

# **International Trade and The Rule of Law**

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If the Merchant of Venice had executed contracts with bankers of Florence instead of sending his wealth East and West (India, Tripolis, etc.), he would still have engaged himself in international trade. The Doge of Venice would have called—as he did—a lawyer from Padua to explain the law. That was the time of a world of cities.

Today, wood pulp producers from Georgia trade in Europe; a pool of international investors gather to build a dam in China; a French

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company builds a tramway in Jerusalem; and when an Indian investor based in the United Kingdom offers a takeover bid on a French company, the protest of the French authorities, as well as the French decree restricting foreign investments, may be regarded as a breach of European Community ("EC") and international law.

Now that we have gone from a world of cities to a worldwide city, or a "global village," the global market needs, just as well, the rule of law. Is that all very new?

International trade goes far back in history, and commercial treaties or contracts can be traced to Ancient Egypt and the merchant law of the eleventh century. For example, in 1417 a most favored nation clause could be found in a treaty between Burgundy and England.<sup>1</sup>

Our present globalization is not new either.

The first instance of Globalization began with the great discovery of the Americas when the Spaniards sailed over and extended European values, rules, and diseases to the South American countries.<sup>2</sup>

The second instance of globalization occurred under British rule through the doctrine of "laissez-faire" and with the improvement of communication and transportation. With cotton mills and businesses, English law spread over India, and today, for that very reason, a lawyer may refer to an unfair competition case involving Calvin Klein that was decided by the Calcutta High Court in order to show that a foreign company has goodwill in the United Kingdom. The same happened with French law in other parts of the world.<sup>3</sup> Freedom of trade ended with the First World War, the major crisis of the thirties, and World War II.

The third instance of globalization, which has its supporters and opponents, favors the rich powers more than it helps the new entrants.

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1. Boris Nolde, *Droit et technique des traités de commerce*, 3 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 295, 301-461 (1924).

2. See TOMÁS LÓPEZ MEDEL, *COLONIZACIÓN DE AMÉRICA: INFORMES Y TESTIMONIOS 1549-1572* (L. Pereña ed. 1990).

3. Many codes, pieces of legislation, and textbooks have been published on colonial law and administration in the past, see for instance: GABRIEL RICARDO, *TRATADO DE DERECHO ADMINISTRATIVO COLONIAL* (Madrid 1894); A.D.A. DE KAT ANGELINO, *COLONIAL POLICY* (Univ. of Chicago Press 1931); E. Moresco, *Les rapports de droit public entre la métropole et les colonies, dominions et autres territoires d'outre-mer*, 55 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 507 (1936); CHARLES M. MACINNES, *PRINCIPLES AND METHODS OF COLONIAL ADMINISTRATION* (1950). Many textbooks on colonial law were published in Spanish, French, and English but also in Italian during the colonial period. See generally PAUL ROUGIER, *PRÉCIS DE LÉGISLATION ET D'ÉCONOMIE COLONIALE*, (Paris, Larose Éditeur 1895); *TWO COLONIAL EMPIRES: COMPARATIVE ESSAYS ON THE HISTORY OF INDIA AND INDONESIA IN THE NINETEENTH CENTURY* (C.A. Bayly & D.H.A. Kolff eds., 1986); *THE BRITISH AND FRENCH MANDATES IN COMPARATIVE PERSPECTIVES* (Nadine Méouchy & Peter Slugett eds., 2004).

We have not yet reached free access and total transparency, but the criticisms do not go so much to the Western model, which people would not want. Conversely, globalization shows other people throughout the world, through the media and the Internet, a kind of social and economic model that is attractive and promising, one which they would like to achieve immediately. However, their political, economic, and social means do not allow these poor countries to reach such a level of development right now. They need to be patient, and this may create frustration. When India—a founding member—and China or other developing countries apply to accede to the World Trade Organization (“WTO”), it is not because they are naïve or because they fear major industrial countries. They can oppose, and they have opposed, the rich countries in that context, as shown in the Cancun World Trade Conference in 2003. They probably have no illusion of the possibility of a spontaneous expansion of wealth through capitalism, but they know now, keeping in mind the nineteenth century experience and the disasters created by socialism, that protectionism is not the proper way to prosperity. Therefore, they search for a convenient way to accede to market, trade, investments, and therefore, development.

This global market supposes the existence or the adoption of common legal principles and rules. The role of law in international trade is quite obvious. It organizes imports and exports, financial transactions, and movement of traders across borders.

Moreover, it has been pointed out by the Conference on Security and Cooperation in Europe in 1990 that “societies based on the rule of law are prerequisites for . . . the lasting of peace, security, justice and cooperation.” So, if we agree with Montesquieu that “peace is the natural effect of trade,”<sup>4</sup> then the rule of law should extend to international trade.

If we apply the criteria defined by A. V. Dicey, the nineteenth century English constitutional lawyer, that the core of “rule of law” is an autonomous legal order: “Under rule of law, the authority of law does not depend so much on law’s instrumental capabilities, but on its degree of autonomy, that is, the degree to which law is distinct and separate from other normative structures.”<sup>5</sup>

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4. CHARLES DE SECONDAT, BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 316 (J.V. Prichard ed., Thomas Nugent trans., G. Bell & Sons, Ltd. 1914) (1748) (“Two nations who traffic with each other become reciprocally dependent; for if one has an interest in buying, the other has an interest in selling: and thus their union is founded on their mutual necessities.”).

5. Bo Li, *What is Rule of Law?*, 1 PERSPECTIVES No. 5 (2000), available at [http://www.oycf.org/Perspectives/5\\_043000/what\\_is\\_rule\\_of\\_law.htm](http://www.oycf.org/Perspectives/5_043000/what_is_rule_of_law.htm). (last visited Apr. 20, 2007).

As an autonomous legal order, rule of law means first, according to Dicey, a certain limitation or constraint on discretionary powers of governments, and it supposes supremacy of law, which requires both individuals and governments to be subject to known and standing laws. Second, rule of law requires a certain kind of equality in the law. Laws should be general and not made in respect of particular persons. Third, rule of law implies some sort of formal or procedural justice, which covers fairness, transparency, and consistency of the rules of decision and procedure.

Does the rule of law apply to economic matters?

Economic historians<sup>6</sup> have shown that the rise and development of the Western World and of liberal democratic nation-states is mainly due to the transformation of the relations between political powers (mainly royal power or princedoms but also aristocratic or merchant republics) and individuals and businesses. Early on, states distanced themselves from commercial activities and the rules that governed the relations between the states, and economic agents instead constituted the seed of the rule of law in trade matters: this was the origin of market economy.

How did the rule of law extend to international trade?

It is quite obvious that at some stage international trade is and has been ruled *by* law. Law served as an instrument of national-states to organize imports and exports, financial relations, and movement of traders across the borders. But the existence of the rule *of* law in this field supposes that the three characteristics of an autonomous legal order should exist in order to achieve three functions.

First, the rule of law regulates the economic behavior of economic agents in order to create and maintain a stable and fair competitive environment, to protect property rights, and to enforce contracts. Second, the rule of law regulates and limits discretionary interventions of the states in economic and commercial activities. Third, the rule of law regulates the relations between states in order to allow them to operate in a fair and open multilateral trading system for the benefit and welfare of their peoples, as stated in the WTO Marrakesh Declaration of 1994.

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6. DOUGLASS C. NORTH & ROBERT PAUL THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973); DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE: POLITICAL ECONOMY OF INSTITUTIONS AND DECISIONS* (1990); DAVID S. LANDES, *THE WEALTH AND POVERTY OF NATIONS: WHY SOME ARE SO RICH AND SOME SO POOR* (1998); NATHAN ROSENBERG & L.E. BIRDZELL, JR., *HOW THE WEST GREW RICH: THE ECONOMIC TRANSFORMATION OF THE INDUSTRIAL WORLD* (1986).

However, how can these conditions be satisfied? How can a “credible commitment” of governments be established in an international community where states are still sovereign? How may the rule of law be made effective and efficient in international trade? That is the question I would like to try to answer by developing two points: (1) The rule of law allows the development of international trade and (2) international trade allows the expansion of the rule of law.

#### I. THE RULE OF LAW ALLOWS THE DEVELOPMENT OF INTERNATIONAL TRADE

Trade supposes the existence of predictable and enforceable law. In the international context, where sovereign states dominate, trade is based on (A) domestic law and (B) international law.

##### A. *International Trade is Based on Domestic Law*

Municipal legislation and regulation go a long way in reflecting the concern of the states over the liberal laissez faire basis of international commercial transactions. It is not so much the courts that concern the states—judges tend to construe contract terms to express and protect the will of the parties, not only as to the object of the contract, but also as to the choice of applicable law. Legislative intervention, which is a more formal and direct intrusion, tends to achieve two functions with regard to international trade: (1) plugging the failures of the market and (2) ensuring public policy.

**1. National Legislation Attempts to Correct or Fill the Gaps in the Market in Economic, Social, and Legal Terms.** First, the state regulates external trade in the sense that it supervises the flow of products and services to and from the country. These rules cover the control of exchanges, foreign investments, customs, taxes, as well as statistics.

Second, social regulation focuses on the failure of the market in providing sufficient information concerning the quality of the goods or services, or on optimal standards in relation to the health and protection of plants or animals. Social regulation may also concern consumer protection. Economic regulation has a similar purpose: the market operators may affect economic interests in the state. For instance, national regulation tends to counteract the destructive monopolistic tendencies of enterprises (competition law) or to protect industrial and commercial property rights.

Third, municipal law provides a legal framework for transactions. As the Permanent International Court of Justice ruled, “Any contract which

is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country.”<sup>7</sup>

There may, however, be competing laws to apply. But in order to avoid a disarticulated contract, the proper law of the contract should be determined. This is expressed in the Rome Convention on the Law Applicable to Contractual Obligations of 1980: “A contract shall be governed by the law chosen by the parties,” and if no applicable law has been chosen, it “shall be governed by the law of the country with which it is most closely connected.”<sup>8</sup>

Nevertheless, there is room in national law for specific adaptations to international trade. For example, under French law, where interests of international trade are at stake, monetary, autonomy, and arbitration clauses allow the state or public bodies or agencies to conclude arbitration clauses are valid, while it would not be so in a purely national contract.

**2. The Second Function of Municipal Law is to Ensure Public Policy.** The state may restrict or prohibit transactions on the grounds of morality, security, or the protection of national treasures or other major interests.<sup>9</sup> Articles XX and XXI of the 1947 General Agreement on Tariffs and Trade (“GATT”) permit such general or security exceptions to apply, so far as they do not constitute a means of arbitrary or unjustifiable discrimination between countries or are not a disguised restriction on international trade.<sup>10</sup> At the regional level, such exceptions are also provided for either in the North American Free Trade Agreement (“NAFTA”), in the MERCOSUR, or in the Treaty Establishing the European Community.

As a consequence, it has been decided by the Dispute Settlement Body of the WTO in the Import Prohibition of Certain Shrimp and Shrimp Products case that member states are entitled to adopt restrictive

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7. Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of the Serbs, Croats and Slovenes), 1929 P.C.I.J. (ser. A) No. 20, at 31, available at [http://www.worldcourts.com/pcij/eng/decisions/1929.07.12\\_payment1/](http://www.worldcourts.com/pcij/eng/decisions/1929.07.12_payment1/) (last visited Apr. 20, 2007).

8. Convention on the Law Applicable to Contractual Obligations, June 19, 1980, tit. 2, arts. 3-4, 1980 O.J. (L 266) 1, 19 I.L.M. 1492, available at [http://www.rome-convention.org/instruments/i\\_conv\\_orig\\_en.htm](http://www.rome-convention.org/instruments/i_conv_orig_en.htm) (last visited Apr. 20, 2007).

9. IAN BROWNLIE, *THE LAW RELATING TO PUBLIC ORDER* (1968); Trevor C. Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, 266 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L 337 (1997); Hilding Eek, *Peremptory Norms and Private International Law*, 139 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L 1 (1973).

10. General Agreement on Tariffs and Trade art. 14, Oct. 30, 1947, 61 Stat. A11, 55 U.N.T.S. 194.

measures on trade in order to protect the environment.<sup>11</sup> States may even suspend or restrict international transactions on the basis of political reasons when they implement international decisions (United Nations resolutions) or in order to achieve diplomatic goals—for example, by freezing assets, or through embargo or boycott decisions. In most countries, the courts restrain from exercising judicial review on such decisions even if the decisions seem contrary to the rules of a global free market. There are highly political reasons or superior legal norms that stop the courts from reviewing a national embargo decision or the freezing of foreign assets.

As for arbitration, two tendencies appear in case law.<sup>12</sup> On the one hand, public policy decisions such as an embargo are not an obstacle to arbitrability because the tribunal will confirm its jurisdiction. In an International Chamber of Commerce (“ICC”) award in 1994, two Italian companies, parties to a contract for the provision of military equipment to Iraq, were denied jurisdiction of the tribunal on the basis of United Nations (“UN”) resolutions (Res. 661 of the Security Council)<sup>13</sup> that prohibit commercial relations with that country. The ICC tribunal rejected that view. The fact that the tribunal may have to apply public policy rules does not mean it lacks jurisdiction.

On the other hand, when it comes to the merits, the arbitral tribunals tend to apply public policy decisions. There are two situations when the tribunals apply public policy. First, if a national measure has been taken on the basis of the law applicable to the contract, it is then normal for the tribunal to give effect to this public policy decision. For example, the National and International Chamber of Commerce of Milan decided that Italian and EC embargo measures against Iraq were binding, and it stopped the enforcement of the contract for the provision of supplies to Iraq. Second, if the measure that prohibits trade derives from a law that is not the law applicable to the contract, the arbitral tribunal could apply it on the basis of *force majeure*, or cause beyond control (act of God). But the tribunal could also take into account restrictive measures

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11. Panel Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998), reprinted in 37 I.L.M. 832 (1998); see HOMAYOON ARFAZADEH, *ORDRE PUBLIC ET ARBITRAGE INTERNATIONAL À L'ÉPREUVE DE LA MONDIALISATION* (2d ed. 2007).

12. Ibrahim Fadlallah, *L'ordre public dans les sentences arbitrales*, 249 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L 369 (1994).

13. S.C. Res. 661, U.N. Doc. S/RES/661 (Aug. 6, 1990), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/575/11/IMG/NR057511.pdf?OpenElement> (last visited Apr. 20, 2007).

in foreign law if its violation would be illegal or if it would affect the validity of the contract.<sup>14</sup>

However, it could also be argued that the arbitrators, as well as national courts, could find that the restrictive measure is based on an international rule and that they must give effect to that rule. This leads to the following point.

### *B. International Trade is Based on International Law*

Commerce cannot be totally emancipated from international law as a consequence of the cross-border relationships it engenders. Trade transactions are also irrevocably tied to regional law and various international provisions. What is the object of those international rules? What is the effect of those rules?

**1. International Agreements in That Matter have Two Objects.** First, there are treaties and international agreements that have a legislative or regulatory function. Some tend to regulate economic, commercial, and financial relations between states and cover customs, commerce, and investments. They govern shipment and carriage by sea, air, road, rail, or containerization, and they may have a highly political dimension, such as those that establish control on exports of high technology.<sup>15</sup> Some other treaties tend to facilitate the legal organization of the transaction or avoid the difficulties arising from conflict of laws or jurisdictions. Some go further as they attempt to harmonize trade law and practice simply as a treaty applicable as law in the countries that have formally ratified or incorporated it. Others constitute model codes that are not binding until their provisions have been brought into the contract as express or implied terms.

This harmonization tends to ensure legal certainty. In spite of this obvious advantage, traders, lawyers, and governments are slow or reluctant to support the process of harmonization. It seems difficult to agree on the interpretation of terms contained in international rules and

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14. Geneviève Burdeau, *Les embargos multilatéraux et unilatéraux et leur incidence sur l'arbitrage commercial international*, 2003 REVUE DE L'ARBITRAGE 753; see also J-B Racine, *L'arbitrage commercial international et les mesures d'embargo: à propos de l'arrêt de la Cour d'appel du Québec du 31 mars 2003*, 131 J. DU DROIT INT'L 89 (2004).

15. Harold Levine, *Technology Transfer: Export Controls Versus Free Trade*, 21 TEX. INT'L L.J. 373 (1986); STUART MACDONALD, *TECHNOLOGY AND THE TYRANNY OF EXPORT CONTROLS: WHISPER WHO DARES* (1990); Wolfgang Graf Vitzthum, *Transfer of Technology and Public International Law*, 36 LAW & STATE 95 (1987); Yves P. Quintin, *Transferts de technologie et application extra-territoriale des contrôles sur les exportations américaines à la lumière de "l'Export Administration Act" de 1985*, 76 REVUE CRITIQUE DE DROIT INT'L PRIVÉ 493 (1987).

even more difficult to ensure compliance and uniformity in the application of these rules. Harmonization may also be regarded as being at the cost of flexibility and party autonomy. Moreover, very often harmonization does not cover all the aspects of a specific legal transaction. For example, the UN Convention on Contracts for the International Sale of Goods leaves out issues of contractual validity, formality, and property rights to national rules.<sup>16</sup> Harmonization is therefore quite diluted; it leaves the possibility of conflict with the spirit or the terms of national law, which opens a field of construction and combination of international and national norms for the courts or arbitral tribunals.

Nonetheless, international organizations or bodies such as the United Nations Commission on International Trade Law (“UNCITRAL”) and the International Institute for the Unification of Private Law (“UNIDROIT”) have proposed a wide range of harmonized rules from banking and carriage of goods to principles of international commercial contracts. These measures are to be adopted and ratified by member states as law.<sup>17</sup> Another interesting example is given by the Ohada Treaty, which organizes the harmonization of business law in Africa between sixteen French speaking countries in order to update their law and set up a single modern business law. This enables easier access to economic activities, guarantees a safe legal environment, and therefore enhances investment. Ohada adopts uniform acts which are then translated into the languages of member states and may have direct effect subject to certain conditions.<sup>18</sup>

Second, there are treaties that do not rule on precise substantive law but set up commercial cooperation or integration mechanisms or organizations. This leads to a set of laws at the regional or universal level that may be enacted or adopted by the institutions of the organization. The most achieved example is the EC, where regulations and

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16. GRANT R. ACKERMAN, U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1992); Karl H. Neumayer & Catherine Ming, *Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire*, 24 CEDIDAC 117 (1993).

17. For instance, legislation based on UNCITRAL Model Law on International Commercial Arbitration (1985) has been enacted in 51 states and by several American states (California, Connecticut, Illinois, Louisiana, Oregon, and Texas).

18. *Traité relatif à l'Harmonisation en Afrique du Droit des Affaires*, 4 Journal Officiel [JO] OHADA 1 (Nov. 1, 1997), available at <http://www.ohada.com/traite.php?categorie=10> (last visited Apr. 20, 2007). The Ohada Treaty was signed on October 17, 1993, and came into force in 1995. The Ohada Treaty covers general commercial law, partnership, securities, insolvency, and debt collection procedure. See also BORIS MARTOR ET AL., BUSINESS LAW IN AFRICA: OHADA AND THE HARMONIZATION PROCESS (2002); B. Martor & S. Thouvenot, *Business Law in Africa: OHADA Harmonization Supports Africa's Development*, LAW SOCIETY, May 17, 2004; Seward M. Cooper, *The African Institute and the Harmonization of Laws in Africa*, AFRICAN DEV. BANK BULL. 2004, at 29.

directives regulate commercial relations of the Union and are binding on member states with direct effect on individuals and businesses. There are other similar cooperation or integration processes: the Americas have NAFTA, MERCOSUR, and CARICOM; Asia has the Association of South East Asian Nations ("ASEAN"); Africa has the West African States Common Market and, more recently, the Agadir Declaration (2001) and the Rabat Treaty (2004) for the future establishment of a free trade zone between the Arabic Mediterranean States.

Such regional links are compatible with cooperation at a global level. Obviously, the WTO has created a legal order of its own with specific rules and mechanisms for its implementation. GATT law as developed for fifty years has been incorporated into the WTO, which is based on a 500-page treaty with 2000 pages of commitments. This new corpus of law constitutes a body of binding rules on all member states.<sup>19</sup> In the WTO appellate body's report entitled *Guatemala–Anti-Dumping Investigation Regarding Portland Cement from Mexico* and in the WTO report entitled *Indonesia–Certain Measures Affecting the Automobile Industry*, the panels considered whether there is a possibility of conflict between the various provisions of the WTO. The obligations contained in this agreement are generally cumulative and can be complied with simultaneously, while different aspects, or sometimes the same aspects, of a legislative act can be subject to various provisions of the WTO agreement.<sup>20</sup>

Therefore, the WTO is a unique legal body that sets up a coherent legal order; it rules a "community" of member states. In the panel report on *United States–Sections 301-310 of the Trade Act of 1974*, the panel admitted that the GATT-WTO did not create "a new legal order the subjects of which comprise both contracting parties or Members and their nationals" as it has been already admitted for the European legal order in the EC.<sup>21</sup> However, it ruled that:

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19. Marrakesh Agreement Establishing the World Trade Organization art. 2, Apr. 15, 1994, 33 I.L.M. 1144, 1144 ("The agreements and associated legal instruments . . . are integral parts of [the WTO] Agreement, binding on all Members.").

20. Appellate Body Report, *Guatemala–Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R (Nov. 2, 1998); Panel Report, *Indonesia–Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R (July 2, 1998).

21. Panel Report, *United States–Sections 301-310 of the Trade Act of 1974*, para. 7.72, WT/DS152/R (Dec. 22, 1999); see also Case 26/62, *NV Algemene Transport en Expeditie Onderneming van Gend & Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1.

The multilateral trading system is, per force, composed not only of States but also, indeed mostly, of individual operators. The lack of security and predictability affects mostly these individual operators. Trade is conducted most often and increasingly by private operators. It is through improved conditions for these private operators that members benefit from WTO disciplines.<sup>22</sup>

As a consequence, the WTO has created a legal order that respects the main features of the international legal system and particularly the equality of states principle. However, its rules allow an adjustment of international law to the needs of international trade. This adjustment is illustrated at two levels: (1) the institutional level and (2) the substantive level.

At the institutional level, the basic rule in the decision making process is that one member state gets one vote, and all members have a seat and may participate in all councils and committees (except the Dispute Settlement panels and Appellate Body), such as the Ministerial Conference and the General Council. However, this principle that one state gets one vote, which reflects sovereign equality of the members, is combined with a systematic recourse requiring a consensus for all decisions.

At the substantive law level, the most favored nation clause and the national treatment clause, which are at the root of the WTO system, create a dynamic and tend to achieve a worldwide trade community.

**2. What is the Effect of International Trade Rules?** The main difficulty is determining the effect of international trade rules. As shown by Dicey, an effective rule of law that is based on international rules supposes its supremacy. In the context of international relations and even more so of international trade, this supremacy may appear problematic.

There is no difficulty in implementing contract terms subject to their conformity with public policy. Furthermore, there is no difficulty in enforcing municipal law, subject to conflicts of laws and jurisdictions, which may be resolved either on the basis of national law or on the basis of a specific convention.

Conversely, where the rule of law derives from an international rule or principle, the trader, the lawyer, or the court may face two sorts of difficulties. The first difficulty is traditional and well known by international lawyers: it concerns the relations between international

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22. Panel Report, *United States–Section 301-310 of the Trade Act of 1974*, supra note 21, at paras. 7.76-7.77.

law and national law, and the opposition of monism and dualism is at the heart of the question. National courts have developed different views in this matter.<sup>23</sup>

English courts have traditionally refused to apply an international rule if it has not been incorporated into English law by an act of Parliament. Sometimes this has led to absurd consequences such as in *Arab Monetary Fund v. Hashim* in 1991 where the House of Lords held that in the absence of a statutory instrument creating the Arab Monetary Fund as an entity with legal status in English law, the Fund did not exist as an international organization, in spite of the fact that it had been established by treaty, had one thousand employees, and had engaged in many transactions in London.<sup>24</sup> This has changed, and in recent cases the courts—and particularly the House of Lords—tend to give effect in some matters to international rules or principles in Common Law through *jus cogens* or by asserting jurisdiction over foreign acts that are contrary to international law. For instance, the decision by a foreign government to confiscate foreign assets is justiciable when it violates international law.<sup>25</sup>

On the contrary, generally, French courts give effect to international law that prevails over domestic law, but according to recent decisions, this is subject to the provisions of the French Constitution: both administrative and judicial supreme courts have ruled that the French Constitution supersedes treaties or international agreements.<sup>26</sup> However, there is no possibility under French law to challenge the constitutionality of a treaty after it has been ratified or approved by French authorities.

Before international courts and tribunals, there is more flexibility. For the International Court of Justice, domestic law is a fact, and international law should prevail. However, on some matters, even an international court will apply domestic law. For example, the applicable law governing the redemption of bonds.<sup>27</sup>

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23. See DUNCAN B. HOLLIS ET AL., NATIONAL TREATY LAW AND PRACTICE (2005).

24. *Arab Monetary Fund v. Hashim* [1991] 2 A.C. 114 (H.L.); Ilona Cheyne, *Status of International Organisations in English Law*, 40 INT'L & COMP. L.Q. 981 (1991).

25. *Kuwait Airways Corp. v. Iraqi Airways, Co.*, [2002] 2 A.C. 883, (H.L.).

26. *Sarran, Levacher et autres*, CE Ass., Oct. 30, 1998, Rec. Lebon 368; *Fraisse*, Cass. ass. plén., June 2, 2000, Bull. Civ., No. 4.

27. *Case Concerning the Payment of Various Serbian Loans Issued in France (Fr. v. Kingdom of the Serbs, Croats and Slovenes)*, *supra* note 7, at 31-34; *Nottebohm Case (Liech. v. Guat.)*, 1955 I.C.J. 4 (Apr. 6); see ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 205 (1995).

In many international trade litigation cases, the choice of applicable law depends on the parties. Where the parties have made no choice, a court, or even more so an arbitral tribunal, enjoys more flexibility.

The International Centre for Settlement of Investment Disputes (“ICSID”) case of *AMCO Asia v. Indonesia*<sup>28</sup> cuts with traditional ideas. Usually, on the basis of Article 42 of the Washington Convention,<sup>29</sup> when there is no agreement of the parties on applicable law, the tribunal applies the contracting state law party to the dispute, and thus rules of international law may be applicable to fill the gaps.<sup>30</sup> That was the solution adopted in the first award. The second award is very clear: it is annoying and difficult to demonstrate that there is a gap in applicable domestic law or a contrariety between domestic law and international law, or both. As a consequence, it was decided that arbitrators are free to draw from the sources of international law without showing the need to do so, and in order to make sure the rule of law is implemented.<sup>31</sup>

Arbitrators may be bound by norms of international law that express concerns of public policy at the international level. For instance, in *Air France v. Libyan Arab Airlines*,<sup>32</sup> a 1992 resolution of the Security Council<sup>33</sup> prohibited the supply of aircrafts to Libya. In 1993, the Security Council confirmed that measure, as it imposed the freezing of Libyan assets and decided that states should take measures to ensure that no claim shall lie at the instance of the Libyan government or any Libyan national or undertaking.<sup>34</sup> The tribunal rejected the plea of Air France, which had submitted that the case could not be arbitrated, but it decided that the claim was admissible only for the parts of the contract enforced before the 1992 UN Resolution.<sup>35</sup>

Similar provisions can be found now in almost any resolution by the Security Council on the basis of Article 41 of the UN Charter,<sup>36</sup> which allows the interruption of commercial relations with member states. This does not mean, however, that a UN resolution has direct effect in

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28. *AMCO Asia Corp. v. Indon.*, 1 ICSID (W. Bank) Rep. 413 (1993) (award of Nov. 20, 1984); *AMCO Asia Corp. v. Indon.*, 1 ICSID (W. Bank) Rep. 569 (1993) (award of June 5, 1990).

29. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159.

30. *Id.* at art. 42, § 1.

31. See *AMCO Asia Corp. v. Indon.*, *supra* note 28.

32. *Air France v. Libyan Arab Airlines*, [2003] 3(4) M.A.L.Q.R. 1 (Fed. Ct.).

33. S.C. Res. 748, U.N. Doc. S/RES/748 (Mar. 21, 1992).

34. S.C. Res. 883, U.N. Doc. S/RES/883 (Nov. 11, 1993).

35. See Geneviève Burdeau, *supra* note 14.

36. U.N. Charter art. 41.

domestic law. In most countries, in order to be enforced, it has to be applied through acts of national law.

The second problem is that it is more difficult to decide when there are competing or even conflicting international rules.

The efficiency and legitimacy of international trade rule of law depends on how it relates to norms of other legal systems and on the relationship between the various international organizations which create and maintain the rules. This can be illustrated through European Union ("EU") and WTO practices.

In the European practice, there has been a recent development in the case law of the European Court of Justice ("ECJ"), which tends to give effect to international rules adopted by the UN. However, the ECJ seems more reluctant with respect to other international rules, particularly the ones adopted by the WTO.

In relation to restrictive commercial measures decided against Yugoslavia, the ECJ has ruled first that a national measure that prevents or restricts the export of certain products cannot be treated as falling outside the scope of common commercial policy on the ground that it has foreign policy and security objectives.<sup>37</sup> Then the court ruled in another case, in view of the aim pursued by Security Council sanctions—such as putting an end to war and massive violations of human rights—that the confiscation of a commercial aircraft cannot be regarded as inappropriate or disproportionate, despite free provision of services, freedom of commercial activity, and protection of property.<sup>38</sup> Finally, the Court of First Instance has gone even further and ruled that "the obligations of the member states under the UN Charter prevail over every other obligation of domestic law or international treaty" and even over their obligations under the EC Treaty. Thus, primacy extends to decisions contained in a resolution of the Security Council. Therefore, member states "must leave unapplied any provision of Community law, whether a provision of primary law or a general principle of that law, that raises any impediment to the performance" of their UN obligations.<sup>39</sup>

One could expect that the same solution should apply to WTO rules as they concern precisely the major field of jurisdiction of the EC: economic activities and international trade. It is not so. According to a steady

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37. Case C-124/95, *The Queen v. H.M. Treasury & Bank of Eng. ex parte Centro-Com Srl.*, 1997 E.C.R. I-81.

38. Case C-84/95, *Bosphorus v. Minister for Transp., Energy & Commc'ns*, 1996 E.C.R. I-3953.

39. Case T-306/01, *Yusuf v. Council of the European Union*, paras. 231, 240, 2005 E.C.R. II-0000.

line of cases of the European Court, given their nature and structure, WTO agreements are not in principle among the rules in the light of which the court is to review the legality of EC measures. This has very practical consequences for traders, and the European Court has gone very far in that matter, ruling that an operator cannot plead before the court of a member state that Community legislation is incompatible with WTO rules, even where the Dispute Settlement Body (“DSB”) of the WTO has stated that it was so. For the ECJ, even when the Community has undertaken after the decision of the DSB to comply with WTO rules, it does not intend to assume a particular obligation in the context of the WTO, as it is capable to justify an exception to the impossibility of relying on WTO rules to exercise judicial review of Community measures.

The European Court invokes two explanations for this reasoning. First, even where there is a decision of the DSB holding that the measures adopted by a member are incompatible with WTO rules, the WTO Dispute Settlement system gives great importance to negotiation between the parties. This requires the courts to refrain from applying rules of domestic law, which are inconsistent with WTO rules, and could have the effect of undermining the Community’s position in its attempt to reach a mutually acceptable solution to the dispute. Second, the European Court invokes reciprocity. Community courts have the direct responsibility of ensuring that the EU comply with WTO rules, and to do otherwise would deprive the Community’s legislative or executive branches of the discretion that the equivalent bodies of the Community’s commercial partners enjoy. It is not disputed that some of the most important partners of the EU have concluded from the subject-matter and purpose of WTO agreements that the agreements are not applicable in their courts when the courts review the legality of domestic law.<sup>40</sup> Such lack of reciprocity would introduce an anomaly in the application of international trade rules between states.

This European case law is consistent with WTO treaty provisions. Its interpretation confirms there is no hierarchy between WTO norms and those norms developed in other organizations. First, Article XX of the GATT provides that nothing prevents member states from setting aside market access obligations when a member decides, unilaterally or through a treaty, that considerations other than those of trade must prevail. Second, the Appellate Body has decided that in the course of interpretation of WTO agreements, consideration should be given to either international law, customary law, or other treaties. It is stated

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40. Case C-377/02, *Léon Van Parys NV v. Belgisch Interventie en Restitutiebureau*, 2005 E.C.R. I-1465.

in the Report on the Standards for Reformulated and Conventional Gasoline<sup>41</sup> that the GATT is not to be read in clinical isolation from public international law.<sup>42</sup> The panels and the appellate body, therefore, refer to the context of the WTO and to non-WTO norms when relevant.

Moreover, when the DSB construes provisions of the 1947 GATT as incorporated in the WTO, it makes reference to an “evolutionary manner” of interpreting the terms of the agreement. For instance, it considers contemporary treaties that define “natural resources” in order to use those new modern definitions in the WTO and ensures coherence with respect to the notion. Another example of this method is given by the Agreement on the Application of Sanitary and Phytosanitary Measures,<sup>43</sup> which states that members’ measures based on standards developed in the Codex Alimentarius,<sup>44</sup> the International Office of Epizootics,<sup>45</sup> and the International Plant Protection Convention<sup>46</sup> are assumed to be compatible with the WTO.

More generally, it means that the WTO “encourages Members to negotiate norms in other international fora which they will then implement coherently in the context of the WTO.”<sup>47</sup>

## II. INTERNATIONAL TRADE ALLOWS THE EXPANSION OF THE RULE OF LAW

The more international trade or financial activities develop, the more the rule of law expands.

International trade is to be understood here in a broad sense. Confirming the ruling of its predecessor on freedom of trade, the International Court of Justice (“ICJ”) in the case concerning *Oil*

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41. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (Apr. 29, 1996) (adopted May 20, 1996).

42. *Id.* at 17.

43. Agreement on the Application of Sanitary and Phytosanitary Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, 33 I.L.M. 1154.

44. See generally Codex Alimentarius Commission Procedural Manual (15th ed. 2005), available at [ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual\\_15e.pdf](ftp://ftp.fao.org/codex/Publications/ProcManuals/Manual_15e.pdf) (last visited Apr. 20, 2007).

45. International Office of Epizootics, [http://www.oie.int/eng/en\\_index.htm](http://www.oie.int/eng/en_index.htm) (last visited Apr. 20, 2007).

46. International Plant Protection Convention, Dec. 6, 1951, 23 U.S.T. 2767, 150 U.N.T.S. 67.

47. Pascal Lamy, Address at the Société Européenne de Droit International Conference in Paris: *La place et le rôle (du droit) de l'OMC dans l'ordre juridique international* (May 19, 2006).

*Platforms*<sup>48</sup> ruled that the word “commerce” includes “commercial activities in general—not merely the immediate act of purchase and sale, but also the ancillary activities integrally related to commerce.”<sup>49</sup> The court then ruled that any act that impedes that freedom is thereby prohibited.<sup>50</sup> It is then for states to transfer this principle of freedom of trade into an enforceable rule of law through national legislation or international agreements. Flowing from this corpus of law are general international standards or legal principles, that may be optional and combined together to create effective rule of law in international trade at a global level. At the other end, among operators and private businesses, some support the view that the development of trade has allowed practices to crystallize into general principles or customary rules that constitute an autonomous body of law: *lex mercatoria*.

#### A. *At the Global Level*

In the present state of globalization, the role of international standards such as the most favored nation clause, preferential treatment, reciprocity, and national treatment has increased with regard to three factors: (1) the substantive and geographical extension of GATT through the WTO; (2) the impressive development of the law of international investment; and (3) the objective of development. Those are the three directions in which progress is being made in international trade legal order. For the purpose of this speech, I would like to insist upon two aspects of this order: (1) access to market and (2) security for investments. This does not mean that development is neglected. On the contrary, development has become a major standard of the rule of law in international trade, but access to market and secure investment have a large positive impact on the economy of developing states. “*Trade but not aid*” has become the motto of development policies in Third World states, subject to some adjustments.<sup>51</sup>

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48. Case Concerning Oil Platforms (Iran v. U.S.), 2003 I.C.J. 161 (Nov. 6).

49. *Id.* at 200, para. 80.

50. *Id.* at 203, para. 89.

51. First, in all WTO agreements you find specific provisions that set up exceptions with respect to developing countries or preferential treatments: textile arrangement, agriculture, and services, for example. Second, it flows from the arbitral case law that the definition of investment includes a development dimension. There has been much discussion among economists and among lawyers as to the definition of what is foreign direct investment. Some treaties do not define the concept and leave to the courts or tribunals the task to categorize an operation as a “greenfield investment” (direct investment in new facilities), which implies transfer of money, technology, know-how to create new production capacity and jobs, or a merger or an acquisition. But arbitral awards on international investment regard as such any operation that covers i) the transfer

**1. Free Access to Market Seems to be the First Standard, Mainly Proclaimed and Developed Through the WTO.** Two main principles are crucial in order to achieve free access: (1) tariff reduction and (2) nondiscrimination.

Tariff reduction, as it is recognized in the GATT, (XXVIII bis) states that customs duties often create serious obstacles to trade. Thus, the parties negotiate on a reciprocal and mutually advantageous basis, in order to reduce substantially the general level of tariffs and other charges on imports and exports. As a complement, international law is also moving towards the abolition of quantitative restrictions on imports and exports, except where they are temporarily and urgently required to solve problems of maintenance of currency reserves or for some other special reason. In the same way, the antidumping code has been made more precise and efficient.

Nondiscrimination is the second principle. It is achieved in the WTO through three standards: (1) the most favored nation clause, (2) the principle of reciprocity, and (3) national treatment. The most favored nation clause and the principle of reciprocity apply to competitive relations between two countries that export to a third country. These are basic standards in the GATT and remain in the WTO along with national treatment, which means there cannot be any discrimination between foreign products and national products. This prohibition against discrimination between products has extended to all matters and activities.

First, as a consequence, market access for agriculture has improved to a significant degree, and it has been reinforced by the Agreement on Application of Sanitary and Phytosanitary Measures, which ensures that technical standards in the agricultural and food sectors will be developed, implemented, and enforced in a nondiscriminatory and nonprotectionist way. Textiles and clothing have also been fully integrated into the GATT system. Second, a major step has been the extension of market access to trade in services. Third, the agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS"), which covers patents, trademarks, copyrights, and other intellectual property rights (1) applies the basic principles to intellectual property; (2) establishes certain minimum levels of protection; (3) requires members to implement enforcement obligations to ensure that protection is in fact observed; and (4) links the obligations of TRIPS with those of the WTO so that in

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of some assets to a foreign country, ii) intended to conduct a commercial or industrial operation either in production of goods or provision of services, and iii) subject to contribution to the development of the host country.

certain circumstances, a violation of TRIPS can be disciplined through the use of trade-related sanctions, such as increased duties.

However, it is not easy to enforce these free-market principles for several reasons. The first reason is evaluation. For example, there may be subtle protectionist tax manipulations, or it may be difficult to evaluate and compare “similar products” as illustrated in a report on *Taxes on Alcoholic Beverages*.<sup>52</sup> Are schochu, whisky, brandy, rum, gin, and even “moonshine” or other liquors similar products? Do they compete directly? Are they interchangeable?

The second reason is related to sanctions. When a state initiates a dispute settlement procedure against another state because it considers that there has been an infringement of WTO obligations, and when that procedure leads to the adoption by the DSB of a report concluding that the measures are inconsistent with some provision of WTO agreements, then the plaintiff expects that the measures concerned will be withdrawn. There may be some delay in the implementation of the decision, and there is room for negotiation. But, in that context, the Understanding on Rules and Procedures Governing the Settlement of Disputes<sup>53</sup> provides for the possibility to compensate any failure in the implementation. So there may be either compensation granted to the complaining party, or the authorization to suspend concessions or other obligations granted to the defending party.<sup>54</sup> In the past, under the GATT, retaliatory measures have been authorized only once: the Netherlands was authorized to impose a quantitative restriction on the import of whole-wheat flour coming from the United States because of restrictions imposed by the United States on Dutch dairy products. Under the new system, it is still quite an exception but there are several famous examples: the Regime for the Importation, Sale and Distribution of Bananas,<sup>55</sup> Measures Concerning Meat and Meat Products (Hormones),<sup>56</sup> Measures Affecting Importation of Salmon<sup>57</sup> between Aus-

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52. Panel Report, *Japan—Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R (July 11, 1996).

53. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1226.

54. Carine Mocquart, *Problems of Commercial Compensations and Withdrawals of Concession in the WTO Dispute Settlement System*, 1 INT'L BUS. L.J. 39 (2003).

55. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

56. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

57. Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, WT/DS18/AB/R (Oct. 20, 1998).

tralia and Canada, Export Financing Programme for Aircraft between Brazil and Canada,<sup>58</sup> and the U.S. Tax Treatment for Foreign Sales Corporations,<sup>59</sup> in which the amount of concessions suspension reached \$4 billion per year.

This practice shows two facts: (1) there is always a possibility to negotiate in international trade relations and (2) it is through international trade measures that at the end of the day, states are made to enforce the rules. This could be illustrated by the report on *Measures Affecting the Approval and Marketing of Biotech Products*<sup>60</sup> case between the EC and U.S., Canada, and Argentina, or by the U.S.-Canada report on *Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*<sup>61</sup> decided last August. One should also remember that the WTO may pass rules and decisions, but resistance may come from the consumers. For instance, in Britain and Europe it seems quite clear that consumers do not want GMO food, whatever the WTO may decide.

**2. One of the most striking examples in recent years of the expansion of the rule of law through trade is provided for by the regulation of foreign direct investment.**<sup>62</sup> Through the years, expropriation, nationalization, confiscation, and harassment have prevailed. Those measures were the result of feverish assertion of national sovereignty. As developing states proclaimed their sovereignty over natural resources, they intended to create a new international economic order, while regarding foreign investments as either a remnant of colonialism or an attempt of economic and financial intervention. This led to severe restrictions such as the prohibition to transfer benefits outside the country, or negative interest on foreign assets, and many other measures. The collapse of the local economy, due to various political and economic reasons, drove those countries to change. They

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58. Appellate Body Report, *Brazil-Export Financing Programme for Aircraft*, WT/DS46/AB/R (Aug. 2, 1999).

59. Appellate Body Report, *United States-Tax Treatment for Foreign Sales Corporations*, WT/DS108/AB/RW (Jan. 14, 2002).

60. Panel Report, *European Communities-Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006).

61. Panel Report, *United States-Final Countervailing Duty Determination with respect to certain Softwood Lumber from Canada*, WT/DS257/RW (Aug. 1, 2005).

62. E.I. Nwogugu, *Legal Problems of Foreign Investments*, 153 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L 167 (1976); A.O. Adede, *Legal Trends in International Lending and Investment in Developing Countries*, 180 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L 9 (1983); P. Juillard, *L'évolution des sources du droit des investissements*, 250 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INT'L 9 (1994); PATRICK JULLIARD & DOMINIQUE CARREAU, *DROIT INTERNATIONAL ÉCONOMIQUE* (Dalloz 2d ed. 2005).

have progressively departed from socialist or third-world theories and have adopted attractive legislation based on taxation advantages, development of free trade sectors, and zones and legal measures to encourage, promote, protect, and even guarantee foreign direct investments against “political risks.”

Investments codes—as they are called—are either general or devoted to specific activities (mining, agriculture, transports, and water supply, for example). Those codes proclaim rules and principles, which can be found also in Bilateral Investment Treaties (“BIT”), which have been concluded at the same time.<sup>63</sup> More than 2000 BIT are in force today: the U.S. has concluded around forty-seven of them, and France is a party to more than eighty such treaties. In that regard, there are several “models” of BIT. The French model appears through the French conventional practice. The most interesting is the U.S. model.<sup>64</sup> A new U.S. model was published in 2004 and has brought quite a lot of changes in comparison with the previous model in 1994. It reflects an evolution, the United States being more a target for foreign investors rather than an exporter of capital. Still, both aspects of investment policy have to be supported and regulated. The U.S. BIT Program’s aims are: protecting investment, encouraging the adoption of market orientated domestic policies that treat private investment in an open, transparent, and nondiscriminatory way, and supporting the development of international law standards.

In practice, protection of investment is achieved through the fair and equitable treatment standard that provides investments with several basic principles:

- most favored nation clauses;
- national treatment: any foreign investor is entitled to be treated the same way as the host state treats its own investors or investors from any third country;
- expropriation is clearly limited and there should be a payment of prompt, adequate, and effective compensation when expropriation takes place;
- the principle of transferability of funds into and out of the host country without delay using a market rate of exchange creates a predictable environment guided by market forces;
- clauses on stability of law;

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63. Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INT’L 251 (1997).

64. The United States model can be found on the website of the United States Department of State at <http://www.state.gov/documents/organization/38710.pdf> (last visited Apr. 20, 2007).

— when performance requirements are imposed, they should be limited;

— Generally, the BITs also give the investor—and it is certainly the case under the U.S. model—the right to engage top managerial staff of their choice, regardless of nationality;

— Conversely, there may be some clauses that impose on the investor the duty to train local workers. Training and education thus underline the development objective of foreign investments policy of the host state;

— Finally, all BITs give investors the right to submit an investment dispute with the treaty partner's government for international arbitration.

In that respect, a major step has been taken in investment protection with the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States.<sup>65</sup> This treaty sets up conciliation and arbitration machinery on a consensual basis. Without going into the details of that convention under which fascinating case law has developed—particularly in recent years—it seems important to point out that each contracting state automatically recognizes the award as binding and must enforce the financial obligations imposed by that award within its territories as if it were a final judgment of a court in that state.<sup>66</sup> For the private parties, there is no real problem in enforcing such an award, which makes it certainly the most efficient system.

Another important step has been taken with the Seoul Convention in 1985,<sup>67</sup> which has established the Multilateral Investment Guarantee Agency ("MIGA"). It implements the concept of a multilateral investment guarantee scheme in respect to noncommercial risks.

Some risks remain inevitable because they are inherent to a market economy. The ICJ has pointed out as a general principle that an investment receiving state, while bound to extend some protection in law to the investments concerned, does not become an insurer of the investing state's wealth that corresponds to such investments.<sup>68</sup>

The contribution of private operators in international trade is not restricted to economic effects; the business community may give rise to

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65. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, *supra* note 29.

66. *Id.* at art. 54, § 1.

67. Convention Establishing the Multilateral Investment Guarantee Agency, Oct. 11, 1985, 24 I.L.M.

68. Barcelona Traction, Light & Power Co. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5).

legal principles of law, and as such, take part in the building of the rule of law.

*B. Expansion of the Rule of Law at the Private Level*

Alongside international and domestic law, is there a specific law addressed to traders that consists in rules, customary law, and principles developed by merchants and businessmen in the course of their activity? This has been a controversial topic for years,<sup>69</sup> but legal practice shows that there is room for spontaneous development of the law within some limits. It may take the form of model contracts or clauses for a particular activity or sector. It may be codified by international bodies such as the International Chamber of Commerce, as illustrated by Incoterms. It may also be customary practice in relation to ethics or professional conduct.

Generally, arbitral tribunals refer to such rules and apply them with caution, either on the basis of good faith or to fill legal gaps. There have been discussions as to the nature or legal effect of this *lex mercatoria*. However, some courts have admitted it as a useful source of law,<sup>70</sup> and so it can be, for example, with regard to stabilization clauses or intangibility clauses in state contracts or in relation to arbitration agreements.<sup>71</sup>

In the *Eurotunnel* case,<sup>72</sup> the arbitral tribunal applied not only common principles to English law and French law, but also principles of international trade as applied by national and international courts. In

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69. The concept was developed by Prof. Berthold Goldman, *Frontières du droit et lex mercatoria*, 9 ARCHIVES DE LA PHILOSOPHIE DU DROIT 177 (1964). See also *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, 106 J. DU DROIT INT'L 475 (1979); NOUVELLES RÉFLEXIONS SUR LA LEX MERCATORIA, ÉTUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 241-55 (Helbing & Lichtenhahn 1993); Clive Schmitthoff, *International Business Law: A New Law Merchant*, 2 CURRENT L. & SOC. PROBS. 129 (1961); FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992). On the other side of the controversy, see Paul Lagarde, *Approche critique de la lex mercatoria*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN 125 (1982); M. Mustill, *The New Lex Mercatoria: The First Twenty Years*, in LIBER AMICORUM FOR LORD WILBERFORCE 149 (Maarten Bos & Ian Brownlie eds., 1987), reprinted in 4 ARB. INT'L 86 (1988).

70. Cour d'appel [CA] [regional court of appeal] Paris, July 13, 1989, *Revue de l'arbitrage* 1990, 663, note Paul Lagarde; Cour de cassation [Cass. 1e civ.] [highest court of ordinary jurisdiction], Oct. 22, 1991, *Revue critique de Droit International Privé* 1992, 113, note B. Oppetit.

71. Cour de cassation [Cass. 1e civ.] [highest court of ordinary jurisdiction], Dec. 20, 1993, 121 J. DU DROIT INT'L 1994, 432, note Hélène Gaudemet-Tallon.

72. Channel Tunnel Group v. Sec'y of State for Transp. (Perm. Ct. Arb. 2007), available at [http://www.pca-cpa.org/PDF/ET\\_PAen.pdf](http://www.pca-cpa.org/PDF/ET_PAen.pdf).

other cases, the arbitrators have referred to principles applicable in Northern Europe, or they have taken into consideration the terms of the contract and trade usages.

This shows that if *lex mercatoria* is not a “source of law” as such, it describes a method for any tribunal to solve a case by applying diverse sources of national and international origin, or by application on a comparative basis.<sup>73</sup> This emphasizes the need for students and schools of law to study other systems of law and to establish a link between domestic and international law in a world that has not become smaller but, rather, more complicated, where the business relations have built bridges, and still do, between various types of national communities either through formal organizations or informally. Does this improve international relations? Is it true, as it is often said, that “peace is the natural effect of trade?” Montesquieu, the eighteenth century French philosopher concluded in that matter: “Commercial laws, it may be said, improve manners for the same reason as they destroy them. They corrupt the purest morals; this was the subject of Plato’s complaints; and we every day see that they polish and refine the most barbarous.”<sup>74</sup>

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73. See Emmanuel Gaillard, *Trente ans de lex mercatoria: Pour une application sélective de la méthode des principes généraux du droit*, 122 J. DU DROIT INT’L 5 (1995).

74. MONTESQUIEU, *supra* note 4, at 316.