

# **The “Transnational” Political Economy: - A Framework for Analysis.**

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## The "Transnational" Political Economy:

### A Framework for Analysis.[\*]

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#### Introduction

This paper is a first attempt to make explicit a methodological framework that will inform the structure for a larger work.<sup>1</sup> It is called "Transnational" Political Economy to distinguish it from the term "globalisation", which is increasingly gaining currency. "Globalisation" is taken to mean the spread of a certain phenomenon to increasingly larger portions of the globe; for instance, the globalisation of capital, or of liberal capitalist ideology. "Transnationalism", as defined here, subsumes globalisation in the sense that it also describes a process, and that it is concerned with the harmonisation of certain commercial activities. Where it differs is that it builds upon the logic of globalisation and refines it within a dynamic, multi-levelled analysis.

Transnational Political Economy is concerned with the processes of harmonisation within, and between, three "levels" of analysis: individual, state/systemic, and structural. At the individual level are individual traders (including multinational corporations), commercial coalitions, and associations of individuals that transcend state boundaries (such as the International Chamber of Commerce, and Unidroit). Occupying the systemic level are states and all of the manifestations of their power, namely, their systems of municipal commercial law, private international commercial law (which is essentially a choice between a system of municipal law), and public international law, including the international commercial regimes (such as the General Agreement on Tariffs and Trade (GATT)) and intergovernmental economic organisations (ECOSOC, UNDP). The structural level is conceived as a Grotian, normative construct that encompasses all of the constraints and opportunities that affect both individuals and states by virtue of operating within a capitalist system.

Transnational Political Economy begins from the assumption that these levels are becoming more integrated, or harmonised, both "horizontally" in their own right, and "vertically" as the distinction between these levels becomes blurred. Horizontal harmonisation refers to a process that affect the actors that are confined to a particular level. For instance, at the individual level, as the ICC promulgates uniform procedures, or standard contracts for the sale of a certain commodity. The actors involved in that community thereby become more integrated in their practice. Similarly, as states agree to more codes at the level of public international commercial law, their legislations become harmonised to a greater extent. For instance, not only have the tariff codes of the signatories to the GATT become

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<sup>1</sup>J. Wiener and A.J. Williams, The Transnational Political Economy: An Introduction to the Politics of the International Economy, (Forthcoming).

uniform, but as they agree to common rules for services trade and the protection of intellectual property rights, for instance, a greater scope of their commercial laws will become standardised.

The concept of "vertical" harmonisation means the simultaneous harmonisation of the private and public spheres. One of the interesting aspects highlighted by Transnational Political Economy is that this methodology spotlights certain trends that are taking place at the different levels simultaneously. For instance, the ICC and various commodity and professional associations are formulating rules of conduct, standard codes, and model laws to govern certain aspects of international trade from the "bottom up" at the same time that states are relinquishing control over the same issues in public international commercial fora from the "top down". One instance of this is the parallel discussion of public procurement in the Uruguay round of the GATT at the same time that the UNCITRAL Model Law Incorporating Services Procurement Procedures was adopted in May 1994.<sup>2</sup>

The Transnational approach therefore seeks to incorporate the process of increasing globalisation and to take into account the dynamics of the international political economy in a multi-level framework. But the most interesting aspects of Transnational Political Economy lie not the mere description of the initiatives at harmonisation. To do so would produce a fairly dry, largely positivist, account of the measures that have been taken to date. Rather, interesting theoretical comments can be made as to the causes and consequences of such harmonisation, which are normative in nature. Three points, in particular, that will be highlighted in this paper, illustrate the importance of the normative-structural level.

The first is that much of the harmonisation has been "demand driven", or functionally determined, due to the imperatives of globalising liberal capitalism. The principles of private international commercial law, whether they be codified by agencies like the ICC or merely exist in the repeated practice of traders, came about due to the increasing volume and complexity of trade, and the need for simplification, standardisation, and predictability. Similarly, leading to the Uruguay round, states found that there was a host of areas in which rules needed to be made to keep pace with the growth of the international economy, such as the protection of intellectual property rights, and services trade.

The second point is that, as the international economy becomes "globalised", it becomes "politicised" at various levels simultaneously. The issues to be contended with increasingly mandate inputs from private traders, be they organised associations or the lobbying activities of multinational corporations, in inter-governmental fora. And, the issues that are under discussion, it is hypothesised, are increasingly dealt with at a number of levels simultaneously, such as public procurement, as mentioned above.

The third point relates to the issue of control, often expressed in the literature of "globalisa-

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<sup>2</sup>"United Nations Commission on International Trade Law Concludes Twenty-Seventh Session, 31 May-17 June; Adopts Model Law Incorporating Services, Procurement Procedures and Guide to its Enactment", L26, 17 June 1994.

tion" as the issue of sovereignty. The logic of the international political economy, it seems, is driving states to create new rules for international trade, which necessarily means that they voluntarily relinquish their authority over certain issues. As these issues move away from the traditional concern of tariffs and quantitative restrictions, and into such issues as services, intellectual property rights, and agriculture, the loss of sovereignty over issues becomes acute, and socially disruptive in some cases. Similarly, there are processes within the international commercial community that operate according to their own logic which are undermining the ability of states to control areas that have traditionally fallen within their sole sovereign authority. This is apparent in the application of national laws in national courts, and in "delocalised" international commercial tribunals.

The conclusion of the framework suggested here points to the search for new patterns of authority in the international economy. For, as the processes of globalisation continue, and the demands for rule-making become acute in a greater number of areas, attention must turn to the ways in which the tensions between state authority and normative structures of authority are resolved.

This paper could not hope, within permissible confines, to elaborate in detail all of the issues raised by the methodology suggested above. For present purposes, this paper will concentrate on the harmonisation that is occurring within the sphere of private and public international trade law. In doing so, it will highlight the differences between positivist and normative/autonomist conceptions of transnational harmonisation. The paper will conclude with some thoughts as to the normative implications of the growth of such harmonisation, and the areas for further research.

### **Private International Trade Law:**

The traditional view of private international commercial law, as expressed by the Permanent Court of International Justice in the *Serbian Loans* case, is that: "Any contract that is not a contract between states in their capacity as subjects of international law is based on the municipal law of some country".<sup>3</sup> The object of the court, or arbitral tribunal, under this framework is to give effect to the express choice of law of the parties to a contract, and in absence of such an expressed choice, to determine the "proper" law of the contract through conflict of laws rules. The presumption is that a contract may not "float" independent of any municipal system of law; rights can be acquired only under a particular municipal system of law, and therefore must be enforced with reference to that system.<sup>4</sup> In the traditional view, therefore, the state is the ultimate authority over a contract, be it within a purely domestic, or an international context.

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<sup>3</sup>Quoted in P.M. North and J.J. Fawcett, *Cheshire and North's Private International Law* 11th. ed., Butterworths, London, 1987, p.485.

<sup>4</sup>See ie., Cheshire, *Private International Law*, Butterworths, London, 1965, p.36; Dicey, *Conflict of Laws*, Stevens, 1958, General Principle 5.

Beginning in the 1950s–e, however, scholars began to challenge this approach, referring to it as an “unwarranted hegemony of municipal law”.<sup>5</sup> Indeed, international society has become increasingly more integrated since the Second World War, in that the number of international contacts has been growing, as has the value, volume, and speed of world trade, finance, and investment. Heightened interdependence within the international commercial community had rendered international business so complex as to impart to it a special character, one that is not easily amenable to the application of municipal laws. Municipal law may serve well in the domestic context, they contended, but could not be expected to perform optimally to the needs of, for instance, a multilateral finance agreement with numerous embedded contracts. As De Ly has noted, “it may not only be difficult, but arbitrary to localise some international business transactions in one jurisdiction”.<sup>6</sup> This is particularly true if the system with which the transaction has its closest connection is undeveloped in the particular aspect of commerce of concern in the contract. The stability, predictability, and confidence which underpins international commerce would thus be jeopardised if traders suspected suboptimal results from a dispute. This is especially true in the case of contracts between private persons and states, the latter of which has the capacity to exercise the power of eminent domain to change the laws, as sometimes has been done arbitrarily. For all of these reasons, the traditional conflicts of laws approach was deemed to be inappropriate to evolving, and increasingly international, business practices.

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Thus, a theory of “transnational law”, also referred to as “anational law”, “supranational law”, “truly international law”, “international customs and usages”, or a “lex mercatoria”, began to be articulated. This “theory” is by no means a coherent set of ideas, and is perhaps better termed a “research programme”. For, two distinct approaches to the subject are discernible from the literature. The first, positivist position, views the lex mercatoria as having transnational origins, but which exists only by virtue of states giving effect to conventions and uniform laws by ratification into municipal codes, and by trade usages that are articulated by international agencies. For positivists, therefore, the state remains the ultimate authority over private international trade law. The second, autonomist approach, conceives of an anational, autonomous, self-generating system of laws articulated by the international commercial community for the regulation of its activities. Its practices, usages, and customs, supplemented by the general principles of law recognised by commercial nations comprise a - not yet fully developed - normative order that exists independent of any national system of law.

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<sup>5</sup>Arguably the first was Lambert, writing “Sources du Droit Comparandeaacute; ou supranational, législation uniforme et jurisprudence comparative in the 1920s. Most scholars credit Jessup's, *Transnational Law*, 1956, as beginning the debate. Given the exigencies of space here, it is not possible to provide a comprehensive genealogy of the evolution of the theory. However, this is done with exceptional clarity by Filip De Ly, *International Business Law and Lex Mercatoria*, North-Holland, London, 1992, esp. chs. 4 and 5.

<sup>6</sup>Thomas E. Carbonneau, “The Remaking of Arbitration: Design and Destiny”, in Carbonneau (ed.), *Lex Mercatoria and Arbitration*, Transnational Juris Publications, Inc., Dobbs Ferry, New York, 1990, p.7.

## The Positivist Perspective.

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Clive M. Schmitthoff is the principal advocate of the positivist conception of the *lex mercatoria*. He argues that it has its origins in the Medieval "law merchant", but in principle only. According to him, the modern *lex mercatoria* is a "new law merchant", which is the third stage of an historical process that blends features of the previous two. In the first, pre-national, stage in Europe, the "law merchant" consisted of a "body of truly international customary rules governing the cosmopolitan community of international merchants"<sup>7</sup> on the high seas and in the conduct of fairs. The *Carta Mercatoria* (1303), and the Statute of the Staples (1353) assured the application of the *lex mercatoria* in the court of Piepowder, the equivalents of modern permanent arbitral tribunals. The notary public also contributed to the harmonisation of such practices by creating model contracts which were observed by the commercial community at large. The second stage consisted of the consolidation of state power and the unification of municipal laws. Thus, from 1606 to 1640, the King's Bench and Courts of Common Pleas replaced the merchant courts, and under Chief Justice Mansfield, the law merchant was absorbed into common law that became applicable to all citizens. The third stage, according to Schmitthoff, consists of a reversion to the principle of a truly international commercial law. He stated, "[w]e are beginning to rediscover the international character of commercial law... the general trend of commercial law everywhere is to move away from the restrictions of national law to a universal, international conception of the law of international trade".<sup>8</sup>

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Schmitthoff seems to be somewhat ambiguous about the standing of this legal order. On one hand, he states that the "new law merchant is in the nature of an 'autonomous law' [with] its own legal regulation without reference to, and independent of any municipal system of law".<sup>9</sup> Yet, Schmitthoff accepts only three aspects of commercial practice in support of this. The first are the principles that are so universally recognised as to make them independent of any particular legal system: that of *pacta sunt servanda*, and party autonomy to choose the law applicable to their contract (subject to issues of legality and mandatory public law rules). The second is the standard form of contract, which, he contends, create a law unto themselves, and "render it redundant to refer to any legal system". He continues, "the proper law of the contract is determined by ascertaining the free will of the parties and applying it to the contract... the parties... can generally make their own law and this

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<sup>7</sup>Filip De Ly, *International Business Law and Lex Mercatoria*, North-Holland, London, 1992, p.58.

<sup>8</sup>Schmitthoff, "International Business Law: A New Law Merchant", *Current Law and Social Problems*, v. 129, 1961 (Reprinted in Chia-Jui Ceng (ed.), *Clive M. Schmitthoff's Select Essays on International Trade*, Martinus Nijhoff Publishers, London, 1988, pp.20-37, at p.20); and Schmitthoff, "The Unification of the Law of International Trade", *Journal of Business Law*, 1968, pp.105-119 (Reprinted in Chia-Jui Ceng, *ibid.*, pp.105-119). For a more detailed exposition of the Medieval mercantile law, see Harold J. Berman and Colin Kaufman, "The Law of International Commercial Transactions (*Lex Mercatoria*)", *Harvard International Law Journal*, Vol.19, No.1, 1978, pp.221-277.

<sup>9</sup>Schmitthoff, "International Business Law: A New Law Merchant", *op. cit.*, p.27.

need not be a system of national law".<sup>10</sup> The third aspect of commercial practice is the growing popularity of international commercial arbitration, which gives parties the freedom to choose the forum to hear their disputes (ie., the London Court of Arbitration (LCA), the International Chamber of Commerce in Paris (ICC), or the World Bank's International Centre for the Settlement of Investment Disputes (ICSID)).

On the whole, this theory concentrates on the unification and harmonisation of international trade law, and is very firmly based on national jurisdiction, as he admits. Schmitthoff stated that the "autonomous law of international trade is derived from two sources, viz, international legislation and international commercial custom".<sup>11</sup> Examples of the former include international conventions and uniform laws, particularly those formulated by the United Nations Commission for International Trade Law (UNCITRAL): the Convention on the Limitation Period in the International Sale of Goods (1974); the Convention on the Carriage of goods by Sea (1978); the Vienna Convention for the International Sale of Goods (1980); the Convention on Contracts for the International Sale of Goods (1980); and the Convention on International Bills of Exchange and International Promissory Notes (1988). On the latter sources of the *lex mercatoria*, international customs, Schmitthoff attributed great importance to those "formulated by international agencies", such as the International Chamber of Commerce (ICC), which has elaborated INCOTERMS (1990); Uniform Customs and Practice for Documentary Credits (UCP, 1983); ICC Rules for Conciliation and Arbitration (1988); Uniform Rules for a Combined Transport Document (1975); and Uniform Rules of Conduct for Interchange of Trade Data by Teletransmission (1988). There are also customs incorporated into standard contracts, as issued by international commodity traders, such as the London Corn Trade Association, the International Air Transport Association (uniform air way bills), and the Lloyds Marine Insurance Policy.

The ambiguity comes when Schmitthoff accords primary importance to the state. Having said that the sources of the *lex mercatoria* are truly international, Schmitthoff goes on to say that it owes its existence, in one way or another, to the state. At first glance, this appears to be a fundamental conflation between "levels". That is, a conflation between individuals apparently superseding the authority of municipal systems of law by exercising their autonomy to create self-contained law in their contracts, and of the *lex mercatoria* owing its existence to the state.

Schmitthoff resolves this tension in favour of the state. International conventions - "deliberate" law creation - are given effect by their acceptance by states and depend on their being ratified into municipal law (either multilaterally, in the case of conventions, or unilaterally, as with model laws). International customs do not depend on the state to bring them into being. Agencies, such as UNCITRAL, ICC, Unidroit, the Hague Convention on Private International Law and the International Maritime Committee articulate these, and parties

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<sup>10</sup>Ibid., p.31.

<sup>11</sup>Ibid., p.32.

give them effect by inserting them into their contract.<sup>12</sup> Schmitthoff explained, "international legislation applies.. by virtue of the authority of the national sovereigns but international custom is founded on the autonomy of the will of the parties who adopt it as the regime applicable to the individual transaction in hand".<sup>13</sup> Yet, even then, Schmitthoff stated that this aspect of the *lex mercatoria* owes its existence by virtue of the stability accorded by sovereign states. Having on one occasion stated that parties are free to make their own law in a contract, that the contract becomes regulated by the clauses that are contained within it and need not make reference to a national law, he elsewhere states that parties "cannot provide for every detail, but can in practice make the proper law dormant".<sup>14</sup> Finally, Schmitthoff drives the final nail in the coffin of any allusion to an autonomous law by declaring that: "It is... wrong to attribute the character of.. supranational law to international trade law. It acquires its autonomous character by leave and licence of all national sovereigns. Ultimately, it is founded on national law".<sup>15</sup>

In summation, Schmitthoff defines the *lex mercatoria* as a process of harmonising municipal trade laws on the one hand, and, whereas he begins to develop a theory of an autonomous law based on the free will of contracting parties on the other, he ultimately retreats from this position by refusing to relinquish his belief in a "proper law" of a contract that, at best, parties can only bury underneath standard trade usages and customs as articulated by international agencies. It is for this reason that the present writer categorises Schmitthoff's theory as holding to a positivist conception.

### The Autonomist Perspective.

The autonomous view sees the *lex mercatoria* as a universal body of substantive, national rules which have been articulated by the international commercial community and which exist independently of any municipal system. According to this view, international commerce has a "sui generis character that warrants a special, separate regime of governance".<sup>16</sup> In fact, Goldman argues that commerce never has been confined to territorial

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<sup>12</sup>Schmitthoff, "Export Law - Then and Now", "Export", *Journal of the Institute of Export*, vol.48, No.9, 1985, pp.34-35. Reprinted in Chia-Jui Ceng (ed.), *op. cit.*, pp.123-127, at p.123.

<sup>13</sup>Schmitthoff, "International Business Law: A New Law Merchant", *op. cit.*, pp.34-36; Schmitthoff, "The Law of International Trade, Its Growth and Operation", in Schmitthoff (ed.), *The Sources of International Trade With Special Reference to East-West Trade*, Stevens and Sons Ltd., London, 1964, pp.3-38 (Reprinted in Chia-Jui Ceng, *op. cit.*, pp.137-169, at p.148); Schmitthoff, "The New Sources of the Law of International Trade", *International Social Sciences Journal*, Vol. XV, No.2 (Reprinted in Chia-Jui Ceng, *op. cit.*, pp.131-136); and Schmitthoff, "The Unification of International Trade, The Unification of the Law of International Trade, *Handelshögskolan Skrifter 1964-1965*, Gotherburg School of Economics and Business Administration Publication, 1964, pp.5-28 (Reprinted in Chia-Jui Ceng, *op. cit.*, pp.170-187).

<sup>14</sup>Schmitthoff, "The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions", *International Comparative Law Quarterly*, Vol.17, 1968, p.551 (Reprinted in Chia-Jui Ceng, *op. cit.*, pp.188-205).

<sup>15</sup>Schmitthoff, "The Law of International Trade, Its Growth, Formulation, and Operation", *op. cit.*, p.149.

<sup>16</sup>See note 9, *supra*.

boundaries, and harkens back to the *ius gentium* of Roman law.<sup>17</sup> This autonomous order is seen to rest on three pillars: the every-day practices of the international business community, the codified usages in international conventions, and the general principles of law.

The autonomous order is “spontaneous”, because it rests upon the will of the parties, who create rules best suited to their particular needs. Such rules include mainly international customs, usages, and contract terms which are used with frequency by the international business community. For the autonomist perspective, the fact that traders repeatedly act in the same ways and subsequently feel bound by such precedents of behaviour is evidence of a process of articulating a code of behaviour, an autonomous legal order specific to that community. Codified usages and international conventions are seen to form the formal part of the *lex mercatoria* because they are legitimated and can be enforced. Supplemented by general (meaning universal) principles of law, this order is seen to form substantive transnational rules. Distilled from a vast literature, these general principles have been enumerated by Lord Justice Mustill as (in abridged form)~e:

1. *Pacta sunt servanda* (contracts should be enforced according to their terms); 28
2. *Rebus sic stantibus* (substantially changed circumstances can entail a revision of contract terms); 29
3. *Abus de droit* (unfair and unconscionable contracts should not be enforced); 30
4. *Culpa in contrahendo*; 31
5. Good faith; 32
6. Bribes render a contract void or unenforceable; 33
7. A state may not evade its obligations by denying its own capacity to make an agreement to arbitrate; 34
8. The controlling interest of a group of companies is regarded as contracting on behalf of all members; 35
9. Parties should negotiate in good faith if unforeseen circumstances arise; 36
10. “Gold clause” agreements are valid and enforceable; 37
11. One party may be released from its obligations if there is a fundamental breach by the other; 38
12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation; 39
13. A tribunal is bound by the characterisation of the contract ascribed to it by the parties; 40
14. Damages for breach of contract are limited to the foreseeable consequences of 41

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<sup>17</sup>Schmitthoff, “The Unification of the Law of International Trade”, *op. cit.*, p.182.

the breach;

15. A party which has suffered a breach of contract must mitigate its losses; 42

16. Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement; 43

17. A Party must act promptly to enforce its rights, lest lose them by waiver; 44

18. A debtor may set off his own cross-claim to diminish his liability to a creditor; 45

19. Contracts should be construed according to *ut res magis valeat quam pereat*; 46

20. Failure to respond to a letter is regarded as evidence of assent to its terms. 47

Thus, the sources of the autonomous *lex mercatoria*, as compiled from various authoritative enumerations, are: public international law; uniform laws and conventions; trade usages and customs, including standard form contracts, which are observed in the behaviour of the international commercial community; general principles of law common to commercial states, which are discovered through a comparative approach; the rules of international organisations; and the reports of international commercial arbitral awards.<sup>18</sup> 48

### **The Sources of the *Lex Mercatoria*: “Lex”, or “Principa”.** 49

The idea of a *lex mercatoria* has not gone without criticism. Critiques have concerned the extent of precision of the sources of the *lex mercatoria*, the suitability of attributing the term “law” to its component parts, its claimed universality, the extent of its usefulness and applicability by arbitrators, and its predictability and ability to produce just resolutions of disputes. 50

The status of public international law as a component of the *lex mercatoria* is unsettled. There is, of course, the traditional view that only states are subjects of public international law. On the other hand, there is the view that the provisions of the Vienna Convention on the Law of Treaties (1969) reflects common practices and therefore is suitable to international contracts.<sup>19</sup> In support of this is the concept of “internationalised” contracts that had been applied to, for example, the *Texaco v Libya* arbitration. The rationale for this is that foreign investors would not submit a long-term contract to the vagaries of the law of the host-state, while the host state would not submit to the laws of another state. Therefore, there emerged an “international law of contracts”.<sup>20</sup> Far from a concept “created” by the arbitrators that heard the cases, the list of concession agreements from the 1940s and 51

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<sup>18</sup>Schmitthoff, “The Law of International Trade”, *Commercial Law in a Changing Economic Climate*, 2nd ed., 1981, pp.18-31 (Reprinted in Chia-Jui Ceng, op. cit., pp.219-230).

<sup>19</sup>Carbonneau, op. cit., p.14.

<sup>20</sup>See: Goldman, “The Applicable Law: General Principles of Law - the *Lex Mercatoria*”, in J. Lew (ed.), *Contemporary Problems in International Arbitration* 113 (1987).

1950s that make reference to vague internationalised choices of law show that “the parties are groping after some legal system which is not the territorial law of either party”.<sup>21</sup> And, Article 42 of the ICSID Convention does permit an arbitrator to apply the laws of the host state as well as principles of international law to a dispute where the parties have not made an express choice of law. Moreover, as Lord McNair has argued, public international law derives its source from general principles of law., ie consistent with Article 38(1)c of the Statute of the International Court of Justice. This source can equally inform another system of law, namely, the *lex mercatoria*. In his words: “the legal system appropriate to the type of contract under consideration is not public international law but shares with public international law a common source of recruitment and inspiration, namely, the general principles of law recognised by civilised nations”.<sup>22</sup>

Having said that, the extent to which “general principles of law common to commercial nations” is a reliable source has been questioned. Schlosser has raised the point that different systems of law permit damages if defective goods are delivered, whereas others simply permit the buyer to cancel the contract.<sup>23</sup> Moreover, it has been argued that one would be hard-pressed to find any principles of law common to Saudi Arabia and China, for example.<sup>24</sup> It is in this context that some have advocated a “micro *lex mercatoria*”. As explained by Mustill, this would involve only the legal systems that are directly concerned with the contract. The drawback of this would be that there would exist “constellations of parala-  
laws, Franco-Belgian, Anglo-Dutch, Italo-Hispano-Korean, and so on”.<sup>25</sup> But this need not necessarily be the case. Mustill's observation derives its comical appeal from mixing the methodology of the autonomist with a positivist, territorial, conception of what constitutes a legal system. It is conceivable that there could be a series of functional, transnational micro *lex mercatoriae*, for instance, within the *societas mercatorum*. In other words, the commercial communities of corn traders, while relying on such universal terms as f.o.b and c.i.f, could supplement these with their own rules that would be distinct from rubber traders, and which the businesspersons of both Saudi Arabia and China must observe if they wish to participate effectively within the trading regimes that govern these areas. Yet even then, as Mustill points out, there is “no guarantee of homogeneity even within a single

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<sup>21</sup>The Rt. Hon. Lord Justice Mustill, “The New *Lex Mercatoria*: The First Twenty-five Years”, in Maarten Bos and Ian Brownlie, *Liber Amicorum* for the Rt. Hon. Lord Wilberforce, Clarendon Press, Oxford, 1987, pp.149-183, at. pp.174-177.

<sup>22</sup>This list is compiled from: Emmanuel Gaillard (ed.), *Transnational Rules in International Commercial Arbitration*, Institute of International Business Law and Practice, International Chamber of Commerce, Paris, 1993, pp.67-68; Ugo Dreatta, Ralph B. Lake, and Ved. P. Nanda, *Breach and Adaptation of International Contracts: An Introduction to the Lex Mercatoria*, Butterworths, 1992, esp. p.13; Ole Lando, “The *Lex Mercatoria* in International Commercial Arbitration”, *International and Comparative Law Quarterly*, Vol.34, 1985, pp.747- 768, esp. pp.748-752; and Mustill, *op. cit.*

<sup>23</sup>Dreatta, Lake and Nanda, *op. cit.*, pp.13-14.

<sup>24</sup>*Texaco Overseas Petroleum and California Asiatic Oil Company v. The Government of the Libyan Arab Republic*, 53 ILR 1979. This concept has been rejected by Sonorajah, *The Pursuit of Nationalised Property*, Martinus Nijhoff, Dordrecht, 1986.

<sup>25</sup>*Ibid*, p.10.

trade” and that “if the parties to a commodity transaction do not wish to bind themselves to, say, the GAFTA Contract Form No.100, there is no legal or other institution which can compel them to do so.”<sup>26</sup>

However, it must be recognised that traders from all states would not be participants within even these small micro mercatoria, since not all municipal systems permit party autonomy - which is the fundamental “trunc commun” that permits the lex mercatoria to come into being - is not recognised by all commercial states. It is true that parties to a contract are generally free to express a choice of law in their contract, and this is to be respected, so long as this choice is not fraudulent for the purposes of evasion of aspects of the law that would otherwise be applicable, and does not contravene mandatory public law rules.<sup>27</sup> However, both Goldman and Schmitthoff overstate the extent to which the principle is recognised “universally”. For instance, the Chinese Law on Economic Contracts restricts the choice of law to one that is connected with the contract, and Venezuelan law also restricts the choice of law. Moreover, some Latin American, North African and Arab countries go further to require that any contract performed in their countries shall be governed by their own national laws and jurisdictions.<sup>28</sup> The choice of Saudi Arabia in the example in the preceding paragraph is (deliberately) erroneous - merchants in Saudi Arabia are required to choose Saudi law. Thus, for De Ly, there are varying degrees of “opposition to the notion of universally conceived principles of international business law or a universal and autonomous lex mercatoria”.<sup>29</sup>

Moreover, it has been argued that those principles that are universally recognised are so fundamental and basic to any system of law as to preclude their mention. Indeed, Lord Mustill asked, “what principles of trade law, apart from those which are so general as to be useless, are common to the legal systems of the members of such a community?”<sup>30</sup> The principle of *pacata sunt servanda*, for example, can be taken as given: for a piece of paper to be a contract there must be the a priori assumption that a contract is something that should be performed. Precisely how it should be performed, what interpretations are to be given to its clauses, and what are the respective rights and obligations of parties are the issues that are determined by a law. If commercial law is a device for conflict avoidance and management, to state that contracts must be performed is to state the obvious, without giving any guidance as to how disputes are to be resolved. A similar point can be made of “good faith”, and so on. Even less guidance is given by the lex mercatoria in specific disputes, for instance, over labour provisions in a contract. To state that “general principles” constitute a self-contained system of law is tantamount to suggesting that because buildings are constructed in all states of the world, the universal use of sand, limestone

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<sup>26</sup>Lord McNair, “The General Principles of Law Recognised by Civilised Nations”, *British Yearbook of International Law*, Vol.33, 1957, pp.1-19, at p.6..

<sup>27</sup>In Gaillard, *op. cit.*, p.29.

<sup>28</sup>Dreatta, Lake and Nanda, *op. cit.*, p.15.

<sup>29</sup>Mustill, *op. cit.*, p.157.

<sup>30</sup>Mustill, *op. cit.*, p.159; De Ly, *op. cit.*, pp.183-192.

and pebbles constitutes an autonomous "building order". This, of course, is not the case, since bricks can be moulded in different shapes and sizes, some are engineered in a more technologically advanced manner to withstand higher stress tolerances, and architecture is influenced by geography, climate, culture, and so on. It is this imprecision of definition, and the fact that these components of the *lex mercatoria* are more properly termed "stepping stones" to real rules of law, rather than rules themselves, that has led critics, such as Keith Highet, to term them "*principa mercatoria*", rather than "*lex mercatoria*".<sup>31</sup>

As regard customs and usages, it has been argued that, "if the custom of international commercial transactions were sufficiently well understood throughout the world, there would be no need for national legislation embodying it; and if national legislation were sufficiently uniform throughout the world, there would be no need for international codification".<sup>32</sup> The legal status of Incoterms is unsettled, since different national systems have different attitudes towards such trade usages.<sup>33</sup> Similarly, although the bankers' associations in 175 states had accepted the 1974 edition of the UCP, the legal status of such trade usages has also been questioned.<sup>34</sup> It has also been argued that ICC documents cannot be taken as a codification of the *lex mercatoria*, as there is no codifying "authority" in the traditional sense, in the community of merchants.<sup>35</sup>

In an attempt to prove the credibility of the *lex mercatoria* on traditional criteria, some have suggested that the United Nations Convention on Contracts for the International Sale of Goods (Vienna Sales Convention, 1980), particularly Article 9, provides expression to the *lex mercatoria* within a statutory framework.<sup>36</sup> It provides that:

1. The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
2. The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation 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.<sup>37</sup>

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<sup>31</sup>The lead cases on this dictum are well known: Lord Atkin in *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft* and Lord Wright in *Vita Food Products Inc. V Unus Shipping Co.* Also, Dicey, *op. cit.*, Rule 127, sub-rule 1.

<sup>32</sup>Norbert Horn, "Uniformity and Diversity in the Law of International Commercial Contracts", in Norbert Horn and Clive M. Schmitthoff (eds.), *The Transnational Law of International Commercial Transactions*, Kluwer, London, 1982, p.10. Specifically, Horacio A. Grigera Naón cites Article 804 of the Bolivian Civil Code which mandates that contracts that are to be performed in Bolivia, even if concluded outside the country, are to be governed by Bolivian law. See Naón, "The UN Convention on Contracts for the International Sale of Goods", in *ibid.*, pp.89-124, at p.98. See also De Ly, *op. cit.*, p.52.

<sup>33</sup>De Ly, *op. cit.*, p.53.

<sup>34</sup>Mustill, *op. cit.*, p.156.

<sup>35</sup>Keith Highet, "The Enigma of the *Lex Mercatoria*", in Carbonneau, *op. cit.*, pp.99-108, at p.100.

<sup>36</sup>Berman and Kaufmman, *op. cit.*, p.264.

<sup>37</sup>De Ly, *op. cit.*, pp.172-174.

Bernard Audit has interpreted this to mean that the purpose of the Convention is to “give recognition to the rules born of commercial practice and to encourage municipal courts to apply them”, and that “the Convention itself can be regarded as the expression of international mercantile custom”.<sup>38</sup> He continues that this Article is significant because it “acknowledges that rules not made by states can be imposed upon the parties”.<sup>39</sup> He concludes therefore that the Convention, “must be regarded as an autonomous system, capable of generating new rules” and that “under the Convention, the *lex mercatoria* is the chief source of the applicable law for international transactions”.<sup>40</sup>

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One criticism of this is that, in order to take effect, the Vienna Convention had to be ratified into municipal law, and took effect in the UK under the Sale of Goods Act (1979).<sup>41</sup> This is an unfortunate criticism, since, while criticising the autonomist approach it actually strengthens the case of the positivists: the whole point, according to the latter, is that domestic laws have international sources.<sup>42</sup> John Honnold, however, has made an interesting observation, though not connected with the debate on the *lex mercatoria*. He pointed out in his exposition of the Vienna Convention that it was the intent of its drafters to give it staying power. He referred to Article 9(2) as an “important vehicle for flexibility” not in the sense that it mandates the application of usages which are held to be a pillar of the *lex mercatoria*, but in the sense that this passage contributes to the longevity of the Convention. In order to be flexible, the Convention would have to be applicable in a changing international commercial environment. Given that the Convention took ten years to harmonise the two 1964 Conventions (the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF)), themselves the product of work since the 1930s, the insertion of Article 9(2) can be seen as a pragmatic attempt to avoid producing a uniform law that would be outdated by the time of its ratification by states, or very shortly thereafter. Honnold expressed the rationale as, “[a]lthough the statutory norms may grow old, applicable practices and usages may keep up with changing times and may respond to special circumstances and needs”.<sup>43</sup> The intention of the Convention, therefore, was not to reify an autonomous body of law.

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Similarly, Article 7 of the Convention establishes the need to promote “the observance of good faith in international trade”. Honnold notes that “good faith is only a guide for interpretation and is less sweeping than the general good faith requirements of some legal sys-

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<sup>38</sup>De Ly, *op. cit.*, pp.175-183.

<sup>39</sup>Dreatta, Lake, and Nanda, *op. cit.*, p.15.

<sup>40</sup>See: J. Berman and Felix Dasser, “The ‘New’ Law Merchant and the ‘Old’: Sources, Content, and Legitimacy”, in Carbonneau, *op. cit.*, pp.21-36; Bernard Audit, “The Vienna Sales Convention and the *Lex Mercatoria*”, in Carbonneau, *op. cit.*, pp.139-160.

<sup>41</sup>United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) in Indira Carr and Richard Kidner, *Statutes and Conventions on International Trade Law*, Cavendish Publishing Ltd., London, 1993, p.390.

<sup>42</sup>Audit, *op. cit.*, at p.139 and p.141.

<sup>43</sup>*Ibid*, p.143.

tems".<sup>44</sup> He continued that, "the Convention rejects "good faith" as a general requirement and uses "good faith" solely as a principle for interpreting the provisions of the Convention".<sup>45</sup> The reference to "general principles", he added, was made in fear that the courts might "turn too quickly to national law". One could therefore argue that the intent of the draftsmen was to ensure the longevity of the Convention in framing Article 9, and with safeguarding its interpretation through Article 7, rather than with the determined effort to give credibility to the *lex mercatoria*.

There can be little doubt of the validity of Honnold's observations, as he was personally involved in the drafting of the Vienna Sales Convention. However, there can be little doubt as to the intent of the numerous conventions for international commercial arbitration that provide the enforcement of arbitral awards based on the *lex mercatoria*, as will be considered in the following section. 62

First, however, the final proposed "source" of the *lex mercatoria*, arbitral awards, will be considered. It has been argued that there are some very serious impediments to making a "case law" for the *lex mercatoria* out of arbitral awards. These are, first, that arbitral awards provide specific answers to very specific problems and cannot be expected to elaborate general principles. This is particularly because the disputes before them are decided on the basis of a compromise, generally by arbitral tribunals of three arbitrators, two of which are chosen by the parties themselves, rather than against the concrete principles of justice.<sup>46</sup> Secondly, there is very meagre reporting of the substance of the cases in order to protect the confidentiality of the disputants as well as any trade secrets. Mustill found that only 130 awards of the thousands heard by the ICC from the 1950s and 1960s were published, of which no more than twenty-five were concerned with the *lex mercatoria*.<sup>47</sup> Thirdly, the extent to which arbitral awards can form a substantive case law depends, as Mustill has pointed out, on one's conception of the nature of the *lex mercatoria*. He stated: 63

If the arbitrator's function is simply that of an exponent, then the second arbitrator need do no more than pay appropriate respect to the reasons of his colleague, without being obliged to arrive at the same decisions.... if the first arbitrator has exercised a creative function as a social engineer, his successor can fairly regard him as no more than a part of the self-regulating mechanism of the contract under which he acted, and can thus feel free to exercise the same function, in a different case, under his own contract.<sup>48</sup> 64

## Applicability and Coercive Force.

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Given the foregoing, the autonomist *lex mercatoria* can hardly be termed "law". As Highet pointed out, "law" is equated with the command of a sovereign, and is reinforced by the threat of coercive sanction in the case of non-compliance.<sup>49</sup> And, as De Ly has argued, standard forms of contract can hardly be seen as creating an independent legal system. Contracts create enforceable rights, but do not create law. And, after an exhaustive survey of the German, Swiss, Italian, Austrian, Dutch, French, and Belgian legal systems, De Ly concluded that international custom and trade usages have a normative value only and are not recognised as formal sources of law.<sup>50</sup>

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However, there is support for alternative conceptions of law, meaning a stable normative system where individuals feel morally bound to observe certain rules of behaviour. To claim that law is a coercive order risks overstating the extent to which a civil society is based upon a series of commands backed by threats. As H.L.A Hart has pointed out with respect to law in general—e, Hans Kelsen with regard to international law, and Friedrich Kratchowil in his discussion on the power of norms—e, the effectiveness of law must not be equated with the effectiveness of the legal sanction.<sup>51</sup> Rational individuals, aware of their long-term self-interest, may observe the norms of their society due to their demand for reciprocity, without the need for a continual threat of negative sanction from the state. For example, one honours one's commitments in good faith in a contract in the expectation that others will also keep their word. It has been suggested that the desire for stability and reciprocity can be so powerful that individuals will accept short-term opportunity costs (ie., reneging on a contract) for the expectation of long term benefits (ie., the sanctity of contract), even if there is no convincing evidence that others will reciprocate in future.<sup>52</sup> This is, in essence, the substance of international law; though not coercive because of ultimate state sovereignty, it is nevertheless "law".

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While it is doubtful that this debate could reach a satisfactory conclusion, it is certainly one that could quite easily overrun the confines of this paper. Suffice to say that there are alternative, and equally valid conceptions of "law", within which the *lex mercatoria* may be classified.<sup>53</sup> But even accepting the positivist definition of law, it appears that the *lex mercatoria* is gaining in coercive force. Highet is quite right to point out that all arbitral awards

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<sup>44</sup>Ibid, p.153 and p.159.

<sup>45</sup>De Ly, op. cit., p.205.

<sup>46</sup>See Schmitthoff, op. cit.

<sup>47</sup>John Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Kluwer, London, 1982, p.60.

<sup>48</sup>Ibid, p.60.

<sup>49</sup>Ibid, p.214.

<sup>50</sup>Mustill, op. cit., p.167, note 57.

<sup>51</sup>Mustill, op. cit., p.179.

<sup>52</sup>Mustill, op. cit., p.161.

<sup>53</sup>Highet, op. cit., p.106.

must be enforced somewhere. He stated, "a stateless contract only looks like a contract.... As soon as the aggrieved party goes to a court to seek an injunction to force the other party to perform or to go to arbitration, the tribute of alleged statelessness disappears".<sup>54</sup> As will be explained below, even "fully-fledged" delocalised arbitrations, which are neither connected to the forum of arbitration nor which apply any national law, the award is by no means independent of any national legal system, since it must be recognised as valid in the jurisdiction where the party seeks to have it enforced.<sup>55</sup> However, the lex is "borrowing" the coercive apparatus of states, as the latter are increasingly recognising it as a legitimate basis for arbitral awards. Indeed, there does appear to be a trend, in the arbitration rules of numerous institutionalised arbitral tribunals, and in the rules for ad hoc arbitration to take into account the lex mercatoria on several levels, and to be given recognition and enforceability through international conventions and national legislations.

In the absence of expressed party choice, Article VII(1) of the European Convention on International Commercial Arbitration (1961), Article 13.5 of the ICC Rules, Article 33(1) of the UNCITRAL Rules, and Article 28(2) of the Model Law enables the arbitrators to select his own conflict of laws rules (note that the arbitrator still must operate within some system of conflicts of laws rules), but to take into account such aspects of transnational law as "trade usages", giving admissibility to the application of the lex mercatoria. In this connection, it is interesting to note that the Iran-US Claims Tribunal, which has adopted, with some modification, the UNCITRAL Arbitration rules, has been mandated under Article V of the Claims Settlement Declaration to employ aspects of the lex mercatoria on two levels. The first regards the conflicts of laws approach, since the Tribunal is free to choose its own choice of law rules. The second relates to the substantive law, the Tribunal is mandated to "decide all cases on the basis of respect for law... taking into account relevant usages of trade, contract provisions and changed circumstances".<sup>56</sup> Moreover, the Iran-US Claims Tribunal is articulating and clarifying many principles of law, such as *rebus sic stantibus*, of which the Tribunal stated that the concept "has in its basic form been incorporated into so many legal systems that it may be regarded as a general principle of law".<sup>57</sup>

### **"Delocalised International Commercial Arbitration":**

Both international conventions and national legislations relating to international commercial arbitration are increasingly giving recognition to, and enabling the enforcement of,

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<sup>54</sup>De Ly, op. cit., p.134.

<sup>55</sup>H.L.A. Hart, *The Concept of Law*, Oxford University Press, London, 1961.

<sup>56</sup>Friedrich V. Kratchowil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, Cambridge University Press, Cambridge, 1989.

<sup>57</sup>Hans Kelsen, *General Theory of Law and the State*, (Translated by Anders Wedberg), Russell and Russell, New York, 1961; Kelsen, *The Pure Theory of Law*, (Translated by Max Knight), University of California Press, Berkeley, 1970.

awards based on the *lex mercatoria*. And this, it should be noted, is a trend that is gaining momentum. The "localisation" theory - that an arbitrator should apply the substantive law of the seat of arbitration - was widely accepted in the 1940s and 1950s.<sup>58</sup> Again, this favoured the territorial state as having ultimate sovereignty over commercial issues within its jurisdiction.

However, there have been trends towards "delocalisation", the ultimate conclusion of which is the application of a national law. There are various permutations of delocalised arbitration. Carlo Croff, has suggested four.<sup>59</sup> In the order of detachment from municipal laws, these are where the arbitrator, sitting outside of the state of closest connection with the contract: 1) makes use of the conflict of laws rules of the state which would have had jurisdiction over a particular case; 2) makes use a cumulative, or comparative, conflicts of laws system which looks at all of the systems which may be connected with the dispute; 3) employs an international conflict of laws rules or general principles of international law; and 4) proceeds directly to the applicable law without any consideration of conflicts of laws. It should be noted that the issue of delocalisation remains unsettled, as for instance, F.A Mann, holding to the traditional conflicts of laws view, has argued that the arbitrator has to make reference to a "particular system of law".<sup>60</sup> However, there are signs that the *lex mercatoria* is gaining increased acceptance.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral (1958) place great emphasis on municipal laws in dealing with capacity of contracting parties, the validity of the arbitral award, and the procedural law to be applied to the conduct of the arbitration. However, there is nothing in Article V, dealing with the grounds for refusal of the enforcement of the award that precludes the use of the *lex mercatoria*.<sup>61</sup> For Croff, this means that the award must be enforced "whether the arbitrator applies an international conflict of laws rule, or settles the dispute directly through the *lex mercatoria*".<sup>62</sup> Article VII of the European Convention on International Commercial Arbitration (1961) is more explicit, as it provides that if the parties fail to chose a substantive law, "the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable". This Article further provides that "the arbitrators shall take account of the terms of the contract and trade usages" whether or not the parties have chosen an applicable law.<sup>63</sup> And,

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<sup>58</sup>Keohane, "Reciprocity in International Relations", in Keohane, *International Institutions and State Power*, Westview, 1989, p.146-147.

<sup>59</sup>There is also the interesting question of whether the *lex mercatoria* could form an "international regime" in the sense of shared norms, rules, and decision-making procedures. Again, this is a tangential discussion that, while interesting, would require a good deal of space to elaborate.

<sup>60</sup>Hight, *op. cit.*

<sup>61</sup>See Jan Paulsson, "Delocalisation of International Commercial Arbitration: When and Why it Matters", *International Commercial Law Quarterly*, Vol.32, 1983, pp.53-61, esp. p.57.

<sup>62</sup>See John R. Crook, "Applicable Law in International Arbitration: The Iran-US Claims Tribunal Experience", *American Journal of International Law*, Vol.83, 1989, pp.278-311.

<sup>63</sup>The Questech decision, in 9 Iran-US C.T.R, 122-123; quoted in Gaillard, *op. cit.*, p.111.

a 1992 Resolution on Transnational Rules Adopted at the 65th International Association Conference in Cairo stated that:

The fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than the law of a particular state should not in itself affect the validity of the award; 1) where the parties have agreed that the arbitrator may apply transnational rules; 2) where the parties have remained silent concerning the applicable law.<sup>64</sup>

Perhaps nowhere is the *lex mercatoria* more explicitly recognised, and the trend towards "fully fledged" delocalisation better illustrated, than in the Inter-American Convention on the Law Applicable to International Contracts (Mexico, 1994).<sup>65</sup> The 1975 Inter-American Convention on International Commercial Arbitration still contained some remnants of the historical aversion of Latin American states even to permitting party autonomy in choosing the proper law of their contract. However, the 1994 Convention accords usages and conventions a prominent place in the absence of an express choice of law by the parties. Article 7(1) gives the arbitrators the discretion to take into account "the parties' behaviour and... the clauses of the contract". Article 9 similarly enables the enforcement of "general principles", as it states that the arbitrator "...shall also take into account the general principles of international commercial law recognised by international organisations". Finally, Article 10 is most explicit. It reads: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirement of justice and equity in the particular case." The particular significance of this Convention is that states with both common law and civil law traditions, which had been hostile even to the autonomy of parties to choose an applicable law, have adopted a Convention that is at the forefront of developments in accepting the *lex mercatoria*.

National legislations are increasingly giving force to the *lex mercatoria*. The Netherlands recently amended its rules, in reaction to the Iran-US Claims Tribunal, to give effect to awards based on transnational rules. The Netherlands Arbitration Act (1986), Article 1054, states that "in all cases the arbitral tribunal shall take into account any applicable trade usages".<sup>66</sup> Under the French Arbitration Decree of 14 May 1981, Article 1496 of the French Civil Code was amended to release arbitrators from any obligation to refer to any national law in order to hand down an award considered to be valid in France. They may apply any law that is applicable, and the French courts reviewing the award is not entitled to interfere with the decision of the arbitrator to apply transnational rules, so long as this choice was

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<sup>64</sup>See A.F.M. Maniruzzaman, "Conflict of Laws Issues in International Arbitration: Practice and Trends", *Arbitration International*, Vol.9, No.4, 1993, pp.371-403.

<sup>65</sup>See Croff, "The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?", *International Lawyer*, Vol.16, 1982, pp.613-645). A.F.M Maniruzzaman lists the latter three, in *op. cit.*

<sup>66</sup>F.A. Mann, "England Rejects 'Delocalised' Contracts and Arbitration", *International and Comparative Law Quarterly*, Vol.33, 1983, pp.193-198.

consistent with the choice of the parties and does not contravene any mandatory public law provisions. According to Jean-Pierre Ancel, this “represents the outline of a system which applies ‘truly international’ rules and principles, since they are not part of the French legal system, no more than they are a part of any national legal system”.<sup>67</sup> Similarly, the Canadian arbitration law was modified in 1985 to permit arbitrators the flexibility to make use of the *lex mercatoria*.<sup>68</sup> Both the Vienna Court of Appeal and the English Court of Appeal had set aside arbitral awards that were based on the *lex mercatoria*, but each of these were overturned by the Austrian Supreme Court, and the Court of Appeal, respectively, since in both cases the application of the *lex mercatoria* was stipulated by the parties and the awards did not violate any relevant public policy.<sup>69</sup>

What all of this shows is that the *lex mercatoria* is gaining in its coercive force and in its applicability, but not that it is any more effective in settling disputes. Indeed, it has been suggested that, given its imprecision, the application of the *lex mercatoria* depends more on arbitrator's own views of a particular case than on the “law”. It is true that the outcome of each of the “hot oil” expropriation cases of the Middle East that contained as choice-of-law clauses the “general principles of law” produced vastly different outcomes. What this means is that each contract, potentially, can be governed by its own peculiar law. All that the increased recognition of the *lex mercatoria* means is that the possible number of outcomes that could obtain from its application to fundamentally similar cases has grown exponentially.

This has led some, such as William Parks to become concerned that, “some arbitrators will be tempted to use the *lex mercatoria* as a fig leaf to hide an authorised substitution of their private normative preferences in place of the parties shared expectations under the properly applicable law”.<sup>70</sup> Mustill agreed, “the release of judicial control is at least as likely to encourage the arbitrator to apply no law at all, as to apply the *lex mercatoria*.”<sup>71</sup> For Bond, “the *lex mercatoria* may end up becoming the last refuge of incompetent or lazy arbitrators”.<sup>72</sup> Clearly, this would ultimately undermine the stability and predictability that the proponents of the *lex mercatoria* seek in detaching international commerce from the arbitrary application of municipal laws.

The defense of the *lex mercatoria* can only be that the greatest unpredictability would arise if arbitrators were forced to choose between, for example, the law of Kuwait or New York, or

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<sup>67</sup>The Convention is reproduced in Carr and Kidner, *op. cit.*, esp. p.304.

<sup>68</sup>Croff, *op. cit.*

<sup>69</sup>This is reproduced in Carr and Kidner, *op. cit.*, esp. p.310.

<sup>70</sup>Cited in Gaillard, *op. cit.*, p.36.

<sup>71</sup>See Friedrich K. Juenger, “The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons”, *American Journal of Comparative Law*, Vol.42, No.2, 1994, pp.381-393.

<sup>72</sup>Cited in Alan Redfern and Martin Hunter, *International Commercial Arbitration*, 2nd. ed., Sweet and Maxwell, London, 1991, p.120.

between France and Venezuela.<sup>73</sup> Some critics may retort that if the arbitrator announces his intention to use a particular national law, the parties may then determine their chances of success and decide whether to proceed or to settle.<sup>74</sup> While this may be practicable in international trade disputes, it may be manifestly unjust to proceed in this way in a dispute concerning foreign investment. For, foreign investors may not have the luxury of settling their dispute amicably with a host state - some have not even been present at arbitration - if the latter has exercised its power of eminent domain to change the laws relating to the investment.

Notwithstanding, it should be recognised that there does seem to be a growing normative consensus among host states on the need to attract capital and to alleviate the fears of investors that their assets may be subject to expropriation. Whether it be within the network of bilateral investment treaties in public international law between states, or in contracts between private foreign investors and host states, nearly all states now agree to settle any potential arbitration under the ICSID, whose Article 42 accords arbitrators the freedom to apply the law of the contracting state party to a dispute, as well as international rules of law. This growing normative consensus will be elaborated in the concluding section of this paper.

### **Preliminary Observations:**

The positivist conception of the *lex mercatoria* is a theoretically unchallenging “state of the art” snapshot of the culmination of fifty years of the harmonisation and unification activities in international commercial law and practice. However, it is theoretically important for the study of Transnational Political Economy in that it attunes the analysis to the transnational forces that are responsible for the creation of certain rules for the conduct of commercial behaviour, and of these transnational sources of domestic legislation. In other words, it attunes the analysis to the “domesticisation” of the international sources of transnational law.

The majority of attacks on the *lex mercatoria* have been directed at the more theoretically brave autonomist approach, the majority of which centre around the claim that its corpus of principles lack the coherence, precision, and predictability to be properly called “law”. While damaged by often persuasive criticism, the autonomist *lex* is nevertheless gaining recognition by states and is gaining *de facto* coercive force by relying on state apparatus to enforce awards based upon it in practice.

However, it is unfortunate that the debate in the discipline of international law has centred around this - largely unresolvable - issue of what constitutes “law”, given the fundamentally irreconcilable epistemologies upon which its background theories are based. Given

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<sup>73</sup>Jean-Pierre Ancel, “French Judicial Attitudes Towards International Arbitration”, *Arbitration International*, Vol.9, No.2, 1993, pp.121-129, at p.127; Lando, *op. cit.*, p.756.

<sup>74</sup>Dreatta, Lake and Nanda, *op. cit.*, p.16.

this, there is a difficulty in reconciling the positivist and autonomist approaches. For the former, the *lex mercatoria* exists only if conventions are ratified into domestic legislation, and there is some ambiguity as to whether the autonomy of parties' will can actually subordinate the proper law of the contract. For the latter, it seems that almost "anything goes", without any hard and fast criteria for evaluation and selecting the more valid elements of the theory from the more theoretically weak. Hence, "everything stays", and there is also a danger of stagnation in this theory, notwithstanding the apparent growth in its practical application.

These problems can be overcome, it seems to the present writer, by relaxing the criteria for "law" and accepting that these trends form part of a larger, normative, perhaps Grotian, framework that is increasingly making rules for conduct. It is here that the third "level" of analysis for Transnational Political Economy becomes important. Before venturing to discuss this, the discussion will turn briefly to consider the forces that appear to be driving a similar process of harmonisation at the level of public international trade law. 85

### **Public International Trade Law.**

Parallel with the processes of harmonisation at the level of private international law is a similar process at the level of public international commercial law, which is being driven by states. 86

In response to the policy errors of the interwar period, the GATT was established in 1947 with the principal aim of liberalising world trade by reducing the level of tariff barriers and eliminating quantitative restrictions.<sup>75</sup> The 1930s had seen a period of competitive tariff increases, particularly between the United States and the British Commonwealth. The US Smoot-Hawley Act of 1930, though not the most protectionist of the US trade acts, followed the Wall Street crash of 1929 at a time of great economic uncertainty, and indicated that the United States would safeguard its own interests above those of the system as a whole. A result of log-rolling the US Congress, the Smoot-Hawley Act showed that US legislators would be sympathetic to domestic producers by safeguarding the home market for their goods by erecting tariff walls to imports.<sup>76</sup> Britain and the Commonwealth countries responded to this in 1932 at the Ottawa Conference by implementing the Commonwealth System of Imperial Preferences, which built a preferential tariff zone which excluded the United States. This contributed to a sharp decline in the US share of international trade from 13.8% in 1929 to 9.9% in 1933 and contributed to the general international malaise, which some in the US administration believed to have fuelled fascism and to have contributed to the onset of the Second World War.<sup>77</sup> 88

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<sup>75</sup>Redfern and Hunter, *op. cit.*, pp.118-120; also Lando, *op. cit.*, p.757.

<sup>76</sup>William W. Parks, "Control Mechanisms in the Development of a Modern *Lex Mercatoria*", in Carbonneau, *op. cit.*, pp.109-138.

<sup>77</sup>Mustill, *op. cit.*, p.154.

To avoid the errors of the 1930s, to assist in postwar economy recovery, and to institutionalise a liberal international trade order so that a discriminatory system could never again be constructed to exclude it, the US set about establishing the Bretton Woods international economic institutions, among which was the GATT.<sup>78</sup> As a result of successive rounds of GATT negotiations, market access has become in many areas a matter of international scrutiny, and the perception of the tariff has changed from a strictly internal corrective to a legally controlled device. The GATT has established a process of negotiation wherein states progressively committed themselves to the further liberalisation of international trade, and has instituted a climate where producers in one state now have a legitimate right to expect a degree of access to the market of another consistent with agreed schedules. 89

It is important to note that the GATT, as its name suggests, related mainly to tariffs on industrial goods. These were the product of industry, which provided necessary employment, and which were required for reconstruction. Hence, manufactured goods occupied the attention of the postwar drafters of the GATT. And, with tariffs at an average level of 40% in the late 1940s, there was ample material for negotiation in the successive negotiating rounds. Within an atmosphere of rapid economic growth, it was relatively easy, politically, to reduce tariff levels by a few percentage points, on average, whilst still maintaining some protection on the most politically sensitive products. 90

Steadily, the GATT performed its mandate. However, by removing the principal element for its very existence, this threatened to create new difficulties. This was particularly so in the early 1980s, which began in the worst recession since the 1930s. GNP grew on average in OECD countries by 1.3% in 1980, 1.2% in 1981, and 0.3% in 1982, the slowest average rate of any three years in the postwar period. In 1982, the volume of world trade fell by 2%, the first time that the volume of trade failed to grow, let alone reversed, since the GATT was established.<sup>79</sup> In 1982, the growth of the US economy was the slowest among OECD countries at -2.6%. Unemployment reached 10.7% and was concentrated in import-competing industries, notably in automobiles at 23.2%, and in steel where it was 29.2%.<sup>80</sup> Organised labour and disaffected industries sought protection. Petitions to the US International Trade Commission (ITC) for escape clause, antidumping (AD) and countervailing duty (CVD) remedies increased exponentially from an annual average of 50 in the late 1970s to 100 in 1983 and 1984.<sup>81</sup> Sympathy to them all would have signalled to the international community that the government was abdicating leadership over the 91

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<sup>78</sup>Bond, in Gaillard, op. cit., p.80.

<sup>79</sup>Gaillard, op. cit., p.75.

<sup>80</sup>Bond, in Gaillard, op. cit., p.80.

<sup>81</sup>See generally: Gerard Curzon, *Multilateral Commercial Diplomacy: The General Agreement on Tariffs and Trade and its Impact on National Commercial Policies and Techniques*, Michael Joseph, London, 1965; Kenneth Dam, *The GATT: Law and International Economic Organisation*, University of Chicago Press, Chicago, 1970; and John Jackson, *The World Trading System: Law and Policy of International Economic Relations*, MIT Press, London, 1992.

domestic economy by externalising difficulties of adjustment and deflecting burdens onto others. However, by not being sympathetic to them channelled their demands to Congress to enact protectionist legislation.<sup>82</sup>

The Reagan administration needed to channel the attention of Congress away from considering a protectionist trade act, and towards the prospect of negotiated market access. Consistent with the "bicycle theory" of international trade, liberalisation efforts cannot stand still: if momentum for liberalisation is lost, the edifice falls down. As Jagdish Bhagwati explained: "The many GATT rounds... proved effective in dealing with the ever-present protectionist pressures from Congressmen; they served to counter these pressures on the grounds that succumbing to them would imperil ongoing...negotiations. An ongoing, continual set of rounds was thus tactically wise."<sup>83</sup>

In the past, there was a wealth of US export interests in which the executive could cultivate support behind its liberalisation programme to countervail protectionist forces, to or mobilise "export politics". However, the tariff, the traditional concern of the GATT, had been all but outlawed through seven MTNs, bringing average tariff levels in developed countries down to approximately 5.4% in the early 1980s. The use of Non Tariff Barriers (NTBs) - such as technical standards and licensing procedures - had grown in the 1970s, and were given some attention in the Tokyo round in the late 1970s. However, as the GATT Work Programme identified, these comprised over 800 government policies which occupied a very grey area between legitimate social policy (ie., safety standards) and protectionism, which mandated much tedious technical negotiation simply on definitions.<sup>84</sup> This was not an issue that would stimulate pro-liberal interests. To generate the kind of support required to launch a new MTN required the mobilisation of new exporters with tangible interests. Services, trade related investment measures, and high technology products, and the protection of intellectual property rights - areas in which the US did have a competitive advantage - provided fertile ground to cultivate export interests behind the programme of further liberalisation. According to the Office of the US Trade Representative, US trade in services accounted for \$110 billion in foreign earnings in 1981. In that year, the US maintained a trade surplus in services of \$38.9 billion, in contrast to a merchandise trade deficit of \$27.8 billion.<sup>85</sup> The US' European partners, despite much acrimony over the issue of agriculture, especially with France, realised that they would benefit from the liberalisation of the trade

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<sup>82</sup>See E.E. Schattschneider, *Politics, Pressure, and the Tariff: A Study in Free Private Enterprise in Pressure Politics, as Shown in the 1929-1930 Revision of the Tariff*, Prentice-Hall, New York, 1935; and Charles Kindleberger, *The World in Depression, 1929-1939*, Allen Lane and Penguin Press, London, 1973.

<sup>83</sup>Cordell Hull, *The Memoirs of Cordell Hull, Vol.I.*, Hodder and Stoughton, London, 1948, p.354.

<sup>84</sup>See Richard N. Gardner, *Sterling-Dollar Diplomacy in Current Perspective: The Origins and the Prospects of our International Economic Order*, Columbia University Press, New York, 1980; Clair Wilcox, *A Charter for World Trade*, The Macmillan Company, New York, 1949; and William Adams Brown, Jr., *The United States and the Restoration of World Trade: An Analysis and Appraisal of the ITO Charter and the General Agreement on Tariffs and Trade*, The Brookings Institution, Washington D.C., 1950.

<sup>85</sup>Joan Eldelman Spero, *The Politics of International Economic Relations*, 3rd.ed., St. Martin's Press, New York, 1985, p.117.

in services and the protection of intellectual property rights, particularly France, which was the world's second largest exporter of services.

The Uruguay round therefore embraced these new issues. The launching of the Uruguay round was an effort by the US and European states to arm themselves with an excuse for not granting protection to domestic interests, and to cultivate countervailing export interests. This was due, in part, to the realisation that the closure of the 1930s could not be repeated; that the mounting trade conflicts - at that time, over a variety of agricultural products, steel, automotive parts, consumer electronics - needed to be channelled into an institutional framework of constructive negotiations, lest they spill over into political relations; that there was a need to reinvigorate the GATT process for political reasons; and by the sheer realisation that national economies would benefit from rules in these new areas. 94

In addition to the congruence of state interests, the role of transnational interests in international agenda-setting for the Uruguay round can not be ignored. There were numerous European firms, such as Siemens, Glaze or Credit Agricole who supported the multilateral effort. But in addition, American multinational corporations with a presence in Europe - particularly Amex and Citibank which organised the Coalition of Service Industries - facilitated the lobbying of multiple European capitals. There existed an interlocking network of transnational chambers of commerce and other special-interest organisations involved in various activities in pressure politics, and in disseminating information by financing research jointly at the American Enterprise institute for Public Policy Research in Washington and the Trade Policy Research Centre in London.<sup>86</sup> 95

Thus, rather than promoting insular behaviour, the deleterious situation of the early 1980s, and the common interests at the sub-national, national, and transnational levels made imperative a new multilateral trade negotiation, and to succeed, these negotiations needed to attempt to make rules for new areas of trade. Through the conclusion of the Uruguay round in 1994, states have relinquished voluntarily their sovereign control over trade policy in a number of new area, thus increasing the mandate of the GATT. The following section now turns to the level of normative structures in an attempt to tie the two levels of public and private trade law into a coherent framework for analysis. 96

### **Normative, Structural Imperatives of the Transnational Political Economy.** 97

This paper has suggested that the international commercial system is becoming integrated, or "harmonised" at various levels. It was seen in the first section that at the level of private international commercial law, there is both the factual uniformity of conventions - what was termed the positivist approach - and de facto uniformity through customs - the autonomist perspective. The former is interesting because it describes a process of globalisation whereby domestic commercial laws have international sources; states derive their 98

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<sup>86</sup>OECD, National Accounts 1960-1988, OECD, Paris, 1990; Spero, op. cit., p.118.

domestic laws from international origins. As commerce becomes more complex, the imperatives of having effective, and most importantly, uniform and predictable structure for commercial communities mandate that harmonisation takes place. The latter theory is interesting because it attunes the analysis to the fact that, although not codified into municipal laws, nearly-universally recognised principles are gaining recognition, and the coercive force of municipal law.

In the second section, it was seen that the very operation of the international economic system provided the impetus for its greater harmonisation. A recession, mounting trade conflicts, and the institutional memory of the 1930s provided for a conjunction of interests between the major trading states and corporations that were seeking enhanced market access opportunities. The response of governments was to reinvigorate and reinforce the institutions dealing with trade for both political and economic reasons, which prompted a harmonisation at the level of public international trade law. Thus, for apparently different reasons, both the levels of private and public international trade law are becoming more harmonised and integrated. 99

But for the project of the Transnational Political Economy, one could hypothesise that these trends at the private and public levels are by no means unrelated aspects of the international political economy. Rather, it would suggest that there may be particular forces that are so constant and universal as to be driving the process. These forces are normative, somewhat deterministic, and operate at the structural level of global capitalism. For the individual merchant, as Berman and Kaufman have stated, the "general similarities of contract practice and contract law are due in part to common commercial needs shared by all who participate in international trade transactions".<sup>87</sup> In other words, the exigencies of a universal situation - buying and selling - has mandated similar behaviour since the act of trading is everywhere becoming increasingly similar. For states, the desire to maintain international stability, the need to manage domestic pressures within increasingly internationalised domestic economies that are susceptible to shifts in technology and production, and the need to compete effectively for reasons of national economic security drives their behaviour in very similar ways. These forces, crudely put, are different manifestations of the forces of global capitalism. 100

What this suggests is that a multi-layered framework for analysis is required, one which departs from the concrete facts of harmonisation and unification of both private and public international commercial law, and is substantiated by a growing normative consensus. The theory of the *lex mercatoria* of the discipline of international commercial law was elaborated to illustrate the manner in which the analysis may proceed. It was suggested that this theory seems to be preoccupied with the extent to which the autonomist *lex* constitutes "law". The exercise, it would seem, has heretofore attempted to elevate the *lex mercatoria* 101

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<sup>87</sup>Richard Boltuck and Robert E. Litan (eds.), *Down in the Dumps: Administration of the Unfair Trade Laws*, The Brookings Institution, Washington D.C., 1991. See also, "Foreign Trade: Roughing up the Opposition", *The Economist*, 9 June 1984, p.42.

to the standing of law to impart to it “academic credibility”. But surely the fact that the bankers' associations of more than 175 countries endorsed the 1974 edition of the UCP has a very real significance, even if such common usages cannot be regarded as “law”. Rather than engaging in what is essentially a semantical discussion of what constitutes law - one could have the same discussion about whether bilateral investment treaties, or even the Resolutions of the UN General Assembly, articulate “law” - it would be preferable to recognise the autonomist conception of the *lex mercatoria* - as well as the forces for harmonisation at the state level, of the globalisation of multinational corporations, and of the ideology of liberal capitalism - as a component part of a growing “international normative consensus”, and that this growing consensus is not self-contained. It lays the foundation for the harmonisation and unification activities, which, in turn, is a symptom of the larger, globalising force of capital.

### **Conclusion: The Agenda for Research:**

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In addition to the issue of international trade, with which this paper was confined, the agenda for research into the integrated, multi-levelled normative framework of the Transnational Political Economy would entertain, inter alia, the following issues.

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### **Ideology:**

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The logical starting point would be with the growing consensus on liberal ideology that underpins the growth of the Transnational Political Economy. That is, essentially, the demise of economic ideological conflicts, both between East and West and North and South, and the globalisation of the ethic of liberal capitalism. By the end of the 1980s, there had been the spectacular failure of the Socialist model, and with the Newly Industrialised Countries (NICs) benefitting from greater interaction with the capitalist system, including a large presence of FDI, and a great many other developing countries effectively stagnating. More states therefore embraced liberal ideology.

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It is neither laudable nor ethnocentric to suggest that others can, and are, becoming like the West. Witness the recognition of the *lex mercatoria* in the Inter- American Convention on International Commercial Arbitration comprising Latin American states of both common law and civil law traditions, most of which had at one time explicitly rejected even the principle of party autonomy in choosing an applicable law (*Calvo doctrine*). In fact, there have been no less than 206 liberalising policy changes in 26 developing countries between 1977 and 1987.<sup>88</sup>

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It is recognised, of course, that as liberal capitalism spreads across the globe, it is gaining an increasing number of variants, and the analysis should avoid generalisations about

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<sup>88</sup>See Mac Destler, *American Trade Politics: System Under Stress*, Institute for International Economics, Washington, and the Twentieth Century Fund, New York, 1986.

the “end of history”. These variants nevertheless relate to a “trunc commun” of economic principles that is increasingly being accepted globally. For instance, Lord Justice Mustill stated that we should recognise that the *lex mercatoria* “is a doctrine of *laissez-faire*”, and that “in very many parts of the world it is considered that the exercise of free consent by individual parties must be subordinated to broader economic and political considerations bearing on international trade”.<sup>89</sup> However, it is evident that he did not foresee the states of Eastern Europe and of the former Soviet Union embracing privatisation only two years after this statement. For this he may be excused, but he did not recognise that this trend was already occurring throughout large portions of the Third World. Without a quantitative analysis to support the claim, it is highly probable that the states which have not embraced *laissez-faire*, privatised capitalism are now in the minority.

### Investment:

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Following on from this change in ideology, there has been, since the mid-1970s, the death of expropriation as a state instrument in dealing with foreign investors, and, particularly since the mid-1980s, a world-wide trend towards privatisation. With this has been competition to attract foreign investment.

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In the 1970s, there were 423 cases of expropriation of foreign owned assets by governments, an activity which peaked at 85 in 1975.<sup>90</sup> However, with this change in ideology has been a realisation of the benefits of FDI to a host state, including an effective method of to transfer technology, training, management, and international marketing skills; increased levels of employment; and higher wages relative to those offered by national industries.<sup>91</sup> Multinational corporations (MNCs) have been increasingly enticed by both developed and developing countries in the competition to attract FDI in the new economic world order of globalised capitalism. The practise of expropriation has vanished along with this demise of the radical critiques of the world economy. In fact, there were only 14 expropriations between 1980 and 1987, and none at all between 1987 and 1992.<sup>92</sup> In fact, as Michael Minor noted, “not only has expropriation activity largely ended, but in some countries, it is being reversed, in very literal terms by reversion to the former owners”.<sup>93</sup> And, perhaps nowhere is the new ideological consensus on the need for FDI more conspicuous than in

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<sup>89</sup>Jagdish Bhagwati, *Protectionism*, MIT Press, London, 1988., p.41.

<sup>90</sup>See a compilation of documents by Gardner Patterson, Robert Baldwin, the US Department of Commerce, and the US Department of State, in *United States International Economic Policy in an Interdependent World: Papers Submitted to the Commission on International Trade and Investment and Published in Conjunction with the Commission's Report to the President, Compendium of Papers, Volume 1*, US Government Printing Office, Washington, 1971; and GATT, *The Tokyo Round of Multilateral Trade Negotiations, Report by the Director- General of GATT*, Geneva, April 1979.

<sup>91</sup>New York Times, 23 November, 1982, D1 and D15.

<sup>92</sup>“Getting Services on the Agenda By Working the Washington Crowd”, *National Journal*, 30 August 1986, pp.2060-2061.

<sup>93</sup>Berman and Kaufman, *op. cit.*, p.222.

the liberalisation of the states of the former Soviet Union, particularly in Russia, Ukraine, Poland, Hungary, and the Czech Republic, and, of course, in the attempts of the former "radicals" of the international economy, such as Vietnam, North Korea, Cuba, and Iran, to attract FDI.

The methodology of the Transnational Political Economy would highlight the domestic policy changes as a result of the structure of foreign investment. One aspect of this uniform behaviour has been the subscription by 133 states to the Multilateral Investment Guarantee Agency (MIGA) of the World Bank and the network of 600 Bilateral Investment Treaties which nearly all provide for international arbitration under the World Bank's International Centre for the Settlement of Investment Disputes (ICSID). This can be seen as a part of the process of the increasingly global recognition of "general principles of law of commercial states".

### **Institutions:**

Also following from the change in ideology are two issues relating to institutions. The first is an examination of the rush of developing countries and the former Communist economies to join the institutions of the liberal order, particularly the GATT. This relates to the demise of the radicalism that underpinned the projects for alternative institutions, such as the UNCTAD and the UNCTC, which is evidenced in the unprecedented developing country participation in the Uruguay round of the GATT. In terms of investment, the UNCTAD, the forum which had given rise to the demands for an NIEO, and which had "spent decades tut-tutting about these firms and drawing up codes of conduct to control them, now spends much of its time advising countries how best to seduce them".<sup>94</sup> This increasing acceptance of fundamental norms is a function of a globalising economic ideology. However, the heterogeneity of membership of these organisations also raises new areas of contention. The Uruguay round also demonstrated that fundamental debates may crystallise along a north-south divide, given the split between mainly the OECD countries and the developed countries, led by Brazil and India, over services trade and intellectual property rights.

The second issue relating to institutions is to determine precisely to what extent the two "levels" of private and public law institutions are becoming integrated. The example given above was of the parallel discussion of public procurement in the Uruguay round of the GATT at the same time that the UNCITRAL Model Law Incorporating Services Procurement Procedures was promulgated. A quantitative assessment of the work of the main commercial institutions needs to be undertaken to determine the extent of this overlap. Qualitatively, it may be speculated that there will be a greater integration of these levels as the issues to be contended with grow in number and complexity. Rudolf Dolzer had the

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<sup>94</sup>Contractor, F.J, "Do Government Policies Toward Foreign Investment Matter?", Rutgers University, GSM Working Paper, No.90-15, July 1990.

foresight to suggest in 1982, that “a renewed effort to establish an international agency supervising and directing the existing ones (along the lines of the ill-fated International Trade Organisation) will therefore become the subject of intense discussion in the future”.<sup>95</sup> The recently created World Trade Organisation may fill this mandate. One could venture to suggest that, to be successful, it will have to take on a coordinating role, and to incorporate not only state actors, as did the GATT, but associations of the commercial community that have been working on the creation of rules in areas that now fall within the remit of the WTO.

### **Sovereignty, Authority, and Governance:**

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Finally, there is the important issue of governance in the international political economy. It would seem that in some areas, states have lost sovereignty by design. In public international trade law, the signatories of the GATT have progressively relinquished their control over tariffs and quantitative restrictions through the General Agreement on Tariffs and Trade, and have recently begun to articulate rules for new areas of trade. They also have imparted greater coercive force to international trade institutions, such as the newly created arbitral procedures of the World Trade Organisation, and the arbitral tribunal in the North American Free Trade Agreement.

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In other areas, states have lost authority by virtue of the forces of globalisation. In private international commercial law, it was seen above that the *lex mercatoria* gained increasing currency that states were forced to take this into account, and thereby reduced their ability to enforce the application of their own municipal codes.

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One could argue in the latter case that authority in this area was ceded to a national, or transnational commercial rules, by states since they permitted their courts to apply them. However, at this juncture, it is interesting to note that the processes of globalisation at the individual level, which suit individual merchants and which supersede the state, does, nevertheless erode the authority of the state. And, the globalisation driven by states, at least in international trade, appears to entail some insecurities at the individual, or social level. As the issues on the agenda of the GATT Uruguay round negotiations diversified away from strict considerations of tariffs, this entailed economic security implications for some farmers in Europe, national insecurities for the preservation of “culture” in France, ecological insecurities as regards the environment, and even human insecurities in developing countries with regard to the protection of pharmaceutical property rights.

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Finally, a distinction needs to be made between *de facto* and *de jure* loss of sovereignty. For instance, while states remain empowered with eminent domain to expropriate foreign assets consistent with international law, it is doubtful that they will take any measures that will contravene the aura of being a hospitable environment for foreign investment.

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<sup>95</sup>Mustill, *op. cit.*, p.181.

Moreover, there are some issues concerning multinational corporations that are not settled, such as whether the MNC has a "nationality", if so how it is to be determined, or whether it is a truly transnational enterprise. In other areas, such as taxation, transfer-pricing, and the ability of MNCs to make a mockery of state-imposed trade barriers by selling "foreign" products within a state's market through shifting production within tariff walls, to name but a few, there is clear tension between the territorial state and the globalisation of production.<sup>96</sup> It must therefore be recognised that whilst states maintain real, legal sovereignty, at both the sphere of private and public international commerce, it is no longer as pervasive and indissoluble as it was, even as recently as the late 1960s.<sup>97</sup>

It is hoped, therefore, that an examination of these issues within the multi-level framework will highlight not only the forces of harmonisation, in a positivist sense, but also the tensions that exist between territorial sovereignty and transnational normative forces. The project would produce a dynamic picture of the growth of the international political economy, and importantly, raise the question, to what extent does the state maintain sovereign authority over the issues outlined above within this normative transnational structure? And, what are the sources of authority in the transnational political economy? At this very early stage of research, the author would be very receptive to constructive comments!

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<sup>96</sup>Michael S. Minor, "The Demise of Expropriation as an Instrument of LDC Policy", *Journal of International Business Studies*, Vol.25, No.1, 1994, esp. table on p.180.

<sup>97</sup>OECD, *Promoting Private Enterprise in Developing Countries*, OECD, Paris, 1990, p.36.

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