A. WHAT IS INTERNATIONAL LAW?

International law is the body of rules and norms that regulates activities carried on outside the legal boundaries of states. In particular, it regulates three international relationships: (1) those between states and states, (2) those between states and persons, and (3) those between persons and persons.

The subject matter of international law has changed dramatically in recent years. Traditionally, this area of law dealt only with conduct between states and was called the law of nations. Later, it came to be called public international law, in part to distinguish it from private international law.

Private international law is the name given to the rules that regulate the affairs of private persons internationally. Examples of public and private international law are shown in Exhibit 1-1.

Contemporary international law now regulates organizations and individuals as well as nations, and the division between public and private law has become blurred. Today, the term international law applies to any conduct outside the boundaries of states, whether of a public or a private nature.

Because there is no world government, some have questioned if international law is really law. It is law, quite simply, because states and individuals regard it as such. This becomes clear when international law is compared with international comity.

Comity is the practice, or courtesy, between states of treating each other with goodwill and civility. It is not law, however, because states do not regard it as something they are required to respect. For example, until it became a matter of legal obligation under the 1961 Vienna Convention on Diplomatic Relations, it was long considered to be a customary courtesy to allow foreign diplomats the privilege of importing goods they intended for their own private use free of customs duties.

1A rticle 36.
2A nother example of comity is set out in Republic of the Philippines v. Westinghouse Elec. Corp., Federal Reporter, Third Series, vol. 43, p. 65 (3rd Circuit Ct. of Appeals 1994). In this case, the appellate court overturned the U.S. trial
court’s order requiring the Philippine government to cease harassing witnesses in the Philippines. The appellate court held that the trial court could request compliance by a foreign sovereign as a matter of comity, but that it could not order compliance as a matter of law.

**B. THE MAKING OF INTERNATIONAL LAW**

Within nations, law is made by legislatures, courts, and other agencies of government. On the international level, by comparison, no formal machinery for making law exists. There is no world government. Nonetheless, in working together, the different states function in the roles of both lobbyists and legislators.

As a basic principle, international law comes into effect only when states consent to it. The general consent of the international community can be found in *state practice*, that is, in the conduct and practices of states in their dealings with each other. Statements or evidence of general consent can be found in the decisions of the International Court of Justice (ICJ) (or its predecessor, the Permanent Court of International Justice), in resolutions passed by the General Assembly of the United Nations, in "law-making" *multilateral treaties*, and in the conclusions of international conferences. Sometimes, when a provision is repeated over and over in *bilateral treaties*, courts and law writers will regard the provision as having the general consent of the international community. Legal writers often cite unratified treaties and reports of international agencies, such as those of the International Law Commission, as indicating a trend toward general consent.

The particular consent of a state to be bound by an international law can be found in the declarations of its government, in its domestic legislation, in its court decisions, and in the treaties (both bilateral and multilateral) to which it is a party.

Recently, the widespread use of *arbitration* tribunals to resolve disputes between private parties has also led to the creation of an international *case law* that is independent of state action. Because lawyers representing states in international tribunals are willing to point to this case law as precedent for resolving disputes between states, and because international tribunals are willing to recognize it in such proceedings, one can conclude that the states of the world have given their general consent to its use.

**C. SOURCES OF INTERNATIONAL LAW**

The sources, or evidences, of international law are what international tribunals rely on in determining the content of international law. Article 38(1) of the Statute of the International Court of Justice lists the sources that the Court is permitted to use. Most writers regard this
A treaty is an agreement between two or more states. Convention is another term for treaty. "To treat." (From Latin tractare: "to treat.")

Legally binding agreements between states are referred to as treaties or conventions. Conventions are legally binding agreements between states sponsored by international organizations, such as the United Nations. Both are binding upon states because of a shared sense of commitment and because one state fears that if it does not respect its promises, other states will not respect their promises.

Today, most of the customary rules that once governed treaties are contained in the Vienna Convention on the Law of Treaties, which came into force in 1980. It only applies to treaties adopted after a party ratifies the agreement; nevertheless, its wide acceptance by states and its codification of customary rules has made it the de facto standard for interpretation.

A treaty is a legally binding agreement between two or more states. The Vienna Convention states that "Treaty" means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation. To avoid complexity, this definition excludes certain agreements, including oral promises, unilateral promises agreements relating to international organizations, agreements governed by municipal law, and agreements that were not intended to create a legal relationship.

Because these agreements are excluded in the Convention's definition, however, does not mean that international tribunals will ignore them or that they do not have effect.


Currently, there are 90 states parties, including most of the developed world other than France and the United States. United Nations, Multilateral Treaties Deposited with the Secretary-General, Status as at 5 August 2002, posted at www.un.org/ga/rpts/Treaty/Whs02newfiles/part_boo/xxiiiboo/xxiii_1.html.

Latin: “from the fact” or “in fact”; in effect although not formally recognized.

See Nuclear Tests Cases, International Court of Justice Reports, vol. 1974, p. 253 (1974). In 1963, the Nuclear Test Ban Treaty was concluded, forbidding atmospheric tests of nuclear bombs. France did not sign the treaty and conducted tests in the South Pacific in 1972 and 1973. Australia and New Zealand brought suits in the ICJ against France. The cases were taken off the Court's list without a decision on the merits when France declared that it would discontinue testing after 1973. The judgment of the Court stated: "It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations… The objects of the statements [by France] are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect." (Note: In 1981, France resumed testing.)

The effect of an authorized oral commitment made by a government official of one state to a government official of another state is discussed in Case 1–1.

Case 1–1  Legal Status of Eastern Greenland  

Denmark v. Norway

Permanent Court of International Justice, 1933.  

In discussions held on July 14, 1919, the Danish ambassador to Norway suggested to Monsieur Ihlen, the Norwegian foreign minister, that Denmark would raise no objection at the Paris Peace Conference to Norway’s claim to Spitzbergen if Norway would agree not to oppose Denmark’s claim to the whole of Greenland at the same conference. On July 22, 1919, in the course of additional discussions with the Danish ambassador, Monsieur Ihlen announced that “the Norwegian Government would not make any difficulty” concerning the Danish claim. Later, in the suit between the two countries over which had sovereignty over Greenland, Denmark argued that this declaration was binding upon Norway.

Judgment of the Court:

This declaration of Monsieur Ihlen has been relied on by Counsel for Denmark as a recognition of an existing Danish sovereignty in Greenland. The Court is unable to accept this point of view. A careful examination of the words used and of the circumstances in which they were used, as well as of the subsequent developments, shows that Monsieur Ihlen cannot have meant to be giving then and there a definite recognition of Danish sovereignty over Greenland, and shows also that he cannot have been understood by the Danish Government at the time as having done so. In the text of Monsieur Ihlen’s minute[s], submitted by the Norwegian Government, which has not been disputed by the Danish Government, the phrase used by Monsieur Ihlen is couched in the future tense: “ne fera pas de difficultés”; he had been informed that it was at the Peace Conference that the Danish Government intended to bring up the question; and two years later—when assurances had been received from the Principal Allied Powers—the Danish Government made a further application to the Norwegian Government to obtain the recognition which they desired of Danish sovereignty over all Greenland.

Nevertheless, the point which must now be considered is whether the Ihlen declaration—even if not constituting a definitive recognition of Danish sovereignty—did not constitute an engagement obliging Norway to refrain from occupying any part of Greenland.

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The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in response to [a] request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs. . . . It follows that, as a result of the undertaking involved in the Ihlen declaration of July 22nd, 1919, Norway is under an obligation to refrain from contesting Danish sovereignty over Greenland as a whole, and a fortiori to refrain from occupying a part of Greenland.

SEPARATE OPINION OF JUDGE ANZIOLITI:

No arbitral or judicial decision relating to the international competence of a Minister for Foreign Affairs has been brought to the knowledge of the Court; nor has this question been exhaustively treated by legal authorities. It is my opinion, it must be recognized that the constant and general practice of states has been to invest the Minister for Foreign Affairs—the direct agent of the chief of the state—with authority to make statements on current affairs to foreign diplomatic representatives, and in particular to inform them as to the attitude which the government, in whose name he speaks, will adopt in a given question. Declarations of this kind are binding upon the state.

As regards the question whether Norwegian constitutional law authorized the Minister for Foreign Affairs to make the declaration, that is a point which, in my opinion, does not concern the Danish Government: it was M[onsieur] Ihlen’s duty to refrain from giving his reply until he had obtained any assent that might be requisite under the Norwegian laws.

Custom

Some rules have simply been around for such a long time or are so generally accepted that they are described as customary laws. International customary law, however, is not fixed. Simply because certain practices were once followed in the international community does not mean that they are still followed today. Indeed, the development and evolution of customary international law is in a continual state of flux. For example, rules that govern the “art” of war are revised at the end of practically every major conflict to reflect the circumstances of a changed world. The present rule that requires a soldier to fight only with “combatants” is rather outdated in today’s world of terrorism and guerrilla warfare and will likely be changed in the near future. In the arena of international commercial law, the rate of change is just as fast. Much of this reflects developments in modern technology. Laws governing the flow of data across international borders (such as messages sent by satellite or transoceanic cable) are presently in a state that might best be described as “confused.” Many countries want to regulate the movement of such information, others demand free and undisturbed movement, and still others want guarantees against invasions of privacy. At present, the regulation is left up to each government, and little “common” law exists.

To show that a customary practice has become customary law, two elements must be established—one behavioral and one psychological. The first—called usus in Latin—requires consistent and recurring action (or lack of action if the custom is one of noninvolvement) by states. Evidence of such action can be found in the official statements of governments, including diplomatic correspondence, policy statements and press releases, the opinions of legal advisors, executive decrees, orders to military or naval forces, comments on draft treaties, national court decisions,9 and even legislation of a subordinate government.10 Consistent and recurring practice does not mean lengthy (as in “since time immemorial,” which is sometimes given as the rule in municipal practice), nor does it mean that it must be followed by all states. On the other hand, it must be accepted by a reasonably large number of major states for a period long enough to be recognized by the courts as establishing constant and uniform conduct.

9The basis for the concept of the “historic bay,” which is now part of the international law of the sea, was first adopted by the U.S. Supreme Court in 1969 in Louisiana v. United States, United States Reports, vol. 394, p. 11 (Supreme Ct., 1969).

10The use of American state legislation as being indicative of a customary international practice was relied upon by the U.S. Supreme Court in the case of The Scotia, id., vol. 81, p. 170 (Supreme Ct., 1871).
The psychological element in showing that a customary practice has become law is the requirement that states observing the custom must regard it as binding. That is, they must recognize the custom as being a practice that they must obligatorily follow as compared with one that they follow out of courtesy (i.e., comity) to other states. This is often referred to by the Latin phrase *opinio juris sive necessitatis*. The Permanent Court of International Justice (PCIJ) discussed this requirement in 1927 in the case of The Lotus. The case involved a collision on the high seas between a French steamer and a Turkish collier in which some Turkish crew members and passengers lost their lives. When the French ship docked in a Turkish port, the Turkish government began criminal proceedings against the French officers on watch at the time of the collision. The French appealed to the PCIJ arguing that Turkey had violated international law, because, France said, only the flag state has jurisdiction over criminal incidents on the high seas. The PCIJ said that the few cases France cited for this proposition “merely show that states had often, in practice, abstained from instituting criminal proceedings, and not that they recognized themselves as being obliged to do so; for only if such abstentions were based on their being conscious of a duty to abstain would it be possible to speak of an international custom.”  

Even if the international community follows a practice and recognizes it as binding customary law, under some circumstances the rule will not apply to a particular state. This happens when a state *persistently objects* to a practice during its formative stages and thus never becomes a party to it. This can also happen after a customary rule has become generally accepted, if a state is allowed by the international community to deviate from the general practice. In the Anglo-Norwegian Fisheries Case, the United Kingdom sued Norway in the International Court of Justice because Norway was not allowing British fishing vessels to enter what Norway claimed were its territorial waters and the British claimed were high seas. Norway was using a special rule for connecting rocks and islands in drawing its territorial boundaries that was contrary to the general rule followed by most countries. The ICJ endorsed Norway’s action because Norway had been claiming the disputed waters since 1812 and because most countries of the world had never objected. Thus, by the acquiescence of other countries, Norway was excused from following a generally accepted customary rule of international law.

The exception that excuses a state from the application of a customary rule because the state refuses from the outset to recognize the rule is the topic considered in Case 1–2.

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**Case 1–2 The Asylum Case Colombia v. Peru**

International Court of Justice, 1950.  

Colombia granted political asylum in its embassy in Lima, Peru, to Señor Haya de la Torre, a Peruvian politician who had participated in an unsuccessful rebellion in Peru in 1948. Colombia asked Peru for the safe conduct of Haya de la Torre from Lima to the Colombian border. Peru refused. Colombia then sued Peru in the ICJ and asked the Court to determine, among other things, that “Colombia, as the state granting asylum, is competent to qualify the offense [as political or not] for the purpose of the said asylum.” Colombia argued for such a determination on the basis of both treaty provisions and “A merican international law in general.” The ICJ considered the last point in the following extract.
JUDGMENT OF THE COURT:

The Colombian government has finally invoked "American international law in general." In addition to the rules arising from agreements which have already been considered, it has relied on an alleged regional or local custom peculiar to Latin-American states.

The party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the states in question, and that this usage is the expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state. This follows from Article 38 of the Statute of the Court, which refers to international custom "as evidence of a general practice accepted as law."

The Colombian government has referred to a large number of cases in which diplomatic asylum was in fact granted and respected. But it has not shown that the alleged rule of unilateral and definitive qualification was invoked or... that it was, apart from conventional stipulations, exercised by the states granting asylum as a right appertaining to them and respected by the territorial state as a duty incumbent on them. [...] The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law, with regard to the alleged rule. [...]

The Court cannot therefore find that the Colombian government has proved the existence of such a custom. But even if it could be supposed that such a custom existed between certain Latin-American states only, it could not be invoked against Peru which, far from having by its attitude adhered to it, has, on the contrary, repudiated it by refraining from ratifying the Montevideo Conventions of 1933 and 1939, which were the first to include a rule concerning the qualification of the offense in matters of diplomatic asylum.

Peru was under no obligation to give Señor Haya de la Torre safe passage out of the country.

D. THE SCOPE OF INTERNATIONAL LAW IN ACTUAL PRACTICE

When courts are required to decide international disputes, they frequently rely on the general principles of law that are common to the legal systems of the world. Indeed, although there are more than 200 states in the world today, there are, in practical terms, only two major legal systems: the Anglo-American common law system and the Romano-Germanic civil law system; and the two are remarkably similar in their basic procedures and substantive rules. It is this similarity that provides courts with the "general principles" they can use in deciding many problems that arise in international disputes.

The Practice in International Tribunals

In actual practice, international tribunals generally regard municipal law as subservient to international law. For example, in the Greco-Bulgarian Communities Case, the Permanent Court of International Justice said that "it is a generally accepted principle of international law that in...
the relations between [states] who are contracting parties to a treaty, the provisions of their municipal law cannot prevail over those of the treaty."  

A nd in the Polish Nationals in Danzig Case, the same court said: "It should . . . be observed . . . that a state cannot adduce as against another state its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force."

Not only do international tribunals treat international law as the superior law, but they also regard states as having a general obligation to bring their municipal law into compliance with international norms. In the Exchange of Greek and Turkish Populations Case, the Permanent Court of International Justice was asked to interpret a clause in the 1923 Treaty of Lausanne that required the parties to modify their municipal law to ensure that the treaty would be carried out. It said: "This clause . . . merely lays stress on a principle which is self-evident according to which a state which has contracted valid international obligations is bound to make in its legislation such modification as may be necessary to ensure the fulfillment of the obligations undertaken."

Procedurally, international tribunals treat municipal law as "mere fact." For example, in the Certain German Interests in Polish Upper Silesia Case, the PCIJ observed:

It might be asked whether a difficulty does not arise from the fact that the Court would have to deal with the Polish law of July 14th, 1920. This, however, does not appear to be the case. From the standpoint of International Law and of the Court which is its organ, municipal laws are mere facts which express the will and constitute the activities of states, in the same manner as do legal decisions or administrative measures. The Court is certainly not called upon to interpret the Polish law as such; but there is nothing to prevent the Courts giving judgment on the question whether or not, in applying the law, Poland is acting in conformity with its obligations toward Germany under the Geneva Convention.

Several consequences of treating municipal law as a fact are significant—such as the requirement that states parties must prove what the law is, that municipal laws will not be interpreted by an international tribunal, and that an international tribunal will not declare such law either void or valid.

The Practice in Municipal Courts

In municipal courts, international law is generally treated as correlative. That is, once a court determines that a particular rule of international law is applicable in a particular case, the law will be treated as law and not as a fact. The major question for the court then is whether the international law has been received into the local jurisprudence. How the court will answer this question depends on whether the law is based on customary practice or is contained in a treaty.

In most countries, customary international law is received in accordance with the doctrine of incorporation. That is, customary international law is treated as adopted to the extent that it is not inconsistent with prior municipal legislation or judicial decisions of final authority. A minority of courts (i.e., some courts in the United Kingdom and the British Commonwealth) apply the doctrine of transformation. This holds that customary international law is not applicable until clearly adopted by legislative action, judicial decision, or established local usage.

The reception rules found in treaties depend on two factors: One is the nature of the treaty, and the other is the constitutional structure of the ratifying state.

As to the nature of treaties, they may be either self-executing or non-self-executing. A self-executing treaty is one that contains a provision that says the treaty will apply to the parties without their having to adopt any domestic enabling legislation; a non-self-executing treaty has no such provision. Case 1–3 examines this difference.

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18In Triquet v. Bath in Burrow’s Reports, vol. 1764, pt. 3, p. 1478 (King’s Bench, 1764), Lord Mansfield stated: “I remember in a case before Lord Talbot... that he declared a clear opinion: ‘That the law of nations, in its full extent was part of the law of England.’... I remember, too, Lord Hardwicke declaring his opinion to the same effect; and denying that Lord Chief Justice Holt ever had any doubt as to the law of nations being part of the law of England...”
19In Chung Chi Cheung v. Rex, Law Reports, Appeal Cases, vol. 1939, p. 160 (1939), Lord Atkin said: “[So] far, at any rate, as the Courts of this country are concerned, international law has no validity save insofar as its principles are accepted and adopted by our own domestic law.”
A s to the structure of states, their constitutions may assign to one or more state organs (or branches) the responsibility for entering into treaties. Thus, in many countries, responsibility for adopting treaties is shared by the executive and the legislature. For example, in the United States, the federal Constitution gives the President responsibility for negotiating treaties and the Senate responsibility for ratifying them (i.e., for giving its “advice and consent” to their adoption). Over the years, however, this cumbersome arrangement has led the United States to develop two kinds of treaties: constitutional treaties and executive agreements. The first are made according to the Constitution’s provisions (i.e., they are negotiated by the President and ratified by the Senate); the second are agreements made solely by the President (i.e., without the “advice and consent” of the Senate). A s to external matters, both of these have the same effect (i.e., they are commitments that impose binding international obligations on the United States); but as to internal matters, they are different. Constitutional treaties that are self-executing are effective domestically; nothing more needs to be done to implement them. Executive agreements—and constitutional treaties that are non-self-executing—have no effect domestically; to obtain effect, implementing legislation must be adopted.

20It is cumbersome because often a political party in opposition to the President controls the Senate, and the two may not share the same view of international relations.

21Examples of American executive agreements that have no domestic effect are the many overseas military-basing agreements made by the U.S. government during the cold war era of 1945 to 1990. An important example of a U.S. executive agreement that was given domestic effect through the adoption of implementing legislation was the General Agreement on Tariffs and Trade 1947 (GATT 1947).

**Case 1–3 Sei Fujii v. State**

Colombia v. Peru

**ChieF Justice Gibson:**

Plaintiff, an alien Japanese who is ineligible to citizenship under our naturalization laws, appeals from a judgment declaring that certain land purchased by him in 1948 had escheated to the state. There is no treaty between this country and Japan which confers upon plaintiff the right to own land, and the sole question presented on this appeal is the validity of the California alien land law.

**United Nations Charter**

It is first contended that the land law has been invalidated and superseded by the provisions of the United Nations Charter pledging the member nations to promote the observance of human rights and fundamental freedoms without distinction as to race. Plaintiff relies on statements in the preamble and in Articles 1, 55 and 56 of the Charter....

It is not disputed that the Charter is a treaty, and our federal Constitution provides that treaties made under the authority of the United States are part of the supreme law of the land and that the judges in every state are bound thereby. A treaty, however, does not automatically supersede local laws which are inconsistent with it unless the

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20The pertinent portions of the alien land law... are as follows:... “§ 7 Any real property hereafter acquired in fee in violation of the provisions of this act by [an alien ineligible for citizenship under the laws of the United States or ineligible to own land in the United States because no treaty between the United States and his or her country provides for such a right]... shall escheat as of the date of such acquiring, to, and become and remain the property of the State of California.”

21United States Constitution, Article VI.
treaty provisions are self-executing. In the words of Chief Justice Marshall: A treaty is “to be regarded in the courts of justice as equivalent to an act of the Legislature, whenever it operates of itself, without the aid of any legislative provision. But when the terms of the stipulation import a contract—when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the Legislature must execute the contract, before it can become a rule for the court.”

In determining whether a treaty is self-executing, courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. . . . In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts. . . .

It is clear that the provisions of the preamble and of Article 1 of the Charter which are claimed to be in conflict with the alien land law are not self-executing. They state general purposes and objectives of the United Nations Organization and do not purport to impose legal obligations on the individual member nations or to create rights in private persons. It is equally clear that none of the other provisions relied on by plaintiff is self-executing. Article 55 declares that the United Nations “shall promote . . . universal respect for all without distinction as to race, sex, language, or religion;” and in Article 56, the member nations “pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.” Although the member nations have obligated themselves to cooperate with the international organization in promoting respect for, and observance of, human rights, it is plain that it was contemplated that future legislative action by the several nations would be required to accomplish the declared objectives, and there is nothing to indicate that these provisions were intended to become rules of law for the courts of this country upon the ratification of the Charter.

The language used in Articles 55 and 56 is not of the type customarily employed in treaties which have been held to be self-executing and to create rights and duties in individuals. For example, [in many cases considered by the U.S. Supreme Court] . . . treaty provisions were enforced without implementing legislation where they prescribed in detail the rules governing rights and obligations of individuals or specifically provided that citizens of one nation shall have the same rights while in the other country as are enjoyed by that country’s own citizens. . . .

It is significant to note that when the framers of the Charter intended to make certain provisions effective without the aid of implementing legislation they employed language which is clear and definite and manifests that intention. For example, Article 104 provides: “The organization shall enjoy in the territory of each of its members such legal capacity as may be necessary for the exercise of its functions and the fulfillment of its purposes. Article 105 provides: “1. The organization shall enjoy in the territory of each of its members such privileges and immunities as are necessary for the fulfillment of its purposes. 2. Representatives of the members of the United Nations and officials of the organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organization.” In Curran v. City of New York, these articles were treated as being self-executory. . . .

The provisions in the Charter pledging cooperation in promoting observance of fundamental freedoms lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification. Instead, they are framed as a promise of future action by the member nations. Secretary of State Stettinius, Chairman of the United States delegation at the San Francisco Conference where the Charter was drafted, stated in his report to President Truman that Article 56 “pledges the various countries to cooperate with the organization by joint and separate action in the achievement of the economic and social objectives of the organization without
infringing upon their right to order their national affairs according to their own best ability, in their own way, and in accordance with their own political and economic institutions and processes.26 The same view was repeatedly expressed by delegates of other nations in the debates attending the drafting of Article 56.

The humane and enlightened objectives of the United Nations Charter are, of course, entitled to respectful consideration by the courts and Legislatures of every member nation, since that document expresses the universal desire of thinking men for peace and for equality of rights and opportunities. The Charter represents a moral commitment of foremost importance, and we must not permit the spirit of our pledge to be compromised or disparaged in either our domestic or foreign affairs. We are satisfied, however, that the Charter provisions relied on by plaintiff were not intended to supersede existing domestic legislation, and we cannot hold that they operate to invalidate the alien land law.

**Fourteenth Amendment of the Federal Constitution**

The next question is whether the alien land law violates the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution. . . .

The California alien land law is obviously designed and administered as an instrument for effectuating racial discrimination, and the most searching examination discloses no circumstances justifying classification on that basis. There is nothing to indicate that those alien residents who are racially ineligible for citizenship possess characteristics which are dangerous to the legitimate interests of the state, or that they, as a class, might use the land for purposes injurious to public morals, safety or welfare. Accordingly, we hold that the alien land law is invalid as in violation of the Fourteenth Amendment.

The judgment of the intermediate appellate court was reversed in part and affirmed in part. Although the United Nations Charter established no rights that applied directly to the plaintiff, the due process and equal protection clauses of the Fourteenth Amendment of the U.S. Constitution forbade racial discrimination of the kind contained in the California alien land law.

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26Report to the President of the Results of the San Francisco Conference . . ., Department of State Publication 2349, Conference Series 71, p. 115.

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**E. INTERNATIONAL PERSONS**

**state:** A political entity comprising a territory, a population, a government capable of entering into international relations, and a government capable of controlling its territory and peoples.

**independent state:** A state that is sovereign; one that operates independently internationally.

**dependent state:** A state that has surrendered its rights to conduct international affairs to another state.

**States**

States are political entities that have a territory, a population, a government capable of entering into international relations, and a government capable of controlling its territory and peoples. Included in this definition are three kinds of states: independent states, dependent states, and inchoate states.

**Independent states** are free from the political control of other states and free to enter into agreements with other international persons. **Dependent states** have formally surrendered some aspect of their political and governmental functions to another state.

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27This rule does not apply in the United Kingdom to European Union legislation. EU legislation is treated in U.K. courts as being directly effective even though there is no U.K. implementing legislation.
**Recognition**

For a state to exist in the international community it must be recognized by other states. Recognition comes about by a unilateral declaration, and it can be either explicit (express) or implicit (tacit). Once given, it implies that the recognized state or government is entitled to the rights and privileges granted by international law. The recognition of a government is different from the recognition of a state. A state is recognized when an identifiable government, people, and territory first come into existence. If the government later changes, it may not be recognized even though recognition of the state continues.

Two theories have been suggested as guidelines for when a government should be recognized: the declaratory doctrine and the constitutive doctrine. The first holds that the legal existence of a government happens automatically by operation of law whenever a government is capable of controlling a territory and its people. The second states that a government does not truly come into existence until such time as it is recognized by other states and participates in the international arena. Which of these two theories ought to be applied in an American court was the issue in Case 1–4.

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**Case 1–4 Matimak Trading Co. v. Khalily and D.A.Y. Kids Sportswear Inc.**


**CIRCUIT JUDGE MCLAUGHLIN:**

Plaintiff appeals from an order entered August 19, 1996, in the United States District Court for the Southern District of New York (Judge Wood) dismissing plaintiff’s claims for lack of subject matter jurisdiction. We review de novo the grant of the dismissal motion. The principal issue is whether a Hong Kong corporation is either a “citizen or subject” of a foreign state for purposes of alienage jurisdiction. We review de novo the grant of the dismissal motion. The principal issue is whether a Hong Kong corporation is either a “citizen or subject” of a foreign state for purposes of alienage jurisdiction. We review de novo the grant of the dismissal motion. The principal issue is whether a Hong Kong corporation is either a “citizen or subject” of a foreign state for purposes of alienage jurisdiction.

More precisely the issue is whether Hong Kong may be regarded as a “foreign state.” We hold that it may not and, accordingly, affirm the district court.

**BACKGROUND**

Plaintiff Matimak Trading Co. Ltd. is a corporation organized under the laws of Hong Kong, with its principal place of business in Hong Kong. It seeks to sue Albert Khalily and D.A.Y. Kids Sportswear Inc., two New York corporations, in the Southern District of New York for breach of contract. Matimak invoked the court’s diversity jurisdiction under United States Code, title 28, § 1332(a)(2), which provides jurisdiction over any civil action arising between “citizens of a state and citizens or subjects of a foreign state.”

In June 1996, the district court sua sponte raised the issue of the court’s subject matter jurisdiction. In August 1996, after allowing the parties to brief the issue, the district court dismissed the complaint for lack of subject matter jurisdiction. The court concluded that Hong Kong is not a “foreign state” under the diversity statute, and, consequently, Matimak is not a “citizen or subject” of a “foreign state.”

**DISCUSSION**

This is not the first time we have had to navigate what we have earlier described as a “shoalstrewn area of the law.” A rticle II of the Constitution extends the federal judicial power to “all Cases... between a state, or citi-

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28The text of the opinion is posted on the FindLaw Internet Web site at laws.findlaw.com/2nd/969117a.html.
29See United States Constitution, art. III, § 2, clause 1; United States Code, title 28, § 1332(a)(2).
30[PL atin: “on its own initiative.”]
zens thereof, and foreign states, Citizens or Subjects.” The United States Judicial Code tracks the constitutional language by providing diversity jurisdiction over any civil action arising between “citizens of a state and citizens or subjects of a foreign state.” This judicial power is referred to as “alienage jurisdiction.”

British sovereignty over Hong Kong ceases on July 1, 1997, when Hong Kong becomes a special administrative region of the People’s Republic of China. Diversity of citizenship, however, is determined as of the commencement of an action.

Given these building blocks, we must address three principal questions: (1) whether Hong Kong is a “foreign state,” such that Matimak is a “citizen or subject” of a “foreign state”; (2) whether Matimak is a “citizen or subject” of the United Kingdom, by virtue of Hong Kong’s relationship with the United Kingdom when it brought suit; and (3) whether any and all non-citizens of the United States may ipso facto invoke alienage jurisdiction against a United States citizen. Although not addressed by the parties, this last question is the focus of the dissent, and thus merits serious consideration.

I. IS HONG KONG A “FOREIGN STATE”?

A. Well-Established Principles in This Court

Neither the Constitution nor § 1332(a)(2) [of the Judicial Code] defines “foreign state.” However, “it has generally been held that a foreign state is one formally recognized by the executive branch of the United States government.” For purposes of diversity jurisdiction, a corporation is a “citizen” or “subject” of the entity under whose sovereignty it is created.

The Supreme Court has never addressed the issue before us. This Court, however, has applied these general rules in addressing alienage jurisdiction on several occasions.

In Iran Handicraft and Carpet Export Center v. Marjan International Corp., an Iranian corporation sued a New York corporation in the Southern District of New York for breach of contract. When the complaint was filed, Iran was undergoing a revolutionary change of government. The issue was whether the court was required to find that the United States formally recognized the new government of Iran to permit the plaintiff to invoke alienage jurisdiction. The court noted the general rule that a “foreign state” in § 1332(a)(2) is one “formally recognized by the executive branch.” The court explained:

Because the Constitution empowers only the President to “receive Ambassadors and other public Ministers,” the courts have deferred to the executive branch when determining what entities shall be considered foreign states. The recognition of foreign states and of foreign governments, therefore, is wholly a prerogative of the executive branch. Thus, it is outside the competence of the judiciary to pass judgment upon executive branch decisions regarding recognition.

The court surveyed the case law, concluding that “[i]n cases involving parties claiming to be citizens of a foreign state, . . . courts have focused on whether the foreign state was recognized by the United States as a free and independent sovereign.” This description is consistent with the accepted definition of a “state” in international law, which requires that the entity have a “defined territory” and be “under the control of its own government.”

Relying on the State Department’s clarification of Iran’s diplomatic status, the Iran Handicraft court concluded that “it is beyond doubt that the United States continues to recognize Iran as an independent sovereign nation.”

The parties here agree that the United States has not formally recognized Hong Kong as a foreign state. Invoking the jurisprudence of this Court and others, however, Matimak contends that Hong Kong has received “de facto” recognition as a foreign state by the United States, and thus its citizens may invoke alienage jurisdiction.

MAP 1-4 Hong Kong (1997)

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Matimak points to the United States’ diplomatic and economic ties with Hong Kong as evidence of this recognition.

This Court established the doctrine of de facto recognition in Murarka v. Bachrack Brothers, Inc. 37 In that case a partnership doing business in New Delhi, India sued a New York corporation. The court ruled that it had alienage jurisdiction despite the fact that the complaint was filed thirty days before the United States formally recognized India as a foreign state. The court explained:

True, as of July 14, 1947, our Government had not yet given India de jure recognition, but its exchange of ambassadors in February and April 1947 certainly amounted at least to de facto recognition, if not more. To all intents and purposes, these acts constituted a full recognition of the Interim Government of India at a time when India’s ties with Great Britain were in the process of withering away, which was followed a month later, when partition took place between India and Pakistan, by the final severance of India’s status as a part of the British Empire. . . . Unless form rather than substance is to govern, we think that in every substantial sense by the time this complaint was filed India had become an independent international entity and was so recognized by the United States.

This analysis might reasonably be regarded as nothing more than an acknowledgment of the United States’ imminent formal recognition of a sovereign state. The analogy of Hong Kong to India is inapt. India, which had been a colony of Great Britain, was about to become an independent sovereign nation. Not so for Hong Kong, which is about to be absorbed into China. Hong Kong is merely changing fealty.

Matimak, of course, argues for a more flexible interpretation of the de facto test. At the very least, however, as Iran Handicraft noted, the de facto test depends heavily on whether the Executive Branch regards the entity as an “independent sovereign nation.” 38 It is beyond cavil that “[w]ho is the sovereign, de jure or de facto, of a territory, is not a judicial, but a political, question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government.” 39

The deference to the Executive Branch exhibited in Iran Handicraft and Murarka was similarly crucial in Calderone v. Naviera Vacuba S/A, 40 where we sustained alienage jurisdiction in a suit between a Cuban corporation and an American company. The court explained:

Considerations of both international relations and judicial administration lead us to conclude that the onus is on the Department of State, or some other department of the Executive Branch, to bring to the attention of the courts its decision that permitting nationalized Cuban corporations to sue is contrary to the national interest. Since silence on the question may be highly desirable, it would not be wise for the court unnecessarily to force the Government’s hand. However, in this case we need not thereby rely on the maintenance of the status quo, because the Executive Branch has made its wishes known . . . . [T]he Department of Justice has urged that nationalized Cuban corporations have access to our courts with the protection of the act of state doctrine.

Courts have consistently required such deference for purposes of alienage jurisdiction. 42

When Matimak brought this suit in August 1995, Hong Kong was a “British Dependent Territory” and was ruled by a governor appointed by the United Kingdom. As such, it maintained some independence in its international economic and diplomatic relationships, but in matters of defense and foreign affairs remained dependent on the United Kingdom.

Hong Kong is the United States’ twelfth-largest trading partner, with direct United States financial investment of almost twelve billion dollars. 43 Hong Kong’s relationship with the United States was most recently manifested in the United States–Hong Kong Policy Act of 1992, 44 which makes clear that Congress desires United States–Hong Kong relations to continue after July 1, 1997, when Hong Kong becomes a special administrative region of China. The Act states that “Hong Kong plays an important role in today’s regional and world economy. This role is reflected in strong economic, cultural, and other ties with the United States that give the United States a strong interest in the continued vitality, prosperity, and stability of Hong Kong.”

The Policy Act makes equally clear, however, that the United States does not regard Hong Kong as an independent, sovereign political entity. The Act provides that Hong Kong “will continue to enjoy a high degree of autonomy on all matters other than defense and foreign

38Latin: “by right” or “by law”; according to law.
41See e.g., Abu-Zeineh v. Federal Labs., Inc., No. 91–2148, at pp. 3–5 (District Ct. for W. District of Pennsylvania, Dec. 7, 1994) (holding that Palestine is not a foreign state for purposes of alienage jurisdiction, as Palestine had not been recognized by the United States as an independent sovereign nation).
affairs” and emphasizes that only “with respect to economic and trade matters” shall the United States “continue to treat Hong Kong as a territory which is fully autonomous from the United Kingdom.” The Act points to the need to safeguard human rights during the “transition in the exercise of sovereignty over Hong Kong.”

The United States has embraced the same position on this appeal. Having originally stated that “Hong Kong should . . . be treated in the courts of the United States as a de facto foreign state” for purposes of alienage jurisdiction, the United States reversed course. In its amicus brief, the Justice Department notes that “[t]he State Department no longer urges treatment of Hong Kong as a de facto foreign state and withdraws any reliance on this contention.”

Although we need not resolve this issue here, we note that the State Department’s unexplained change in stance following the district court’s opinion might under different circumstances require further inquiry into its ulterior motives. No reason is apparent, and none is suggested, for refusing to defer to the State Department in this case.

The State Department’s stance on appeal confirms what is already clear from the United States’ dealings with Hong Kong, as evidenced in the Policy Act: it does not regard Hong Kong as an independent sovereign entity. For these reasons, it is clear that the United States does not recognize Hong Kong as a sovereign and independent international entity. Accordingly, consistent with this Court’s precedent, Matimak cannot invoke alienage jurisdiction as a “citizen or subject” of Hong Kong.

II. IS MATIMAK A “CITIZEN OR SUBJECT” OF THE UNITED KINGDOM?

Well-established principles—both in this Circuit and elsewhere—furnish the analytical scaffolding for determining whether Matimak is a citizen or subject of the United Kingdom. There is no question, of course, that the United States formally recognizes the United Kingdom as a sovereign international entity.

We begin with the truism that a foreign state is entitled to define who are its citizens or subjects. It is another accepted precept that a corporation, for purposes of diversity jurisdiction, is a “citizen” or “subject” of the entity under whose sovereignty it is created.

The Justice Department, as amicus, argues that as a Hong Kong corporation, Matimak is governed by the Hong Kong Companies Ordinance, which is modeled on the British Companies Act 1948. The Justice Department concludes that because the ultimate sovereign authority over the plaintiff is the British Crown, Matimak should be treated as a subject of United Kingdom sovereignty for purposes of § 1332. Hong Kong corporations, however, are no more “subjects” than “citizens.”

The fact that the Hong Kong Companies Ordinance may be “ultimately traceable” to the British Crown is too attenuated a connection. Matimak was incorporated under Hong Kong law, the Companies Ordinance 1984 of Hong Kong, and is entitled to the protections of Hong Kong law only.

Matimak is not a “citizen or subject” of a foreign state. It is thus stateless. And a stateless person—the proverbial man without a country—cannot sue a United States citizen under alienage jurisdiction.

III. DOES “CITIZEN OR SUBJECT” IN § 1332(A)(2) DESCRIBE ANY AND ALL PERSONS WHO ARE NOT CITIZENS OF THE UNITED STATES?

It has recently been suggested that the Founding Fathers intended to confer alienage jurisdiction over suits between a United States citizen and any other person in the world who is not a United States citizen. The dissent makes the same argument, substantially adopting the analysis set forth in this commentary and arguing that the Judiciary Act, prior to its amendment in 1875, evidenced the intent of the drafters.

Even beyond its obvious rejection of well-established precedent, this argument is flawed in several respects.

During the Constitutional Convention of 1787, the drafters of the Constitution used the phrase “citizen or subject of a foreign state” as frequently as “alien” or “foreigner.” As the dissent stresses, a basic assumption of the drafters was that anyone who was not a citizen of the United States must by definition have been subject to the power of a foreign government or sovereign. The “idea of statelessness” was simply not in their “contemplation.”

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46Letter from Hergen to Potashner, supra, at p. 2.
[47Abbreviated form of amicus curiae. Latin: “friend of the court.” One not a party to a suit who is permitted by the court to advise it in respect to some matter of law that directly affects the case in question.]
48The Justice Department chose to inform the Court of this crucial fact in a footnote. This Court frowns on raising such important points in footnotes, either before the district court or on appeal. “The enormous volume of briefs and arguments pressed on each panel of this court at every sitting precludes our scouring through footnotes in search of some possibly meritorious point that counsel did not consider of sufficient importance to include as part of the argument.” United States v. Estropo, Federal Reporter, Second Series, vol. 986, p. 1462 at p. 1463 (2d Circuit Ct. of Appeals, 1993).
... [However], the dissent's conclusion that the drafters in the late-eighteenth century intended that all "foreigners," including stateless persons, be entitled to invoke alienage jurisdiction over a United States citizen ignores the fact that the term in 1787 did not include stateless persons—a category of people unknown to the drafters of the Constitution.

The dissent also appears to agree that the overriding rationale of alienage jurisdiction was to accord foreign citizens a neutral forum rather than a state court that might be perceived by a foreigner as biased in favor of its own citizens. This would avoid entanglements with foreign states and sovereigns. According alienage jurisdiction to "stateless" persons does not serve this rationale: there is no danger of foreign entanglements, as there is no sovereign with whom the United States could become entangled.

It might occasionally seem incongruous not to allow a stateless person to bring suit in federal court; but this does not make it inconsistent with the idea of alienage jurisdiction. The drafters' worry that foreigners not suffer prejudice in state courts reflected their concern that such prejudice might harm foreign relations; avoiding prejudice to the individual foreigners themselves was not an independent concern. At any rate, stateless persons are not totally denied an American forum; they may choose to sue in a state court.49

CONCLUSION

Matimak is not a "citizen or subject of a foreign state," under United States Code, title 28, § 1332(a)(2), and there is no other basis for jurisdiction over Matimak's suit. The district court properly dismissed Matimak's suit for lack of subject matter jurisdiction. Accordingly, the order of the district court is affirmed.

CIRCUIT JUDGE ALTIMARI, DISSENTING:

... [O]ur jurisprudence has heretofore barred stateless persons from access to our federal courts. Today, the majority bars stateless corporations as well. A stateless corporation is an oxymoron. In the United States, a corporation cannot be created without the imprimatur of the state. This is also true in Great Britain and Hong Kong. ... [N]evertheless, the majority has decided that] a Hong Kong corporation, such as Matimak, is denied access to our federal courts under alienage diversity jurisdiction because it is not a British corporation. Is it thus so easy to disavow a person or a corporate entity?

The majority emphasizes the importance of affording deference to the Executive Branch. In fact, it extensively quotes from Calderone v. Naviera Vacuba S/A in which this Court sustained alienage diversity jurisdiction because the Executive Branch made its wishes known.50 In this case, the Department of State and the Department of Justice unequivocally made their wishes known—they withdrew support of de facto recognition of Hong Kong and urged this Court to recognize Hong Kong as a "citizen or subject" of the United Kingdom.

It is important for a government to be recognized because recognition implies that the recognizing government wishes to have normal relations. And recognized governments are entitled, among other things, to diplomatic protection and sovereign immunity. To avoid any possible connotation that recognition also means approval, many governments have adopted a policy of never formally recognizing other governments. This policy is known as the Estrada Doctrine, after the Mexican foreign minister who first stated it.

Territorial Sovereignty

For a state to exist, it must have territorial sovereignty. Sovereignty is the right to exercise the functions of a state within a territory.51 This right, however, may not be absolute. Other


Estrada Doctrine:
Doctrine that foreign governments will not be explicitly recognized.

Territorial Sovereignty:
The right of a government to exclusively exercise its powers within a particular territory.51

The 1888 Convention Respecting Free Navigation of the Suez Canal, also known as the Convention of Constantinople, declared the Suez Canal open to ships of all nations. American Journal of International Law, vol. 3, p. 123 (1909). The 1977 Panama Canal Treaty states that the canal “shall remain . . . open to peaceful transit by the vessels of all nations on terms of entire equality.” Id., vol. 72, p. 238 (1978). Servitudes are usually created by treaty but they can be created by custom as well, as the ICJ pointed out in the Right of Passage Case. International Court of Justice Reports, vol. 1960, p. 6 (1960).

**servitude:** (From Latin servitudo: “slavery.”) A right to the use of another’s property.

**Case 1–5 The Trail Smelter Arbitration**

**United States v. Canada**


At the beginning of this century, a Canadian company built a lead and zinc smelting plant at Trail, British Columbia, about 10 miles north of the state of Washington border. Beginning in the 1920s, production was increased and by 1930 more than 300 tons of sulfur, including large quantities of sulfur dioxide, were being emitted daily. Some of the emissions were being carried down the Columbia River Valley and allegedly causing damage to land and other property in Washington. After negotiations between the United States and Canada, the latter agreed in 1928 to refer the matter to the American-Canadian Joint Commission that the two countries had established in the Boundary Waters Treaty of 1909. In 1931, the Commission’s Arbitral Tribunal reported that damage had occurred in the amount of $350,000. Canada did not dispute its liability and agreed to pay this amount. The smelter continued to operate, however, and continued to emit pollutants into the air over Washington. In 1938, the United States claimed $2 million in damages for the years 1931 to 1937. The Tribunal allowed the claim only in part, awarding damages of just $78,000. In 1941, the United States sought to have the operation of the smelter enjoined. The following question was submitted to the Tribunal: “whether the Trail Smelter should be required to refrain from causing damage in the state of Washington in the future and, if so, to what extent?”

**1941 REPORT OF THE TRIBUNAL:**

The first problem which arises is whether the question should be answered on the basis of the law followed in the United States or on the basis of international law. The Tribunal, however, finds that this problem need not be solved here as the law followed in the United States in dealing with quasi-sovereign rights of the states of the Union, in the matter of air pollution, whilst more definite, is in conformity with the general rules of international law.

Particularly in reaching its conclusions as regards this question . . . , the Tribunal has given consideration to the desire of the high contracting parties “to reach a solution just to all parties concerned.” As Professor Eagleton puts it: “A state owes at all times a duty to protect other states against injurious acts by individuals from within its jurisdiction.”53 A great number of such general pronouncements by leading authorities concerning the duty of a state to respect other states and their territory have been presented to the Tribunal. . . . But the real difficulty often arises rather when it comes to determine what, pro subjecta materie, is deemed to constitute an injurious act.

A case concerning, as the present one does, territorial relations, decided by the Federal Court of Switzerland between the Cantons of Soleure and Argovia, may serve to illustrate the relativity of the rule. Soleure brought a suit against her sister state to enjoin use of a shooting establishment which endangered her territory. The court, in granting the injunction, said: “This right (sovereignty) excludes . . . not only the usurpation and exercise of sovereign rights (of another state) . . . but also an actual encroachment which might prejudice the natural use of the territory and the free

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53Responsibility of States in International L aw, p. 80 (1928).

54Latin: “for the subject matter”; concerning the subject matter at hand.
movement of its inhabitants." As a result of the decision, Argovia made plans for the improvement of the existing installations. These, however, were considered as insufficient protection by Soleure. The Canton of Argovia then moved the Federal Court to decree that the shooting be again permitted after completion of the projected improvements. This motion was granted. "The demand of the government of Soleure," said the court, "that all endangerment be absolutely abolished apparently goes too far." The court found that all risk whatever had not been eliminated, as the region was flat and absolutely safe shooting ranges were only found in mountain valleys; that there was a federal duty for the communes to provide facilities for military target practice and that "no more precautions may be demanded for shooting ranges near the boundaries of two Cantons than are required for shooting ranges in the interior of a Canton." 

No case of air pollution dealt with by an international tribunal has been cited or has been found.

There are, however, as regards both air pollution and water pollution, certain decisions of the Supreme Court of the United States which may legitimately be taken as a guide in this field in international law, for it is reasonable to follow by analogy, in international cases, precedents established by that court in dealing with controversies between states of the Union or with other controversies concerning the quasi-sovereign rights of such states, where no contrary rule prevails in international law and no reason for rejecting such precedents can be adduced from the limitations of sovereignty inherent in the Constitution of the United States. . . .

The Tribunal, therefore, finds that the above decisions, taken as a whole, constitute an adequate basis for its conclusions, namely that, under the principles of international law, as well as the law of the United States, no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequences and the injury is established by clear and convincing evidence.

The decisions of the Supreme Court of the United States which are the basis of these conclusions are decisions in equity and a solution inspired by them, together with the régime hereinafter prescribed, will, in the opinion of the Tribunal, be "just to all parties concerned," as long, at least, as the present conditions in the Columbia River Valley continue to prevail.

Considering the circumstances of the case, the Tribunal holds that the Dominion of Canada is responsible in international law for the conduct of the Trail Smelter. A part from the undertakings in the Convention, it is, therefore, the duty of the government of the Dominion of Canada to see to it that this conduct should be in conformity with the obligation of the Dominion under international law as herein determined.

The Tribunal, therefore, answers [the question submitted] as follows: . . . So long as the present conditions in the Columbia River Valley prevail, the Trail Smelter shall be required from causing any damage through fumes in the state of Washington; the damage herein referred to and its extent being such as would be recoverable under the decisions of the courts of the United States in suits between private individuals. The indemnity for such damage should be fixed in such manner as the governments, acting under Article XI of the Convention, should agree upon.

To have territorial sovereignty, a state must first acquire territory. This is done in two ways: (1) by the occupation of land not claimed by another sovereign and (2) by the transfer of territory from one sovereign to another. Once territory is acquired, a state's title is affirmed either by the formal recognition of other states or by a process of estoppel.
CHAPTER 1 Introduction to International and Comparative Law

Estoppel: (From Old French estoupail: "stopper" or "bung.") Legal rule that one cannot make an allegation or denial of fact that is contrary to one's previous actions or words.

Dispositive treaty: A treaty concerned with rights over territory, such as boundaries and servitudes.

Merger Rule: Legal rule that the treaties in effect in a former state remain in effect in its territory when it becomes part of a new state.

Changes in Territorial Sovereignty

When there is a change in sovereignty over territory, several legal consequences arise. A treaty rights and obligations, successor states must observe treaties that implement general rules of international law, and they are bound by dispositive treaties—that is, treaties concerned with rights over territory, such as boundaries and servitudes.

The obligation of a successor state to observe other treaty commitments depends on whether it acquires a territory by a merger, partial absorption, or complete absorption or whether a seceding territory attains its independence through decolonization or dissolution. The Merger Rule governs the first of these cases. This rule presumes that when two states merge to form a new state (i.e., State A and State B merge and become State C), then the pre-existing treaties remain in force in the territories where they previously applied (i.e., State A treaties remain in force in the former territory of State A, and State B treaties remain in force in the former territory of State B). For example, when Egypt and Syria merged to form the United Arab Republic (1958–1961), the new republic declared that

... the Union is a single member of the United Nations, bound by the provisions of the Charter, and that all international treaties and agreements concluded by Egypt or Syria with other countries will remain valid within the regional limits prescribed on their conclusion and in accordance with the principles of international law.55

There are, however, two exceptions to the Merger Rule. First, the new successor state and other states parties to a treaty with one of the predecessor states can agree to either terminate the treaty or extend it to the whole territory of the new state. (E.g., when Tanganyika and Zanzibar merged in 1964, Zanzibar's treaties were given force throughout the new state of Tanzania.56) Second, a treaty will terminate if its object and purpose can no longer be accomplished or if the conditions necessary to accomplish its object and purpose have radically changed. (E.g., after the formation of the United Netherlands in 1815, the Dutch argued the new state was so different from its predecessors that a treaty with the United States had to be terminated.57)

If territory from one state shifts to another (i.e., a province in State A becomes a province in State B), the law of state succession applies the Moving Boundaries Rule. This holds that the treaties of the absorbing state displace the treaties of the receding state in the territory where sovereignty has changed. Thus, for example, when France took over Alsace-Lorraine after World War I, France's treaties displaced those of Germany in the annexed territory.58 Similarly, the Federal Republic of Germany's treaties displaced those of France when it regained control of the Saarland in 1957,59 and in 1969, when the Netherlands transferred West New Guinea to Indonesia, Indonesia's treaties were extended over its new territory.60

57John B. Moore, A Digest of International Law, vol. 5, p. 344 (1906).
When a new state comes into being through decolonization, its obligation to observe the treaties made by its colonial parent state are determined by the so-called **Clean Slate Doctrine**. That is, the ex-colony starts with no obligation to succeed to the treaties of its former colonial power. Nevertheless, it is common practice for a newly independent ex-colony to announce its intention to continue to be bound by existing treaties.

When two states come into existence following the disintegration of a predecessor, the **Clean Slate Doctrine** does not apply. Rather, both are bound by the predecessor’s treaties to the extent they are applicable within each of their territories. For example, when the Soviet Union broke up into 12 republics in 1991, the international community insisted that each of the republics acknowledge its obligation to observe the existing treaties of the Soviet Union, including arms control and human rights treaties, before they would be recognized. The United States, Great Britain, France, and China—the four remaining permanent members of the United Nations Security Council—relied on the same rule in announcing that Russia would automatically succeed to the Soviet seat on the Council.

The nationals of a territory that is acquired by a successor state will keep the nationality of the predecessor state unless a different result is agreed to in a treaty of cession or by municipal legislation.

Public property located within a territory becomes the property of the successor state, while property located in a third state belongs to whichever government the third state recognizes. If a third state recognizes both states, however, the property will belong to whichever state is in actual possession, as Case 1–6 points out.

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**Case 1–6 Arab Republic of Syria v. Arab Republic of Egypt**


In 1951, the government of Syria purchased property in Rio de Janeiro, Brazil, for its embassy. In 1958, when Syria and Egypt merged to form the United Arab Republic (UAR), the property was turned over to the UAR. The UAR was represented by a single ambassador to Brazil. In 1961, the UAR was dissolved and Syria and Egypt again became separate independent sovereign states. Syria then sought to reclaim its embassy, but the property was being occupied at that time by an Egyptian diplomat (who had been the UAR’s last ambassador) and he refused to return the property to Syria. Subsequently, the property was used as the Egyptian embassy and later (following the move of the Brazilian capital from Rio de Janeiro to Brasilia) as an Egyptian consulate.

In 1981, the Syrian Ambassador to Brazil brought suit in the Brazilian Supreme Court against the Egyptian Ambassador to Brazil and the Egyptian Consul in Rio de Janeiro seeking to reclaim possession of the property. Neither the Egyptian Ambassador nor Consul nor the Egyptian government formally appeared to answer the suit. The Egyptian Ambassador informed the Brazilian Ministry of Foreign Affairs that Egypt regarded itself as possessing jurisdiction and that the Brazilian courts were not competent to hear a dispute between two sovereign foreign states.
The Court considered whether Egypt's contentions were valid.

JUDGE CLOVIS RAMALHETE:

...I believe, on the basis of the submissions made, that state succession occurred twice in relation to the parties. First, when the constituent states gave the UAR in its constitution the authority to act in their place internationally, and, second, when the UAR was dissolved by the decision of its constituent states.

That this truly is a case of state succession can be seen from the fact that the constituent states granted the United Arab Republic the authority to exercise the powers they had previously exercised in their dealings with other states, and that because of this the UAR was endowed with its own legal personality and the right to establish diplomatic missions in place of its constituent states.

In the case before us, ownership of the property in question was automatically transferred at the moment that sovereignty (with respect to the carrying on of foreign relations) was transferred.

In light of the above considerations, it is clear that the dispute which gave rise to the dissolution of the United Arab Republic was an international dispute between two states. It is also clear that this is not a private dispute over which a foreign state may exercise jurisdiction and in which the parties to the dispute may be compelled to appear before the courts of that state. Indeed, the manner in which the Ambassador of Syria and the Ambassador of Egypt have formulated their jurisdictional arguments clearly demonstrates that this is a dispute between states and not a case of private litigation between two ambassadors concerning property located in Brazil.

In sum, the case before this Court is concerned with the scope and the limits of state succession in a dispute between two sovereign states. In such a case, no judicial decision can be made. Accordingly, I believe that the complaint should be annulled and the suit vacated.65

To reiterate, I am of the opinion that Brazilian courts may not consider disputes arising out of questions relating to state succession that affect foreign states. In particular, the principle of equality of states denies to a court in a third state the competency to decide a dispute between two states which arose out of actions taken by them in the exercise of their sovereign powers and which they failed to resolve at the time that they dissolved their Union.

...This does not mean that all judicial recourse is denied to the parties. They are, of course, at liberty to utilize other peaceful means to resolve their dispute, such as mediation, arbitration, or the lodging of a claim before an international tribunal.

In conclusion, I vote in favor of the annulment of this suit.

DECISION OF THE COURT

...[T]he suit is annulled and the case is dismissed.

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JUDGE NERI DA SILVEIRA
[DISSENTING]:

In deference to Brazil’s sovereignty and its duty to guarantee the property rights set out in its Constitution and laws, it is my belief that Brazil must not allow its courts to tolerate any infringement of those rights, even when the infringement is alleged in a complaint brought by one foreign state against another. Indeed, given that the property in question is located in Brazil, a holding that the Brazilian courts lack competence to hear such a matter would mean that title to this property could never be adequately safeguarded because no foreign court would have jurisdiction and any judgment it might render would be unenforceable within Brazil.

If the plaintiff were a private person and was denied the right to bring a claim before the Brazilian courts that was based on the same grounds and facts as the claim brought by the Arab Republic of Syria, we would hold that such a denial would violate Article 8 of the Universal Declaration of Human Rights, which provides:

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the Constitution or by law.

As a direct consequence of this public international law rule, the municipal courts are obliged to guarantee the basic human rights granted by the Constitution and the laws of their state.

Viewing the issue involved in this case in light of the above, one has to admit that there is at least one exception to the principle of absolute sovereign immunity (which provides that one state may not exercise jurisdiction over another because of the rule of par in parn non habet jurisdictionem) and that that exception allows a foreign state to be sued in proceedings concerning a right in property whose title is registered in Brazil.

I therefore consider that this Court is competent to examine the claim brought by the Arab Republic of Syria pursuant to Article 119(1)(c) of the Constitution and also to make a decision on the merits of the case.

The private property rights of individuals do not lapse because of a change in government. A government, however, is always entitled to expropriate the property of its own nationals, so private property rights may well be adversely affected by a change in government. Similarly, a successor state is, as a general proposition, bound by the private contractual obligations of its predecessors; and to the extent a successor acquires part or all of a territory, it is proportionately responsible for that territory’s national debt.

International Organizations

According to the Charter of the United Nations, there are two kinds of international organizations: (1) public or intergovernmental organizations (IGOs) and (2) private or nongovernmental organizations (NGOs).69

Intergovernmental Organizations

Intergovernmental organizations are permanent organizations set up by two or more states to carry on activities of common interest. Modern IGOs evolved from the European practice of convening conferences at the end of wars to draw new boundaries and sign peace treaties. Beginning in the nineteenth century, these conferences turned to sponsoring multilateral treaties and the setting up of organizations both to maintain the peace and to carry on a vari-

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67Latin: “an equal has no jurisdiction over an equal.”
69United Nations Charter, Article 71. The terminology used in the United Nations Charter assumes that the organizations are international and not domestic or municipal IGOs and NGOs. That same assumption is made here.
70Clive Archer defines an intergovernmental organization as “a formal continuous structure established by agreement between members (governmental and/or nongovernmental) from two or more sovereign states with the aim of pursuing the common interest of the membership.” International Organizations, p. 35 (1983).
71The peace in nineteenth-century Europe was maintained informally through an arrangement known as the Concert of Europe. This arrangement involved regular consultations between the major powers (Austria, France, Great Britain, Prussia, and Russia) who acted together to recognize new states and to put down military uprisings in others.
ety of other international activities of common interest, such as the delivery of mail and the protection of industrial and literary property.

Following World War I, the League of Nations was founded as the first organization that was both general in scope and universal in its intended membership. After World War II, the activities of the League were taken over and greatly expanded by the United Nations.

Since World War II, the number of intergovernmental organizations has increased dramatically. Today there are some 400 IGOs. Most significantly, IGOs have evolved from the simple meeting or conference of states to entities that have permanent structures and staffs, carry on a variety of activities, and, at least in the case of one IGO, have supranational powers.

Unlike states, an IGO is created much in the fashion of a corporation. Its aims and objectives, internal structure, resources, and express powers are set out in a “constituent instrument,” or charter, which is drafted and adopted by the organization’s member states. The United Nations Charter, for example, gives the organization its name, sets out its purposes and principles, defines its membership, names its structural elements or “organs,” describes the makeup and powers of those organs, sets out the rights and duties of its members, endows the organization with international personality, and describes the procedures for the Charter’s ratification and amendment.

For an IGO to have the legal capacity to deal with other international persons—including the capacity to carry on diplomatic relations with a state or to sue or be sued in an international or municipal court—it must be recognized. With respect to its own state members, most authorities regard recognition as being implicit. In other words, by becoming a member in an IGO, a state automatically recognizes the IGO’s international personality. This is not, however, the uniform rule. In the United Kingdom, the fact that the executive becomes a member in an intergovernmental organization does not imply any internal recognition. Thus, the U.K. courts will not recognize the capacity of an IGO to bring suit or be sued in the United Kingdom unless the U.K. government specifically certifies that the IGO has such capacity.

As for establishing the legal capacity of an IGO vis-à-vis its nonmember states, recognition is also required. In some states, such as the United States, an IGO is essentially regarded as an agency of its members and recognition of the IGO will be implied if its member states are recognized. In other countries, including the United Kingdom, recognition requires specific certification from the government.

Case 1–7 explores why the courts in the United Kingdom need certification from the executive before they will recognize the capacity of IGOs.

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**Case 1–7 Arab Monetary Fund v. Hashim and Others (No. 3)**


The Arab Monetary Fund (AMF) was an organization created by a group of 20 Arab states and the Palestine Liberation Organization in 1976. The charter of the...
organization, the Arab Monetary Fund Agreement (Agreement), provided that the AMF was to have an “independent juridical personality and . . . in particular the right to own, contract, and litigate.” A federal decree issued by the President of the United Arab Emirates (UAE) gave the Agreement the force of law throughout the UAE, including the emirate of Abu Dhabi, where the AMF had its headquarters.

The AMF brought suit in the English courts against Dr. Hashim, its former Director-General, and various other defendants, alleging that they had misappropriated AMF funds. The defendants asked to have the suit dismissed, arguing that the AMF had no legal personality in the United Kingdom and, therefore, could not bring this suit. The United Kingdom was not a member of the AMF nor had it formally recognized the AMF under the provisions of the United Kingdom’s International Organizations Act of 1968.

JUDGE HOFFMANN:

. . . Mr. Pollock, who appeared for AMF, advanced two grounds on which the fund’s existence should be recognized. The first was that the English conflict of laws recognizes the existence of legal entities constituted under international law just as it recognizes those constituted under foreign systems of domestic law. The second was that the AMF had been constituted under a system of domestic law, namely, that of its headquarters state of Abu Dhabi, and should therefore be recognized as an ordinary foreign juridical entity.

For reasons which I shall explain, I was more attracted by Mr. Pollock’s first answer than by his second. But the motion was argued when the judgment of the House of Lords in J. H. Rayner (Mincing Lane), Ltd. v. Department of Trade and Industry,83 (which I shall call “the Tin Case”) was known to be imminent and I reserved my judgment until after it had been given. I then heard further submissions from counsel. Mr. Pollock now concedes that the Tin judgments make his first submission untenable. I agree. But I need to say why it originally appealed to me in order to explain certain difficulties I had with Mr. Pollock’s second submission, which I have nevertheless decided to accept.

Until the Tin Case, there was no authority for or against Mr. Pollock’s first submission, although it had the support of distinguished writers on international law. The absence of authority is not surprising in view of the relatively recent growth of international trading and banking organizations and the statutory provisions, which have existed since 1944, for conferring capacity in domestic law on those constituted under treaties to which the United Kingdom is a party.84 In 1945, however, Dr. C. W. Jenks expressed the view that in this respect the statute was only declaratory of the common law.85 Dr. F. A. Mann wrote in similar terms in 1967,86 but added the rider that an international organization, like a foreign state, could be accorded legal capacity in the courts only if it was recognized by the executive. This qualification has not been universally accepted by other writers,87 but seems to be logical. The recognition of an international organization at the level of international law must be a matter for the executive and it would be rather odd if the English courts recognized the existence in domestic law of an international organization which Her Majesty’s government declined to recognize in international law.

Extending our conflict rule to international organizations seems to me to be sensible and practical. The rule as it applies to entities created by foreign domestic laws is based on the inconvenience of having legal entities which exist in one country but not in another. International organizations set up by foreign states do exist in fairly substantial numbers, trade with this country, and bank in the City of London. They are invariably recognized as juridical entities by the domestic systems of the parties to the treaty as well as many other countries. The evidence in this case was that the fund would be recognized in Switzerland and, as Lord Justice Kerr pointed out in the Tin Case in the Court of Appeal,88 the New York courts

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84See Diplomatic Privileges (Extension) Act 1944.
appeared to have no difficulty about recognizing the existence of the International Tin Council, even though the United States was not a party to the treaty. It is difficult to see why an entity created by treaty between two or more foreign states should be less entitled to recognition than an entity created under the sovereign authority of a single foreign state within its domestic system. I shall however briefly list some of the objections advanced by Mr. Sumption, who appeared for the banks.

(1) The United Kingdom is not obliged to recognize an entity created by a treaty to which it was not a party.

(2) United Kingdom legislation since the Diplomatic Privileges (Extension) Act 1944 is inconsistent with the existence of a common law conflicts rule for the recognition of international organizations.

(3) Recognition of an entity created by international treaty would offend the rule that the legal consequences of treaties are not justiciable in domestic courts.

(4) The fund has not been accorded recognition by Her Majesty’s government.

That brings me to the Tin Case. The International Tin Council was created by a treaty to which the United Kingdom was a party, had its headquarters in London and was accorded the legal capacities and legal personality of a body corporate in English domestic law by statutory instrument. The AMF, on the other hand, was created by a treaty to which the United Kingdom was not a party and is not the subject of a statutory instrument or any other United Kingdom legislation. The Tin Case raised, as Lord Templeman said, “a short question of construction of the plain words of a statutory instrument,” whereas the question in this case is the scope of the common law conflicts rule. Nevertheless, the reasoning of their Lordships is inconsistent with Mr. Pollock’s first submission.

Lord Templeman found it unnecessary to speculate about what the status of the International Tin Council (ITC) would have been absent an Order in Council. But Lord Oliver of Aylmerton, with whom the others of their Lordships agreed, made some pertinent observations. The effect of the Order in Council, he said, was “to create the ITC (which, as an international legal persona, had no status under the laws of the United Kingdom) a legal person in its own right. . . .” Speaking of the status of the ITC as an international entity, he said:

Let it be assumed for the moment, that the international entity known as the ITC is, by the treaty, one for the engagements of which the member states becomes liable in international law, that entity is not the entity which entered into the contract relevant to these appeals. Those contracts were effected by the separate persona ficta which was created by the Order in Council.

And again:

Whilst it is, of course, not inaccurate to describe Article 4 of the Order as one which “recognizes” the ITC as an international organization, such “recognition” is of no consequence in domestic law unless and until it is accompanied by the creation of a legal persona. Without the Order in Council the ITC had no legal existence in the law of the United Kingdom and no significance save as the name of an international body created by a treaty between sovereign states which was not justiciable by municipal courts.

These passages destroy the possibility of a common law conflict rule under which the courts can recognize the existence of an international organization as such.

I therefore turn to Mr. Pollock’s second submission, which was that the AMF should be recognized as an entity constituted under Abu Dhabi domestic law. This route did not at first attract me because the AMF is not an Abu Dhabi entity. It is an international entity which has been accorded legal personality under Abu Dhabi law and I regarded the argument over whether such legal personality was “recognized” or “constituted” and whether it was by local statute or local conflict rules as somewhat barren. If the domestic Abu Dhabi entity was something different from the international organization, the same fund would have a separate existence under the laws of each of the member states which accorded it legal personality and one of these personas fictae would presumably be able to sue another in an English court. That seemed an unappetizing conclusion.

But the inconvenience of the Tin Case, as I see it, is that I ignore the treaty and regard the AMF as constituted under the Abu Dhabi law as a separate persona ficta. As such, it is entitled to recognition as a domestic

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90 Id., p. 980.
91 I.e., a formal order of recognition issued pursuant to the International Organizations Act.
93 Lat. “persona.”
95 Lat. “fictional person.”
entity under ordinary conflict rules. I am able to reach this conclusion because the United Arab Emirates happened to have passed legislation conferring juridical personality on the AMF. It may not have been open to me if there had been no legislation because the personality of the AMF was recognized under the conflict rules of all member states. This would have been unfortunate because the challenge to the AMF’s existence is not a mere procedural objection which could be met by reconstituting the action with (say) the United Arab Emirates as plaintiff suing on behalf of itself and all other members. The new plaintiffs would have to show that they have a cause of action under the law of the place where the alleged fraud was committed and may not be able to do so because by the law of Abu Dhabi the money belonged to the AMF and not to the individual members.

Mr. Sumpton met Mr. Pollock’s submission by saying that in the case of an international organization, the legislation conferring personality under the law of a member state should be regarded as purely territorial in scope. Its purpose was solely to give effect to the treaty obligation to accord personality in its domestic law and not to create a separate entity capable of recognition abroad. Otherwise an international organization would fragment into at least as many separate entities as there were members. If I could regard the international organization as, for our purposes, identical in law with the Abu Dhabi entity, I think Mr. Sumpton’s argument would be entirely correct. But since the international entity has no existence, I do not see how I can take it into account as a ground for refusing recognition to what is plainly a legal entity under the law of Abu Dhabi. I accept that a logical consequence is the existence of other emanations of the fund under the laws of other member states. This raises questions of trinitarian subtlety into which I am grateful that I need not enter. I therefore find that the AMF exists in English law and dismiss the first set of motions.

The Court of Appeal overruled Judge Hoffmann’s decision in this case. The House of Lords, however, reversed the Court of Appeal, reinstating Judge Hoffmann’s opinion and adopting his reasoning.

The United Nations

The most important of the intergovernmental organizations is the United Nations. Its Charter, a multilateral treaty, came into force on October 24, 1945. (See Exhibit 1-2.) Its goals are the maintenance of peace and security in the world, the promotion of economic and social cooperation, and the protection of human rights. The philosophical basis the drafters of the UN Charter relied on to achieve these goals was their belief in the rule of law. Corollaries of this philosophy are the several principles that are written into the Charter. In particular, members are sovereign equals; disputes must be settled peacefully, and all members are obliged to fulfill their international obligations in good faith.

The organs of the UN are the General Assembly, the Security Council, the Secretariat, the International Court of Justice, the Trusteeship Council, and the Economic and Social Council. The General Assembly is a quasi-legislative body made up of representatives of all member states. Its function is to discuss any question or matter within the scope of the Charter. The Security Council is made up of representatives of 15 member states, 5 of which are permanent member states. It is responsible for maintaining international peace and security, and it is the only UN organ with the authority to use armed force. A Secretary-General elected by the General Assembly heads up the UN’s Secretariat. The Secretariat is the UN’s administrative arm, responsible for making reports and recommendations to the General Assembly and the Security Council.

The International Court of Justice is the UN’s principal judicial body. The Trusteeship Council, which no longer has a function, was set up at the end of World War II to supervise the world’s non-self-governing territories. Finally, the Economic and Social Council, which comprises 54 member states elected by the General Assembly, is responsible for promoting economic, social, health, cultural, and educational progress as well as respect for human rights.


The United Nations System is the name given to various autonomous agencies (themselves IGOs) concerned with a wide range of economic and social problems that have entered into...
CHAPTER 1  Introduction to International and Comparative Law

EXHIBIT 1-2

The United Nations

From August through October of 1944, representatives of China, the Soviet Union, the United Kingdom, and the United States met at Dumbarton Oaks, a mansion in Georgetown, near Washington, D.C., to draft proposals for a United Nations Charter. In April of the next year, delegates from 50 countries met in San Francisco at the United Nations Conference on International Organization to debate and refine the proposals. A final Charter was adopted unanimously on June 25, 1946, and signed the next day by the representatives of all 50 countries. Poland, which was not represented at the Conference, signed it later and became one of the original 51 United Nations member states.

The United Nations officially came into existence on October 24, 1945, when the Charter had been ratified by China, France, the Soviet Union, the United Kingdom, the United States and by a majority of the other signatories. October 24 is now celebrated each year as United Nations Day.

European Union: A n intergovernmental organization that has as its goals the elimination of internal frontiers and the establishment of a political, economic, and monetary union.

agreements with the United Nations to become UN Specialized Agencies (see Exhibit 1-3). Additionally, two other organizations—the World Trade Organization (WTO) and the International Atomic Energy Agency (IAEA)—although not Specialized Agencies, have entered into similar relationships with the UN.

The European Union  A nother important intergovernmental organization is the European Union (EU).101 Founded in 1951 by 6 states (Belgium, France, Germany, Italy, Luxembourg, and the Netherlands), its member states increased to 9 in 1973 (with the addition of Denmark,

EXHIBIT 1-3  The Specialized Agencies of the United Nations

<table>
<thead>
<tr>
<th>Nonbanking Agencies</th>
<th>World Bank Group</th>
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</thead>
<tbody>
<tr>
<td>FAO Food and Agriculture Organization</td>
<td>IBRD International Bank for Reconstruction and Development</td>
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<tr>
<td>ICAO International Civil Aviation Organization</td>
<td>IDA International Development Association</td>
</tr>
<tr>
<td>IFA D International Food for Agricultural Development</td>
<td>IFC International Finance Corporation</td>
</tr>
<tr>
<td>ILO International Labor Organization</td>
<td>MIGA Multilateral Investment Guarantee Agency</td>
</tr>
<tr>
<td>IMF International Monetary Fund</td>
<td>ICSID International Center for the Settlement of Investment Disputes</td>
</tr>
<tr>
<td>IMO International Maritime Organization</td>
<td></td>
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<tr>
<td>ITU International Telecommunications Union</td>
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<tr>
<td>UNESCO United Nations Educational, Scientific and Cultural Organization</td>
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<tr>
<td>UNIDO United Nations Industrial Development Organization</td>
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<tr>
<td>UPU Universal Postal Union</td>
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<tr>
<td>WHO World Health Organization</td>
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<tr>
<td>WIPO World Intellectual Property Organization</td>
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<tr>
<td>WMO World Meteorological Organization</td>
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101The European Union’s Internet Web site is at europa.eu.int/index.htm.
Ireland, and the United Kingdom), to 10 in 1981 (when Greece joined), to 12 in 1986 (when Portugal and Spain became members), and most recently to 15 in 1995 (when Austria, Finland, and Sweden were admitted).

The founding states created the European Union in order to integrate their economies and political institutions. The process of integration began with the adoption of the European Coal and Steel Community (ECSC) Treaty,\(^{102}\) which the founding states signed in Paris in 1951. Although no longer in force—it expired in 2002—the ECSC, created a common market for coal and steel and intergovernmental institutions to oversee this original “community.” Building on the experience of the ECSC, the original member states adopted the European Economic Community (EEC) Treaty,\(^{103}\) and the European Atomic Energy Community (EAEC or Euratom) Treaty,\(^{104}\) which they signed in Rome in 1957. Ten years later, the Maastricht Treaty, signed in Brussels in 1997, consolidated the separate institutional organizations that oversaw the three separate communities into a single structure. In 1992, in Maastricht, the member states signed the European Union (EU) Treaty.\(^{105}\) The EU Treaty established a political union,\(^{106}\) common citizenship for nationals of the member states, a Social Charter,\(^{107}\) a monetary union, a Central Bank, and a common currency (the euro).\(^{108}\) Then in 1997, the Treaty of Amsterdam eliminated all internal borders,\(^{109}\) established a larger role for the European Parliament,\(^{110}\) renamed the EEC Treaty as the Treaty Establishing the European Community (the EC Treaty), and consolidated and renumbered the articles of the EC and the EU treaties. Most recently, in anticipation of the accession of new member states from Eastern and Southern Europe,\(^{111}\) the Treaty of Nice,\(^{112}\) signed in 2001, made changes—effective in 2005—to the makeup of and the voting mechanisms of the principal EU institutions.

**Supranational Powers.** Unlike most other intergovernmental organizations, the European Union is endowed with supranational powers. That is, EU law within its scope of applicability is superior to the laws of the member states. This “supremacy principle” has two consequences: one, the member states are required to bring their internal laws into compliance with EU law and, two, EU law is directly effective within the member states.

An example of the obligation of member states to bring their internal laws into compliance with the EU legal order is provided by the case of Commission v. Belgium. Taxes imposed by Belgium discriminated against lumber produced in other member states contrary to Article 90 of the EC Treaty. In defending itself before the European Court of Justice in an action brought by the European Commission under Article 226, the government of Belgium said that it had introduced draft legislation in the Belgian Chamber of Representatives two years earlier but the legislation had not been passed. The government explained that the principle of separation of powers that applied in Belgium prevented the government from doing anything more. This excuse did not impress the Court of Justice. It said: “The obligations arising under Article 90 of the Treaty devolve upon states as such and the liability of a member state under Article 226 arises whatever the agency of the state whose action or inaction is the cause of the failure to fulfill its obligations, even in the case of a constitutionally independent institution.”\(^{115}\)

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\(102\) The text of the treaty is posted at europa.eu.int/abc/obj/treaties/en/entoc29.htm.

\(103\) The treaty is posted at europa.eu.int/eur-lex/en/treaties/dat/ec_cons_treaty_en.pdf.

\(104\) The treaty is posted at europa.eu.int/abc/obj/treaties/en/entoc38.htm.

\(105\) The treaty is posted at europa.eu.int/eur-lex/en/treaties/dat/eu_cons_treaty_en.pdf. The EU Treaty changed the names of the principal institutions of the EU to European Commission, European Council (formerly the Council of Ministers), European Parliament, European Court of Justice, European Economic and Social Committee, and European Court of Auditors.

\(106\) The E.U.’s Commission (see the following discussion) is authorized to discuss both foreign policy and security issues.

\(107\) The Social Charter establishes uniform minimum social and economic standards for individuals.

\(108\) The United Kingdom, which objected to most of the changes in the Maastricht Treaty, obtained a special concession that allows it to avoid participating in the monetary union and that excuses it from the requirements of the Social Charter.

\(109\) Great Britain and Ireland will be temporarily exempted from this requirement.

\(110\) The treaty is posted at europa.eu.int/eur-lex/en/treaties/treaty/treaty.htm.

\(111\) As of June 2002, twelve countries were applicants for admission to the EU: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia.

\(112\) The treaty is posted at europa.eu.int/eur-lex/en/treaties/dat/nice_treaty_en.pdf.

\(113\) As of June 2002, twelve countries were applicants for admission to the EU: Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia.

\(114\) Formerly Article 169.

\(115\) Formerly Article 95.

\(116\) Formerly Article 169.

The direct applicability of the supremacy principle is illustrated by the case of Costa v. ENEL. That case involved a challenge to Italy’s decision in 1962 to nationalize its private electric generating companies. Mr. Costa, a shareholder in one of those companies, refused to pay his electric bill; and when he was sued by the National Electric Board (ENEL), he defended himself by arguing that the nationalization decree violated the European Community Treaty (then known as the European Economic Community Treaty). The trial court referred the matter to the European Court of Justice. There, ENEL argued that the Court of Justice’s decision would be irrelevant because the trial court, being an Italian court, was obliged by Italian law to apply Italian law. The Court disagreed, pointing out that some provisions of the EEC Treaty are directly effective and bestow rights on individuals that the agencies of the member states are obliged to respect. The Court stated:

By contrast with ordinary international treaties, the EEC Treaty has created its own legal system which, on the entry into force of the Treaty, became an integral part of the legal systems of the member states and which their courts are bound to apply.

By creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane, and, more particularly, real powers stemming from a limitation of sovereignty, or a transfer of powers from the states to the Community, the member states have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds both their nationals and themselves.

Thus, not only Mr. Costa but any other individual is entitled to directly invoke the EEC Treaty in the courts of the EU member states.

Case 1–8 examines both the obligation of member states to bring their laws into accord with the EEC treaties (in particular the European Community Treaty — then known as the European Economic Community Treaty) and the direct effect of those treaties.

Case 1–8 Eunomia di Porro & Co. v. Italian Ministry of Public Education

In March of 1970, the firm of Eunomia di Porro exported a painting valued at 500,000 lire from Italy to Germany through the Italian customs post at Domodossola. The customs post collected a tax of 108,750 lire. Citing a 1968 decision of the Court of Justice of the European Communities that had held that Italy was in default of its obligation to abolish duties on exports to other member states under Article 16 of the European Economic Community Treaty (now the European Community Treaty), because it was continuing to levy taxes on the export of art works, Eunomia di Porro brought suit in the District Court of Turin (Tribunale de Torino) asking that the tax it had paid be returned. The District Court referred the matter to the Court of Justice of the European Communities, asking the latter if Article 16 of the EEC Treaty was directly effective in Italy and whether it conferred on private individuals rights that had to be protected by the Italian courts.

The history of the direct effect of EEC Treaty provisions was reviewed by one of the Court of Justice’s Advocate-Generals in his argument to the Court. The Court, following the reasoning of the Advocate-General, held that

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118 An Advocate-General is an official, commonly found in civil law countries, who prepares a detailed brief analyzing the arguments of the parties and suggesting how the court should decide the case. Unlike courts in common law countries, the opinions of civil law courts generally do not engage in extensive analysis of the issues; rather, they state a conclusion and a concise reason for their conclusion. Often, but not always, the court will adopt the reasoning of the Advocate-General.
Article 16 did produce direct effects on the relationships between member states of the European Economic Community and their citizens.

**Map 1-9** European Communities (1971)

**SUBMISSIONS OF THE ADVOCATE-GENERAL:**

... Certainly there already exists an extensive case law built up by this Court on the problem of the direct applicability of Treaty provisions. The parties have duly cited it, and it suffices merely to recall it in the present case.

This line of cases begins with Case 26/62.\(^{119}\) In that case the Court laid down the fundamental proposition that:

the Community constitutes a new legal order in international law... a legal order, whose subjects are not only member states, but also individuals.

Community law confers rights on individuals not only where the Treaty provides for this explicitly, but also on the basis of unequivocal obligations which the Treaty imposes on individuals as well as on the member states and the Community institutions. [A s to] Article 12 of the EEC Treaty, the provision then in question whereby “member states shall refrain from introducing as between themselves any new customs duties on imports or exports or any taxes having equivalent effect and from increasing those which they already levy in their trade with each other”), the Court laid down that this was “a clear and unconditional prohibition,” an obligation which was “not restricted by any reservation on the part of states seeking to make its fulfillment dependent on an act of domestic law,” a provision whose effectiveness required “no intervention by the national legislator.” This provision could therefore be interpreted so as “to produce direct effects and create individual rights which national courts must respect.” In Case 57/65\(^{120}\) this case law was further developed in connection with Article 95 of the EEC Treaty, which prohibits member states from imposing “directly or indirectly on the products of other member states any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products,” and particularly the provision in the first paragraph of Article 95 whereby member states:

shall, not later than at the beginning of the second stage,\(^{121}\) eliminate or amend any provisions existing when this Treaty comes into force which conflict with the above rules.

This admittedly involved an obligation on the member states to take action, and to apply provisions of domestic law; but because no latitude was allowed to the states as regards timing, the third paragraph of Article 95 having to be applied by 31 December 1961 at the latest, and because the first paragraph of Article 95 contains “a clear and unconditional obligation,” which requires “no measures... on the part of the member states,” the Article amounts to a “complete, legally perfect” rule of law, which took full effect on expiry of the period mentioned in the third paragraph, and is apt “to produce direct effects on the legal relationships between member states and persons subject to their law.” Case 13/68\(^{122}\) belongs to the same line of cases. It concerned the prohibition in Articles 31 and 32 of the EEC Treaty against introducing “new quantitative restrictions or measures having equivalent effect,” and the provision that member states, in their trade with one another:

shall refrain from making quotas and measures having equivalent effect, which were in existence when this Treaty came into force, more restrictive than they were.

This case established that Article 31 of the Treaty contains, for the period subsequent to the notification of lists of liberalized products, or at the latest after expiry of the notification period (even if the member states have not fulfilled their obligation to take action), a “clear prohibition,” an obligation “which is not restricted by any reservation on the part of states seeking to make its fulfillment dependent on an act of domestic law or measure of the Community institutions.” It is therefore

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\(^{121}\) The European Economic Community Treaty was phased in over a series of stages. During the first stage, which lasted from 1958 to 1968, member states were required, among other things to eliminate or amend inconsistent domestic legislation.

“particularly apt to produce direct effects on the legal relationships between member states and persons subject to their law,” and creates “individual rights which national courts must respect.” Only in relation to the final sentence of the second paragraph of Article 32, and Article 33, did the Court hold that there was no direct effect, because they provided for a gradual removal of restrictions in the course of the transitional period, i.e. an obligation to take action, in the fulfillment of which the member states enjoyed a certain latitude. Hence, these provisions were too imprecise to be treated as having direct effect. Finally—without the list being exhaustive—we may mention Case 33/70. Here again the question related to a Treaty obligation to take action, namely that arising from Article 13 of the EEC Treaty, which concerned the gradual abolition as between member states of taxes having equivalent effect to import duties. This abolition had to be effected during the transitional period in accordance with a timetable specified in the Commission’s directives, in that case by 1 July 1968 at the latest. The Court, as you know, laid down that the directive in question had fixed a date by which the obligation arising from Article 13 had to be carried out. This amounted to a clear and unequivocal prohibition to which member states “had attached no reservation making its effectiveness dependent on a positive act of domestic law or an intervention of the Community institutions.” It therefore had to be inferred that the relevant directive of the Commission, in conjunction with Articles 9 and 13(2) of the Treaty, had direct effect on the relationships between the member state to which the directive was addressed and its citizens, and had, from 1 July 1968, conferred rights on the latter “which domestic courts must respect.”

From this line of cases, then, the correct solution of the present case may be deduced without any difficulty. We conclude that Article 16, with which we are now concerned, speaks of customs duties on export[s] and taxes having equivalent effect, and thus uses expressions comparable with those in Article 12. A time limit is fixed for the abolition, and this is laid down by the Treaty itself, not by any secondary source of Community law. There is no room for any latitude on the part of the member states. Together with Article 9, whereby the foundation of the Community is a customs union, which involves “the prohibition as between member states of customs duties on imports and exports and of all taxes having equivalent effect,” Article 16 of the EEC Treaty thus contains, since 1 January 1962, a clear, precise prohibition, unrestricted by any reservation or condition. The obligations thus imposed on member states are, to adopt the language of the cases already cited, complete and legally perfect. Hence, rights are created for individuals which national courts must protect. In this connection—as will be remembered from Case 13/68—it is left to the national legal system to define the nature of these rights and to determine the form of judgment appropriate to protect them.

The questions of the President of the Tribunale di Torino should be answered in this sense. Further exposition would be superfluous.

JUDGMENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES:

By Order dated 6 April 1971, lodged with the Registry of the Court on 15 April 1971, the President of the Tribunale di Torino has referred to the Court, under Article 177 of the Treaty establishing the European Economic Community, two questions relating to the interpretation of Article 16 of the said Treaty.

It appears from the Order referring the case that the judge doing so has to decide on an application for repayment of the export tax imposed on articles of artistic, historical, archaeological or ethnological value by Law No. 1089 of 1 June 1939, which is charged on the occasion of export of a work of art to another member state. This tax, as was declared by this Court in its judgment of 10 December 1968 (Case 7/68), is a tax having equivalent effect to a customs duty on exports, and falls under Article 16 of the Treaty.

By the first question, the Court is asked whether Article 16 amounts to a rule of law immediately applicable and directly effective in the Italian state from 1 January 1962. Should this question be answered in the affirmative, the Court is asked whether—from the said date—that rule has conferred on individuals, as against the Italian state, subjective rights which the courts must protect. Since the two questions are closely connected, it is convenient to consider them together.

By Article 9 of the EEC Treaty, the Community is based on a customs union, which implies, inter alia, the prohibition as between member states of customs duties and any taxes having equivalent effect. By Article 16 of the Treaty, member states shall, as between themselves, abolish customs duties and taxes having equivalent effect, at the latest by the end of the first stage.

Articles 9 and 16, read in conjunction, contain a clear and precise prohibition, in relation to all taxes having equivalent effect to customs duties on export, and at the latest from the end of the first stage, against collecting such taxes, a prohibition whose effectiveness does not depend on any domestic legal measure nor on any intervention by the Community institutions. This prohibition is by its nature perfectly apt to produce

123 Latin: “among other things.”

CHAPTER 1  Introduction to International and Comparative Law

effects directly on the legal relationships between the member states and their subjects.

Consequently, from the end of the first stage (i.e., from 1 January 1962), these articles conferred on individuals rights which national courts must protect, and which must prevail over conflicting provisions of domestic law, even if the member state has not taken steps at the proper time to repeal such provisions.

THE COURT

... concludes: From 1 January 1962, the date the first stage of the transitional period came to an end, Article 16 of the Treaty produces direct effects on the relationships between member states and their subjects and confers on the latter rights which national courts must protect.

The Institutions of the European Union. The main institutions of the European Union (see Exhibit 1-4) are (1) the European Commission, (2) the Council of the European Union, (3) the European Parliament, (4) the European Economic and Social Committee, (5) the European Committee of Regions, (6) the European Court of First Instance, (7) the European Court of Justice, and (8) the European Central Bank.

The European Commission. The European Commission is the EU’s executive. That is, it drafts legislation for submission to the Council and the Parliament, and once the legislation is adopted it is responsible for its implementation. The Commission also is responsible for overseeing the implementation of the treaties that establish the EU. Additionally, it represents the EU internationally.

The Commission is currently composed of 20 individuals appointed by Parliament for five year terms. The President of the Commission is nominated by the European Council. The other 19 commissioners are nominated by the member states in consultation with the President. The large states—Germany, France, Italy, Spain, and the United Kingdom—nominate two commissioners each, and the small states, one each. All of the commissioners must act only in the interest of the EU, and they are forbidden to receive instructions from any national government. Parliament can force the Commission to resign by adopting a motion of censure.

Commission decisions are made collegially, even though each commissioner is given responsibility for specific activities. The tasks of the Commission are to (1) ensure that EU rules are respected (to do this, the Commission has investigative powers and it can impose fines on individuals or companies it finds to be in breach of the rules; it can also take member states that

EXHIBIT 1-4  European Union Commission

European Union Commission, January 2001. Seated (l to r): Vice President Neil Kinnock, President Romano Prodi, Vice President Loyola de Palacio, (Photo: Library of the European Commission © European Community 2001.)

125 Information about the Commission is posted on the Internet at europa.eu.int/comm/index_en.htm.
126 The number of commissioners will increase to a maximum of 27 with the addition of new member states.
127 The Parliament had never censured the Commission, which requires the support of an absolute majority of members and two-thirds of the votes cast. In March 1999, however, following an investigation into allegations of mismanagement by a committee of independent experts mandated by Parliament, the Commission chose to resign rather than face censure by Parliament.
fail to respect their obligations before the European Court of Justice), (2) propose to the European Council measures likely to advance the development of EU policies, (3) implement EU policies, and (4) manage the funds that make up most of the EU budget.

The Commission has an administrative staff of some 15,000 officials divided between 23 Directorates-General that are located primarily in Brussels and Luxembourg. Of these officials, more than one in five are employed as translators (a reflection of the EU’s use of 11 equally authoritative languages to carry out its business).

**Council of the European Union** The **Council of the European Union** is the member state governments’ representative. Its role is to: (1) adopt legislation in conjunction with the

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128 The Council’s Internet Web site is at ee.eu.int/en/summ.htm.
129 EU legislation is given various names. It is called a “regulation” when it applies directly; a “decision” when it is binding only on the member states, companies, or individuals to whom it is addressed; a “directive” when it lays down compulsory objectives but leaves it to the member states to translate these into national legislation; and a “recommendation” or “opinion” when it is not binding.
The Council of the EU is made up of ministers from the member state governments. Like the Commission, it has a presidency, which is rotated among the member state governments every 6 months. Participants in the Council’s meetings change according to the agenda. For example, Agriculture Ministers discuss farm matters and Employment and Economic Ministers discuss unemployment problems. Foreign Ministers not only discuss foreign policy matters but also coordinate the work of the other ministers.

Every six months, at the beginning of each new presidency, the heads of state or government of the member states, along with their Foreign Ministers, meet with the European Commission President in an EU Summit that is known (somewhat confusingly) as the “European Council.” Unlike the Council of the EU, which is responsible for EU rule making, the European Council focuses on establishing general policies and goals for the EU.131

The European Parliament. The European Parliament has 626 members elected every five years by universal suffrage.132 It holds most of its plenary sessions (session attended by all of its members) in Strasbourg, France. Other plenary sessions and committee meetings are held in Brussels, Belgium. Its staff, known as the General Secretariat, is located in Luxembourg.

Since its first election in 1979, Parliament has acquired increased powers. At first only a deliberative body, it now has three main roles: (1) it has oversight authority over all EU institutions; (2) it shares legislative power with the Council of the EU; and (3) it determines the EU’s annual budget in conjunction with the Council.

Parliament’s oversight authority extends beyond its power to appoint and censure the Commission (discussed earlier). Most importantly, it has limited oversight authority over the Council. Its members may ask the Council to respond to written and oral questions, and the President of the Council attends the plenary sessions and takes part in important debates.

EU legislation is made jointly by Parliament and the Council. Prior to the adoption of the 1992 EU Treaty, the Council could adopt legislation after consulting Parliament, regardless of Parliament’s recommendations. Now, most legislation is adopted through a process known as “codecision.” This requires draft legislation prepared by the Commission to be reviewed twice by the Parliament and the Council. If the two co-legislative bodies cannot agree, a “conciliation committee” made up of Council and Parliament representatives, with the participation of the Commission, attempts to reach a compromise draft. If a compromise draft is reached, it is submitted to Parliament and the Council for a third review for its final adoption.

The codecision process is used for adopting legislation governing the common internal market, the free movement of workers, research and technological development, the environment, consumer protection, education, culture and health.133

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130 The decisions of the Council of the EU may be made by simple majority, qualified majority, or unanimity, depending on the action it is taking. Most legislation is adopted by a qualified majority vote. Using this procedure, 62 votes out of a total of 87 votes are needed. France, Germany, Italy, and the United Kingdom each have 10 votes; Spain has 8; Belgium, Greece, the Netherlands, and Portugal have 5 each; Austria and Sweden have 4; Denmark, Finland, and Ireland have 3 each; and Luxembourg has 2 votes. The cases in which a qualified majority voting procedure may be used include decisions relating to the completion of the European internal market, to research and technology, to regional policy, and to improvement of the working environment.

131 The original EU treaties did not envision meetings of the heads of state or government. Beginning in the 1960s, however, they began to meet on an occasional basis and by the mid-1970s their meetings took place semi-annually. The role of the European Council was finally recognized in 1992 in Article 4 of the European Union Treaty.

132 The number of members elected by each state is as follows:

- Germany 99
- France 87
- Italy 87
- United Kingdom 87
- Spain 64
- The Netherlands 31
- Belgium 25
- Greece 25
- Portugal 25
- Sweden 22
- Austria 21
- Denmark 16
- Finland 16
- Ireland 15
- Luxembourg 6

Members are grouped by political affiliation rather than nationality. Nearly 100 political parties are represented in the Parliament, ranging from far left to far right. These are organized in a limited number of political groups (presently eight).

133 The codecision process is described in Article 251 of the Treaty Establishing the European Communities and it applies to non-discrimination on the basis of nationality (Article 14), right to move and reside (Article 21), freedom of movement for the workers (Article 40), social security for migrant workers (Article 42), right of establishment (Articles 43, 44), transport (Article 71), and internal market (Article 95).
For certain kinds of legislation, Parliament only has a veto right: it may not amend or modify a commission proposal. This power, known as “assent,” applies to proposals for the accession of new members to the adoption of certain international agreements, and to certain rules relating to the European Central Bank. If Parliament does not give its assent, the legislation cannot be adopted. For other legislation, notably for tax matters and the review of farm price supports, the Parliament may only express an opinion.

The process by which the EU’s annual budget is adopted is somewhat similar to the decision procedure. The Commission submits a draft budget to Parliament and the Council, each of which may review it twice. If they are unable to agree, the Council makes the final decision on so-called “compulsory expenditures” (mainly agricultural expenditures and expenditures related to international agreements with third countries). Parliament has the final say on “non-compulsory expenditures” and the final adoption of the budget in its entirety.

European Economic and Social Committee Before the Council can adopt a proposal, opinions first must be obtained from the Parliament and, in many cases, from the Union’s Economic and Social Committee. In essence, this consultative body is an institutionalized lobby. Its 222 members represent a wide range of special interest groups, including employers, trade unions, consumers, farmers, and so on.

European Committee of Regions The 1993 Maastricht Treaty on European Union created a second consultative body: the Committee of Regions. The Committee, which consists of 222 representatives of local and regional governments, was established to ensure that the public authorities closest to the citizen—such as mayors, city and county councilors, and regional presidents—are consulted on EU proposals of direct interest to them. In particular, the Committee must be consulted on matters relating to trans-European networks, public health, education, youth, culture, and economic and social cohesion.

European Court of First Instance The Court of First Instance is the EU’s trial court for cases brought by individuals to challenge legislation or actions taken by the EU institutions, to challenge an institution’s failure to act, and for deciding employment disputes between EU institutions and their employees. It is made up of 15 judges appointed by the common accord of the member states for renewable terms of 6 years. The Court sits in chambers of 3 or 5 judges to decide most disputes, but it may sit in plenary session to decide important cases.

European Court of Justice The EU’s Court of Justice is also made up of 15 judges selected in the same fashion and for the same term as judges of the Court of First Instance. It, too, sits in chambers of 3 or 5 judges or in plenary session. The Court hears contentious cases and makes preliminary rulings. It hears four kinds of contentious cases: (1) appeals from the Court of First Instance; (2) complaints brought by the Commission or one member state against another member state for failure of the latter to meet its obligations under EU law; (3) complaints

employment (encouragement actions) (Article 129), customs cooperation (Article 135), fight against social exclusion (encouragement actions) (Article 137(2)), culture, equal opportunities and equal treatment (Article 141(3)), implementing decisions relating to the EU’s Social Fund (Article 148), education (encouragement actions) (Article 149(4)), vocational training (Article 150(4)), culture (except the recommendations) (Article 151(5)), health (encouragement actions) (Article 152(4)), consumers (Article 153(4)), trans-European networks (guidelines) (Article 156), implementing decisions relating to the EU’s Regional Development Fund (Article 162), research (framework program) (Article 166(1)), research (Article 166(2)), environment: general action programs (Article 175(1) and 175(3)), transparency (Article 255), prevention of and fight against fraud (Article 280), statistics (Article 285), and creation of a consultative body for data protection (Article 286).

A assent is required for specific missions of the European Central Bank (Treaty E stablishing the European Communities, Article 105(6)), amendment of the statutes of the European System of Central Banks/European Central Bank (Article 107(5)), structural funds and cohesion funds (Article 161), uniform electoral procedures (Article 190(4)), specified international agreements (Article 300(3)), accession of new member States (EU Treaty, Article 49).

The European Economic and Social Committee’s Internet Web site is at www.ces.eu.int/en/org/fr_org_welcome.htm.

The European Parliament Committee of Regions’ Web site is at www.cor.eu.int/.

The European Court of First Instance Web site is at www.europa.eu.int/cj/en/index.htm.

Individuals may seek the annulment of a legal measure that is of direct and individual concern to them; they may bring actions to compel an EU institution to act; and they may seek damages for injuries caused by EU institutions or servants in the performance of their duties.

The European Union Treaty, Article 168A.

The European Court of Justice can be found on the World Wide Web at www.europa.eu.int/cj/index.htm.

E ntrepreneurship, Article 165. E very 3 years there is a partial replacement of judges. Seven and eight are replaced alternatively. I.d., Article 176.
brought by a member state against an EU institution or its servants for failing to act or for injuries they may have caused; and (4) actions brought by a member state, the Council, the Commission, or the Parliament seeking the annulment of an EU legal measure. Preliminary rulings come about when a national court is hearing a case involving an EU law and the national court is in doubt as to the interpretation or validity of that law. In such a case, the national court may, and in some cases must, request a preliminary ruling from the Court of Justice.

Nine Advocates-General assist the judges of the Court of Justice in carrying out their duties. An Advocate-General is an official, commonly found in courts in civil law countries, who prepares a detailed brief analyzing the arguments of the parties and suggesting how the court should decide the case. In many regards, an Advocate-General’s brief is similar to an opinion prepared by a judge in a common law country. The reason for this is that the opinions handed down by civil law courts (including the European Court of Justice) generally do not engage in an extensive analysis of the issues; rather, they state a conclusion and a concise reason for their conclusion. Often, but not always, the court will adopt (sometimes in the fewest of words) the reasoning of the Advocate-General.

European Central Bank (ECB) The European Central Bank (ECB), which came into being on January 1, 1999, is responsible for carrying out the EU’s monetary policy. The ECB’s decision-making bodies are a Governing Council and an Executive Board. These oversee the European System of Central Banks (ESCB). The ESCB determines the amount of money in circulation, conducts foreign-exchange operations, holds and manages the member states’ official foreign reserves, and ensures the smooth operation of payment systems.

European Court of Auditors The EU budget, which is funded from customs duties and agricultural levies on external imports and from a portion of the value-added tax (VAT) collected in the member states, is supervised by a Court of Auditors made up of 15 individuals appointed by mutual agreement of the European Council for six-year terms. The Court of Auditors has wide-ranging powers to examine the legality and regularity of EU receipts and expenditures and to ensure the sound financial management of the budget.

Other Intergovernmental Organizations

IGOs can be categorized into two basic groups: (1) general intergovernmental organizations that have competence in a wide variety of fields, including politics, security, culture, and economics, like the United Nations, and (2) specialized intergovernmental organizations that limit their activities to a particular field.

General Intergovernmental Organizations Three prominent regional general IGOs are devoted to political cooperation, security, and the promotion of economic, social, and cultural development. They are the Council of Europe, the African Union (AU), and the Organization of American States.

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142d. Article 169 through 171 provide for actions for infringement against a member state for failing to observe an EU treaty or a law derived therefrom; Article 173, 174, and 176 provide for an action to annul the acts taken by the Union’s institutions in violation of the EU treaties; Articles 175 and 176 provide for action to compel an EU institution to take action; and Articles 178 and 215(2) provide for an action for damages arising from the non-contractual (i.e., tort) liability of the Union.

143d. Article 177. The Court will only hear requests (1) that involve a genuine issue as to Union law and (2) that the referring court regards as being necessary to its being able to give a judgment. See Costa v. ENEL, Case 6/64, European Court Reports, vol. 1964, p. 585 (1964), and Case 68/80, European Court Reports, vol. 1980, p. 771 (1980).

144e. Article 166. A with the judges, half of the Advocate-General are replaced every three years. Id., Article 166. No Advocate-General serve in the Court of First Instance. In certain cases, one of the judges of the Court of First Instance will perform the functions of Advocate-General.

145 The European Court of Auditors’ Internet Web site is at www.eca.eu.int/.

146 As of July 1999, the Council of Europe had 40 members: Albania, Andorra, Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, the Russian Federation, San Marino, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, and the United Kingdom. See the list of member states on the Council’s Internet Web site at www.coe.fr/eng/std/states.htm.

147 The AU has goals the economic, political, and social integration and development of the AU member states. It is the successor to the Organization of African Unity (OAU), which was founded in 1963 with the goal of eradicating all forms of colonialism in Africa and promoting the sovereignty, territorial integrity, and independence of its member states. As of June 2000, the OAU had 53 members: Algeria, Angola, Benin, Botswana, Burkina Faso, Burundi, Cameroon, Cape Verde, Central African Republic, Chad, Comoros, Cote d’Ivoire, Democratic Republic of Congo, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Gabon, the Gambia, Ghana, Guinea, Guinea-Bissau, Kenya, Liberia, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Mozambique, Namibia, Niger, Nigeria, the Ivory Coast, Senegal, Sierra Leone, Somalia, South Africa, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe.
States (OAS). The oldest is the OAS, which was established in its present form in 1948. The Council of Europe was created in 1949 and the AU (which replaced the Organization of African Unity, founded in 1963) came into being in 2002. Each limits membership to states from their region. The Council of Europe further limits its membership to states committed to the rule of law and the enjoyment of human rights. Spain and Portugal, for example, were excluded from the Council until the mid-1970s because they did not have democratic regimes. The OAS admits any independent American state except those involved in territorial disputes. Belize and G u y a n a were not admitted until 1993 because of this requirement. A ny independent sovereign African state is eligible for membership in the AU with the exception of countries ruled by white minority regimes.

The institutional structure of all three of these organizations is quite similar. The Council of Europe is different in one important respect, however. It has a Parliamentary Assembly whose representatives are elected by the national parliaments of the member states and whose numbers vary in proportion to the population of each member. The representatives do not vote as a block representing their states, but individually or as part of political parties that have formed within the Assembly. This means that individuals influence the deliberations more than governments.

A II three organizations seek to promote cooperation between their members in a variety of fields. Because of differing circumstances each, however, has emphasized a slightly different agenda. The Council of Europe has stressed legal, social, and cultural matters; the OAS has emphasized issues of peace and security; while the newly established AU is concentrating on political cooperation. Human rights are an important interest of all three. Individuals within member states of the Council of Europe may bring human rights cases directly to a European Court of Human Rights. Within the OAS, individuals may submit complaints to an Inter-American Commission on Human Rights. The Commission, after carrying out an independent investigation, will either submit a report to the OAS’s Council or, if the member state concerned has recognized the court’s jurisdiction, forward the complaint to the Inter-American Court of Human Rights. In Africa, the AU has a Human Rights Commission with investigatory powers similar to those of the Inter-American Commission.

In addition to these three regional general IGOs, there are three notable nonregional general IGOs: the Commonwealth of Nations, the Arab League, and the Commonwealth of


The Organization of African States has as its objectives “peace and justice, and promoting solidarity among the African states.” It has 35 members: Antigua and Barbuda, Argentina, Wu y a n a, Haiti, Honduras, Jamaica, Peru, Nicaragua, Panama, Paraguay, Uruguay, Saint Lucia, Saint Vincent and the Grenadines, Suriname, Saint Kitts and Nevis, Trinidad and Tobago, the United States of America, Uruguay, and Venezuela. See the list of member states on the OAS’s Internet Web site at www.oas.org/en/nstates/mstates.htm.

See “A bout the Council of Europe” on the Council’s Internet home page at www.coe.fr/eng/ present/about.htm.

The African Union will have a Parliamentary Assembly once the Protocol creating the assembly is ratified by the member states on the OAS’s Council or, if the member state concerned has recognized the court’s jurisdiction, forward the complaint to the Inter-American Court of Human Rights. In Africa, the AU has a Human Rights Commission with investigatory powers similar to those of the Inter-American Commission.

Established in 1931 to promote cooperation among states that were once part of the British Empire and that recognize the British Monarchy as their heads of state. The British Commonwealth of Nations has 54 members: Antigua and Barbuda, Australia, the Bahamas, Bangladesh, Barbados, Belize, Botswana, Brunei, Cameroon, Canada, Cyprus, Dominica, Fiji, the Gambia, Ghana, Gambia, Gambia, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malawi, Malawi, Malaysia, Malta, Mauritius, Mozambique, Namibia, Nauru, New Zealand, Nigeria, Pakistan, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, Sierra Leone, Singapore, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Tuvalu, the United Kingdom, Uganda, Vanuatu, Western Samoa, and Zimbabwe. The Republic of Ireland is associated with it for commercial purposes but is not a member. See the British Monarchy home page on the Internet at www.royal.gov.uk/today/cw.htm. A lso see the Commonwealth’s home page at www.thecommonwealth.org/ and the Commonwealth Online page at www.tcoi.co.uk/index.htm.

Founded in 1945, the League of Arab States (A rab League) seeks to promote political, economic, cultural, and communication ties among its members and to mediate internal disputes. A s of 1998 it had 22 members: A g e ria, Bahrain, Comoros, Djibouti, Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Oman, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, the United Arab Emirates, Yemen, and the Palestine Liberation Organization. See the Central Intelligence Agency’s CIA Factbook. A ll are on the Internet at www.odci.gov/cia/publications/factbook/index.html.
One important group of specialized IGOs promotes economic cooperation and development. This group is made up of several types of organizations, the most developed of which are the common markets or customs unions, such as the European Union. Customs unions are intended to eliminate trade barriers between their members and to establish common external tariffs. A side from the EU, the success of other customs unions (see Exhibit 1-6) has been limited for several reasons. First, the economies of their member states—all developing countries—tend to compete with, rather than complement, each other. Second, many of the member states only recently gained independence and they are reluctant to surrender that independence to a central authority. Third, the economic gains made within these unions have often been unequal, prompting those states that have not shared fully to become discouraged and withdraw.

A second type of cooperative economic IGO is the free trade area (FTA). FTAs are set up to eliminate trade barriers between member states without establishing a common external tariff. Examples include the Association of Southeast Asian Nations Free Trade Area (ASEAN-FTA), the Central European Free Trade Area (CEFTA), the EFTA, the European Free Trade Association (EFTA), MERCOSUR, the Southern Cone Common Market (MERCOSUR), and the North American Free Trade Agreement (NAFTA). Established in 1991, its members are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. See id.

The Commonwealth of Nations limits its membership to countries that were formerly part of the British Empire; the Arab League is open only to Arab nations; and the Commonwealth of Independent States is made up of former republics of the Soviet Union. Unlike other general IGOs, the Commonwealth of Nations has no charter (or, at least, no written charter) and, beyond a Secretariat, no organs other than a biennial meeting of heads of government, annual meetings of finance ministers, and regular meetings of other ministers (especially education, law, and health). The Arab League has a Council made up of representatives of each member state, several committees that assist the Council, and a Secretariat. In addition, Arab kings and presidents meet at regular Arab League summit conferences. The Commonwealth of Independent States was originally set up to provide for the orderly dissolution of the former Soviet Union. It now seeks to promote cooperation among the former Soviet republics.

Each of these organizations encourages cooperation among its members, but, unlike the Council of Europe or the Organization of American States, which carry on many service functions, they are primarily forum organizations.

**Specialized Intergovernmental Organizations**

There is a whole range of specialized intergovernmental organizations that deal with a wide variety of areas of mutual interest to their members. Examples are the European Space Agency, the International Coffee Organization, the International Criminal Police Organization (INTERPOL), the International Institute for the Unification of Private Law (UNIDROIT), and the World Tourism Organization. There is a whole range of specialized intergovernmental organizations, the most developed of which are the common markets or customs unions, such as the European Union. Customs unions are intended to eliminate trade barriers between their members and to establish common external tariffs. A side from the EU, the success of other customs unions (see Exhibit 1-6) has been limited for several reasons. First, the economies of their member states—all developing countries—tend to compete with, rather than complement, each other. Second, many of the member states only recently gained independence and they are reluctant to surrender that independence to a central authority. Third, the economic gains made within these unions have often been unequal, prompting those states that have not shared fully to become discouraged and withdraw.

A second type of cooperative economic IGO is the free trade area (FTA). FTAs are set up to eliminate trade barriers between member states without establishing a common external tariff. Examples include the Association of Southeast Asian Nations Free Trade Area (ASEAN-FTA), the Central European Free Trade Area (CEFTA), the European Free Trade Association (EFTA), MERCOSUR, the Southern Cone Common Market (MERCOSUR), and the North American Free Trade Agreement (NAFTA).

155 Established in 1991, its members are Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, the Russian Federation, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. See id.

156 Founded in 1975, it has 14 state members. See the European Space Agency’s home page at www.esrin.esa.int/.

157 Founded in 1963, it has 44 exporting state members and 18 importing state members. See the International Coffee Organization’s home page at www.ico.org/.

158 Founded in 1923, it has 177 state members. See INTERPOL’s home page at www.kenpubs.co.uk/interpol-pr/index.html.

159 Founded in 1926, it has 57 state members. See UNIDROIT’s home page at www.unidroit.org/.

160 Founded in 1975, it has 138 state members and 350 affiliated tourism organizations. See the World Tourism Organization’s home page at www.world-tourism.org/.

161 Established in 1990 to bring about the economic union of Belgium, Luxembourg, and the Netherlands. See id.

162 Established in 1992 to facilitate the free exchange of goods in Southeast Asia within 15 years. Its members are Brunei, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam. See the ASEAN Secretariat’s home page at www.aseansec.org/.

163 Established in 1993 to progressively create a free trade area by January 1, 2001. Its members are Bulgaria, the Czech Republic, Hungary, Poland, Romania, and the Slovak Republic.

164 Established in 1960, the European Free Trade Association presently has only four members: Iceland, Liechtenstein, Norway, and Switzerland. In 1991, EFTA and the European Community (now the European Union) entered into a trade agreement (called the European Economic Area) that joined the EU and three of the EFTA states (Iceland, Liechtenstein, and Norway) into the world’s largest free trade area. See EFTA’s home page at www.efta.int/structure/main/index.html.

165 The Mercado Común Sudamericano was established in 1991. Its members are Argentina, Brazil, Paraguay, and Uruguay. See the Uruguay embassy Web site at www.mercosur.org/uruguay/ for a description of MERCOSUR.

166 A decree to in 1993 by Canada, Mexico, and the United States, NAFTA came into effect January 1, 1994. See the U.S. Department of Commerce’s NAFTA Web page at www.mercosur.org/uruguay/ for a description of MERCOSUR.
Finally, a third type of IGO involved in economic cooperation and development is the economic consultative association. The function of a consultative association is to gather and exchange statistics and information, to coordinate the economic policies of member states, and to promote trade cooperation. Examples are the Organization for Economic Cooperation and Development (OECD),175 (see Exhibit 1-7), the Colombo Plan for Economic Cooperation and Development (see Exhibit 1-6), and the ANCOM Andean Common Market. Established in 1992 to create a free trade zone. Members are Bolivia, Colombia, Ecuador, Peru, and Venezuela.167

**ANCOM**

A ndean Common M arket. E stablished in 1992 to create a free trade zone. M embers are Bolivi a, Colombia, E cuador, Peru, and V enezuela.167

**CACM**

C entral A merican Common M arket. E stablished in 1997 to replace a common market of the same name that functioned from 1960 to 1969. M embers are Cos ta R ica, El S alvador, G uatemala, H onduras, and N icaragua.168

**CARICOM**

C aribbean Community. E stablished in 1973, it replaced the C aribbean F ree T rade A ssociation created in 1965. Its members are A ntigua and B arbuda, t he B ahamas, B arbados, B elize, D ominica, G renada, G uyana, J amaica, M ontserrat, S aint K itts and Nevis, S aint L ucia, S aint V incent and t he G renadines, S uriname, and T rinidad and T obago. In 1989, the Community agreed to create a S ingle M arket and E conomy (unofficially known as the C aribbean C ommon M arket) by 1994.169

**COMESA**

C ommon M arket for E astern and Southern A frica (formerly Preferential Trade A rea for E astern and Southern A frican States). E stablished in 1981 to create a common market. M embers are A ngola, B urundi, C ongo, Equatorial R epublic of the Congo, D emocratic R epublic of t he Congo, D enmark, E gypt, F rance, G ermany, G reece, H ungary, I rland, I taly, J apan, K ore a, Luxembourg, M exico, t he N etherlands, N ew Zealand, N orway, P oland, P ortugal, S pain, S weden, and S witzerland.170

**ECCAS**

E conomic Community of Central A frican States. E stablished in 1981 to gradually create a common market. M embers are B urundi, C ameroon, C entral A frican R epublic, Chad, Democratic R epublic of the Congo, E quatorial G uinea, G abon, R wanda, S ao Tom é and P rincipe.

**ECOWAS**

E conomic Community of West A frican States. E stablished in 1977 to promote economic development and gradually create a common market. M embers are B enin, B urkina F aso, C ape V erde, Gambia, G hana, G uinea, G uinea-B issau, I rland, Leto nia, M alawi, M auritania, M alawi, M auritius, M ozambique, N amibia, S andwana, S waziland, T anzania, U ganda, Z ambia, and Z imbabwe.170

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**SACU**

S outhern A frican Customs U nion. E stablished in 1969 to promote free trade and cooperation in customs matters. M embers are B otswana, L esothe, N amibia, S outh A frica, and S waziland.172

**SA DC**

S outhern A frican D evelopment Community. E stablished in 1979, it seeks to establish an economic union among its members: A ngola, B otswana, C ongo (K inshasa), L esothe, M alawi, M auritius, M ozambique, N amibia, S andwana, S waziland, T anzania, Z ambia, and Z imbabwe.172

**UDEAC**

C entral A frican Customs and E conomic U nion. E stablished in 1964 to promote the gradual and progressive creation of a common market. M embers are C ameroon, C entral A frican R epublic, Chad, R epublic of the Congo, E quatorial G uinea, and G abon.174

**EXHIBIT 1-6** Customs U nions in the D eveloping W orld
Cooperative Economic and Social Development in Asia and the Pacific (Colombo Plan), the Group of 77 (G-77), and the Organization of Petroleum Exporting Countries (OPEC).

Nonprofit NGOs serve as coordinating agencies for private national groups in international affairs. Examples of nonprofit NGOs are the International Air Transport Association, Amnesty International, and the International Committee of the Red Cross.

For-profit NGOs, also known as transnational corporations or multinational enterprises (MNEs), are businesses operating branches or subsidiaries or joint ventures in two or more countries. The organizational structures of MNEs are as diverse as any national business. They may invest in other businesses abroad; they may establish physical plants with management, labor and financing overseas; they may have a single central headquarters; or they may be loosely coordinated through contractual agreements.

States perceive MNEs both as necessities and as threats, and they have tried to work together to adopt international regulations both to control and to promote them. The International Chamber of Commerce, the Organization for Economic Cooperation and Development, the International Labor Organization, and the United Nations Commission on Transnational Corporations have each produced codes of conduct for MNEs. These codes' influence, however, has been limited since they are only suggested guidelines.

In particular, the MNEs have acquired the authority to enter into international agreements with states and to sue states in at least one international tribunal. The right to sue a state is granted in the International Convention on the Settlement of International Disputes between States and Nationals of Other States adopted in 1965. This Convention, sponsored by the World Bank, is meant to encourage investment in underdeveloped countries. To do this, it allows MNEs to enter into agreements with developing countries, and it requires both the MNEs and

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176 The Colombo Plan is an international organization that has been in existence since 1959. It seeks to aid the economic development of its Aisan members. There are 26 members: Afghanistan, Australia, Bangladesh, Bhutan, Burma, Canada, Fiji, India, Indonesia, Iran, Japan, Kampuchea, Laos, Malaysia, the Maldives, Nepal, New Zealand, Pakistan, Papua New Guinea, the Philippines, South Korea, Singapore, Sri Lanka, Thailand, the United Kingdom, and the United States. See its home page at www.colombo.org.

177 The Group of 77 is an ad hoc group of 77 developing countries who sought to coordinate their negotiating positions within the Group of 77 now functions as a Third World “negotiating block” in its dealings with the developed world. The G-77 promotes mutual cooperation and the establishment of a “New Economic Order” (to give international negotiating power to the Third World). At present there are 132 members. See its home page at www.g77.org.

178 Established in 1960, the Organization of Petroleum Exporting Countries attempts to set world oil prices by coordinating the oil production of its member states. There are 11 member countries: Argentina, Indonesia, Iran, Iraq, Kuwait, Libya, Nigeria, Qatar, Saudi Arabia, the United Arab Emirates, and Venezuela. Ecuador was a member from 1973 to 1992 and Gabon from 1975 to 1994. See its home page at www.opec.org.

179 Founded in 1945, the International Air Transport Association represents 259 airlines in promoting an economically viable international air transport industry. See its home page at www.iata.org.

180 Founded in 1961, Amnesty International undertakes campaigns to free prisoners of conscience, ensure fair and prompt trials for political prisoners, abolish cruel and unusual punishments, and end extrajudicial executions. It is made up of 4,300 local groups and approximately 1 million members and supporters in 100 countries. See its home page at www.amnesty.org.

181 Founded in 1963, the International Committee of the Red Cross seeks to help all victims of war and internal violence by coordinating the activities of 175 national Red Cross and Red Crescent societies. See the ICRC home page at www.icrc.org.


Organization for Economic Cooperation and Development

The Organization for Economic Cooperation and Development (OECD) is a forum organization for developed countries, whose members discuss, develop, and perfect common economic and social policies. It is sometimes referred to as the “rich countries club” because its members produce two-thirds of the world’s goods and services.

In October 1947, Western European heads of state met to discuss the Marshall Plan, the U.S. sponsored plan for post-World War II European economic recovery, at Chateau de la Muette in Paris. This meeting led to the creation of the Organization for European Economic Cooperation in April 1948, which became the Organization for Economic Cooperation and Development in September 1961, with the addition of United States and Canada as members.

EXHIBIT 1-7

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the countries to resolve any disputes about their agreements by a mandatory mechanism of conciliation and arbitration. Currently, 126 states are parties to the Convention.185

F. THE RIGHTS OF INDIVIDUALS UNDER INTERNATIONAL LAW

International law looks upon individuals in two different ways: (1) it ignores them or (2) it treats them as its subjects. The traditional view is to ignore them. This is based on the idea that international law (or, more particularly, “the law of nations”) applies only to states. Some writers still believe that this is the only proper way for international law to treat individuals. For example, the Chinese international law writer K’ung Meng has this to say:

[A] ccording to the fundamental characteristics of international law (it is the law among states), individuals can only be subjects of municipal law and cannot be subjects of international law. In international relations, individuals are represented by their own countries and if rights and interests (such as entry, residence, employment, and property) are violated in a foreign country, individuals should negotiate with the state concerned through the organs of their home country. Only their home country enjoys the rights of diplomatic protection in international law.186

Even though individuals have no direct rights according to this traditional view, they do have derivative rights. That is, as K’ung Meng points out in the excerpt, the state of which an individual is a national can seek redress on behalf of that individual from any foreign state that causes the individual injury. The rationale for allowing such action by the individual’s state of nationality is based on the notion that an injury to a national is an injury to the state.

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The traditional international law concept that allows a state to seek compensation from other states for injuries done to its nationals is known as the law of state responsibility. Although it protects individuals from virtually any kind of mistreatment by foreign states, the law of state responsibility gives individuals few rights. In particular, it does not give them the right to pursue their own claims or the right to protest the actions of their own national state. (The law of state responsibility is discussed more fully in Chapter 2.)

The second way in which international law looks upon individuals is to treat them as its subjects. This view—one developed only over the last half-century—regards individuals as having basic human rights and, significantly, the right to assert claims on their own behalf against states, including the state of their nationality. In comparison with the law of state responsibility, however, the kinds of claims that individuals can raise are limited. That is, they can only be based on rights granted in treaties or in widely recognized international declarations.

Exhibit 1-8 compares the scope and nature of the law of state responsibility with that of international human rights law.

Case 1-9 examines the differences between the traditional law of state responsibility and international human rights law.

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**Exhibit 1-8** Comparison of the Law of State Responsibility and International Human Rights Law

<table>
<thead>
<tr>
<th></th>
<th>Law of State Responsibility</th>
<th>International Human Rights Law</th>
</tr>
</thead>
<tbody>
<tr>
<td>Basis of a claim</td>
<td>Any loss of property or personal injury</td>
<td>Injuries defined by treaty</td>
</tr>
<tr>
<td>Claimant</td>
<td>The state of which the injured individual is a national</td>
<td>The injured individual</td>
</tr>
<tr>
<td>Defendant</td>
<td>A foreign state</td>
<td>A any state</td>
</tr>
</tbody>
</table>

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187 See, for example, Alvarez-Machain v. United States, Federal Reporter, Third Series, vol. 266, p. 1045 (9th Circuit Ct. of A ppeals 2001) in which a Mexican national successfully sued the United States for kidnapping him and forcefully abducting him from Mexico to stand trial—a trial in which he was acquitted—in the United States.

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**Case 1-9 De Sanchez v. Banco Central De Nicaragua**


**CIRCUIT JUDGE GOLDBERG:**

In July 1979, the Nicaraguan government of General Anastasio Somoza fell to the Sandinista revolutionaries. As usually occurs, members of the old regime fled the country to escape the reach of “revolutionary justice.” But where defeated aristocracies once emigrated to London or Paris, now they seem to wind up in Miami. One of the emigres—Mrs. Josefina Navarro de Sanchez, the wife of President Somoza’s former Minister of Defense—brought the present suit to collect on a check for $150,000 issued to her by the Nicaraguan Central Bank (Banco Central de Nicaragua) shortly before Somoza’s fall. Mrs. Sanchez was unable to cash this check after the new government assumed power and placed a stop-payment order on it.

Mrs. Sanchez then brought suit against the Banco Central in a United States court seeking an order to make it honor the check (which was drawn on a U.S. bank). The trial court instead granted Banco Central’s motion for a summary judgment and dismissed the suit. Mrs. Sanchez appealed. The central issue on appeal was whether an individual (Mrs. Sanchez) who is a national of a state (Nicaragua) can sue an agency of that state (the Banco Central) in another state’s courts for an alleged contractual breach. . . .

International law, as its name suggests, deals with relations between sovereign states, not between states and individuals. Nations, not individuals have been its traditional subjects. Injuries to individuals have been cognizable only where they implicate two or more different nations: if one state injures the national of another state, then this can give rise to a violation of international law since the individual’s injury is viewed as an injury to his state. As long as a nation
Injures only its own nationals, however, then no other state’s interest is involved; the injury is a purely domestic affair, to be resolved within the confines of the nation itself.\(^{188}\)

Recently, this traditional dichotomy between injuries to states and to individuals—and between injuries to homegrown and to alien individuals—has begun to erode. The international human rights movement is premised on the belief that international law sets a minimum standard not only for the treatment of aliens but also for the treatment of human beings generally. Nevertheless, the standards of human rights that have been generally accepted—and hence incorporated into the law of nations—are still limited. They encompass only such basic rights as the right not to be murdered, tortured, or otherwise subjected to cruel, inhuman, or degrading punishment; the right not to be a slave; and the right not to be arbitrarily detained.\(^{189}\) At present, the taking by a state of its national’s property does not contravene the international law of minimum human rights.\(^{190}\) This has been held to be true in much more egregious situations than the present, including cases where the plaintiff had had his property taken pursuant to Nazi racial decrees.\(^{191}\)

\(^{188}\) Potentially, an injury by a state to its own nationals might implicate international law if the injury occurred within another state’s territory. In that event, the state where the injury occurred might have an interest if the injury affected its territorial sovereignty. International law would become involved not because of the status of the injured party but because of the location of the injury.

In the present case, Mrs. Sanchez claims that her injury occurred in the United States, since that is where Banco Central’s check was made payable. We need not decide here whether Banco Central’s contractual obligations were “located” in the United States. Even if they were, the breach of these obligations was not of such a nature as to affront the territorial sovereignty of the United States. The situation might be different if Mrs. Sanchez had attempted to expropriate a piece of real property owned by Banco Central. In such a case, the United States might have an interest if the injury affected its territorial sovereignty. International law would be involved not because of the status of the injured party but because of the location of the injury.

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certainly true here. As the court noted in Jafari v. Islamic Republic of Iran:192

It may be foreign to our way of life and thought, but the fact is that governmental expropriation is not so universally abhorred that its prohibition commands the “general assent of civilized nations” . . . a prerequisite to incorporation in the “law of nations” . . . We cannot elevate our American-centered view of governmental taking of property without compensation into a rule that binds all “civilized nations.”193

The doctrine that international law does not generally govern disputes between a state and its own nationals rests on fundamental principles. At base, it is what makes individuals subjects of one state rather than of the international community generally. If we could inquire into the

193Id., at p. 215 . . .
[194The Golden Rule is “Do to others as you would have them do to you.” It is not, as Judge Goldberg seems to suggest, “Leave others alone out of fear that they might not leave you alone.” E.d.]

G. COMPARISON OF MUNICIPAL LEGAL SYSTEMS

There are more than 200 nations in the world today, and each has a different set of laws that govern its people and its relations with the rest of the world. Whereas international law governs relations between states, institutions, and individuals across national boundaries, municipal law governs these same persons (including the private or commercial conduct of foreign states) within the boundaries of a particular state. Although it would be impossible to describe the legal system of every nation, it is possible to describe the basic systems or “family groupings.” The study, analysis, and comparison of the different municipal law systems is known as comparative law.

Comparative lawyers classify countries into legal families. The two most widely distributed families are the Romano-Germanic Civil Law and the Anglo-American Common Law. Another family that has become important internationally in recent years is Islamic Law.

Of course, each of these families has many subfamilies; for example, within the Romano-Germanic family one finds the Romanist, Germanic, and Latin American subfamilies. In addition, many legal systems are hybrids. The Japanese and the South African legal systems thus have elements of both the civil and the common law. Finally, some legal practices are truly unique to a particular country. This is especially so in some African countries that use tribal customary law to varying degrees. Drawing a “family tree,” as a consequence, can become very complicated and the map in Exhibit 1-9 should be considered as only a generalization.

It is important to understand that the legal system in one country can vary greatly from that in another country, even if both belong to one of the major legal families. This is because the values underlying a legal system can vary greatly among countries, depending on a country’s history, language, religion, ethics, and other cultural factors. The importance of cultural differences, the way those differences affect the community of nations, and the affect they can have on international law, is discussed in Reading 1–1.

Comparative law: The study, analysis, and comparison of the world’s municipal legal systems.
The Next Pattern of Conflict

World politics is entering a new phase, and intellectuals have not hesitated to proliferate visions of what it will be—the end of history, the return of traditional rivalries between nation states, and the decline of the nation state from the conflicting pulls of tribalism and globalism, among others. Each of these visions catches aspects of the emerging reality. Yet they all miss a crucial, indeed a central, aspect of what global politics is likely to be in the coming years.

It is my hypothesis that the fundamental source of conflict in this new world will not be primarily ideological or primarily economic. The great divisions among humankind and the dominating source of conflict will be cultural. Nation states will remain the most powerful actors in world affairs, but the principal conflicts of global politics will occur between nations and groups of different civilizations. The clash of civilizations will dominate global politics. The fault lines between civilizations will be the battle lines of the future.

***

Why Civilizations Will Clash

Civilization identity will be increasingly important in the future, and the world will be shaped in large measure by the interactions among seven or eight major civilizations. These include Western, Confucian, Japanese, Islamic, Hindu, Slavic-Orthodox, Latin American and possibly African civilization. The most important conflicts of the future will occur along the cultural fault lines separating these civilizations from one another.

Why Will This Be the Case?

First, differences among civilizations are not only real; they are basic. Civilizations are differentiated from each other by history, language, culture, tradition and, most important, religion. The people of different civilizations have different views on the relations between God and
man, the individual and the group, the citizen and the state, parents and children, husband and wife, as well as differing views of the relative importance of rights and responsibilities, liberty and authority, equality and hierarchy. These differences are the product of centuries. They will not soon disappear. They are far more fundamental than differences among political ideologies and political regimes. Differences do not necessarily mean conflict, and conflict does not necessarily mean violence. Over the centuries, however, differences among civilizations have generated the most prolonged and the most violent conflicts.

Second, the world is becoming a smaller place. The interactions between peoples of different civilizations are increasing; these increasing interactions intensify civilization consciousness and awareness of differences between civilizations and commonalities within civilizations. North African immigration to France generates hostility among Frenchmen and at the same time increased receptivity to immigration by “good” European Catholic Poles. Americans react far more negatively to Japanese investment than to larger investments from Canada and European countries. Similarly, as Donald Horowitz has pointed out, “A n Ibo may be... an Owerri Ibo or an Onitsha Ibo in what was the Eastern region of Nigeria. In Lagos, he is simply an Ibo. In London, he is a Nigerian. In New York, he is an A frican.” The interactions among peoples of different civilizations enhance the civilization-consciousness of people that, in turn, invigorates differences and animosities stretching or the civilization-consciousness of people that, in turn, invigorates differences and animosities stretching or thought to stretch back deep into history.

Third, the processes of economic modernization and social change throughout the world are separating people from long-standing local identities. They also weaken the nation state as a source of identity. In much of the world, religion has moved in to fill this gap, often in the form of movements that are labeled “fundamentalist.” Such movements are found in Western Christianity, Judaism, Buddhism and Hinduism, as well as in Islam. In most countries and most religions the people active in fundamentalist movements are young, college-educated, middle-class technicians, professionals and business persons. The “unsecularization of the world,” George Weigel has remarked, “is one of the dominant social facts of life in the late twentieth century.” The revival of religion, “la revanche de Dieu,” as Gilles Kepel labeled it, provides a basis for identity and commitment that transcends national boundaries and unites civilizations.

Fourth, the growth of civilization-consciousness is enhanced by the dual role of the West. On the one hand, the West is at a peak of power. At the same time, however, and perhaps as a result, a return to the roots phenomenon is occurring among non-Western civilizations. Increasingly one hears references to trends toward a turning inward and “A slanization” in Japan, the end of the Nehru legacy and the “Hinduization” of India, the failure of Western ideas of socialism and nationalism and hence “re-Islamization” of the Middle East, and now a debate over Westernization versus Russianization in Boris Yeltsin’s country. A West at the peak of its power confronts non-Wests that increasingly have the desire, the will and the resources to shape the world in non-Western ways.

In the past, the elites of non-Western societies were usually the people who were most involved with the West, had been educated at Oxford, the Sorbonne or Sandhurst, and had absorbed Western attitudes and values. At the same time, the populace in non-Western countries often remained deeply imbued with the indigenous culture. Now, however, these relationships are being reversed. A de-Westernization and indigenization of elites is occurring in many non-Western countries at the same time that Western, usually American, cultures, styles and habits become more popular among the mass of the people.

Fifth, cultural characteristics and differences are less mutable, and hence less easily compromised and resolved, than political and economic ones. In the former Soviet Union, communists can become democrats, the rich can become poor and the poor rich, but Russians cannot become Estonians and Azeris cannot become Armenians. In class and ideological conflicts, the key question was “Which side are you on?” and people could and did choose sides and change sides. In conflicts between civilizations, the question is “What are you?” That is a given that cannot be changed. A nd as we know, from Bosnia to the Caucasus to the Sudan, the wrong answer to that question can mean a bullet in the head.

Even more than ethnicity, religion discriminates sharply and exclusively among people. A person can be half-French and half-Arab and simultaneously even a citizen of two countries. It is more difficult to be half-Catholic and half-Muslim.

Finally, economic regionalism is increasing. The proportions of total trade that were intraregional rose between 1980 and 1989 from 51 percent to 59 percent in Europe, 33 percent to 37 percent in East Asia, and 32 percent to 36 percent in North America. The importance of regional economic blocs is likely to continue to increase in the future. On the one hand, successful economic regionalism will reinforce civilization-consciousness. On the other hand, economic regionalism may succeed only when it is rooted in a common civilization. The European Community rests on the shared foundation of European culture and Western Christianity. The success of the North American Free Trade Area depends on the convergence now underway of Mexican, Canadian and American cultures. Japan, in contrast, faces difficulties in creating a comparable economic entity in East Asia because Japan is a society and civilization unique to itself. However strong the trade and investment links Japan may develop with other East
A sian countries, its cultural differences with those countries inhibit and perhaps preclude its promoting regional economic integration like that in Europe and North America.

Common culture, in contrast, is clearly facilitating the rapid expansion of the economic relations between the People’s Republic of China and Hong Kong, Taiwan, Singapore and the overseas Chinese communities in other A sian countries. With the Cold War over, cultural commonalities increasingly overcome ideological differences, and mainland China and Taiwan move closer together. If cultural commonality is a prerequisite for economic integration, the principal E ast A sian economic bloc of the future is likely to be centered on China. This bloc is, in fact, already coming into existence. A s M urray Weidenbaum has observed,

Despite the current Japanese dominance of the region, the Chinese-based economy of A sia is rapidly emerging as a new epicenter for industry, commerce and finance. This strategic area contains substantial amounts of technology and manufacturing capability (Taiwan), outstanding entrepreneurial, marketing and services acumen (Hong Kong), a fine communications network (Singapore), a tremendous pool of financial capital (all three), and very large endowments of land, resources and labor (mainland China). . . . From Guangzhou to Singapore, from Kuala Lumpur to Manila, this influential network—often based on extensions of the traditional clans—has been described as the backbone of the E ast A sian economy.195

Culture and religion also form the basis of the Economic Cooperation Organization, which brings together ten non-A rab M uslim countries: Iran, Pakistan, Turkey, A zerbaijan, K azakhstan, K yrgyzstan, Turk- menistan, Tajikistan, Uzbekistan and Afghanistan. One impetus to the revival and expansion of this organization, founded originally in the 1960s by Turkey, Pakistan and Iran, is the realization by the leaders of several of these countries that they had no chance of admission to the E uropean Community. Similarly, C AR ICOM, the Central A merican Common Market and M ER COSUR, rest on common cultural foundations. E fforts to build a broader Caribbean-Central A merican economic entity bridging the A nglo-Latin divide, however, have to date failed.

A s people define their identity in ethnic and religious terms, they are likely to see an “us” versus “them” relation existing between themselves and people of different ethnicity or religion. The end of ideologically defined states in E astern Europe and the former Soviet Union permits traditional ethnic identities and animosities to come to the fore. Differences in culture and religion create differences over policy issues, ranging from human rights to immigration to trade and commerce to the environment. Geographical propinquity gives rise to conflicting territorial claims from Bosnia to India. M ost important, the efforts of the West to promote its values of democracy and liberalism as universal values, to maintain its military predominance, and to advance its economic interests engender countering responses from other civilizations. Decreasingly able to mobilize support and form coalitions on the basis of ideology, governments and groups will increasingly attempt to mobilize support by appealing to common religion and civilization identity.

* * *

THE WEST VERSUS THE REST

The West is now at an extraordinary peak of power in relation to other civilizations. I ts superpower opponent has disappeared from the map. M ilitary conflict among Western states is unthinkable, and Western military power is unrivaled. A part from Japan, the West faces no economic challenge. I t dominates international political and security institutions and, with Japan, international economic institutions. G lobal political and security issues are effectively settled by a directorate of the U nited States, Britain and France, world economic issues by a directorate of the U nited States, Germany and Japan, all of which maintain extraordinarily close relations with each other to the exclusion of lesser and largely non-Western countries. D ecisions made at the U N Security Council or in the International M onetary Fund that reflect the interests of the West are presented to the world as reflecting the desires of the world community. T he very phrase “the world community” has become the euphemistic collective noun (replacing “the Free World”) to give global legitimacy to actions reflecting the interests of the U nited States and other Western powers.196 T hrough the I MF and other international economic institutions, the West promotes its economic interests and imposes on other nations the economic policies it thinks appropriate. I n any poll of non-Western peoples, the I MF undoubtedly would win the support of finance ministers and a few others, but get an overwhelmingly unfavorable rating from just about everyone else, who would agree with G eorgy A rbatov’s characterization of I MF officials as “neo-Bolsheviks who love

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196 A lmost invariably Western leaders claim they are acting on behalf of “the world community.” O ne minor lapse occurred during the run-up to the Gulf W ar. I n an interview on “G ood M orning A merica,” D ecember 21, 1990, British Prime M inister J ohn M ajor referred to the actions “the West” was taking against S addam H ussein. H e quickly corrected himself and subsequently referred to “the world community.” H e was, how- ever, right when he erred.
expropriating other people’s money, imposing undemocratic and alien rules of economic and political conduct and stifling economic freedom.”

Western domination of the U N Security Council and its decisions, tempered only by occasional abstention by China, produced U N legitimation of the West’s use of force to drive Iraq out of Kuwait and its elimination of Iraq’s sophisticated weapons and capacity to produce such weapons. It also produced the quite unprecedented action by the United States, Britain and France in getting the Security Council to demand that Libya hand over the Pan Am 103 bombing suspects and then to impose sanctions when Libya refused. A fter defeating the largest Arab army, the West did not hesitate to throw its weight around in the Arab world. The West in effect is using international institutions, military power and economic resources to run the world in ways that will maintain Western predominance, protect Western interests and promote Western political and economic values.

That at least is the way in which non-Westerners see the new world, and there is a significant element of truth in their view. Differences in power and struggles for military, economic and institutional power are thus one source of conflict between the West and other civilizations. Differences in culture, that is basic values and beliefs, are a second source of conflict. V. S. Naipaul has argued that Western civilization is the “universal civilization” that “fits all men.” A t a superficial level much of Western culture has indeed permeated the rest of the world. A t a more basic level, however, Western concepts differ fundamentally from those prevalent in other civilizations. Western ideas of individualism, liberalism, constitutionalism, human rights, equality, liberty, the rule of law, democracy, free markets, the separation of church and state, often have little resonance in Islamic, Confucian, Japanese, Hindu, Buddhist or Orthodox cultures. Western efforts to propagate such ideas produce instead a reaction against “human rights imperialism” and a reaffirmation of indigenous values, as can be seen in the support for religious fundamentalism by the younger generation in non-Western cultures. The very notion that there could be a “universal civilization” is a Western idea, directly at odds with the particularism of most Asian societies and their emphasis on inter-group accommodation. In the short term it is clearly in the interests of the West to promote greater cooperation and unity within its own civilization, particularly between its European and North American components; to incorporate into the West societies in Eastern Europe and Latin America whose cultures are close to those of the West; to promote and maintain cooperative relations with Russia and Japan; to prevent escalation of local inter-civilization conflicts into major inter-civilization wars; to limit the expansion of the military strength of Confucian and Islamic states; to moderate the reduction of Western mili-

When it has developed in non-Western societies it has usually been the product of Western colonialism or imposition.

* * *

IMPLICATIONS FOR THE WEST

This article does not argue that civilization identities will replace all other identities, that nation states will disappear, that each civilization will become a single coherent political entity, that groups within a civilization will not conflict with and even fight each other. This paper does set forth the hypotheses that differences between civilizations are real and important; civilization-consciousness is increasing; conflict between civilizations will supplant ideological and other forms of conflict as the dominant form of conflict, international relations, historically a game played out within Western civilization, will increasingly be a game played out within non-Western civilizations; and that non-Western civilizations are actors and not simply objects; successful political, security and economic international institutions are more likely to develop within civilizations than across civilizations; conflicts between groups in different civilizations will be more frequent, more sustained and more violent than conflicts between groups in the same civilization; violent conflicts between groups in different civilizations are the most likely and most dangerous source of escalation that could lead to global wars; the paramount axis of world politics will be the relations between the West and the Rest; the elites in some tont non-Western countries will try to make their countries part of the West, but in most cases face major obstacles to accomplishing this; a central focus of conflict for the immediate future will be between the West and several Islamic-Confucian states.

This is not to advocate the desirability of conflicts between civilizations. It is to set forth descriptive hypotheses as to what the future may be like. If these are plausible hypotheses, however, it is necessary to consider their implications for Western policy. These implications should be divided between short-term advantage and long-term accommodation. In the short term it is clearly in the interest of the West to promote greater cooperation and unity within its own civilization, particularly between its European and North American components; to incorporate into the West societies in Eastern Europe and Latin America whose cultures are close to those of the West; to promote and maintain cooperative relations with Russia and Japan; to prevent escalation of local inter-civilization conflicts into major inter-civilization wars; to limit the expansion of the military strength of Confucian and Islamic states; to moderate the reduction of Western mili-

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The Roman-Germanic Civil Law System

The oldest and most influential of the legal families is the Roman-Germanic legal system, commonly called the civil law. The civil law dates to 450 B.C., the traditional date when Rome adopted its Twelve Tables (a code of laws applicable to Romans). The most significant event in the historical development of the civil law, however, was the compilation and codification (that is, the selection, arrangement, and simplification) of all Roman law done under the direction of Byzantine Emperor Justinian (483-565 A.D.). This code, known as the Corpus Juris Civilis, was compiled between 528 and 534 A.D. It was important because it preserved in written form the ancient legal system. The Roman law was displaced to some extent by the rules of the Germanic tribes when they overran the Western Empire. Germanic tribal law, however, recognized the principle of personal (as opposed to territorial) law, so the former Roman subjects and their descendants were allowed to follow the Roman law. The medieval Roman Catholic Church also played an important role in preserving the ancient law. Canon law, the law used in the Church’s courts, was based on Roman law.

With the revival of interest in classical culture in Western Europe in the eleventh and twelfth centuries, accompanied by the discovery of a copy of the long lost Corpus Juris Civilis, active study of the ancient Roman law began in earnest. At universities in northern Italy—especially Bologna—the Corpus Juris Civilis was systematically analyzed, first by glossators (who added notes—annotations—explaining its meaning) and later by commentators (who attempted to adapt it to the needs of their time). Students from throughout Europe, who traveled to Italy to study, returned to their own countries to become the new profession of lawyers. Not only did they set up new universities—in Paris, Oxford, Prague, Heidelberg, Kraków, and Copenhagen—but they also found work both in the Church and as advisors to princes and municipalities. Their common background led to the creation of a new civil law, one based on the Roman law, canon law, and the huge body of writings created by the glossators and commentators. This was called the jus commune, or the common law of Europe.

At the same time, Europe was emerging from a long period of economic stagnation. The newly founded towns gave rise to markets, fairs, and banks, and the rapid development of maritime and overland trade eventually led to large commercial centers that had a need for laws to govern their business transactions. The Germanic law, which at first had been adequate for the general needs of a rural, agrarian society, did not contain legal concepts that suited the needs of the commercial community. Nor did the Roman law, which presumed the presence of an extensive imperial government that no longer existed. The guilds and merchants’ associations began to follow their own practices and they set up their own courts (called pepoinds courts, or literally “dusty feet” courts, but euphemistically referred to in English as “piepowder” courts).
These courts worked out rules and procedures based on the customs of the merchants that were practical and fair. Soon these same rules were being applied both in governmental and church courts, and eventually the lex mercatoria (law merchant) became an international body of generally accepted commercial rules that transcended national boundaries. It proved to be more influential than even the civil law, spreading to England where the legal community resisted the Roman law tradition. Today, many of the concepts contained in the law merchant are incorporated in modern commercial law codes, such as the United Nations Convention on Contracts for the International Sale of Goods.

In the sixteenth and seventeenth centuries, the centers of European legal scholarship moved to France and Holland. The new study of the jus commune was carried on by French Humanists and Dutch Naturalists. Using historical analysis and philology (i.e., the tracing out of the development of the usage of words), the Humanists came to believe that the jus commune was only a product of history and that the Corpus Juris Civilis was merely an ancient text (rather than a holy encapsulation of the “living law”). This desacralization of Roman law was continued by the Dutch Naturalists, who developed the theory that law was based on a universal law of nature, and not on the contents of an ancient sacred book.

Along with the development of a theory of law, other events would eventually lead to the disappearance of the jus commune as the common law of Europe. The appearance of national states, with national literatures written in national languages (rather than Latin as had been the case before), led to aspirations for systems of national law. In many of the states of continental Europe, legal nationalism found its embodiment in national codes. The first such codes appeared in Scandinavia in the seventeenth century. In the eighteenth century, the codes of France, Prussia, and Austria were the products of “enlightened” monarchs like Frederick the Great of Prussia (1712–1786) and Joseph II of Austria (1741–1790). As such, they attempted not only to bring about legal unity within a single kingdom, but also to express the political and philosophical ideals of the time.

Two national codes have had such widespread and lasting influence that they are now regarded as the very basis of the modern civil law. Both the French Civil Code of 1804 and the German Civil Code of 1896 were models for most of the other contemporary civil codes. The French Code is now followed in the Netherlands, Belgium, Poland, Spain, Portugal, Latin America, sub-Saharan Africa, Indochina, and Indonesia; the German in Austria, Czechoslovakia, Greece, Hungary, Switzerland, Yugoslavia, Turkey, Japan, and South Korea.

The French Civil Code is often referred to as the Code Napoléon, because of the extensive involvement of Napoléon Bonaparte (1769–1821) in its writing. Jean Jacques Cambacérès (1753–1824), second consul under Napoléon, and a commission of four jurists were the principal drafters. Most scholars rightfully regard it as the first modern code. Although organized structurally in much the same fashion as the Corpus Juris Civilis, it was not merely a restatement of prior law. It incorporated the principal ideas of the French Revolution, including the right to possess private property, the freedom to contract, and the autonomy of the patriarchal family. With regard to private property, the Code’s authors consciously attempted to break up the old feudal estates of the aristocracy by prohibiting restraints on the sale of land as well as restraints on its transfer in a will.

The Code, nevertheless, preserved much of the past. Because it was written in a remarkably short period of time—at the insistence of Napoléon—its authors relied heavily on the jus commune, French royal ordinances, academic writings, and customary law (especially the influential Custom of Paris, which had been transcribed in the sixteenth century). Like the authors of other seventeenth- and eighteenth-century codes, the draftsmen of the Code Napoléon looked on their work as putting all of the prior French law through a “sieve of reasons.” Unlike the German Code, however, the style and form of the French Code are straightforward, easy to read, and understandable to everyone—in many respects, it reminds one of the United States Constitution. Also, like the U.S. Constitution, the authors of the French Code realized that they could not foresee every possible legal eventuality, so they set out flexible general rules rather than detailed provisions. Jean Portalis (1746–1807), one of the authors, said:

We have equally avoided the dangerous ambition to regulate and foresee everything. . . . The function of law is to fix in broad outline the general maxims of justice, to
The German Civil Code (Bürgerliches Gesetzbuch) was enacted almost a century later, partly because Germany first had to take shape as a nation and partly because of the influence of a group of German scholars known as Pandectists. The leader of the Pandectists, Friedrich Karl von Savigny (1779–1861), argued that a German code could not be adopted until extensive study of Germany’s legal institutions had been made. Rather than studying German legal materials, however, the Pandectists concentrated on the text of the Corpus Juris Civilis, with the aim of discovering its “latent” or underlying principles and organization. From these studies a highly structured and technically precise system was eventually devised for use in Germany.

The drafting project itself was enormous, taking more than 20 years to complete. Issued finally in 1896, the German Code’s organization and form is incredibly precise and technical. Special terminology was devised. Legal concepts were defined and then used in the same way throughout the entire Code. Sentence structure indicates which party has the burden of proof. Elaborate cross-references keep the Code reasonably brief and make it a logical and unified system. Unlike the French Code, which was intended to be a handbook for the citizen, the German Code was meant for the use of trained experts.

Although the French and German codes are different in style and tone, they are more similar than dissimilar. Both are based on the jus commune, especially in their approach to the law of obligations and in their overall structure. They also rely on many of the same political and philosophical ideals, notably laissez-faire economics and the autonomous rights of individuals.

Public law: Constitutional and administrative law. It is not included in civil law codes.

England, King’s Bench, 1911.
Law Reports, King’s Bench Division, vol. 1911, pt. 2, p. 93 (1911).

Miss Fischer, an American, recklessly rode a horse in the Avenue du Bois de Boulogne in Paris and ran into Monsieur Raulin, a French officer, seriously injuring him. The Procureur de la République prosecuted Fischer for criminal negligence in the Civil Court of First Instance of the Department of the Seine, which was then sitting as a correctional tribunal pursuant to Article 320 of the French Penal Code.

Case 1–10 Raulin v. Fischer
By the provisions of the French Code d’Instruction Criminelle, a person who is injured by a criminal act may intervene in the prosecution (action publique) and make a claim for damages. In such a case, the injured individual’s claim (action civile) is tried along with the action publique and one judgment is pronounced for both. Raulin intervened in the prosecution of Fischer and claimed damages.

At a hearing held in 1909, Fischer, who did not appear, was convicted and sentenced to one month’s imprisonment and a fine of 100 francs. Because the Court did not have sufficient evidence before it to decide how extensive the injury was that Raulin had suffered, it entered a France and England (1911) provisional award of 5,000 francs for damages and ordered him to be examined by an expert. Following the expert’s report to the Court, the award was changed to 15,000 francs for damages and 917 francs for costs.

Later, Raulin sought to recover the sum of 636 pounds, 13 shillings, and 6 pence in an English court, that being the equivalent in English money of the 15,917 francs that the French court had ordered Fischer to pay him.

JUDGE HAMILTON:

Of the judgment of the French Court the plaintiff is in my opinion entitled to recover the English equivalent of 15,000 francs that have been awarded him as damages. It was not disputed by the defendant’s counsel that he would be so entitled but for the rule of private international law that a penal judgment of a court in one country cannot be enforced by action in another country. The point raised for the defendant was that the judgment sued on was in truth a penal judgment within that rule, and that though part of it might be more or less civil in its character there was no power in this court to dissect the judgment and enforce here that part which was enforceable by action though the judgment as a whole was not enforceable.

Although the French courts might refuse to distinguish between the parts of a judgment which may be called principal and the parts which may be called accessory, the parts which are by way of punishment and the parts which are by way of civil remedy, it does not follow that the English courts in dealing with a French judgment should take the same course. The rule which governs such a question is that laid down by the Privy Council in Huntington v. Attrill. 198 It was there held that, a judgment having been given by a New York court against the respondent under a New York statute which imposed a liability for false representation, and an action having been brought in an Ontario court upon that judgment, it was the duty of the Ontario court to determine for itself whether the judgment sued on was a penal one or not, and that it was not bound by the interpretation put upon the statute by the New York courts. I have therefore to inquire first of all whether this judgment insofar as it concerns the present plaintiff is one for the satisfaction of a private wrong or for the punishment of an infraction of public law; and secondly whether, if it be as regards him only for the satisfaction of a private wrong, it is one which can be separated from the rest of the judgment, so that he may sue upon the judgment in spite of the fact that a considerable part of its relates to purely criminal proceedings.

Certain French expert witnesses were called before me, and the effect of their evidence was this. In various respects that remedy in the form in which it was pursued differs from the form in which it might have been pursued. The result of Monsieur Raulin having pursued his remedy for compensation by intervention in the prosecution instead of bringing a separate civil action was that he came before a court especially assigned to criminal business. That court decided both in the prosecution and in the civil intervention, and to that extent the plaintiff obtained his judgment from a correctional tribunal. But in other respects it does not appear to me that his remedy differed in its character from the remedy which he might have pursued by a separate civil action. The prosecution

 CHAPTER 1   Introduction to International and Comparative Law

The Anglo-American Common Law System

The origins of the Anglo-American common law system can be traced back to the year 1066, when the Normans conquered England and William the Conqueror began to centralize the governmental administration of his new kingdom. The name “common law” is derived from the theory that the King’s courts represented the common custom of the realm, as opposed to the local customary law practiced in the county and manorial courts.

Development of the enduring principles of the common law was largely the product of three courts created by Henry II (1133–1189). The Court of Exchequer settled tax disputes; the Court of Common Pleas dealt with matters that did not involve a direct interest of the King, such as title to land, enforcement of promises, and payment of debts; and the Court of King’s Bench handled cases of a direct royal interest, such as the issuance of “writs” (written decrees) to control unruly public officials. Eventually, the jurisdiction of the King’s Bench was used to control abuses of power by the King himself, establishing a fundamental doctrine of the common law: the supremacy of the law. (Today, the doctrine of supremacy means not only that the King is subject to the law but that the acts of ordinary government agencies can be reviewed in the courts.) Also, when the Court of Common Pleas began to charge large fees to hear cases, much of its jurisdiction was taken over by the King’s Bench. The judges of the King’s Bench did this by broadly interpreting the writ of trespass so that it took in virtually every kind

abates with the death of the accused. The civil remedy does not. The liability to imprisonment in order to enforce payment of the damages is in law an incident both of the intervention in the action publique and of the separate civil action. The course of procedure differs because, instead of the whole conduct of the action on the intervener’s side resting with the plaintiff as it would have done in civil proceedings, he has to adapt himself to the control of the proceedings by the Procurator of the Republic. But the issues remain unchanged. The issue between the Procurator and the accused was whether she had broken the law against driving negligently contained in Art. 320 of the Penal Code. On that issue the contributory negligence of the plaintiff would have afforded no defense, but the contributory negligence of the plaintiff would have been material to the question of damages claimed by him as an intervening party, and that issue, if the facts justified it, would be raised just as much in the civil intervention in the action publique as it could in a separate action civile. It seems to me that there is no doubt that the public prosecution and private suit are two quite separate and distinct proceedings although they are for the purposes of procedure combined in one. The judgment for the 15,000 francs is not in any respect a judgment in what is substantially a criminal suit from that portion of it which was in this connection certain decisions of French courts were cited to me, but not much assistance is to be gained from them, especially in view of the evidence that according to the jurisprudence of France the decisions of the courts are not binding even upon the courts of inferior jurisdiction unless they are pronounced in the same cause or matter, and, consequently, though the decisions of the courts are constantly cited, they are cited by way of edification only and not as authority.

In any case, according to the judgment of the Privy Council, this is not a matter in which I am bound by the view of the French Courts. It is one in which I must determine for myself whether the enforcement of the plaintiff’s rights would either directly or indirectly involve the execution of the penal law of another state. In my opinion it would not. Moreover here the decision awarding the final damages was not even pronounced at the same time as the decision inflicting the fine. It was given at a time when the only issue being contested was of a private and civil character, and one with which the state had nothing whatever to do. I think the decision must be for the plaintiff. I am fortified in this view by . . . Sir Francis Piggott’s work on Foreign Judgments in which he deals with this very provision of the French law, that civil proceedings for a tort are allowed to be tacked on to criminal proceedings for the offense and damages may be awarded to the person injured, and suggests that the award of damages in such case is a civil judgment recognizable in England in the usual way.

Judgment for plaintiff. □

Piggott on Foreign Judgments, part I, p. 90 (3rd ed.).

common law: The legal system of England and countries that were once English colonies. It is based primarily on court-made rules or precedent.

supremacy of the law: Doctrine that all persons, including the sovereign, are subordinate to the rule of law.
found in the Islamic legal system. It is based upon principles of justice developed by the Prophet Muhammad (570–632 A.D.), (3) the writings of Islamic scholars who derived rules by analogy from the principles established in the Koran and the Sunna, and (4) the consensus of the legal community.

In the tenth century A.D., three centuries after the founding of Islam, the legal community decided that further improvement of the scholars’ analysis of divine law was impossible. They decided at that time to “close the door of ‘ijtihad (independent reasoning),” freezing the evolution of Islamic law. As a consequence, Shari’a judges and scholars may only apply the law as it was set down by the early writers. They may not change, modify, or extend that law.

**Shari’a:** (Arabic: شريعة) The Islamic legal system. It is based upon principles found in the Koran and related writings.
The closing of the door of ijtihad has produced a legal system that is often at odds with the modern world. Many important figures in the Islamic world (including Saudi Arabia’s King Fahd [1922–]) have recently advocated reopening the door of ijtihad, but this step has been vehemently opposed by traditionalists (including Iran’s late Ayatollah Khomeini [1900–1989]). It is important to note that the Shari’a is primarily a moral code, more concerned with ethics than with the promotion of commerce or of international relations. Nonetheless, many principles of the Shari’a are not unlike the principles found in the civil law and the common law. Case 1–11 points out the many similarities between the Shari’a and the secular legal systems.

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EXHIBIT 1-10 General Characteristics of the World’s Two Major Legal Systems

In 1955, the Libyan American Oil Company (LIAMCO), a Delaware corporation, acquired three concessions (Nos. 16, 17, and 20) from the Libyan Ministry of Petroleum. The concessions, which followed a model set out in the Libyan Petroleum Law of 1955, gave LIAMCO the exclusive right for 50 years to search for, extract, and sell petroleum from designated areas of Libya. On several occasions between 1955 and 1968, the concessions were amended with LIAMCO’s consent. In their final form, each concession provides that the contractual rights expressly created by this concession shall not be altered, except by mutual consent of the parties (Clause 16).

Clause 28 of each of the concessions also provided for the settlement of disputes by arbitration and stated that the concession shall be governed by and interpreted in accordance with the principles of the law of Libya common to the principles of international law and, in the absence of such common principles, then by and in accordance with the general principles of law, including such of those principles as may have been applied by international tribunals.

In 1969, a military coup led by Colonel Muammar Gadhafi deposed the Libyan monarchy and established the Libyan Arab Republic. Between 1970 and 1973, the new government negotiated changes in the economic provisions of the LIAMCO concessions. Then, in September 1973, the Libyan Revolutionary Command Council promulgated Law No. 66, nationalizing 51 percent of LIAMCO’s con-
cession rights. In February 1974, LIAMCO’s remaining rights were also nationalized. Both laws included provision for compensation. A press statement issued by the Libyan government promised that LIAMCO would receive the net book value of each concession as compensation. No compensation was actually offered to LIAMCO.

LIAMCO asked for the matter to be referred to arbitration in accordance with Article 28 of the concessions. Libya rejected the request and refused to nominate an arbitrator. LIAMCO then asked the President of the International Court of Justice to appoint a Sole Arbitrator in accordance with the arbitration clause. The ICJ President nominated Dr. Sobhi Mahmassani, a well-known authority on Islamic law. Libya did not take part in the arbitration proceedings. LIAMCO asked the Sole Arbitrator to declare that:

1. the nationalization laws constituted a fundamental breach of the concessions;
2. the nationalization laws were ineffective to transfer rights under the concession and neither the purported transfer of these rights nor the title of Libya to oil extracted from the concession areas was entitled to international recognition;
3. in the event of LIAMCO not being restored to its concession rights, it should be entitled to damages.

DR. SOBHI MAHMASSANI:...

Analysis of the Choice of Law Clause

The proper law governing LIAMCO’s Concession Agreements, as set forth in the amended version and said Clause 28, para. 7, is in the first place the law of Libya when consistent with international law, and subsidiarily the general principles of law.

Hence, the principal proper law of the contract in said Concessions is Libyan domestic law. But it is specified in the Agreements that this covers only “the principles of law of Libya common to the principles of international law.” Thus, it excludes any part of Libyan law which is in conflict with the principles of international law.

To decide the meaning of “the principles of international law,” it is useful to refer to those of its sources that are accepted by the International Court of Justice. Article 38 of its Statute provides as follows:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
   a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
   b) international custom, as evidence of a general practice accepted as law;
   c) the general principles of law recognized by civilized nations;
   d) subject to the provisions of Article 59 (concerning the relative effects of judgments), judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

2. This provision shall not prejudice the power of the Court to decide a case ex aequo et bono,[200] if the parties agree thereto.

As to the meaning of “the principles of the law of Libya” in this connection, it is relevant to point out that this comprises any legislative enactment consistent with international legal principles. It includes, inter alia,[201] all Petroleum concessions laws, all consistent relevant sections of any private or public Libyan legislation, including the Civil Code.

In particular, Article 1, para. 2, of the Libyan Civil Code, promulgated on 28 November 1953, provides that:

2. If there is no legal text to be applied the judge will adjudicate in accordance with the principles of Islamic law, failing which in accordance with custom, and failing that in accordance with natural law and the rules of equity.

[200] Latin: “according to what is just and good.”
[201] Latin: “among other things.”
This text, which has been inserted in other Arab Civil Codes (all prepared by the late Egyptian jurist, Dr. A bdurrazak Sanhoury), adds to Libyan statutory law two complementary sources, namely Islamic law and natural law and equity.

A part from that specific reference to Islamic law, this law deserves special mention in connection with Libya. It has always been the common law governing family matters in Libya as well as in all Arab and most Islamic countries. Libya adopts in this field the teachings of the Maliki School of Jurisprudence, which is one of the four Sunni Schools.

Moreover, the Revolutionary government underscores the importance of this source of law in its new legislation. Pursuant to this policy, the Revolutionary Command Council, by Decree dated 28 October 1971 (9 Ramadan 1391 H.), provided that Islamic law shall be the principal source of Libyan legislation, and appointed special commissions to review existing laws and to amend them according to dictates of Islamic Shari’a. Typical examples of such amended laws are the Statute on Wakfs No. 124 of 1972, the Larceny Statute No. 148 of 1972, and the Adultery Statute No. 70 of 1973.

It is relevant to note that the other subsidiary legal sources mentioned in said Article 1 of the Libyan Civil Code, namely custom and natural law and equity, are also in harmony with the Islamic legal system itself. As a matter of fact, in the absence of a contrary legal text based on the Holy Koran or the Traditions of the Prophet [i.e., the Sunna], Islamic law considers custom as a source of law and as complementary to and explanatory of the contents of contracts, especially in commercial transactions. This is illustrated by many Islamic legal maxims, of which the following may be quoted:

- Custom is authoritative.
- Public usage is conclusive and action may be taken in accordance therewith.
- A matter established by custom is like a matter established by law.

Similarly, equity (Istihsan) is considered as an auxiliary source of law, especially by the Maliki and Hanafi Schools. Further, all Islamic rules of law are based on and influenced by religious and moral precepts of Islam.

It is very relevant in this connection to point out that Islamic law treats international law (the Law of Siyar) as an imperative compendium forming part of the general positive law, and that the principles of that part are very similar to those adopted by modern international legal theory.204 Thus, it has been pointed out that Libyan law in general and Islamic law in particular have common rules and principles with international law, and provide for the application of custom and equity as subsidiary sources. Consequently, these provisions are, in general consistent and in harmony with the contents of the proper law of the contract chosen and agreed upon in Clause 28, para. 7, of LIAMCO’s Concession Agreements, in which it is provided, as already explained, that said agreements are governed primarily by those principles of the law of Libya as are common to the principles of international law.

Moreover, in the absence of that primary law of the contract, the same Paragraph provides as a secondary choice to apply subsidiarily “the general principles of law as may have been applied by international tribunals.” These general principles are usually embodied in most recognized legal systems, and particularly in Libyan legislation, including its modern codes and Islamic law. They are applied by municipal courts and are mainly referred to in international and arbitral cases. They, thus, form a compendium of legal precepts and maxims, universally accepted in theory and practice. Instances of such precepts are, inter alia, the principle of the sanctity of property and contracts, the respect of acquired vested rights, the prohibition of unjust enrichment, the obligation of compensation in cases of expropriation and wrongful damage, etc.

**The Arbitration Clause and Its Validity**

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It has been contended by the Libyan government, in its Circular letter of 8 December 1973, addressed to all oil companies... that it rejects arbitration as contrary to the heart of its sovereignty. Such argument cannot be retained against said international practice, which was also

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204 Vis our lectures in the Academy of International Law entitled “General Principles of International Law in the Light of Islamic Doctrine,” Recueil des cours de l’Académie de droit international (1966), and our book on International Law and Relations in Islam (A rabic, Beirut, 1972).
confirmed in many international conventions and resolutions. For instance, the Convention of 1966 on the Settlement of Investment Disputes between States and Nationals of other States provides, in its Article 25, that whenever the parties have agreed to arbitrate no party may withdraw its consent unilaterally. Moreover, Resolution No. 1803 (XVII) of the United Nations General Assembly, dated 21 December 1962, while proclaiming the permanent sovereignty of peoples and nations over their natural resources, confirms the obligation of the state to respect arbitration agreements (Section 1, paras. 1 and 4).

Therefore, a state may always validly waive its so-called sovereign rights by signing an arbitration agreement and then by staying bound to it.

Moreover, that ruling is in harmony with Islamic law and practice, which is officially adopted by Libya. This is evidenced by many historical precedents. For instance, Prophet Muhammad was appointed as an arbitrator before Islam by the Meccans, and after Islam by the Treaty of Medina. He was confirmed by the Holy Koran205 as the natural arbitrator in all disputes relating to Muslims. He himself resorted to arbitration in his conflict with the Tribe of Banu Qurayza. Muslim rulers followed this practice in many instances; the most famous of which was the arbitration agreement concluded in the year 659 A.D. (37 H.) between Caliph `Ali and M`awiyah after the battle of Siffin.206 Sanctity of Contracts

The right to conclude contracts is one of the primordial civil rights acknowledged since olden times. It was the essence of commercial law207 or jus commercii208 of the Roman jus civilis209 whose scope was enlarged and extended by jus gentium.210 Then it was always and constantly considered as security for economic transactions, and was even extended to the field of international relations.

This fundamental right is protected and characterized by two important propositions couched respectively in the expression that “the contract is the law of the parties,” and in the Latin maxim that pacta sunt servanda (pacts are to be observed).

The first proposition means that the contracting parties are free to arrange their contractual relationship as they mutually intend. The second means that a freely and validly concluded contract is binding upon the parties in their mutual relationship.

In fact, the principle of the sanctity of contracts, in its two characteristic propositions, has always constituted an integral part of most legal systems. These include those systems that are based on Roman law, the Napoleonic Code (e.g. Art 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence (Shari’a).

Libya adopted and incorporated this legal principle in its Article 147 of the Civil Code (same in Article 147 of the Egyptian code, Article 146 of the Iraqi and Kuwaiti codes, Article 148 of the Syrian code, and Article 221 of the Lebanese Code of Obligations and Contracts), whose paragraph 1 reads as follows:

The contract is the law of the parties. It cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law.

The binding force of the contract is expressed in Article 148, para. 1, of the same Code:

A contract shall be performed according to its contents and in the manner which accords with good faith.

Moreover, Islamic law, which as we have seen forms a complementary part of the law of Libya (Article 1 of its Civil Code) underscores the binding nature of contractual relations and of all terms and conditions of a contract that are not contrary to a text of law. This is expressed in the legal maxim:

A stipulation is to be complied with as far as possible.211

وَلَيْزَمْ مَرَايَةُ الشَّرْطِ بِقَدْرِ الإِمَانِ (المادة 83 مادة)

This maxim is corroborated by the various sources of Islamic law. For instance, a Koranic Verse ordains:

فَأَوْفَفِنَّكُم بِمَبَانِي الدِّيَنِ (المادة 1)؛

In the same sense, a Tradition of the Prophet reads:

M̱uslims are bound by their stipulations.213

المسلمون على شروطهم (الجامع الصغير للسيوطي ج 2 رقم 1213)

Muslim commentators and jurists expounded this binding force of contracts in detail. In particular, the Learned Ibn Al-Kayyem elaborated this principle in his great treatise I’lam Al-Muwaaqeeen.214

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205Sura (Chapter) IV, Verse 65.
207Latin: “commerce.”
208Latin: “commercial law.”
209Latin: “civil law.”
210Latin: “the law of nations.”
211The Ottoman Ma’ajalah Code, Art 83. Vis our book The General Theory [of Obligations and Contracts under Islamic Law], vol. II, pp. 335 and 462 [(in Arabic)].
212Koran, sura (chapter) V, verse 1.
Further, and as a corollary to the binding force of the contract, its repeal or alteration requires a contrary mutual consent (contrarius consensus) of the contracting parties. This is well underscored in said paragraph 1 of Article 147 of the Libyan Civil Code, as well as in most legal systems mentioned above.

Consequently, one of the parties cannot unilaterally cancel or modify the contents of the agreement, unless it is so authorized by the law, by a special provision of the agreement, or by its nature which implies such presumed intention of the parties.

Likewise, the same rule is recognized in Islamic law, in which cancellation of a contract is not valid except by mutual consent (alikâlah).\(^{215}\)

Furthermore, some contracts explicitly emphasize the already mentioned principles and corollaries in a special provision, as in Clause 16 of LIAMCO’s Concession Agreements, wherein it is provided that the:

contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties.

The said Libyan law, whether in the text of the civil code or in the complementary Islamic Jurisprudence appears clearly consistent with international law in this connection, as exemplified by international statutes and custom.

In the first place, it is relevant to recall here what has been provided in the above mentioned United Nations Resolution in relation to the subject matter.

Resolution No. 626 of 21 December 1952, while asserting the right of states to exploit freely their natural wealth and resources stresses “the need for maintaining the flow of capital in conditions of security, mutual confidence and economic cooperation among nations.”

Resolution No. 1803 of 14 December 1962 declares in Paragraph 1, 8, that:

Agreements relative to foreign investments freely concluded by sovereign states or between such states shall be respected in good faith.

Resolution No. 3281 of 12 December 1974, called the Charter of Economic Rights and Duties of States, recites among the fundamentals of international relations: the fulfillment in good faith of international obligations and the respect for human rights and fundamental freedoms (Chap. i, j, and k).

International custom and case law had always sustained the proposition of pacta sunt servanda. It has been upheld in many arbitration awards, such as Aramco–Saudi Arabia Arbitration of 1958,\(^{216}\) and Sapphire International Petroleum, Ltd. v. National Iranian Oil of 1963.\(^{217}\)

This principle is also upheld by most international publicists, who maintain that the sovereign right of nationalization is limited by the respect due for contractual rights.\(^{218}\) Professor Lapradelle, as rapporteur of the 1950 meeting of the Institut de droit international, recorded that:

Nationalization, as a unilateral act of sovereignty, shall respect validly concluded agreements, whether by treaty or contract.\(^{219}\)

The principle of the respect for agreements is thus applicable to ordinary contracts and concession agreements. It is binding on individuals as well as governments.

The same is admitted in Islamic law, as is evidenced by many historical precedents. For instance, no less than the Great Caliphs Omar Ibn Al-Khattab and Imam Ali accepted to abide by their agreements and to appear before the Cadis (judges) as ordinary litigants without feeling that this conduct was against their sovereign dignity.\(^{220}\)

Libya was held to be bound by its arbitration agreement and to have breached its concession contracts with LIAMCO. LIAMCO was awarded U.S. $80,085,677 in damages. ■

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\(^{216}\) International Law Reports, vol. 27, p. 117.

\(^{217}\) Id., vol. 35, p. 136.


\(^{220}\) Vis our article on “The Judiciary and A l-M awerdi,” A l-M awerdi Millenium (A rabic, Cairo, November 1975).

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Chapter Questions

1. Define law.

2. The Harvester Company entered into a contract with Country R to harvest lumber on government land in Country R for a period of 20 years. The contract provided that if there were any disputes, the matter was to be resolved by arbitration with the International Chamber of Commerce appointing the arbitrator, and the arbitrator applying the rules of
international law, the general principles of law, and equity. Two years later, Country R told Harvester to cease operations and leave the country. Country R made no effort to compensate Harvester for the country’s breach of the contract. Harvester has now initiated an arbitration proceeding. Country R claims that contracts between a state and a private person can be broken at any time by the state because to do otherwise would be to deny the state its sovereignty. Discuss.

3. What is the difference between public and private international law? Is this a legitimate way to classify international law?

4. Several years ago, a multilateral treaty came into effect among some 45 countries, including most of the major developed countries of the world. The treaty, known as the “Outer Space Treaty,” forbids any member state from claiming “any planet, satellite, asteroid, or other celestial body” as part of the territory of the member state. State X, which is not a party to the treaty, recently sent a spacecraft to the earth’s moon. The crew members of the craft unfurled the flag of State X and claimed a 1,000 square kilometer surface area of the moon to be part of the territory of State X. Several small buildings were constructed, including a radio transponder and a landing guidance system.

State Y, joined by the other member states of the Outer Space Treaty, has brought suit against State X in the International Court of Justice. They ask the Court to declare that State X’s claim to the territorial annexation of part of the moon be declared void. They argue that the provisions of the Outer Space Treaty forbidding such annexations are part of customary international law and that the treaty itself is an expression of the world community’s opinio juris. State X argues that even if there is an opinio juris, none of the members of the world community have acted to prevent the annexation of parts of the surface of the moon, and therefore there is no usus. How should the Court rule? Discuss.

5. The head of the national police of Country X, Commandant Doe, ordered a raid on the house of Jones, an outspoken opponent of the dictator of Country X. Jones was forcibly dragged from his home, brutalized, and then taken to the office of Doe, who personally executed Jones without any legal cause. Jones’s body was then dumped on the steps of his home, terrifying his widow. Jones’s widow fled to Country Y and took asylum. Several months later, Doe came to Country Y on a personal visit. While Doe was in Country Y, Jones’s widow brought a wrongful death suit against him. Country Y has a statute that gives its courts jurisdiction over actions brought by a plaintiff either in delict or tort for a violation of international law. Will widow Jones succeed in her complaint? Discuss.

6. On July 20, 1974, Turkey invaded Cyprus to “protect” the minority Turkish population of Cyprus, occupying approximately the northern third of the island nation. On November 15, 1983, following a failure of the negotiations between Turkey and Cyprus, the area under the control of the Turkish Army declared itself the Turkish Republic of Northern Cyprus (TRNC). To this date, only Turkey has recognized the TRNC.

Assume that a large cache of precious metals belonging to the treasury of Cyprus was captured by the Turkish Army during its invasion and subsequently turned over to the TRNC. The TRNC has now contracted to sell the cache to a private buyer in Western Europe. The Cyprus government, learning of this, brings suit in the state where delivery is to take place asking the Court to either (a) enjoin the sale and turn the metals over to Cyprus or (b) require the buyer to pay Cyprus for the metals once they are delivered by the TRNC. How should the Court rule? Discuss.

7. State A dumps its raw, unprocessed sewage into the sea thereby killing much of the marine life along its coastline and the coastlines of its neighbors, States B and C. The three States each have recognized the jurisdiction of the International Court of Justice (ICJ) to resolve disputes between them involving breaches of international law. States B and C, accordingly, have brought suit in the ICJ against State A. They have asked the Court to order State A to take immediate steps to stop dumping sewage into the ocean and to pay for their expenses in cleaning up their coastlines. What should the Court do? Discuss.

8. State A and State B have a common border. State A has ratified the UN Convention on the Prevention and Punishment of the Crime of Genocide, State B has not. State A has entered into a treaty establishing commercial relations with State X and extending Most Favored Nation status to State X, State B has not. State A has a treaty with State Y that
establishes the international border between State Y and State A’s Western Province. Which of these treaties will continue to have effect in the changed territory if
(a) State A cedes its Western Province to State B?
(b) The Western Province obtains its independence?
(c) State A and State B merge and become new State C?

Review Problem

You are a finalist for a position in the United Nations Office of Legal Affairs. The Assistant Secretary-General for Legal Affairs, the head of that office, has invited you to her office for an interview. During the course of the interview, she asks you the following questions:

1. What is international law? How is it different from comity?
2. How is international law made?
3. What rules govern the making of international treaties?
4. What must one show to establish the existence of a customary rule of international law?
5. If a state ratifies an international human rights convention but refuses to implement the convention’s provisions domestically, who may sue to compel the state to comply with its obligations?
6. A certain large country has recently broken up into several smaller countries. When should those countries be recognized? What are the legal consequences of extending recognition?
7. How are intergovernmental organizations different from nongovernmental organizations?
8. Does international law grant individuals any benefits, rights or duties?
9. What are the principal similarities of the common law, the civil law, and Islamic law, and what influence do those municipal law systems have on international law?