*, p. 703.

[42] UN Charter, Arts 48 and 49; J.P. Cot and A. Pellet, *op.cit.*, pp. 749–762.





co-operation in the development of atomic weapons. In 1990 the Security Council prohibited trade with Iraq and Kuwait when Iraq illegally invaded Kuwait; the economic sanctions against Iraq remained in force after the military action against Iraq in 1991.[43] In 1991, the Security Council imposed sanctions on Yugoslavia because of its aggression in the Balkans, which have been lifted since.

The economic sanctions imposed by the Security Council have been effective only to a limited extent. Rhodesia succeeded in surviving the sanctions for 10 years because the boycott was not generally observed. The measures against South Africa were only limited in scope; the South African regime remained in power for a long time. And the boycott of Iraq did not remove Saddam Hussein from power.

**ECOSOC** The Economic and Social Council (ECOSOC) is a UN body active specifically in the social and economic area. Fifty-four UN Member States, all elected on the basis of a fair geographic distribution, have a seat in ECOSOC.[44] The majority of members are therefore developing countries. 2.22

ECOSOC may commission studies on international economic problems. It may draft conventions and organise conferences on social or economic affairs. ECOSOC also functions as co-ordinator between various specialised institutions and the UN. It may co-ordinate the activities of the specialized institutions of the UN and it issues annually a report on their activities.[45] ECOSOC can only discuss; it has no actual power of decision. Moreover, it does not deal with economic issues, which are already covered by a specialised institution or another UN body.[46]

Several committees operate within ECOSOC.[47] The Regional Economic Committees deserve a special mention. The Economic Commission for Europe (ECE), for instance, has been very active in the field of international trade law. In the 1950s and 1960s it facilitated trade between Western Europe and of the state-run economies communist Eastern Europe. Arbitration rules,[48] an arbitration convention,[49] several standard contracts for turnkey projects, and many of its other documents are still relevant. At present, the ECE is involved in the simplification of international trade procedures, the standardisation of documents

[43] See, *inter alia*, M. Weller, "The Kuwait Crisis; a survey of some legal issues" (1991) A.J.I.C.L. 1; E. Lauterpacht, *The Kuwait crisis: sanctions and their economic consequences* (Grotius, Cambridge, 1991); T. Merow and B.H. Weston, "The Gulf crisis in international and foreign relations law" (1991) Am.J.Int'l.L. 63 *et seq.* and 506 *et seq.*; B. Grelon and C.E. Gudin, "Contrats et crise du Golfe" (1991) J.D.I. 633; B. Stern, *Les Aspects Juridiques de la Crise et de la Guerre du Golfe* (Montchrestien, Paris, 1991).

[44] Accordingly, the ECOSOC members are distributed as follows: Africa: 14; Asia: 11; Latin America: 10, eastern Europe: 6; western Europe and other countries: 13.

[45] UN Charter, and Arts 62–66.

[46] J. P. Cot and A. Pellet, *op.cit.*, pp. 691–704.

[47] *e.g.* in respect of natural resources, development planning, technology for development, transnational enterprises, transport of dangerous materials, international standards for accounting.

[48] The ECE Arbitration Rules have played an important role in East-West Trade dispute settlement, but have now been overtaken by the UNCITRAL Arbitration Rules (see para. 11.21).

[49] European Convention on International Commercial Arbitration of 1961.

and the promotion of harmonised practices through its recently created Centre for Trade Facilitation and Electronic Business (CEFACT).[50]

## Other bodies and institutions of the United Nations

**2.23** **UNCITRAL** The United Nations Commission on International Trade Law (UNCITRAL) creates uniform law for international trade and co-ordinates the work of the various international institutions and private organisations active in this field. Located in Vienna, it is composed of delegates from 36 states, representative of the composition of the General Assembly.[51]

UNCITRAL has already drawn up conventions and model laws for *inter alia* the limitation period on the international sale of goods (New York Convention 1974),[52] the international sale of goods (Vienna Convention 1980) (see paragraph 4.05), the carriage of goods by sea (UN convention 1978, the so-called Hamburg Rules), international multi-modal transport (UN convention 1980), arbitration (UNCITRAL arbitration rules 1976 (see paragraph 11.21); UNCITRAL conciliation rules 1980; UNCITRAL arbitration model law 1985 (see paragraph 11.02)), international credit transfers (UNCITRAL model law 1989) (see paragraph 8.02), bills of exchange and promissory notes (UNCITRAL convention 1988) (see paragraph 9.27).

Within UNCITRAL there are several sub-committees working on drafts concerning, for instance, the establishment of an international monetary unit for international treaties, damages and penalty clauses for breach of contract, clauses safeguarding against price changes, contracts for industrial development, further codification of international commercial arbitration and counter-trade contracts.

**2.24** **UNCTAD** The UN first convened an UNCTAD conference on trade and development (United Nations Conference on Trade and Development) in 1964. With this conference the UN intended to increase the access of developing countries to the world market. Since then, an UNCTAD conference has been convened every four years.[53]

UNCTAD's purpose is to give developing countries more access to the world's economy. UNCTAD is therefore working on, for instance, an Integrated Programme for Commodities, to regulate the price and the production of 18 commodities proposing multilateral commodity agreements (see paragraph 2.65). UNCTAD has also drawn up a code of conduct for the transfer of technology from developed to developing countries. Furthermore, it intends to increase the share of developing countries in international shipping and it therefore promotes bilateral shipping treaties (the so-called Shipping Conferences), which grant preference to shipping companies from developing countries for transport from those countries. UNCTAD also pays considerable attention to the financial and monetary situation of developing countries in respect of their burden of debts.

The Trade Development Board, on which all UNCTAD members have a seat, is responsible for the preparation of the conferences and the implementation of decisions of the conferences, as well as looking after the continuity of its work. The UNCTAD Secretariat in Geneva co-ordinates these activities.

In addition, there are numerous specialised committees within UNCTAD (*inter alia*, for commodities, shipping, technology, competition, trade preferences, etc.). UNCTAD also runs, together with WTO, the International Trade Centre.

**2.25** **UNDP** UNDP, the United Nations Development Programme, finances technical aid to developing countries from voluntary contributions. Running the projects is usually left to other bodies. However, UNDP decides the priorities and has, therefore, a great influence on development aid. Furthermore, it maintains supervision over projects through its own representative (resident co-ordinator), located in almost all developing countries (see paragraph 7.07).

**2.26** **UNIDO** UNIDO (United Nations Industrial Development Organisation) promotes the industrialisation of developing countries. It makes studies and seeks advice from experts about the possibilities for fitting out new industrial plants in developing countries.[54] The model agreements for industrial projects, drawn up by UNIDO, assist developing countries in their negotiations with foreign investors.

**2.27** **Other organisations** Within the framework of the UN, a number of other organisations play also a role in the international economic sphere.

- The International Labour Organisation (ILO) in Geneva is active in the international regulation of working conditions. It has drawn up a number of conventions in respect of minimum wage, working hours, safety at work, etc. It exercises pressure on governments to adopt these conventions.

[50] See K. Sahlgren, "Le rôle de la Commission économique pour l'Europe (CEE) dans l'élaboration du droit international économique" in *Les Nations Unies et le Droit International Économique* (Pedone, Paris, 1986) p. 185. More specifically about standard contracts: A. Tunc, "L'élaboration de conditions générale de vente sous les auspices de la Commission Economique pour l'Europe" (1960) R.I.D.C. 112 *et seq.*; P. Benjamin, "The ECE general conditions of sale and standard forms of contract" (1961) J.B.L. 131 *et seq.* For jurisprudence concerning ECE standard contracts see, for example, Bundesgerichtshof, October 22, 1969, (1970) N.J.W. 383; Cass.Fr., November 26, 1980, (1981) J.D.I. 355.

[51] G. Hermann, "The contribution of Uncitral to the development of international trade law" in N. Horn and C.M. Schmitthoff, *The Transnational Law of International Commercial Transactions* (Kluwer, Deventer, 1982) pp. 35 *et seq.*; J. Touscoz, Les National Unies et le droit international économique (Pedone, Paris, 1986) pp. 3, 32 *et seq.*; P. Volken, "Fünfundzwanzig Jahre UNCITRAL" (1992) RSDIE 133. UNCITRAL publishes a Yearbook of international trade law and a Bibliography of recent writings related to the work of UNCITRAL.

[52] T. Krapp, "The limitation Convention for international sales of goods" (1985) *Journal of World Trade Law* 343; H. Smit, "The convention on the limitation period in the international sale of goods" (1975) Am.J.Comp.L. 337.

[53] *e.g.* Geneva (1964); New Delhi (1968); Santiago de Chile (1972); Nairobi (1976); Manilla (1979); Belgrade (1983); Geneva (1987); Cartagena (1992); Midrand (1996); Bangkok (2000).

[54] A. Lewin, "Les services de promotion des investissements de l'O.N.U.D.I." (1987) AFDI 498.

- The Food and Agricultural Organisation (FAO) in Rome dispatches experts to developing countries and carries out development projects. Many agricultural projects are financed by the International Fund for Agricultural Development (IFAD), also established in Rome.
- The World Bank (see paragraph 7.03) will be discussed later. The International Maritime Organisation (IMO) in London,[55] the International Civil Aviation Organisation (ICAO) in Montreal, the World Health Organisation (WHO), the World Intellectual Property Organisation (WIPO) and the International Telecommunication Union (ITU) in Geneva ought also to be mentioned.

## International institutions for the unification of law

2.28 **Outline** The role of UNCITRAL (see paragraph 2.23) and the ECE (see paragraph 2.22) for the unification of law has already been highlighted. The significance of the International Chamber of Commerce will be illustrated when the non-governmental organisations are discussed (see paragraph 2.43). The following inter-governmental organisations should also be mentioned.

2.29 **UNIDROIT** The *Institut international pour l'unification du droit privé* in Rome was established in 1926 within the framework of the League of Nations. This institution is still financed by just over 50 countries.[56] For more than 30 years UNIDROIT has carried out considerable preparatory work for the unification of law.

The UNIDROIT Principles of International Commercial Contracts have already been mentioned (see paragraph 1.34). UNIDROIT has also drawn up conventions in respect of international leasing (see paragraph 8.45), international factoring (paragraph 8.41), protection of cultural property, international agencies, etc .

Committees of experts are at present drafting rules on certain international aspects of security interests in mobile equipment. UNIDROIT runs a databank for uniform law as well as a programme of legal aid for developing countries.[57]

2.30 **The Hague Conference on Private International Law** The Hague Conference has existed since 1893, but only in 1935 acquired the status of inter-governmental organisation. This institution provides, *inter alia*, the basis for the Hague Conventions on the law applicable to international contracts of sale (see paragraph 4.02) and on the law applicable to agency contracts (see paragraph

[55] The IMO prepares drafts for uniform law for carriage by sea.
[56] R. Dolzer, "International agencies for the formulation of transnational economic law" in N. Horn and C.M. Schmitthoff, *op.cit.*, pp. 71–72; M. Bonell, "The Unidroit initiative for the progressive codification of international trade law" (1978) I.C.L.Q. 413; R. Monaco, "L'activité scientifique d'UNIDROIT" (1976) R.D.C. 34. UNIDROIT publishes a quarterly News Bulletin.
[57] see UNIDROIT's website: http://www.unidroit.org





5.24). The Hague Conference is furthermore active in other areas of law, including family law, succession law and international procedural law. At present it is examining the possibility of a worldwide convention on judicial competence and enforcement of judgments (see paragraph 10.05).

## Restricted organisations

2.31 **Concept** Although no international organisation has effectively all states as actual members, some organisations have the ambition to regulate for the world. The organisations of the UN, for instance, have a universal objective and aim at universal membership.

Besides universal organisations there are restricted organisations that are only active in a certain geographic region (*e.g.* NAFTA, MERCOSUR or the E.U.) (see paragraph 2.34). Other restricted organisations regulate the economy or trade of states, which, although not located within the same geographic area, have a similar economic system (*e.g.* the OECD) (see paragraph 2.32).

In general, there is a greater solidarity between the members of restricted organisations than exists in world organisations. Usually, these organisations do not have extensive powers and leave the sovereignty of each member untouched. Their decisions, therefore, have to be taken unanimously.

2.32 **OECD** The Organisation for Economic Co-operation and Development (OECD) in Paris is a good example of a restricted organisation. Its purpose is to streamline the economic policies of its members.[58] The OECD examines the economic situation in the Member States on an annual basis and issues recommendations. It encourages its members to develop sound energy policies and organises co-operation on energy matters (through the International Energy Agency). It has drafted many codes of conduct (see paragraph 1.13), (dealing with, *inter alia*, competition (paragraph 3.63), export subsidies (paragraph 8.31) and financial transactions, and publishes many studies.

2.33 **OHBLA** The Organisation for the Harmonisation of Business Law in Africa (OHBLA), OHADA in French (*Organisation pour l'harmonisation en Afrique du Droit des Affaires*), was created by treaty in 1993. Today OHBLA is made up of 17 French-speaking African states.[59] The main objective of this organisation is "the harmonization of business laws in the Contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes".[60] OHBLA is served by a Council of Ministers, a Permanent Secretariat, a Common Court of Justice and Arbitration, and an

[58] The OECD is mainly a West European organisation of which Canada, the U.S., Japan, Australia and New Zealand are also members.
[59] Benin, Burkina Faso, Cameroon, the Central African Republic, Côte d'Ivoire, Congo, Comores, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Republic of Guinea (Conakry), Senegal, Chad and Togo.
[60] Art. 1 of the Treaty.

Advanced Regional School of Magistracy. Some of OHBLA's major achievements have been the adoption of Uniform Acts on business law, on company law, on economic interest groupings and on securities, as well as a uniform arbitration law and arbitration rules. The uniform acts are directly applicable and obligatory in contracting states, notwithstanding any contrary provisions of a previous or subsequent internal law.[61]

## Free trade zones; customs unions; common markets

2.34 **Overview** Some organisations have a wider objective and aim at a more complete economic integration of their members. They further the creation of a larger market for their Member States to enable them to produce more efficiently and cost effectively. This integration can take place by means of a free trade zone, a customs union or a common market.

Members of a free trade zone agree to abolish customs duties between them so that they can import goods between them duty free or at reduced tariffs. For third countries, however, the customs duties of each participating state are maintained (otherwise, entrepreneurs from third countries, who wanted to export to a country in the free trade zone, could do so through the country with the lowest import tariff). Border controls are thus maintained within the free trade zone. To benefit from the free trade the importer has to prove that the goods do not originate from a third country but from a contracting state, for instance by a certificate of origin.

In a customs union, not only are customs duties between Member States abolished, but customs duties in respect of third countries are also equalised. Hence, an identical customs tariff is levied on a product imported from a third country into the customs union no matter in which country the import takes place. This means that products from third countries can circulate freely within the customs union, once tariffs have been paid.

A common market includes, besides the free movement of goods, free movement of persons, free movement of services and free movement of capital. The most important common market is the E.U. A common market needs continuous adjustment through a common economic policy. A common market could be undermined if, for instance, a state granted its enterprises state aid in order to drive competitors out of the market. The economic policies of the Member States have to be harmonised in order to avoid such distortions. The E.U. has, for this reason, not only a common market but also a common economic policy. With the

[61] T. M. Lauriol, "OHBLA law forces the pace" (2001) I.B.L.J., pp. 596. See also P. K. Agboyibor, "OHADA: new uniform company law" (1998) I.B.L.J., pp. 673–690; T. M. Lauriol, "The OHBLA Arbitration Centre: formation and effects of the Arbitration Agreement" (2000) I.B.L.J., pp. 999–1010; J. C. Otonmou, "The OHADA Letter of Guarantee" (1999) I.B.L.J., pp. 425–456; T. M. Lauriol, T. Gawel, "Legal aspects of creating security interests over mining titles in the states parties to the OHADA" (2001) I.B.L.J., pp. 175—187; R. Amoussou-Guenou, "Arbitration pursuant to the Treaty for the Harmonization for African Business Law (OHADA)" (1996) I.B.L.J., p. 321. For more on OHBLA, see the organisation's website: http://www.ohada.com. See also www2.lexum.umontreal.ca/ohada/ohada.html.





introduction of the euro (see paragraph 9.22), the E.U. is moving towards a more complete economic and monetary union.

Free trade areas and customs unions have a special status under the GATT as its members grant each other a more favourable treatment than they give third countries (see paragraph 3.11).

**The European Free Trade Association (EFTA)** EFTA is an international organisation currently comprising four states, Iceland, Liechtenstein, Norway and Switzerland, between which there are reduced customs duties and quantitative restrictions to trade. Originally, the EFTA arrangement also extended to Denmark, Portugal, the United Kingdom, Finland, Austria and Sweden.[62] 2.35

EFTA members also harmonised trade regulations and policies between themselves. Furthermore, the EFTA countries negotiated free trade agreements with the E.U. to extend their free trade zone to E.U. countries. EFTA members, with the exception of Switzerland, came to an even greater rapprochement with the E.U. with the creation of the European Economic Area. The Treaty for the European Economic Area (EEA) was signed on May 2, 1992 and entered into force on January 1, 1994, creating the world's largest free trade zone.[63] However, with the accession to the E.U. of Finland, Austria and Sweden in 1995, these countries now participate in the EEA only as members of the E.U. rather than as members of EFTA. The EEA Agreement unites the 15 E.U. Member States and three EFTA states into one single market governed by the same basic rules (*acquis communautaire*).[64]

**North American Free Trade Area (NAFTA)** After more than a century of attempts between Canada and the United States to achieve a bilateral liberalisation of trade, the first successful agreement between these two countries was signed in 1988 in the form of the U.S.–Canada Free Trade Agreement (USCFTA).[65] Subsequent negotiations with Mexico resulted in the creation of the North American Free Trade Agreement, which was concluded on August 12, 1992, largely extending the provisions of USCFTA to Mexico. On January 1, 1994, the North American Free Trade Agreement entered into force, creating the North American Free Trade Area (NAFTA).[66] NAFTA aims at the elimination of most tariffs between the three countries over a 10-year (exceptionally 15-year) 2.36

[62] Denmark and the U.K. relinguished their membership in 1972 when they joined the EEC, as did Portugal in 1985, and Finland, Austria, and Sweden, in 1994.

[63] The EEA brought together the (then) 12 members of the E.U. with five members of the EFTA (Austria, Finland, Iceland, Norway and Sweden). Switzerland rejected the EEA Agreement in a December 1992 referendum. For this reason Liechtenstein, forming a customs union with Switzerland, could not initially join the EEA. However, a referendum held on May 1995 confirmed Liechtenstein's entry into the EEA.

[64] For more on this, see http://secretariat.efta.int/euroeco (consulted March 15, 2001).

[65] USCFTA entered into force on January 1, 1989. For more on the evolution of U.S.–Canada bilateral trade relations, see Michael Trebilcock and Robert Howse, *The Regulation of International Trade* (2nd ed. Routledge, New York, 1999) pp. 38, 39.

[66] See Richard Schaffer, Beaverley Earle, and Filiberto Augusti, *International Business Law and Its Environment* (3rd ed., West Publishing Co., 1996), pp. 466–500.

phase-out period.[67] As a Free Trade Area, NAFTA explicitly states that it is "consistent with Article XXIV of the General Agreement on Tariffs and Trade".[68]

The NAFTA approach is set to expand southwards to Latin American countries. Immediately after the entry into force of NAFTA a summit of 34 countries of North and South America agreed in Miami on a schedule to complete negotiations for the creation of a single free trade area by 2005. This intercontinental free trade arrangement is to be called the "Free Trade Area of the Americas", or FTAA.[69]

**2.37** **MERCOSUR** MERCOSUR, the emerging customs union composed of Argentina, Brazil, Paraguay and Uruguay is already a reality in Latin America.[70] Most intra-regional trade has been duty-free since January 1, 1995 and this is expected to be the case for practically all products with the expiration of the period for adaptation to the trade liberalisation programme (which was four years for Argentina and Brazil, and five years for Paraguay and Uruguay). Although the progress towards this end has been affected by different economic crises of its two big players, Brazil and Argentina, MERCOSUR works on the establishment of a common market with a common external tariff and common foreign trade policies.[71]

**2.38** **Common Market for Eastern and Southern Africa (COMESA)** COMESA is a economic organisation made up of 22 eastern and southern African states.[72] COMESA is a continuation of a more transitional regional economic

[67] See *ibid.* See also A. de Mestral, "The North American Free Trade Agreement: A comparative analysis" (1998) *Rec.Cours.*, 275, p. 219; J.L. Gudofsky, "Shedding light on Article 1110 of the North American Free Trade Agreement (NAFTA) Concerning Expropriations: An environmental case study" (2000), NW.J.Int'l.L.&Bus. 21, pp. 243–316; C. O'Neal Taylor, "Dispute resolution as a catalyst for economic integration and an agent for deepening integration: NAFTA and MERCOSUR" (1996–97) NW.J.Int'l.L.&Bus. 17, pp. 850–899; D. López, "Dispute resolution under NAFTA: Lessons from the early experience" (1997) Tex.Int'l.L.J. 32, pp. 164–208.

[68] See Art. 101 of the NAFTA Agreement.

[69] For further information on the FTAA negotiation process, see http://www.ftaa-alca.org/alca_e.asp.

[70] Brazil's President Cardoso is quoted to have said that MERCOSUR is "our destiny" while FTAA is "a mere 'policy option". See "Some Realism for Mercosur", *The Economist* , March 31, 2001, p. 14. See the Treaty of Asunción of March 26, 1991. A look at the institutional provisions of the Additional Protocol to the Treaty of Asunción on the Institutional Structure of Mercosur Protocol of Ouro Preto shows that there is a close resemblance between MERCOSUR and the E.C. See also "Protocol of Buenos Aires on international jurisdiction in disputes relating to contracts" (1997) I.L.M. 34, p. 1263.

[71] For further information about MERCOSUR see, *e.g.*, V. J. Samtleben, "Das Internationale Prozeß- und Privatrecht des MERCOSUR" (1999) RabelsZ 63, pp. 1–69; M.C.A. del Prado, "The Formation of MERCOSUR and the harmonisation of rules in the field of industrial property" (1997) I.B.L.J., pp. 221–232; C. O'Neal Taylor, "Dispute resolution as a catalyst for economic integration and an agent for deepening integration: NAFTA and MERCOSUR" (1996–97) NW.J.Int'l.L.&Bus. 17, pp. 850–899. See also the organisation's website: http://www.mercosur-.org/english/.

[72] Angola, Burundi, Comoros, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Uganda, Tanzania, Zambia, and Zimbabwe.





organisation introduced by the 1981 Treaty Establishing the Preferential Trade Area for Eastern and Southern Africa, commonly known as the Preferential Trade Area (or the PTA). The primary object of the PTA was to promote co-operation and integration covering diverse fields of economic activity including trade and industry and to prepare the ground for the formation of a much deeper economic integration in the form of a common market organisation. COMESA was created in 1994 largely as an embodiment of that long-term aspiration. In its drive toward the creation of a free trade area, COMESA had the target of complete removal of all internal trade barriers by the year 2000. COMESA further aims to create a kind of economic union by the adoption of a common external tariff by 2004. At the institutional level, COMESA has its headquarters in Lusaka, Zambia and a Court of Justice started operation in 1998.[73]

**2.39** **The Economic Community of West African States (ECOWAS)** ECOWAS is a regional economic organisation of West African States headquartered in Lagos, Nigeria. Created in 1975, ECOWAS currently has 15 members.[74] Like most such regional economic organisations, the main mission of ECOWAS is to promote regional economic integration, with the ultimate object of creating the West African Economic Union. At the institutional level, ECOWAS has organs including a Council of Ministers, a Community Parliament, and a Community Court of Justice.[75]

**2.40** **Southern African Development Community (SADC)** The Southern African Development Community (SADC) is a community of 14 nations.[76] SADC was created by the Declaration and Treaty establishing the Southern African Development Community which was signed at a Summit meeting held on July 17, 1992 in Windhoek, Namibia, replacing the Southern African Development Co-ordination Conference (SADCC), which had been in existence since 1980. SADC aims at the harmonisation and rationalisation of policies and strategies for sustainable development. The SADC Trade Protocol, which entered into force on September 1, 2000, calls for an 85 per cent reduction of internal trade barriers over eight years and constitutes the trade dimension of the organisation.[77]

**2.41** **The Association of South East Asian Nations (ASEAN)** ASEAN is one of the most successful regional economic organisations consisting of a number of

[73] See http://www.comesa.int. For a useful survey of African regional economic arrangements, see T. Mulat, "Multilateralism and Africa's regional economic communities" (1998) J.W.T. 32(4), pp. 115–138.

[74] Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone, and Togo. See "Economic Community of West African States. Revised Treaty" (1996) I.L.M. 35 p. 660.

[75] http://www.ecowas.int/

[76] Angola, Botswana, Democratic Republic of Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. Note that some countries are members of both SADC and COMESA.

[77] For more on SADC, see http://www.eia.doe.gov/cabs/sadc.html.

important competitive economies. Created by the signing of the ASEAN Declaration (also known as the Bangkok Declaration) of August 8, 1967 by five countries—Indonesia, Malaysia, the Philippines, Singapore and Thailand—ASEAN currently enjoys the membership of all 10 countries of South East Asia. The newly added members are Brunei Darussalam, Cambodia, Laos, Myanmar, and Vietnam. ASEAN has its headquarters in Jakarta, Indonesia. The economic co-operation aspect of ASEAN was initially limited to programmes for joint ventures and complementary schemes among ASEAN governments and/or companies. However, with the growing awareness of the importance of trade liberalisation as a tool of development, the Fourth ASEAN Summit of members in 1992 decided to open up members' economies, with the ultimate aim of full integration. To that end, an agreement has been reached to create the ASEAN Free Trade Area (AFTA) within 15 years (since reduced to 10 years), to eliminate all intra-regional trade barriers.[78]

## International non-governmental organisations

2.42 **Overview** A number of international non-governmental organisations (NGOs) have an impact on international trade law. Indeed, many branches of business or profession have an international organisation with which the respective national professional association is connected. There is, for example, the Fédération Internationale du Commerce des Semences, which regulates amongst other things arbitration for that particular sector of industry, or FIDIC (Fédération internationale des ingénieurs-conseils) which draws up, *inter alia*, standard contracts for building projects.[79] Also well known is IATA (International Aviation Transport Association), which formulates, for instance, extensive air transport and tariff regulations.

As the name indicates, NGOs are not established by states; they exist by the initiative of private persons or associations. They are, as such, not governed by international law, but by national law. Nevertheless, they can be international in composition if they group together members from different countries. Sometimes, an international organisation involves NGOs in its activities. NGOs are frequently observers at international meetings and conferences and are often invited to submit position papers. The ultimate decisions, however, are taken by the international organisation itself or by its Member States, on the basis of the information received.

Some NGOs deserve a more detailed description.

2.43 **International Chamber of Commerce (ICC)** The (ICC), an association under French law and established in Paris, unites thousands of enterprises and business organizations from 110 countries.

[78] http://www.aseansec.org/

[79] See, *e.g.*, C.R. Seppala, "FIDIC's new standard forms of contract: Claims, resolution of disputes and the Dispute Adjudication Board" (2001) I.B.L.J., pp. 3–12; C.R. Seppala, "The new FIDIC provision for a Dispute Adjudication Board" (1997) I.B.L.J., pp. 967–984; C.R. Seppala, "The new FIDIC international civil engineering subcontract" (1995) I.B.L.J., pp. 659–683.





The ICC discusses the problems of international trade with its members. These members generally represent all sides interested in a particular problem, so that the outcome of the discussion is balanced and objective. The ICC then formulates the point of view of the business world at large. Businesses and organisations usually have little opportunity to be heard on an international level, where states and international organisations are in charge. Through the ICC they can make their viewpoint known.

The ICC has consultative status with the institutions of the UN. Moreover it can act through the national committees, which it has in about 60 countries, or through the direct members, which it has elsewhere.

The ICC also drafts standard contracts, guidelines, codes of conduct or other documents for specific trade issues with the co-operation of many practitioners and experts. The success of these private codifications depends on the business communities themselves. Thus, the "Uniform Customs and Practices for Documentary Credits" (UCP) (see paragraph 8.10) and the Incoterms (see paragraph 4.54) enjoy universal recognition. However, these uniform rules do not have the status of customary law. They have to be explicitly adopted by the parties.

The ICC has enjoyed less success with some of its other uniform rules. Its text on contractual guarantees (1978), for instance, apparently did not sufficiently reflect the international practice of bankers or of applicants for guarantees. The success of the Uniform Rules for Demand Guarantees (1991) (see paragraph 8.57), of its codes of conduct for fair publicity and for environmental protection, or of its model contracts for sales,[80] agency,[81] distribution,[82] etc, is as yet unclear.

The ICC has also established Arbitration Rules and a Court of Arbitration which allows enterprises to settle their trade disputes efficiently by arbitration (see paragraph 11.16).

A number of other organisations are active on the fringes of the ICC, including the Institute of World Business Law (Paris), where present trends in international trade law are discussed, the International Maritime Organisation (London), which gathers information on maritime fraud, the Counterfeit Investigation Office (London), which obtains information on the forgery of proprietary brands and patents and provides the police and customs authorities with the relevant evidence, and the International Environmental Agency (Geneva), which exchanges information on environmental technology with businesses and states (particularly developing countries).

**The World Economic Forum** The World Economic Forum is associated with the annual gathering in Davos, Switzerland, of top business and political leaders as well as academics to discuss all sorts of issues, ranging from regional politics to globalisation and the divide between the haves and the have-nots. 2.44

Having started in 1970 with the modest ambition of serving as a forum for Europe's chief executives to discuss a coherent strategy for European business,

[80] ICC, *The ICC Model International Sale Contract* (ICC publication, No. 556, Paris).

[81] ICC, *The ICC Model Commercial Agency Contract* (ICC publication, No. 496, Paris).

[82] ICC, *The ICC International Distributorship Contract (Sole importer-Distributor)* (ICC publication, No. 518, Paris).

the Forum currently serves as an occasion at which pressing global issues are debated, opinions are exchanged, consensus is built, and new policy proposals are aired. Despite its non-governmental nature, and owing to the involvement of high-level business and political decision-makers in the Forum, Davos plays an important role in shaping global economic policy trends, perhaps more so than a number of intergovernmental organisations and forums.[83]

2.45 **Other organisations** The Comité Maritime International (CMI) is a private association, established in 1896 for the unification of legal rules for the carriage of goods by sea. To this end, 26 conventions have since been drafted,[84] amongst which are the so-called Hague Rules on the unification of some provisions in relation to bills of lading (see paragraph 1.32).[85] For some time, there has been an increased co-operation between the CMI and the International Maritime Organisation, which operates in the same area.

Two other private organisations of a more academic nature contribute significantly, through their comparative law studies, to the unification of law: the Institut de Droit International (IDI) and the International Law Association (ILA), both established in 1873.

## PART III: DEVELOPING COUNTRIES AND INTERNATIONAL TRADE REGULATION

2.46 **UNCTAD** Awareness of the specific problems of developing countries increased, particularly in the UN, after the 1955 Bandung Conference. In 1964, the UN General Assembly convened a United Nations Conference on Trade and Development (UNCTAD) in Geneva (see also paragraph 2.24). Besides industrialised countries, developing countries also took part. From one conference, UNCTAD has grown into an international organisation, whose aim is to promote economic growth in the developing countries through international trade, to formulate principles and policy options for international trade and economic development, and to make proposals to this effect.

A general meeting has usually been held every four years, as follows: UNCTAD I (Geneva, 1964), UNCTAD II (New Delhi, 1968), UNCTAD III (Santiago, 1972), UNCTAD IV (Nairobi, 1976), UNCTAD V (Manilla, 1979), UNCTAD VI (Belgrade, 1983), UNCTAD VII (Geneva, 1987), UNCTAD VIII (Cartagena, 1992), UNCTAD IX (Midrand, South Africa, 1996) and UNCTAD X (Bangkok, 2000).

Different UNCTAD conferences have laid the foundation for international treaties or UN General Assembly resolutions on international trade with developing countries. The following issues in particular have been discussed at the UNCTAD meetings: agreements on basic products (see paragraph 2.65), general

[83] See http://www.weforum.org.

[84] See Xerry, "The contribution of the Comité Maritime International to the movement for the unification of maritime law" (1977) R.D.C. 87.

[85] Convention of Brussels, of August 25, 1924. This convention was changed by a "Protocol" of February 23, 1968, better known as the Hague-Visby Rules.





tariff preferences (paragraphs 2.49 *et seq.*), financing of development co-operation (for instance, by the International Monetary Fund) discriminatory and competition-distorting practices in carriage at sea, participation in the decision-making process of the IMF, special measures for the least developed countries, 1 per cent (later 0.7 per cent) of GNP as target figure for development aid from the industrialised countries, participation in the negotiation rounds of GATT, mutual co-operation and preferential tariffs between developing countries, transfer of technology (paragraph 6.32); restrictive business practices (paragraph 3.63), repayment of foreign debt of developing countries, and using globalisation as an effective instrument of development for all peoples.

At present, some 190 countries are members of UNCTAD, which has its Secretariat at Geneva. UNCTAD is governed by a Trade and Development Board. At the 1964 conference, besides the industrialised countries, 77 developing nations took part. Although the number of developing countries has since increased, the "Group of 77" is still used to designate the developing countries.

In 1964, GATT created the International Trade Centre (ITC), whose purpose is assisting developing countries in their efforts to promote their exports. Since 1968, the ITC has been jointly operated by the United Nations acting through UNCTAD and the GATT (now WTO) and has become a joint subsidiary organ of the WTO and the United Nations. As the focal point for technical co-operation with developing countries in trade promotion, the ITC works in such areas as product and market development, trade information, human resource development, international purchasing and supply management, as well as needs assessment and programme design for trade promotion.[86]

2.47 **GATT Part IV** Largely as a result of the opposition of the United States, the original version of GATT did not go very far in addressing the specific problems of developing countries.[87] The 1955 Review Session of the contracting parties provided the first occasion for the concerns of developing countries to be considered.[88] However, mainly due to the influence of UNCTAD, more important changes have followed since the 1960s. Within months of the first session of UNCTAD, the GATT was supplemented on November 26, 1964, with a "Part IV" on trade and development (Articles XXXVI–XXXVIII). These provisions came into force on June 27, 1966.

Part IV recognises some fundamental needs of developing countries, including increased income from export of mainly agricultural products, increased share in

[86] For further information on the ITC, see http://www.intracen.org.

[87] As observed by Robert Hudec in connection with the negotiation of GATT 1947: "in spite of vigorous protests, the United States refused to agree to include the ITO provision permitting new trade preferences." Hudec, R. *Developing Countries in the GATT Legal System* (Gower for the Trade Policy Review Centre, London, 1987) at 14.

[88] It was during this session that, among others, the balance-of-payments exceptions of Art. XVIII(B) were introduced allowing developing countries to impose quantitative restrictions so as to safeguard their external financial position and to ensure a level of reserves adequate for the implementation of their programmes of economic development. See Hudec, R. *Developing Countries in the GATT Legal System* (Gower for the Trade Policy Review Centre, London, 1987) at 26–28. See also M. Flory, "Mondialisation et droit International de Development" (1997) Rev.gen.dr.int.pub. No. 101, Vol 2. pp. 609–633.

international trade, greater access to the world markets for their manufactured products; and financial participation from industrialised countries in the economic development of the developing countries.

Part IV moreover urges the developed countries to encourage participation either individually (Article XXXVII) or jointly (Article XXXVIII) in international trade by the developing countries. It is worth noting, however, that Part IV does not create concrete enforceable legal obligations on developed countries in favour of developing countries. In most cases, it provides only for a "best efforts" obligation. Article XXXVII, for example, although entitled "Commitments", commences as follows:

> "The developed contracting parties shall to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible—give effect to the following . . . ." (emphasis supplied.)

The GATT provides no criteria for the determination of which countries must be considered as "developing countries". The UN refers, *inter alia*, to: the GNP per capita, the share of industry in the GNP, and the level of literacy. However, no strict criteria have been established for qualification as a developing country.[89]

**2.48** **No reciprocity** Reciprocity has always been a leading principle of trade negotiations under the GATT. However, Part IV of the General Agreement stipulates:

> "The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less developed contracting parties."[90]

The relationship between developed countries and developing countries ought not therefore to be based on the principle of reciprocity. In other words, the trade concessions granted to the developing countries by the developed countries (lower customs duties, fewer quantitative and other trade restrictions) must not be linked with the granting of similar advantages by the developing countries to the developed countries.

[89] The classification of countries on the basis of their levels of social and economic development has not been an easy task. Different organisations still use different criteria for their classification. By far the most common classification is that prepared by the Development Assistance Committee (DAC) of the OECD. According to the latest OECD listing, the category of "developing counties and territories" covers a wide range of countries and territories falling in about five sub-categories: 48 "Least-Developed Countries"; 24 "Low Income Countries" (per capita GNP <$760 in 1998); 45 "Lower Middle Income Countries and Territories" (per capita GNP $761–$3 030 in 1998); 32 "Upper Middle Income Countries and Territories" (per capita GNP $3 031–$9 360 in 1998); and two "High Income Countries and Territories" (per capita GNP >$9 360). This list is normally reviewed every three years. For further details, see http://www.oecd.org/dac/htm/daclist3.htm. See also, *e.g.*, G. Verdirame, "The definition of Developing Countries under GATT and other international law" (1996) G.Y.I.L. 39, pp. 164–197.

[90] Art. XXXVI(8) of the General Agreement.





## Tariff preferences for developing countries

**2.49** **General** In 1968 UNCTAD promoted the principle of a system of general, non-reciprocal and non-discriminatory tariff preferences for the exportation of manufactured products and semi-finished products from developing countries. It gave further substance to this principle by an agreement of 1970. This agreement can be summarised as follows:

- all members of the OECD (see paragraph 2.27) or Comecon (see paragraph 3.50) are requested to give preferences to countries that have declared themselves to be developing countries;
- the preferences must concern processed or semi-processed industrial goods, or processed agricultural products (*e.g.* foodstuffs);
- the preference must consist of a reduced tariff or of the full removal of customs duties (so-called "zero rate").

In principle, however, preferential treatment is not allowed between contracting parties of the GATT because of the most favoured treatment rule (see paragraph 3.09). In order to introduce non-reciprocal preferential tariff treatment for products originating from developing countries, GATT contracting parties opted for a 10-year waiver of the provisions of Article I of the General Agreement, pursuant to Article XXV(5) thereof.[91] This temporary arrangement was later placed on a more permanent basis by a Tokyo Round Decision, "Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries", often called the "enabling clause".[92]

**2.50** **The "enabling clause"** The enabling clause (*clause d'habilitation*) provides expressly for a derogation from the most favoured nation treatment requirement of Article I of the GATT. It empowers the contracting states to accord "differential and more favourable treatment to developing countries without according such treatment to other contracting parties".

The enabling clause forms the legal basis for the preferential treatment of developing countries with regard to tariff and non-tariff barriers in developed countries; it also allows the establishment of reciprocal tariff and non-tariff preferences as between the developing countries themselves, and special preferences in favour of the least developed countries.

**2.51** **Conditions for preferential treatment** Preferential treatment is permitted, provided it satisfies substantive and formal requirements. Preferences granted to a developing country may not constitute new trade restrictions *vis-à-vis* other contracting states. Moreover, the preferences must be in response to real needs of developing countries. Each system of preferential treatment must be notified to

[91] See "Generalised system of Preferences, Decision of 25 June 1971" (L/3545), *BISD* 18S/24–26.

[92] See Decision, of November 28, 979, (L/4903), *BISD* 26S/203–205.

number of conditions before a country becomes eligible for GSP benefits, and the level of economic development is only a necessary, and not sufficient, condition for country eligibility.

The President of the United States is authorised to designate any country, with the exception of a specified few,[4] as a beneficiary developing or least developed country. There are, however, some general exceptions. Historically, the United States' GSP system excluded most Communist countries, members of OPEC and some other similar commodity arrangements having a disruptive impact on the world economy, and countries that followed policies which were not in the interest of the United States regardless of their economic levels of development. Other grounds on which a country might be denied beneficiary status include granting other industrialised countries more preferences than they give to the United States, violation of the proprietary rights of United States citizens and companies contrary to international law, not acting in good faith when refusing to enforce arbitral awards in favour of United States subjects, and so forth.

Over time, some of the old conditions have been relaxed. For example, a number of formerly Communist states in Eastern Europe and the Baltic region, as well as several former republics of the Soviet Union, have been added to the list of GSP beneficiaries.[5] On the other hand, quite a number of new conditions have also been introduced progressively, an important one being the 1984 amendment introducing respect for "internationally recognised workers' rights" as a condition for eligibility to GSP benefits.[6] These rights have been defined to include the right of association, the right to organise and bargain collectively, prohibition of forced labour and child labour, and establishment of acceptable conditions of work. These conditions, together with the possibility of withdrawal of a benefit on several counts, makes the GSP system an important tool of U.S. foreign policy.[7]

Nevertheless, all products that are eligible for GSP treatment in the United States at this moment are imported duty free; however, the share of GSP imports has been rather limited.[8] The United States reserves the right to decide whether certain goods from the developing countries have to be kept outside the system or deserve less advantages because they are "sufficiently competitive". Applying the principle of graduation, the United States completely excludes a number of newly industrialised countries: Hong Kong, South Korea, Taiwan and Singapore in 1989, Israel in 1995, and Aruba, the Cayman Islands, Cyprus, Greenland, Malaysia, Macau, and the Netherlands Antilles in 1998.

[4] These are Australia, Canada, E.U. Member States, Iceland, Japan, Monaco, Norway, New Zealand and Switzerland. See s.2462(B) of the Trade Act of 1974 (as amended).

[5] At the time of writing, the only countries still subject to exclusion mainly on the ground of Communism are Cuba and North Korea.

[6] Trade Act of 1974 (as amended), s.2462(G).

[7] According to UNCTAD, the U.S. "has increasingly employed the GSP and other preferential trade programs as substitute form of enforcement authority." See *Handbook on the GSP Scheme of the United States of America* (2000).

[8] According to UNCTAD, only 1.3% of U.S. imports in 1999 entered duty-free under the GSP. See *Handbook on the GSP Scheme of the United States of America* (2000).





On May 18, 2000 the President of the United States signed into law the African Growth and Opportunity Act, which authorises a new trade and investment policy for sub-Saharan Africa.[9] The Act declares that free trade agreements should be negotiated, where feasible, with interested countries in sub-Saharan Africa. It requires the President to develop a plan to that effect.[10]

An important development brought about by the Act is its authorisation of duty-free and quota-free treatment for certain textiles and apparel products for eligible countries. Given that the exclusion of these products from the coverage of the United States' GSP scheme had been "one cause of African countries' less successful record of deriving benefit from the duty-free preferences of that scheme", the importance of this development cannot be doubted. At the same time, its potential benefit has been diminished by the fact that complete duty- and quota-free treatment is restricted almost exclusively to apparel products made using U.S. fabrics.[11] In line with the apparent shift to a more differentiated approach in the treatment of developing countries according to their levels of economic development, the so-called least developed sub-Saharan African countries (defined to mean countries that had a per capita gross national product of less than $1,500 a year in 1998) are exceptionally allowed to export apparel articles regardless of the country of origin of the fabric used to make them.[12]

The African Growth and Opportunity Act does not cover such sensitive commodities as coffee and sugar. At the level of products, the President can suspend duty-free treatment if the Secretary of Commerce determines that a surge in imports of a specific product, even within the quotas, injures or threatens competing U.S. industries.[13]

Under the terms of the Act, a "United States–Sub-Saharan Africa Trade and Economic Co-operation Forum", has been set up to foster closer economic ties between the two entities.

**General tariff preferences under the E.U.** The system of general tariff preferences first introduced by the EEC in 1971 for an initial 10-year period **2.56**

[9] The term "sub-Saharan Africa" has been defined to include the following 48 countries listed in s.107 of the Act: Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, D. R. Congo, Congo, Côte d'Ivoire, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Africa, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. By a Presidential Proclamation of October 2, 2000, 34 of these countries were designated as eligible for purposes of the African Growth and Opportunities Act. Not included are the following: Angola, Burkina Faso, Burundi, Comoros, D. R. Congo, Côte d'Ivoire, Equatorial Guinea, Gambia, Liberia, Somalia, Sudan, Swaziland, Togo, and Zimbabwe.

[10] The African Growth and Opportunity Act, s.116.

[11] *ibid.*, s.112.

[12] To be designated as an eligible sub-Saharan African country, a country must satisfy a set of general and specific conditions, including establishment of a market-based economy that protects private property rights, rule of law and political pluralism, the elimination of barriers to U.S. trade and investment, protection of internationally recognised workers rights, and distancing itself from activities that undermine U.S. national security or foreign policy interests. The President is authorised to terminate such status if an eligible country is not making continual progress in meeting those requirements.

[13] The African Growth and Opportunity Act, s.105

(1971–1981), has been modified and extended a number of times. Its second phase covered the decade 1981–1991. The overall revision that was due at the end of the second decade in 1991 had to be deferred, pending the outcome of the Uruguay Round in 1994.[14] The third major phase thus started on January 1, 1995 with the adoption of a scheme of generalised preferences for the 1995–2004 period.[15] In what has been termed a "radical departure" from the past, the 1995 revision "did away with the quantitative limitation of GSP imports".

Not all products qualify for the E.U.'s GSP scheme. For those that do, the applicable preferential margin depends on the degree of their import sensitivity, as so designated by the E.U. There are four classes of products with different applicable preferential margins over the corresponding MFN rate: very sensitive (15 per cent), sensitive (30 per cent), semi-sensitive (65 per cent), and non-sensitive (100 per cent). This classification broadly reflects their sensitivity on the Community market as established at the time of the Uruguay Round multilateral trade negotiations.[16]

The E.U. uses its GSP scheme to encourage countries to, *inter alia*, undertake effective programmes to combat drug production and trafficking. Such countries "continue to enjoy duty-free access for industrial and agricultural products provided they continue their efforts to combat drugs."[17] This treatment is extended to industrial products from the Central American Common Market countries and Panama. Since 1998, there have also been special incentive schemes designed to encourage countries towards compliance with labour standards and environmental norms set by relevant international organisations. More specifically, incentives are granted to countries that have adopted and applied in their national legislation the standards elaborated by the ILO concerning the right to organise and bargain collectively, as well as minimum age for employment, or the tropical forest protection standards of the International Tropical Timber Organisation (ITTO).

The E.U.'s GSP scheme provides for dual means to protect sectors or products that are sensitive to Community industry and agriculture against import surges—a mechanism involving a modulation of preferential tariff margins[18] and an emergency safeguard clause.[19] Finally, the E.U. applies the graduation principle and removes countries from the list of GSP beneficiaries in the event that their

[14] The previous scheme was thus kept in being until December 31, 1994.

[15] The basic legislative acts were Council Regulation 3281/94, concerning industrial products, which was extended until June 30, 1999, and Council Regulation 1256/96, concerning agricultural products. For the period from July 1, 1999 to December 31, 2001, the E.U. revised its GSP scheme on the basis of Council Regulation 2820/98. See UNCTAD, *Handbook on the GSP Scheme of the European Community*, http://www.unctad.org/gsp/eu.

[16] See [1999] O.J. C348/136.

[17] See para. 17 of the preamble to Council Regulation 2820/98 applying a multiannual scheme of generalised tariff preferences for the period July 1, 1999 to December 31, 2001, [1998] O.J.L357/1.

[18] Tariff modulation refers to the system under which individual "fixed duty-free amounts" and ceilings (concerning sensitive industrial products) and "fixed reduced duty" amounts (concerning agricultural products) are replaced by reduced rates of duty, classified according to four categories of product sensitivity. For a comprehensive and illustrated summary of the E.U.'s GSP system, see UNCTAD, *Handbook on the GSP Scheme of the European Community*, http://www.unctad.org/gsp/eu.

[19] See para. 8 of the preamble to Council Regulation [1998] 2820/98, [1998] O.J. L357/1.





per capita gross national product exceeds $8,210 (according to the most recent World Bank figures), and their development index (calculated in accordance with a given formula) is greater than 1.[20] Applying these criteria, the Council decided to withdraw Hong Kong, South Korea and Singapore from the list of preference-receiving countries as of May 1998.[21]

The recent shift of attention at the global level towards least developed countries has also been reflected in the preferential arrangements of the E.U. In fulfilment of a pledge made by WTO members to improve access to their markets for products originating in the least developed countries, Council Regulation 602/98 granted least developed countries not parties to the Lomé Convention preferences equivalent to those enjoyed by the parties to the Convention. Most recently, the E.U. has approved the Commission's proposal to eliminate quotas and duties on all products, except for arms, coming from the 48 LDCs[22]—hence often called the "everything but arms" market access principle, which entered into effect on March 5, 2001.[23] Although the move is quite exemplary, its actual impact is expected to be limited. First, largely due to pressure from the E.U. farming lobby, three "sensitive" products—bananas (until 2006), sugar (until 2009) and rice (until 2009)—have been excluded from immediate full liberalisation. And secondly, the impact of this move is likely to be modest because over 99 per cent of Community trade with the LDCs already carries zero import duty, either under the Lomé Convention or under the Generalised System of Preferences (GSP).

The general preferences of the E.U. do not affect the specific preferences granted by virtue of the Cotonou Partnership Agreement, to the so-called ACP countries, that is countries in Africa, the Caribbean and the Pacific associated with the E.U. (see paragraph 2.57). This is another expression of the E.U.'s use of the concept of "differentiation in preferences".

**E.U. Preferences for ACP countries** The E.U. and its Member States have entered into successive association agreements, the so-called Lomé Agreements concluded in Lomé (Togo), with 78[24] countries in Africa, the Caribbean and the Pacific (the so-called ACP countries). The last Lomé Agreement (Lomé IV) was initially concluded in 1989 for a term of 10 years, but was revised in Port Louis (Mauritius) in 1995. Just before the expiry of Lomé IV on February 29, 2000, the E.U. and the ACP countries concluded a successor agreement, governing the future terms of co-operation between them. The new agreement, called the "ACP-EU Partnership Agreement" was signed in Cotonou (Benin) on June 23, **2.57**

[20] See Art. 1.4 of Council Regulation 2820/98, [1998] O.J. L357/1.

[21] See Art. 3 of Regulation 2623/97, [1999] O.J. L354/9.

[22] Art. 37.9 of the Cotonou Agreement had in fact envisaged this to happen by 2005 at the latest.

[23] See press release by DG Trade entitled "EU approves 'Everything But Arms' trade access for least developed countries", Brussels, February 26, 2001, available on http://europa.eu.int/comm/trade/miti/devel/eba3.htm.

[24] In December 2000, the ACP Council of Ministers admitted Cuba as the 78th member of the ACP Group. For the latest list of members of the ACP, see http://www.acpsec.org. However, Cuba has yet to accede to the Cotonou Partnership Agreement. Moreover, the trade provisions of the Cotonou Agreement do not apply to South Africa, whose trade relations with the E.U. are regulated by a separate agreement.

2000. The Cotonou Agreement is intended to run for a term of 20 years with a five-yearly review clause.

**2.58** **The Cotonou Agreement** Cotonou, like Lomé, aims to provide a firm and solid foundation for economic and trade co-operation between the ACP states and the E.U. so as to foster the smooth and gradual integration of the ACP states into the world economy. The Cotonou Agreement explicitly provides that economic and trade co-operation "shall be implemented in full conformity with the provisions of the WTO, including special and differential treatment, taking account of the Parties' mutual interests and their respective levels of development."[25] In furtherance of the principle of "differentiation in preferences", the Agreement talks in terms of ensuring "special and differential treatment" for all ACP countries and of maintaining special treatment for ACP LLDCs.[26]

Cotonou has introduced important changes to the Lomé system. Notable, among others, are the following: (1) it has set strict deadlines for the transformation of the currently non-reciprocal preferential arrangement into a reciprocal free trade regime which would also require non-LDC ACP countries to progressively open their markets for E.U. products; (2) it has introduced new provisions on such new subjects as trade in services, competition policy, labour standards, intellectual property, and the environment; and (3) it has brought the different financial protocols and instruments, such as Stabex and Sysmin, operating under Lomé IV into a single instrument. These will be discussed in turn.

In trade matters, Cotonou is as much a concluded agreement as a programme for future negotiations designed eventually to phase out the traditional non-reciprocal preferential arrangement between the E.U. and ACP countries. In the short term, the Cotonou Agreement largely extends the life of Lomé IV for a preparatory period of eight years which expires on December 31, 2007. Accordingly, Annex V to the Cotonou Agreement provides that non-agricultural products originating in the ACP states shall be imported into the Community free of customs duties and charges having equivalent effect. As regards agricultural imports from the ACP states, the Community has "undertaken to adopt the necessary measures allowing more favourable treatment than that granted to third countries benefiting from the most-favoured nation clause".[27]

In the area of non-tariff barriers, too, Cotonou provides that the Community shall not apply any quantitative restrictions or measures having equivalent effect to imports of products originating in the ACP states.[28] This is, however, subject to a GATT–Article XX type of exception authorising import restrictions or prohibitions on grounds of health, security, public morals and others. Moreover,

[25] See Art. 34.4 of the Cotonou Agreement. See, *e.g.* F. Matambalya, S. Wolf, "The Cotonou Agreement and the challenges of making the New E.U.–ACP trade regime WTO compatible" (2001) J.W.T. 35, No. 1, pp. 123–144.

[26] See, *inter alia*, Art. 35:3 of the Cotonou Agreement.

[27] See Art. 1 of Annex V to the Cotonou Agreement. A "Joint Declaration" concerning agricultural products has been annexed to the Final Act which lists E.C. agricultural tariff lines with corresponding percentage reductions from generally applicable MFN rates. These rates generally range between exemption and a 15 per cent reduction in applicable *ad valorem* duties. See Declaration XXII for the details.

[28] See Arts 1 and 2 of Annex V to the Cotonou Agreement.





the Community is also free to introduce safeguard measures in cases where its domestic industries are threatened with serious injury due to increased quantities of imports from the ACP countries.

During the transitional period, no reciprocity is required from the ACP countries; they are required only to give the Community MFN treatment on the same level as their other developed trading partners. Indeed, a Declaration annexed to the Final Act even provides for an exception that ACP countries might discriminate in favour of other developed countries if those other developed countries grant them greater preferences than those granted by the Community.[29] As a result, since the Lomé IV waiver from the MFN principle of Article I of GATT 1994 expired on February 29, 2000, the E.U. and ACP member countries of the WTO have jointly submitted a new request under Article IX of the WTO Agreement "for the extension of the existing waiver in order to allow the maintenance of preferential trade between the parties."[30]

**2.59** **Rules of origin** In order to exclude countries that do not enjoy general or specific trade preferences from exporting their products under preferential conditions to the E.U., preferences are subject to strict rules for the origin of goods. Rules of origin are therefore an essential element of such an arrangement.

According to Protocol 1 attached to Annex V of the Cotonou Agreement, products incorporating materials which have not been wholly obtained in ACP states may still be considered as originating therefrom on condition that they have undergone "sufficient working or processing in the ACP States".[31] A detailed product-by-product description of about 120 pages has been attached to the Agreement in order to determine whether non-wholly obtained products are sufficiently worked or processed in the ACP states.[32] At a more general level, however, non-originating materials may be used if their total value does not exceed 15 per cent of the ex-works price of the product and if that does not take them beyond the limits set by the list regarding the allowable maximum value of non-originating materials for the specific product in question.[33] The combined territories of the ACP states are considered as being one territory for purposes of determination of origin. Moreover, applying the principle of cumulation, in determining the origin of finished goods coming directly from ACP countries, raw materials originating and works carried out on them in the Community are treated as materials and works of the ACP states.[34] Such products are also generally required to be transported directly without entering any other territory;

[29] See Declaration XXXI annexed to the Final Act of the Cotonou Agreement.

[30] See WTO doc. G/C/W/187, March 2, 2000. The request has so far been blocked by the five Latin American banana-exporting countries (Costa Rica, Ecuador, Guatemala, Honduras, and Panama) which demanded submission by the E.U. of an acceptable and WTO-consistent banana regime as a prior condition for consideration of the waiver request.

[31] Protocol 1 to Annex V of the Cotonou Agreement, Art. 2.

[32] *ibid.*, Annex II to Protocol 1.

[33] Cotonou Agreement, Protocol 1, *ibid.*, Art. 4.

[34] Protocol 1, *ibid.*, Art. 6.

operating previously to just two: an instrument for granting subsidies for long-term development support (a Grant Facility) and an investment facility to promote the private sector in the ACP countries (an Investment Facility).[43]

The Grant Facility is a single procedure for the granting of aid to ACP countries and regions on the basis of needs and performance. It will be possible to use these resources to finance a wide range of operations, such as macro economic support, sector policies, additional assistance in case of shortfall in export earnings, decentralised co-operation, debt relief, as well as traditional projects and programmes. Cotonou still recognises the particular problems of ACP countries arising from to the instability of their export earnings, particularly in the agricultural and mining sectors, and establishes a "system of additional support in order to mitigate the adverse effects of any instability in export earnings . . . within the financial envelope for support to long-term development."[44]

The Investment Facility focuses on fields of intervention and operations that cannot be financed sufficiently from private capital or by local financial institutions. It aims *inter alia*, to stimulate regional and international investment, particularly to strengthen the capacity of local financial institutions; help the development of the ACP private sector by financing projects and/or commercially viable enterprises and companies; and provide risk capital and loans on concessionary terms.

The Cotonou Agreement enters into force only after ratification by all the Member States of the E.U. and at least two-thirds of the ACP states, and a separate approval by the Community.[45] In the meantime, the provisions of the Lomé Convention, with some exceptions, continue to be applicable.[46]

## Commodity agreements

2.65 **International agreements on basic products—general** States have entered into agreements for the trade in commodities for many years. For instance, as early as 1902, nine Western European countries concluded, an agreement to reduce export subsidies for sugar. Later commodities agreements were aimed more directly at reducing production in order to keep prices sufficiently high and

[43] See statement by ACP Secretary-General Jean-Robert Guolongana in *The Courier: Special Issue* (September 2000), p. 5.

[44] The Cotonou Agreement, Art. 68.

[45] *ibid.*, Art. 93:3. In order to close any gaps resulting from the expiry of Lomé IV on February 29, 2000, transitional interim measures have been taken first by the ACP–E.U. Committee of Ambassadors (on February 28, 2000), and later by the ACP–E.U. Council of Ministers to cover the period between August 2, 2000 and the entry into force of the Cotonou Agreement. It is interesting to note here that this latter decision by the ACP–E.U. Council of Ministers enabled an early application of the final Agreement as from August 2, 2000 with the exception of provisions concerning the release and implementation of financial resources from the ninth European Development Fund (EDF). See Decision No. 1/2000 of the ACP–E.U. Council of Ministers of July 27, 2000 regarding transitional measures valid from August 2, 2000 until the entry into force of the ACP–E.U. Partnership Agreement ([2000] O.J. L195/46).

[46] See Decision No. 1/2000 ([2000] O.J. L195/46). See also Decision No. 1/2000 of the ACP–E.U. Committee of Ambassadors of February 28, 2000 on transitional measures valid from March 1, 2000 ([2000] O.J. L56/47).





stable. Before the Second World War, international arrangements thus restricted the production of tin, rubber, tea and sugar. Chapter VI of the Havana Charter (see paragraph 3.02), which never came into force, contained rules for the international trade in "basic products". Under this chapter, exporting and importing countries had to conclude multilateral agreements for, *inter alia*, stability in supply and price.

Basic products are produced and exported mainly by developing countries. Article 6 of the (not legally binding) Charter of Economic Rights and Duties of States (see paragraph 3.94) determines that it is the duty of all states to participate in multilateral agreements on basic products, for the purpose of, amongst other things, the establishment of fixed, compensatory and equitable prices.

**International agreements** The import and export restrictions that were thus introduced by various agreements for basic products that have been concluded, particularly since the Second World War, were in principle contrary to Article XI of the GATT (see paragraph 3.26). However, Article XX(h) provides for an exception for import and export restrictions introduced by basic products agreements if these restrictions have been approved by the contracting parties (in practice the General Council). Moreover, Part IV of the GATT, on "trade and development" (see paragraph 2.47), imposes a duty on the contracting states, where appropriate, to enter into international trade agreements for basic products which are of particular importance to developing countries; measures for the stabilisation of market conditions and prices must be established in these agreements (Article XXXVIII [2][a]). However, Part IV does not provide for adequate rules for the negotiation of such agreements. 2.66

The existing agreements can be divided in to two groups:

- agreements on basic products limited to informal arrangements;
- agreements which bring about a market regulation, in which the producing and consuming countries both participate.

In view of the limited success in the past of agreements aimed at the introduction of extensive market regulation, a less far-reaching co-operation has been proposed in more recent negotiations for new commodities agreements.

**Informal regulations** For some basic products such as rubber, lead, zinc and copper, there are intergovernmental consultative bodies consisting of representatives of producing and consuming countries. Within these groups consultations take place on the market development for the particular product. 2.67

The Food and Agricultural Organisation (FAO), a specialist institution of the UN, has created similar consultative bodies for, *inter alia*, tea, citrus fruits, cereals, rice, meat, bananas, skins and hides, oil-containing seeds, oils and fats, hard fibres and fish. Within UNCTAD there are consultative bodies for tungsten and copper.

Certain products (*e.g.* sugar, jute, hard fibres, tea, rice, bananas, oil-containing seeds) are covered by "gentlemen's agreements" which usually introduce price indications and/or export quotas. These arrangements are more readily accepted

than strict agreements, since they do not impose legal duties and their execution is dependent on the willingness of the participant states.

**2.68** **International market regulation** An international market regulation for a basic product can only be created through a multilateral convention in which the most important importing and exporting countries have agreed to comply with this regulation. These conventions have a "mixed" nature: producing as well as consuming countries are parties. Agreements between producing states only (*e.g.* OPEC; see paragraph 2.71) or consuming countries only lack this mixed nature.

At present, market regulation agreements have been concluded for, *inter alia*, cereal, cocoa, rubber, jute and timber. Some of these agreements (*e.g.* for rubber and timber) are currently being renegotiated. The international market regulation for tin suffered considerable financial problems, mainly as a result of speculation on the London Metal Exchange, and was abolished in 1985.

Each market regulation agreement requires an international institution, in which the producing and consuming countries are represented and which supervises the operation of the agreement. It also provides for sanctions and dispute regulation. Some market regulation agreements (*e.g.* for milk products and beef) refer to the GATT dispute settlement regulation (see paragraph 3.110).

The substantive rules of the market regulation agreements depend on the objectives (market mechanism or planning) set by the contracting parties. Some agreements only cover the removal of trade restrictions, others provide for direct intervention in supply and demand.

For instance, the agreement on olive oil regulates competition on the olive oil market, as well as overseeing the elimination of illicit practices, and quality control. Similar regulations are found with regard to other agreements (*e.g.* cocoa, milk products, natural rubber, jute and tropical timber), where they are supplemented by more interventionist measures. The agreements on jute and tropical timber provide, for instance, for research and production structures in the producing countries.

Other agreements are aimed at stabilising the market and the prices. To this end the following three systems are used:

(a) The agreement on milk products determines minimum export prices and provides for a mechanism for price adjustment.

(b) The coffee agreement (London, 1983) provided for a quota system for exports on the basis of the price level on the international market. World-wide quota were fixed by the International Coffee Council and consisted of a fixed part (70 per cent) and a variable part (30 per cent). The fixed part was divided amongst the exporting countries in proportion to their export volumes; the variable part was divided in proportion to the existing stocks in the producing countries (Art. 35). The quotas came into effect when the market prices were below a minimum level; they were suspended when they were higher than the maximum level of the fixed reference prices. The dominant position of Brazil in the coffee market often complicated an efficient execution of the agreement. In 1989 the agreement was extended





to September 30, 1991 after which date the existing quotas were to be abolished. However, negotiations on a new coffee agreement failed in 1993. The present agreement, which came into force September 30, 1994, does not provide for market regulation. As a reaction to the absence of a world-wide market regulation for coffee, Central American coffee producers, together with producers from Brazil and Colombia, concluded a separate agreement in 1993 to maintain control over the coffee market. This is achieved, for instance, by stockpiling 20 per cent of the coffee intended for export.

(c) The cocoa and natural rubber agreements provide for the establishment of a market regulation for buffer stocks, for the fixing of price scales and for a system for export control. When the market prices exceed the fixed maximum prices the institution must sell a given proportion of the buffer stock to stabilise the price within the agreed price scale. When, on the other hand, the market price slumps below the fixed minimum price this institution must buy (and replenish the buffer stock with) sufficient quantities to stabilise the price. When purchases are insufficient to bring the price within the agreed price range the institution may then impose temporary export restrictions on the producing countries. These agreements are at present being renegotiated. A similar, rather detailed, regulation operated under the now defunct international tin agreement. One of the consequences of the insolvency of the International Tin Council was that producing and consuming countries became reluctant to organise buffer stocks for other basic products. The buffer stocks are financed by the countries involved as well as through loans from the IMF.

**2.69** **The UNCTAD "integrated programme"** Each of the various commodity agreements concerns a specific product and has its own regulations. There is no common approach or harmonised implementation, although the UN has made efforts in this direction. As recently as 1976 an "integrated programme" for basic products agreements was established by UNCTAD. During the UNCTAD conference in Nairobi (1976) a global approach for the basic products agreements was accepted. This approach, the "integrated programme", rests on two principles:

(a) an international regulation, applicable to most basic products, should stabilise markets and prices;

(b) prices for basic products should be linked to prices for industrial goods.

The programme seeks to serve the interests of the exporting as well as the importing countries: the export income of the exporting countries must at least remain stable and if possible gradually increase; the importing countries must be assured of supplies.

The integrated programme applies during the first phase to 18 basic products, for each of which UNCTAD must convene an international conference in order to:

(a) establish a regulation for the composition of buffer stocks, possibly linked with production restrictions or export quotas;

(b) establish price mechanisms which take account of, amongst other things, price fluctuations for industrial products imported by producing countries, production costs, exchange rates, inflation and the volume of production and consumption. (This rule means index linked prices according to the price development for industrial products.)

The agreements concerning natural rubber, jute and tropical timber reflect these principles.

However, most of the integrated programme's commodity agreements are less ambitious and, for instance, set up market research and development programmes for production and distribution.

2.70 **The Common Fund** Extensive financing is needed for the realisation of the integrated programme and the storing of buffer supplies. In 1980 it was decided within UNCTAD to establish a "Common Fund" for this purpose.

The Common Fund consists of two accounts:

(a) the first account (needs estimated at $400 million) must serve for the financing of the buffer stocks which must be stockpiled in accordance with the respective agreements between the producing and consuming countries. The financial means are provided by the contracting states.

(b) The second account (needs estimated at $280 million) must serve for the financing of research and development, *inter alia* for improvement of market structures for basic products, for increased productivity and for diversification and marketing of basic products. The financial means are provided by the countries involved, on a partially voluntary basis.

One of the many obstacles in the difficult negotiations was the allocation of the votes in the Council, responsible for the management of the Fund. In the end the votes were allocated as follows: developing countries 45 per cent, industrialised countries 40.2 per cent, the former Eastern bloc 7.7 per cent, China 2.9 per cent and other countries 4.2 per cent.

Because the ratifications took some time, the Fund came into effect only in June 1989. By 1993, 105 countries (but not the United States and Canada) had acceded to the Common Fund. However, the financial means remain far below the proposed amounts: at present the first account has just over $137 million and the second account just over $22 million. The activities of the Fund are therefore rather restricted and concern mainly the second account. The Fund is managed from Amsterdam.

2.71 **Producer organisations** A number of countries that produce basic products or raw materials have set up producer organisations for the representation of their common interests.

Perhaps the best known producer organisation is OPEC (the Organisation of Petroleum Exporting Countries), founded by the Agreement of Bagdad (1960), to





which, besides the Arab countries from the Middle East, Algeria, Libya, Iran, Venezuela, Indonesia, Nigeria, Ecuador and Gabon are also parties. Having initially restricted itself to consultation for the purpose of joint negotiations with the oil companies, OPEC introduced unilateral price fixing for oil in 1973. The industralised countries reacted to the increased oil price by developing alternative sources of energy and by buying oil increasingly from non-OPEC oil producers. In this way the influence of OPEC has been reduced. For some years the OPEC countries have been allotting export quotas among themselves, though, in the absence of sufficient solidarity, the quotas are not always observed.

There is a difference of opinion on the legitimacy of OPEC. The United States considers the organisation to be contrary to the spirit and objectives of the GATT. The developing countries, which are members of OPEC, are excluded from the general tariff preferences granted by the United States (see paragraph 2.55). The developing countries rely on Article 5 of the (non-binding) Charter of Economic Rights and Duties of States (see paragraph 7.29) for the legitimacy of producer organisations such as OPEC. According to most Western countries, a producer organisation is not as such illegitimate, though its actions can be.

There are also producer organisations representing countries which are also parties to international basic product agreements, for instance for cocoa, copper, natural rubber, coffee, bauxite, bananas, iron ore, tungsten, tea, sugar and tropical timber. These organisations do not intervene as such in the market. Rather they co-ordinate the viewpoints of producing countries on the existing agreements for basic products.