THE CREATION OF INTERNATIONAL COMMERCIAL LAW: a desuniform uniformization

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ABSTRACT

Given the growing number of interest groups acting in the realm of International Trade, a wide range of sources of International Trade Law can be identified. This paper will glance upon the three main vectors of creation in this field, in order to analyze how integrated this creation actually is. Initially, we must study the role of international organizations specialized in creating uniform norms about international trade and related issues. Those organizations, some private, and others constituted by States, will act not only as a source of Law, but also as a discussion forum among the States. Later, we shall study the interpretative and harmonizing function of the arbitral courts, again, specialized in the subject at hand. Finally, as it has been studied, the main vector is the *lex mercatoria* itself, translated as a set of principles created by the international market's economic agents. This set of principles is important especially for cross-border trade, since its early days, during the Middle Ages, becoming more significant, in this paper, with regards to its integration with Public Law. Hence, we may conclude that the parts played by different forums and economic agents ranging from States to transnational companies, in a complex network of diverse interests, translates itself as the International Trade Law.

KEY-WORDS: International Trade Law,. Uniform Law. Comparative Law. International Organization

A CRIAÇÃO DO DIREITO DO COMÉRCIO INTERNACIONAL: uma uniformização desuniforme

RESUMO

Dado o crescente número de grupos de interesse atuantes no âmbito do comércio internacional, verifica-se uma diversidade de fontes do Direito do Comércio Internacional. O presente trabalho estuda os três principais vetores de criação deste ramo, de modo a analisar o quanto uniforme é esta criação. Primeiramente, averígua-se o papel das organizações internacionais especializadas em criar normas uniformes sobre comércio internacional e temas a fins. Essas organizações, por vezes privadas, por vezes compostas apenas por Estados, funcionam não apenas como uma fonte de Direito, mas também como fórum de debate entre os Estados. Posteriormente, verifica-se a função interpretativa e harmoniosa das cortes arbitrais, novamente, especializadas no tema em tela. Por fim,

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estuda-se, talvez, o principal vetor é a própria *lex mercatoria* traduzida como conjunto de princípios criados pelos agentes econômicos no mercado internacional. Este conjunto de princípios tem importância para comércio interfronteiriço desde seu surgimento, na Idade Média, e ganha destaque, no presente trabalho, quanto a sua conciliação com o Direito estatal. Desta forma, conclui-se que a atuação de diferentes fóruns e agentes econômicos que vão desde o Estado à empresa transnacional, numa complexa rede de interesses diversos, se traduz no Direito do Comércio Internacional.

PALAVRAS-CHAVE: Direito do Comércio Internacional. Direito Uniforme. Direito Comparado. Organização Internacional.

The Creation of International Trade: a fragmented integration

The history of Trade Law integration begins it the renaissance period, during which it was necessary to confront a fragmented Europe, divided in small feuds closed in their own agricultural activities, without any commercial bond between them. With the arrival of the renaissance period and the growth of Italian mercantile villages, that which we know today as *lex mercatoria* began being used in the European market. According to Irineu Strenger (STRENGER, 2005), Goldman defines *lex mercatoria* "precisely as a set of principles, institutions and rules originated from various sources, which nourished and still nourishes the structures and the specific legal functioning of the collective international trade operators".

Just as in the past, the market currently seeks legal mechanisms that are efficient in the regulation of International Trade Law, through the integration of commercial norms. For that, instead of applying the vendors' or the buyer's norm, through a rule of connection, or the principle of proximity, or even through best interest analysis; in the international trade the most efficient solution has always been the combination, the integration and the creation of a common rule. This way, international contract is ruled by a norm known to both parts. Legislative integration, therefore, has been since its origin, at the end of Feudalism and the beginning of Capitalism, one of the most important directives for international commerce.

The development of international trade through, specially, the expansion of communication means, and the opening of markets, permits us to, today, state that we live in a new phase of globalization. Such *phenomenon*, although controversial with respect to its origin, occurs through economic and social integration of the people in its global sphere, which, in its turn, happens by means of the cultural exchange and the expansion of domestic markets. (MAXEINER, 1997).

In spite of controversies regarding the phases of globalization, authors often characterize this new phase by the growing speed by which information is being exchanged as well as the problems derived from this new reality, such as intellectual property Law issues and the use of new technologies such as the internet. In the Law, according to Cláudia Lima Marques, Eryk Jayme states that we are living in post-modern times characterized by plurality, communication, speed, fluidity and internationality of private relations (MARQUES, 2008).

In this scenario, we face a diversity that is not only cultural but also legislative, in which for the same cause it is possible to apply more than one national norm, at times, one international rule, or even customary rules. One may conclude, therefore, that the various processes of integration, as it will be demonstrated further ahead, create a growing variety of International Trade norms, so rich and non-centralized, that leads us to talk about a fragmented integration.

International Trade Law

The creation of International Trade Law occurs by the very own integration of substantial international trade norms (CASTRO, 2000 and TENÓRIO, 1976). Private International Law, on the other hand, relate to internal norms referred to trade disputes with an international element. Oscar Tenório stresses the fact that such distinction does not justify a separate study, once the "integration of Law happens as a consequence of the experience and the observation of the rules of conflicts among laws from the various States" (TENORIO, 1976, p.224).

Thus, Irineu Strenger defines Trade Law as the "complex of legal norms that rule over private relations derived from the commercial activity". In this sense, the author argues that International Trade Law is part of Private International Law, which has the purpose of "setting the principles which determine the jurisdiction of States' legal norms, belonging to Trade Law (STRENGER, 2005, p. 757).

On the other hand, the same author favors the autonomy of this branch of Law, by explaining that International Trade Law, still in the process of consolidation, uses technical means that are broader than domestic Law, due to the very international nature of its legal relations. The autonomy of International Trade Law, on the other hand, will be always subject to the effectiveness of domestic law (STRENGER, 1996).

Regarding its sources, Maristela Basso states that International Trade Law gets them from transnational Law, as well as from domestic Law. However, according to her, the first will serve in the absence of internal norms, which is the subject of wide opposition in the doctrine. In addition, the author includes in the group of transnational norms *lex mercatoria* and its specific branches, such as *lex petrolea* (RIBEIRO, 2006). Irineu Strenger, on the other hand, argues that customary Law and normative treaties are sources exclusive to International Trade Law, since, as part of International Law, it must reveal itself only through the "concordant will of various States" (STRENGER, 2005, p. 759).

The author explains that there are two fundamental requirements for the existence of International Trade Law: "the diversity of trade law norms" and "the existence of international trade" (STRENGER, 2005. p. 757-728).

The Integration

If the *phenomenon* of integrating rules of International Trade Law is the reflex of the growing worldwide commercial integration, or if it is, *per se*, the facilitator of the latter, that's irrelevant, given the advanced stage in which both phenomena find themselves today. What is noteworthy, however, is the relation between them: trade grows in the same pace that norms get integrated which in the same rate grows as international trade expands. Considering that, it is important at this point, to analyze the phenomenon of integration.

As pointed by Jacob Dolinger, the diversities originated from the plurality of people's cultures are natural and necessary. The integrated law, according to the author, is always welcome when spontaneous (DOLINGER, 2009). Oscar Tenório, following René David's lead, cites as the main influence factors for integration geographical aspects as well as ethnical, linguistic, religious and economic aspects. Following up in his conclusion, the author argues that "without a sense of national reality it's not possible to think about integration" (TENÓRIO, 1976, p. 39).

The concept of a general and universal integration of the Law has been long surpassed. By the 20th Century, the illusion of creating a "Universal Law" had faded out completely. That concept was seen as utopic, considering that in order to become applicable, a uniform Law depends on concessions from each State, individually, as well as on the uniform application of each

jurisprudence. This ideal was impracticable, especially with regards to certain Civil Law institutes that reflect the culture and traditions of each people (CASTRO, 2000).

Nevertheless, with Commercial Law, as pointed out by Jacob Dolinger, the process of integration, if not natural, presents itself as necessary (DOLINGER, 2009). Sharing the same view, Irineu Strenger understands that, in Commercial Law, the integration of International Private Law norms appears as one more justified link (STRINGER, 2005). Due to this particularity, one can perceive a major movement towards integration within the field of Commercial Law. Considering that international trade carries within it the peculiarity of being linked to various distinct judicial systems, it is also necessary that its norms end up providing solutions for future conflicts of law.

With this objective, there are many examples of International Trade Law norms that are uniform. In order to illustrate this one can list the following norms referred to as the most important ones for Brazil and the world: Convention Providing a Uniform Law For Bills of Exchange and Promissory Notes, 1930; Uniform Law Relative to Checks, 1931; European Convention for Conflict Resolutions involving Investments between States and Nationals from other States, 1965; Inter-American Convention for International Trade Arbitration, 1975; Rome Convention, 1980; United Nations Convention for the International Sale of Goods, 1980; Inter-American Convention for Applied Law related to International Contracts, 1994.

The International Organizations

> "There is no social relations domain without a corresponding organization in charge of proposing rules of behavior and bringing together national legislations and promoting the conclusion of international treaties."
>
> Alain Pellet, Patrick Daillier e Nguyen Quoc Dinh

As already mentioned in this work, there are various forms of integration in Commercial Law. We shall deal with the role of international organizations, international arbitration and *lex mercatoria*.

International organizations as well as non-governmental organizations (NGO's) have been under the spotlights of the international trade arena, due to their responsibility in creating uniform norms and, many times, because of the creation of an international jurisprudence, considering that the most important international arbitration courts are organized within their internal structures.

Presently, we shall study the administrative structure of such organizations, giving special attention to the creation process of a uniform norm, and later, we shall analyze the most important international organizations acting in the international trade field.

According to Alain Pellet, Patrick Daillier and Nguyen Quoc Dinh, in spite of being very theoretical and restrict, Sir Gerald Fitzmaurice's definition seems to be the most adequate among those presented by the doctrine. According to the mentioned author, international organizations are "associations of States, constituted by treaty, composed of a constitution and common obodies, and bearing legal personality distinct from that of the individual member-States". (PELLET, *at. al.*, 2003, p. 592). The above mentioned authors remind us also, that the Vienna Convention on Treaties Rights, from 1969, in its 2nd article, first paragraph, "i", does not present us with a definition of "international organization", stating only that they are considered as "intergovernmental organizations" and stressing the significant distinction between the latter and NGO's. (PELLET, *at. al.*, 2003).

Celso Mello refers in his manual to Angelo Piero Sereni's definition which carries in itself the advantage of detailing all of those organization's attributes (MELLO, 1994, p. 507):

> International organization is a volunteer association of international legal subjects, constituted by an international act and ruled in the relation between parties by the International Law norms, and which materializes itself as an entity of stable appearance, bearing its own internal legal system, composed of its own bodies and institutes, through which it seeks to achieve its members' common objectives based on private functions and exercising the powers that have entrusted upon it.

Based on the concept that the organization is a "entity of stable appearance", Celso Mello derives the legal personality of the organization (MELLO, 1994). On this subject, Ian Brownlie claims that to be a creditor of international rights is the same as possessing international rights and obligations and have the capacity to defend their rights through an international claim. Thus, the author points out that the question of personality involves "the capacity to present claims about

International Law violations, the capacity to sign treaties and settlements valid in the international domain, and to enjoy privileges and immunities granted by national jurisdictions" (BROWNLIE, 1990, p. 71). Based on that, the author concludes that States and organizations are the only regular kinds of subjects in the international scenario, in spite of recognizing simlar types (BROWNLIE, 1990). It is understood that the legal personality of an international organization is, in general, derived from the will of the State – main international agent, whose rights and obligations are vast due to the Principle of Sovereignty, which is attributed only to it. As seen, this is one of the elements of its own definition and, for that, it is considered that every organization duly constituted has legal personality (PELLET, at. al., 2003).

Another observation regarding the legal personality of the international organization is the fact that it is derived and, consequently, variable, as it depends on what the States determines to be the competence of that organization. Nevertheless, there is a "hard core" of the personality, which is characterized as "functionality" by Alain Pellet, Patrick Daillier e Nguyen Quoc Dinh. This functionality depends on the attributions of each organization (PELLET, at. al., 2003). For this reason, doctrine will explain that the assessment of an organization's legal personality is made through the functional criteria, and based on that, Ian Brownlie established three criteria for this assessment:

> 1. a permanent association of States, pursuing legal objectives, having its own bodies;
> 2. a distinction in terms of powers and legal objectives, between the organization and its member-States;
> 3. the existence of legal powers that may be exercised in the international domain, and not only in the realm of national systems of one or more States

The doctrine classifies the legal personality of an international organization under internal and international or external. The first refers to its capability to execute, within the territory of a sovereign State, the necessary activities for its maintenance such as hiring work force and acquiring property. As for the international personality, on the other hand, according to João Mota de Campos, is the "set of rights, obligations and prerogatives that manifest themselves in relation to other subjects of International Law" (CAMPOS, 1999, p. 156), thus, it is possible to assert, for example, the capacity of an organization to present a claim against a State.

As a conclusion one can derive that international organizations are those with objectives defined by the States. Nonetheless, they maintain a rather independent relation with such States in what refers to their autonomy to decide. Another important characteristic is their permanent action, which distinguishes them from international conferences.

Based on that, it becomes important to analyze the competences of such international organizations. Alain Pellet, Patrick Daillier e Nguyen Quoc Dinh point out the existence of three categories of competence: operational competence, normative and jurisdictional or near jurisdictional. The first refers to the competence to organize and create norms for their own governance, with special importance for budget related norms. (PELLET, *at. al.*, 2003).

Regarding normative competence, doctrine usually classify norms designed to regulate the legal order of international organizations as "Original Law", as a reference to those norms ruling over the creation of the organization, such as their constitutive act and the Common International Law, and in Derivative Law, those norms created by the organization itself, and to which they are naturally obliged, (CAMPOS, 1999). It is from this "Derivative Law" that stems the International Uniform Commercial Law, itself. According to Rezek, such competence is so important that the existence of an international organization without powers to celebrate treaties is questionable (REZEK, 1991). In this sense the author stresses out the definition of international organization as proposed by René-Jean Dupuy in which this normative function is highlighted: "international organizations are those which as a result of their legal statute, have the capacity to seal international settlements in the exercise of their regular functions and for the realization of their objective." (REZEK, 1991, p. 251). On the other hand, the author, in the same line as Celso Mello, points out that legal personality does not imply automatically that there is a capacity to sign treaties: it is necessary that the legal act creating the organization so determine. (MELLO, 1994). Besides that, the Vienna Convention on Treaty Law, of 1986, establishes in its 6th article that "the capacity of an international organization to celebrate treaties is ruled by the norms of the organization".

This Derivative Law arises from the decision making process of the international organizations leading to the creation of unilateral norms. Rezek argues that every organization must have, at least, two bodies: one assembly general by which member-States gather periodically and

vote in equal conditions; a permanent council that works uninterruptedly and performs an executive function and which could be composed either by representatives of all member-States or by just part of them (REZEK, 1991). Alain Pellet, Patrick Daillier e Nguyen Quoc Dinh mention the importance of jurisdictional bodies whose activities are totally independent from intergovernmental bodies, as well as the importance of consulting bodies, responsible for preparatory work, without initiative to define the contents of their tasks, performing as an auxiliary body to the secretariat. The secretariat, or commission, is another body whose administrative importance is necessary for governance of the international organization.

With regards to the decision making process, Rezek understands that, in the international organizations, the majority principle is not applied in the same way as in Internal Law, hence, the submission of the minorities is not common in the international domain – with the exception of the ECC, as it will be demonstrated further on.

Alain Pellet, Patrick Daillier e Nguyen Quoc Dinh, on the other hand, recognize that the majority system is often adopted in a similar manner than that of the internal systems of the member-States, as an attempt to democratize international politics. Also according to the same author, since this system does not benefit these great powers, many times the system of ponderable voting is used, as in the case of the International Monetary Fund and the World Bank, in which the value of each vote is proportional to the capital contribution of each country, as it happens in the internal regime of a commercial society. Nonetheless, the bodies of the organization may still choose the system of consensus. This system is adopted when a decision reached by a majority is to be adopted by every State, including the ones that belong to a minority. In the words of Alain Pellet, Patrick Daillier e Nguyen Quoc Dinh, "this systems carries the inconvenience of translating, in general, a commitment over a disagreement" (2003, p. 641). Nevertheless, through consensus, one can gain the advantage of avoiding that the approved decision become ineffective, once the countries that were against its approval could end up not incorporating it to its legal system or not executing it, depending on the regime adopted by that organization.

Having understood the concept, the competences and the functions of an international organization, it becomes easy to understand how those institutions are important for the integration of International Trade Law. As seen, the main competence of the international organizations is the elaboration of treaties through the above mentioned bodies. Before we can verify how this task is accomplished, it's important to refer to the observation made by Claire R. Kelly regarding the fact

that the political role played by those international organizations could be "pure" as a State that puts pressure so that an international norm may be created, as an effort to force a legal integration. This task, on the other hand, may reflect in a political preference and thus, the organization must choose: "*What situations need norms? Which or whose norms? How should norms be implemented?*" According to the author, this is the way an organization's decisions become legitimate, which is of extreme importance for the accomplishment of their tasks. (KELLY, 2009, p. 21).

When it comes to international organizations, as opposed to States, the power of sealing a treaty does not come from their sovereignty, provided that this is not one of its attributes, but from its objectives and the specific dispositions of its constitutive treaty. For that reason, the process of adopting a treaty by an organization varies from one institution to another. José Cretella, however, will summarize what would be the common procedure: the secretariat deposits the treaty and summons the organization's members for meetings – debates which can held in general or extra-ordinary assemblies – and will be responsible for supervising the implementation of such conventions.

However, the creation of treaties is not the only way that an organization may help in the process of norm integration. Organizations will serve also as forums for the States' practices when the States, through their representatives manifest their internal norms and the trade customary practices of their countries. Furthermore, the international organization has great importance for Consuetudinary Law, through the approval of resolutions which are often not mandatory but merely declarative. It is necessary to underline that the interpretation of an organization's norms is made by their internal bodies, as an attempt to avoid disagreements between member-States. Such interpretative acts although not mandatorye, can not be ignored by the member-States. Other activities may be listed, such as (i) the work of judicial experts participating in the codification and the progressive development of the Law; (ii) the judicial decisions which help uniform the interpretation of International Law norms; (iii) official statements of application on specific subjects; etc (BRONWLIE, 1990).

It is important to stress the fact that international organizations' activities in the purpose of unifying Trade Law are not critic-proof. Initially, one can assess the existence of a wide range of organizations that even if not carrying the same objectives, given that this would not be possible due to the Principle of Specialty, often have merging objects, as in the case of the World Trade Organization and the International Intellectual Property Organization, from the U.N.; not to mention

the jurisdiction conflict between the WTO and other organizations such as the MERCOSUL. Besides that, it's important to clarify that a treaty applied in the domain of an international organization, in general, does not oblige non-member States, which maintains a diverse legislation.

International Arbitration

> "Procedural *lex mercatoria*" should therefore continue also to be the primary generator of the "substantive *lex mercatoria*"; and both can allow us to better understand how law evolves, especially in our increasingly globalized world."
>
> Luke Nottage

International organizations, as seen, in addition to their normative competence, also carry a jurisdictional or near-jurisdictional competence. It is through the actions of international arbitration courts, working in the realm of international organizations, that it became one of the most important sources of Customary Trade Law, being, for some authors, one of the elements of *lex mercatoria* itself (STRENGER, 1996).

According to José Maria Garcez, arbitration is defined, in the view of René David, as such:

> the technique used to settle disputes of interests between two or more persons, by one or more persons – arbitrator or arbitrators – holding powers resultant of private conventions and who decide, based on such conventions, without being invested by the State in that mission (1999, p. 163-164)

Arbitration will be international based on, essentially, the same differentiation criteria between an international and a national contract, which means when it is connected to more than one judicial system, either due to subjective aspects – nationality of the parts – or due to objective circumstances such as the place of celebration or compliance of the contract. Furthermore, one of the international arbitration's characteristics is the need for it's judicial confirmation in order to be applied.

Jacob Dolinger and Carmen Tiburcio remind us the important distinction between a national and an international arbitration, given it's nationality (DOLINGER; TIBURCIO, 2003, p.91):

> (i) "determines the norm to be used to rule upon the arbitration, which will be, at first, this nationality's law;
> (ii) "determines the state's court that may end up having jurisdiction upon the arbitration process, in case an intervention becomes necessary;
> (iii) "identifies the proceedings to be adopted for the application of the arbitration award, considering that usually an award issued internally is easier applied than on issued elsewhere".

In Brasil, the Supreme Court (STF) has always confirmed arbitral awards issued abroad, which allowed the doctrine to conclude that the criteria adopted was geographical, and that was later confirmed through Law nº 9.307, issued on September 23rd, 1996, as the Arbitral Law Act (Art. 34) (DOLINGER; TIBURCIO, 2003).

The UNCITRAL model-law regarding international arbitration brings the following, which is broader and more coherent with the commercial reality:

> An arbitration is international if:
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
> (b) one of the following places is situated outside the State in which the parties have their places of business:
> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

As such, arbitration is currently the most commonly used means of dispute settlement outside the judicial system. Jacob Dolinger and Carmen Tiburcio state that "proof of that is the existence of several respected institutions acting with the purpose of making their use effective". (DOLINGER, TIBURCIO, 2003, p. 49). It can be verified that international arbitration has been increasingly making use of equity, the general principles of law, international trade practices and international treaties.

Hence, one can derive that arbitration is the means by which all rules of international trade – translated by the international conventions or applied by trade agents through customary law and general principles – arrive at an interpretative systematization and conformation, creating, thus, an international jurisprudence of strong impact over international trade agents. The integration of International Trade Law, through international arbitration, therefore, is obtained by three different

ways: by the conformation of procedural rules, facilitating the recognition of foreign awards; by the interpretation of international rules; and by the use of precedents.

On the other hand, Gary Born will stress the fact that international arbitration, in spite of being accepted as a means for dispute settlement, only finds its efficacy due to the complexity of both national and international legal systems, given that it is only due to the legal binding effect brought by these norms, that the States recognize the arbitral awards (BORN, 2001).

Concerning the advantages of arbitration, based on Jose Maria Garcez, according to William F. Fox Jr, arbitration is sought in order to avoid the long lasting judicial processes, given the burden usually carried by the judicial power related to limit resources, and slowness caused by the great number of judicial claims (GARCEZ, 1999). In addition to that, arbitration provides a confidential treatment, which serves to protect the commercial secrets of the litigating parties. Jacob Dolinger and Carmen Tiburcio point out, also, the fact that arbitrators are chosen based on their specific knowledge of the commercial field involved in the claim to be settled, which confers them the capacity to arrive at a better quality award than that of a judge (DOLINGER; TIBURCIO, 2003). Furthermore, doctrinaires mention the possibility of choosing the place of the arbitration as an advantage, once it is possible to choose a neutral country, hence avoiding overlapping awards. A lot has been said about developing a less costly procedure. Insofar as this last advantage is concerned, Luke Nottage argues that such advantage is just a relative one, considering that in some cases the arbitral process can be just as costly as a judicial one (NOTTAGE, 2006). The possibility of the parties to choose the law to be applied, is also brought up, specially, their choice for applying the equity principle. For all that, Gary Born will state that international commerce arbitration will provide more security for the parties involved (BORN, 2001).

Following that, a brief analysis must be made of the various international organizations and international arbitral tribunals whose works are related to international trade, without, however, intending to exhaust the examples:

UNCITRAL

The *United Nations Commission on International Trade Law* – UNCITRAL – is a body of the United Nations responsible for developing international trade norms. Created in 1967 with 29 members, it is currently composed by approximately 60 member-States. Its objective is to elaborate legal instruments about international trade, among which are included bankruptcy, transport, sales, insurance, commercial arbitration, international payment, intellectual property, legalization of documents, etc (UNCITRAL, 2009).

Its decision making process is subject to the general rules of the UN's General Assembly and involves: (i) the Commission; (ii) Work Groups (composed even by non-members); and (iii) the Secretariat. It is important to point out that the Commission and the Work Goup act upon consensus.

Such "consensus", however, is not clear. The Commission speaks of a "great cooperation" between countries with different economic, social and legal realities (KELLY, 2009). In its observations, France criticizes this method based on the increase of members in the Commission (UNCITRAL, 2007).

Among the various works already developed, a great distinction, without any doubt, is the U.N.'s Convention on Contracts for International Sales of Goods (CISG). Approved on April 11th, 1980, this Convention went into effect only in 1988, for the 11 first countries that deposited its instruments of application to the Secretariat – Argentina, China, Egypt, United States, France, Hungary, Italy, Yugoslavia, Lesoto, Siria and Zambia.

The Commission elaborated the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as a means to uniform and formalize the international arbitral procedures, known as the Convention of New York, 1958. Currently, this Convention is adopted by 144 States. The four Mercosul countries signed up the Convention under a reciprocity clause. Hence, the Convention has a wide scope of application and is a reference for the International Trade Law.

In 1985, UNCITRAL created its model Law for International Commercial Arbitration. According to Pieter Sanders, the impact of the Convention was so relevant that there is not a single

State which updated its arbitral law without taking its dispositions in consideration. (Garcez, 1999). In 2006, the Convention was revised, and a chapter about cautionary measures was added to it.

WTO

The WTO is undoubtedly the most important organization for the integration of International Trade Law. Created by the GATT (*General Agreement on Tariffs and Trade*) State members in the Uruguayan Round, in 1994, it currently gathers 153 effective members and 30 observing countries (WTO, 2010).

The World Trade Organization serves the purpose of regulating international trade by imposing restrictions against States' intervention in their domestic economy, thus avoiding a snowball harming effect in the world economy. One of the mechanisms of implementation of its rules' is the international arbitration through which a State can claim against another member-State which it perceives to being acting unjustly in its economy or breaking the rules of this organization, as well as the uses and customary practices of international trade.

One can therefore state that the WTO has two distinct functions related to the integration of International Trade Law: the creation of uniform norms, serving as a debate forum for the member-States and as a dispute settlement court. Regarding this last aspect, its application deserves a closer analysis. The observer-countries, international organizations, regional or local, are not eligible for that. This way, through its rulings, the WTO has managed to make it easier for third parties (private individuals or firms) to participate in disputes such as *amicus curiae*, in spite of this being still a controverted theme within the organization's members (WTO, 1998). There are two bodies involved in the dispute settling process: The Dispute Settlement Body (DSB), responsible for resolving trade quarrels based on the Dispute Settlement Understanding (DSU), who can call upon a special group known as Panel, whose objective is to "seek information and technical advice from any individual or body which it deems appropriate" (Article 13.1 on the Understanding on rules and procedures governing the settlement of disputes, Annex 2 of the WTO Agreement).

Finally, we must emphasize the WTO's voting system. After being created in the Uruguayan Round, the main change was, without a doubt, the elimination of the consensus vote for the formation of panels – it was originally necessary to obtain a consent from all the members of an agreement

before the Panel reports could be adopted, including that of the responding country (FELIX, 2002). This was called the system of positive consensus.

Starting in 1995, the system changed to what is called a negative consensus, which consists in prohibiting the blocking of the panel's report, in other words, "the report shall be adopted at a DSB meeting unless the DSB decides by consensus not to adopt the report (Article 16.4 for panel reports and Article 17.4 for Appellate Body reports – both being ESC dispositions)" (LUPI, 2001). This change had direct effects over the settlements originated in the WTO, given that, this way once the panel report had been concluded, it will hardly be vetoed and it will have its execution determined for a term that will be established on a case-by-case basis. Another important effect is noted when we analyze the impact of the decisions in the WTO's realm, which, in spite being applied to a particular case, will reverberate throughout the international trade domain.

An important observation is regarding the possibilities of private acts being questioned within the WTO. The prevailing understanding is that this is not possible, once WTO rules establish governmental commitments, which, for that reason, cannot be broken by a private entrepreneur, for example. Nevertheless, it is accepted that private acts may be directly connected to acts of government, as incentives, which could become the object of claims having only the member-State as the passive subject (WTO, 2010).

Some examples of Conventions created within the WTO are the following: Agreement over the Implementation of Article VI from GATT 1994, about anti-dumping policies; Agreement of the Aspects of Intellectual Property Related to Trade, from 1994.

OAS

In spite of the lack of a specific arbitral tribunal to handle trade conflicts, the OAS (Organization of American States), currently composed of 35 member-States has important conventions regarding the theme of this work: The Inter-American Convention of Panama over International Trade Arbitration, of 1975, is currently sanctioned by 19 countries (among which, the four Mercosul members and the United States who signed it under a reciprocity clause). The Convention was created to facilitate arbitral awards' validity within the territories of the Organization's member-States. It also accepts the use of the OAS' procedural norms of the Inter-

American Commission on Trade Arbitration, in case the parties do not reach an agreement about the applicable rules (art. 2). According to Carmen Tiburcio, the Convention has a very broad application range, given that, among other subjects, it regulates extraterritorial arbitral awards, the validity of commitment clauses and compromise, etc. (ARAUJO; CASELA; 1998). Lauro Gama concludes that this is, hence, "one of the most important and useful results of the First Inter-American Conference Specialized in International Private Law (CIDIP-I)", given that its range of application is not restricted to American States (ARAUJO; CASELLA, 1998, P. 373).

The EU

The European Union is an international body whose member-States have reached such an integration level that, today, it represents the only economic block working as a common market in the whole world. The EU plays an important role in the process of International Trade Law integration, once the creation of conforming norms among member-States is part of its very objectives to facilitate commercial exchange between countries. This field of Law originated from the EU is currently known as Communitarian Law (MELLO, 1996).

Celso Mello argues that Communitarian Law is a field of International Public Law with *sui generis* attributes, among which the absence of nationalism (MELLO, 1996). Some of the main characteristics of Communitarian Law are the imposing effect, or, the mandatory nature of its norms, with provision of sanctions that are applied when a member-State does not abide by its rules; priority towards the States' Internal Law: the direct effect, meaning that the Communitarian Law is not dependent of a specific reception procedure by the State in order for the rule to be applied internally, with a few exceptions; and uniform interpretation and application (FRANCA FILHO, 2002).

With regards to the legislative process, the EU competent bodies are the European Parliament, the European Council, the Commission, The European Court of Justice and the European Court of Auditors. The European Parliament is currently composed by 736 members (MEP) elected directly by the citizens of their respective member-States (EU, 2010) It is important to note that MEP's are not bound by their country's interests but by the political position adopted by each one's party. It is therefore, the most important law making body, together with the European Council, in a process known as codecision (established by Article 251st of the CE Treaty and instituted by the Maastricht Treaty). This process takes place when the majority of the European Council adopts a norm given

that it must be then submitted to the Parliament for voting. However, when concerning bills that are related to Monetary and Economic Union, the process of cooperation is still applied (which has gradually lost space to the codecision process). According to Casella, this is a way for the Parliament to improve the proposed legislation. (CASELLA, 2002) and works as follows:

> The cooperative procedure starts always by a proposal from a Commission, which is transmitted to the Council and the European Parliament (…). The Parliament expresses its view about the Commission's proposal. The Council will deliberate according to a qualified majority and establishes, thus, a common position (…).
> The Parliament examines such position (…). In the case of rejecting a proposal the Council can only rule on a second reading by unanimous consensus.
> The Commission will then re-examine, within a one-month term, the proposal which constituted the basis for the Council to establish its respective common position and transmits its proposal to the Council (…).
> Within a three-month period, the Council may approve the re-examined proposal by qualified majority, alter the proposal by unanimity or approve the alterations which were not considered by the Commission, also by unanimity." (EU, 2010).

Regarding the creation of uniform laws, they have already reached a vast number, being important to point out the following examples: Rule (EEC) no. 2913/92 of the Council, which established the Communitarian Customs Code; and the Rule (EC) no. 1184/2006 of the Council, from 2006, related to the application of certain rules of competition to the production and trade of agricultural products.

In addition to those there are some uniform norms precisely about arbitration, such as the European Convention over International Trade Arbitration, signed in Genebra in 1961. Created within the Economic Commission for Europe, this Convention is currently applied in all countries of Europe, with the exception of Portugal and England.

As to its role in the integration of International Trade Law, on the other hand, through its jurisdictional function, the EU distinguishes itself for the work done by the Justice Court of the European Communities and the Court of First Instance. For the building of a common market, the EU needs a mechanism to make its norms more effective. Casella explains that, in order to accomplish that, it is necessary to adopt jurisdictional parameters in a communitarian scale, regarding

which Ulrich Everling even mentions a "jurisprudential law of the European Community" (CASELLA, 1994).

Doctrinaires, in general, view the performance of the European tribunals very positively, as they have, since their creation, ruled over 15.000 cases (EU, 2010).

Through their work, the Court of Justice guarantees the uniform interpretation and application of Communitarian Law. It is made up of 15 judges and assisted by 9 general-attorneys chosen among personalities that can guarantee an independent position towards their State of nationality and meet in those territories the necessary prerequisites to conduct their profession (LOBO, 2001).

The attorney's work is restricted to a manifestation through the General Conclusions, in an impartial and independent manner. To this court are assigned claims involving two or more EU member-States, not allowing the settlement of direct disputes between an entrepreneur and a member-State which may be breaking communitarian norms, but working as a supranational body capable of imposing a harmonized interpretation of the communitarian law against the States directly. Hence, it deals with constitutional related claims (involving the Maastricht Treaty, signed in 1992, creating the European Community, as named then); administrative claims (related to the legality of acts adopted by the other EU institutions); civil claims (such as in the case of extra-contractual responsibility); workforce related claims (for claims involving the organization' staff members). Furthermore, the Court may deal with voluntary or litigious jurisdiction. In the first case, when there is a procedure of harmful re-sending, by request from the national jurisdictional bodies, and in the case of litigious jurisdiction, the doctrine usually divides it among four distinct kinds:

> (i) Legality litigation: involves claims related to annulments, by omission, excessive illegality, and reparation for the Community's extra-contractual responsibility
> (ii) Full litigation: usually related to directives, this procedure is triggered by the Commissions' initiative, when it finds out that a State is not complying with a legal determination and, for that, it issues a notification establishing a term to be complied with. If even so, the State does not comply, the Commission may recourse to the Court of Justice. (LOBO, 2001).

Furthermore, the Court of Justice may serve as an appealing body for decisions taken by the General Court. It will also be competent whenever so determined by the compromiser clause originated from disputes between member-States whether within the realm of Public Law or Civil

Law. Finally, the General Court has consulting functions by which it can express its opinion, when requested by the Council, the Commission or any member-State, about a project (LOBO, 2001).

Provisional measures are part of the expected actions, although their execution depend on each State's on internal norms. Important to note, that its deliberations are always confidential (LOBO, 2001).

As for the Court of First Instance, created in 1988, it is composed by 15 judges, following the same pattern of the Court of Justice with respect to the nomination and replacement of members. Regarding its jurisdiction, it must be emphasized the great advances promoted within the EU, when allowing the participation of natural or legal persons in claims promoted before an international court. The Court of First Instance has jurisdiction over any claim related to the omission, annulment or civil responsibility claim proposed against the Community, as well as claims involving Competition Law and litigations between the Community and its servants. All of that being supported by one of its main functions, which is the control, and interpretation of communitarian norms. (LOBO, 2001).

Ana Paula Tostes even claims that the effectiveness of Communitarian Law owes its success to the work of the Court of Justice, considering that only as a result of coercive measures imposed by the latter the supranational norms can be consolidated, together with the political basis for the EU's sovereignty (TOSTES, 2004). The author stresses the fact that the insertion of Communitarian Law in the daily routine of European life was achieved gradually with every decision made by the Court as well as to the gradual conquest of its legitimacy (TOSTES, 2004).

Mercosul

The MERCOSUL (South Cone Common Market) is an economic block made up of Brazil, Argentina, Paraguay and Uruguay, created by the Treaty of Assuncion, in 1991, and redefined by the Ouro Preto Protocol (POP), in 1994 (AMBOS; PEREIRA, 2000). Hence, the block was born with a temporary structure only acquiring a legal personality after the POP. Even though it hasn't yet

gained the attributes of a common market, being considered only as a free trade zone, the block represents a major step towards the economic integration of South America. According to Ana Cristina Pereira, the Mercosul was created in the 90's, a period characterized by a boom of similar institutions being created, in view of a growing interaction between the States (AMBOS: PEREIRA, 2000).

As seen, international organizations play a major role in the elaboration of international norms and such is not different in the case of Mercosul. It is within its ambience that the Derived Law is brought up, also called Integration Law. The doctrine takes special consideration, in this aspect, with the obligation of incorporation of norms brought forward by the Mercosul and its relation with domestic law of each country. In short, one can say that, as established by articles 38 and 40 of the Treaty of Conceição and articles 41 and 42 of the POP, there is, indeed, an obligation to incorporate the Mercosul norms into the Mercosul's members' internal legal systems, within a established deadline. However, the norm becomes mandatory only after being incorporated by all member-States. Considering it being a block with an intergovernmental organic structure, Mercosul norms are only approved by consensus of its members. One can therefore derive that, if by one hand there are blocks of supranational nature, such as the European Union, whose legislation has a majoritarian quality and its incorporation happens automatically, on the other hand, in the intergovernmental blocks, such as the Mercosul, there is no sharing of national sovereignty, but the application of the unanimity rule (BAPTISTA, 1998) and the consequent need for the adoption of rules in the domestic domain with the purpose of incorporating the block's decisions.

The main bodies responsible for the creation of norms within the Mercosul are the Council for the Common Market and the Common Market Group, aided by the Trade Commission. In the view of Luiz Olavo Baptista, the first two serve as a negotiation forum (POP, articles 3 through 9), an in addition, the Council carries a political-diplomatic function, acting in the political conduct and representation of the mercosul (BAPTISTA, 1998). The Trade Commission, on the other hand, is subordinate to the Group, has a broader function, including the power of proposing norms and/or modifying them for its superior body (BAPTISTA, 1998). Furthermore, there are other bodies serving in the creation of norms, such as the Parliamentary Joint Comission (CPC) and the Consulting Social Economic Forum (MELLO, 1996).

The Mercosul also helps in the integration of International Trade Law, not only by creating international norms, but also through its dispute settlement system. Regulated by the Protocol of Brasilia, 1991, and revised by the Protocol of Olivos, 2002, the dispute settlement system of the Mercosul is competent for judging any dispute referring to the decisions of the Council of the Common Market and the resolutions of the Common Market Group, as well as defining the limits for the interpretation of such instruments.

The Treay of Assuncion, when constituting the Mercosul, anticipated the creation of a dispute settlement mechanism with a deadline of 180 days. Hence, the Protocol of Brasilia, elaborated in 1991, with temporary rules, which, later, were better defined by the Protocol of Olivos, in 2002, which however, kept the basic structure of the system. This Protocol guaranteed a stronger legal security in the domain of the Mercosul and the correct application of its norms (NOHMI, 2005), increasing, thus, the application of its norms (NOHMI, 2005). Nevertheless, Barral argues that the flexibility of the previous system has the advantage of providing less formal alternatives when facing a crisis. (NOHMI, 2005).

The current procedure contemplates three steps for a dispute settlement originated from the application or interpretation of Mercosul's norms: (i) direct negotiation; (ii) considerations by the Common Market group; and (iii) arbitration procedure.

The Protocol of Olivos assures the exclusive participation of the parties involved. The procedure must then be informed to the Common Market Group, by the Administrative Secretariat which has the deadline of 15 days, unless otherwise agreed. Touscoz points out that the majority of international disputes are settled through diplomacy (NOHMI, 2005). Only when they can't reach a consensus, the interested party may recourse to the Common Market Group, within a 60-day term. Currently the Group has 30 days to make its recommendations. For that it can seek the help of specialists. The States, however, are not bound by this manifestation, having the right not to comply with the suggestions. In addition, currently this phase is only optional and could, at the demanding States' wish, initiate simultaneously with the arbitration process. The organization has innovated regarding the possibility of a member-State not taking part in the negotiations having the right to claim that the matter under discussion be taken up to the Group.

Some changes introduced by this new Protocol, are worthwhile to be briefly mentioned: (i) the creation of a Permanent Revision Tribunal, with powers to revise the awards issued by the *ad hoc* Tribunal; (ii) the possibility of emergency and exceptional measures be taken by the Common Market Council; (iii) adoption of the principle of proportionality when applying compensation measures; (iv) the possibility of a claiming member-State choose the settlement system of another tribunal, such as the WTO; (v) the requesting regime translated by the possibility of a Permanent Revision Tribunal to issue consulting opinions regarding the Integration Law; and (vi) the adoption of the principle of confidentiality (NOHMI, 2005) typical of arbitration systems.

Regarding arbitration within the Mercosul, it matters to highlight the observation made by Moraes with respect to the " relative weight reduction of the political decision in the process of dispute settlements; and (…) the creation of a permanent judicial instance" (NOHMI, 2005, p. 103), with the incorporation of the Protocol of Olivos. The author points out that it was only due to the creation of a permanent judicial body and the possibility (no longer an obligation) of the Common market Group to participate, that such changes were made possible (NOHMI, 2005). Furthermore, the administrative tasks related to the arbitration processes were transferred from he Group to the Administrative Secretariat. The formation of the *ad hoc* tribunal is made up of three arbitrators, as a rule, two of them from the States involved and the third one from a third member-State. The arbitrators must come from a previously defined list to which each member-State contributes with the names of twelve national and four foreign arbitrators

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The Protocol of Olivos kept yet other important rules, such as the choice of the applicable norm; the cognitive procedure; the unification of the representation, when there are more than two States involved; and the deadline for the compliance of the arbitral award, which, when not otherwise defined by the tribunal is set for 30 (thirty) days. It is important to note, however, that this term gets suspended in the event of a recourse to the Permanent Tribunal. For that there is a deadline of 15 (fifteen) days and it I only acceptable if the *ad hoc* tribunal did not judge with equity – *ex aequo bono*. Finally, it's worth to mention the possibility of the Permanent Tribunal operate as a single instance, when agreed by the parties involved. This tribunal is made up of five permanent arbitrators, whose terms are of two years for the ones selected by each member-State and three years for the fifth

arbitrator, chosen by consensus. When there are only two States involved in the dispute, the Tribunal will work with only three arbitrators.

ICC

The International Chamber of Commerce – ICC – is a non-profit organization based in Paris, founded in 1919, regulated under the French legal system and which leads the network of national commissions whose members are economic and industrial agents (SCHAFER; VERBIST; IMHOOS, 2005). Bearing a stricture that is similar to that of an international organization, the ICC allow for the gathering of economic agents not bound by governmental interests, with the objective of creating commercial norms that can meet the markets' needs.

This task is performed by the commissions which, currently, account for more than 500 members, among which firms and associations. In addition to the commissions, the ICC has a Council (similar to an Assembly General) made up of representatives of each National Committee. Currently, the ICC is present in nearly 130 countries, provided that 10 chairs on the Council are assigned to representatives of non-member States. In addition to promoting debates and voting the proposals for integrated norms, the Council elects the organization's President and Vice-President, for a two-year term. The Secretariat General, by its turn, carries administrative tasks to ensure that the programs are complied with.

In addition to the task of creating international norms, the ICC plays an important role for some international organizations such as the UN and the WTO. In the UN summits about sustainable development, the ICC acts as the representative for private firms; together with the UNCTAD, the ICC represents some of the poorer countries, in addition to having helped create the Investment's Consulting Council. Within the WTO, the ICC prepares entrepreneurial recommendations worldwide.

The Brazilian Commission was created on October 23rd, 1967, with the purpose of spreading international trade practices recommended by the ICC. For that, "the ICC Brazil promotes periodical meetings of the Commissions and Work Groups, seminars and workshops to handle important issues that affect global commercial relations" (PORTAL DO COMÉRCIO, 2010). In

Brazil, there are three commissions: Arbitration Commission, Sustainable Development and Energy Commission and the Commission of Intellectual Property and Free Trade.

Due to that, the work of the ICC gained great importance in the international market, as even being a soft law, it has been adopted by several market agents, given that if, by one hand, it lacks coerciveness, on the other hand its legitimacy and quality are widely recognized. One example is the Incoterms rules, which establish rights and obligations in the transportation of goods as well as the insurance between the vendor and the buyer in international commerce. Furthermore, the arbitration rules established by the ICC have been adopted by several international contracts, conferring the Committee great recognition.

Since 1975, rules related to conciliation and private trade related arbitration are being edited by this institution. In 2008, the International Arbitration Court of the ICC acted in 50 countries, involving arbitrators of 74 different nationalities (ICC, 2010).

In its website, the ICC maintains statistical data available, about its work in the world of international arbitration which serves the purpose of assessing the growth of arbitration, known to be expanding worldwide. Based on those statistics, Horacio A. Grigera Naon points out that the participation of Latin-American countries in international arbitrations has up scaled: in 1996, 11.5% of the parties involved in ICC cases were Latin-American: whereas in 1987, this group was represented by only 3.8% (GARCEZ, 1997).

UNIDROIT

The International Institute for the Unification of Private Law – UNIDROIT, founded in 1926, has as its objective to study the ways to harmonize and coordinate Private Law between States and to gradually prepare the adoption of a uniform Private Law legislation (UNIDROIT, 2010). Originally, the Institute was a body linked to the League of Nations. Upon its termination, the UNIDROIT was re-structured. Currently it's made up of 58 member-States (GDDC, 2010).

Its administrative structure is made up of a Secretariat, developing its executive function; the Council which supervises the methods adopted by the Institute and the Secretariat's work and the Assembly General, responsible for budget related decisions, the work programs (every three years) and for electing the Council (every 5 years).

Considering its objectives, the UNIDROIT's tasks are turned, as a rule, to the integration of material norms and not to conflicts, the choice of themes that are to be integrated must meet certain criteria. Furthermore, it is essential that the States recognize the possibility of having their domestic norms altered by international norms ruling over that specific area, in spite of them not being mandatory.

For that, the Institute functions based on a work method that divides itself in four steps:

(i) The use of Study Groups that help the Secretariat in the elaboration of a report that serves to demonstrate the convenience and the possiblity of a legislative reform in various judicial systems;

(ii) Intergovernmental negotiation: a proposal must be approved by the Council who in its turn must establish the next steps;

(iii) Publication of UNIDROIT's work material;

(iv) Cooperation with the international organizations: as a result of this method and the cooperation among international organizations, there are several cases of international conventions prepared by UNIDROIT and approved in Conferences which guarantee, thus, mandatory compliance with the approved text: Haia Convention of 1964 about contract elaboration for sale of international movable corporeal objects and the international sale of movable corporeal objects; Genebra Convention of 1983 for the representation on the subject of international sale of goods; Convention of 1956 regarding the contract of road transport of goods; and Convention of UN of 1980, about sales of international goods contracts.

One of the main works elaborated by this organization are the Principles for International Commerce Contracts for UNIDROIT. According to Lauro Gama, "the Principles constitute a non-legislative source of uniform law for international contracts. Its authority as a source of law, among other reasons, derives from the excellence of the work developed by the scholars involved" (GAMA, 2006, p.3). The author concludes that the Principles of UNIDROIT reveal a modern reading of international contracts, whose essence is in the partnership between the parties. In addition, the author avails arbitration as a means for application and diffusion of these principles (GAMA, 2006).

ICSID

The International Center for Settlement of Investment Disputes was created within World Bank domain, through the Convention for Dispute Settlement between States and Citizens of Other

States, from 1966, with the objective of establishing an arbitration system turned to disputes between foreign investors and host States.

This court has currently, 155 signatory countries with over 180 cases already settled. In spite of being an organization with its own legal personality independent from the World Bank, its political function is clear as displayed in its website which states that (ICSID, 2010):

> The Convention sought to remove major impediments to the free international flows of private investment posed by non-commercial risks and the absence of specialized international methods for investment dispute settlement

It is important to clarify that the Center has Administrative Council made up of representatives of all member-States, in addition to a Panel of Conciliators and Arbitrators (GARCEZ, 1997). In 1978, a new mechanism was created within the ICSID's arbitration system allowing the solution of conflicts between a national and a non-member State of the Convention, upon agreement between the parties. Another important issue is regarding the fact that every arbitration process within the ICSID is completely independent from a national law, including, in the words of José Maria Rossani Garcez, the "designation of an arbitrator for the revision or annulment of the arbitral award, for example, are entrusted to a judge not from the state judiciary system, but from the very Center" (GARCEZ, 1997, p.181), which demands the recognition of the award.

Lex Mercatoria

Finally, it´s important to study the role played by *lex mercatoria* as a means to uniform International Trade Law, whose importance is such that they sometimes get mixed up. Beforehand, it is relevant to elucidate an important conceptual question: when referring to *lex mercatoria*, Irineu Strenger, the most prominent author in this topic, many times uses that expression as a synonym for "International Trade Law". For the same reason we will abide by the same opinion in the present work. However, it is important to stress the fact that in spite of the fact that the history of International Trade Law develops parallel to *lex mercatoria*, given that the latter is a set of rules originated from the international trade, those concepts are distinct. As seen, International Trade Law supports itself on internal state sources, such as the law, whereas *lex mercatoria*, as it will be demonstrated, has as its primary sources, commerce customary rules.

Lex mercatoria is the result of scholars' questioning about the phenomenon of international trade. Such concept arises as a reference to trade's customary practices and soon gained a broader acceptance, becoming a set of norms that were particular to the international trade (STRENGER, 1996). According to Bernardo M. Cremades, *lex mercatoria*, consists of four elements: the commercial uses, the model-contracts, the professional regulation conferred by its own representative association and arbitral jurisprudence (STRENGER, 1996). Irineu Strenger teaches that the elaboration of those norms have the purpose of liberating trade from the restraints of domestic Law and, for that reason, scholars will emphasize the principle of free will as a base principle for all International Trade Law.

Historically, it was during the Middle Ages that a set of rules first appeared, with the purpose of regulating cross-border trade. Customary trade practices were confirmed and acquired legal status through the commerce courts, in general, made up of members of the mercantile class. (STRENGER, 2005). As reminded by Irineu Strenger, this set of rules constituted exclusively to regulate of a group of people and their institutes of interest, became known as *statuto mercatorum* or *jus mercatorum* (STRENGER, 2005).

In the same scenario, took place the great fairs that gathered merchants from various towns with various customs. With the intent to settle possible conflicts, they used to set up in those fairs, a court responsible for any conflict that could arise out of the mercantile activity, with the exception of land property related conflicts. Those courts applied then the so-called *lex mercatoria*.

In spite of its tremendous importance, after its start, *lex mercatoria* found itself in a declining phase, as the national States grew stronger along with the imposition of National Law. As seen, during the Middle Ages, European States found themselves weakened by the power of the feudal lords. Nevertheless, as history teaches us, it is with the strengthening of commerce and the bourgeois class that the national State regains its place. In this context arise countries such as Portugal, Spain, Italy, etc, under the monarchic, absolutist power of their kings. Hence, international commercial relations stopped being ruled by *lex mercatoria* and began being regulated by the National law applicable to each case.

Currently, *lex mercatoria* is regaining its space with the development of a global market, even though it still finds its limitations imposed by National law (AMARAL, 2004). In the words of Amilcar de Castro, is within the international trade's nature the clash between *lex mercatoria*, translated into the customary concept and the National Law (CASTRO, 2000, p. 46):

> international trade is essentially movement, speed, dynamics, human migration, flow of goods and capital, Gannagé states that this movement comes to clash wit the nation, political and economic entity that is getting more and more organized and nationalized in face of the other, and for that government rules must be at the same time flexible, so as to avoid tangling the flow of international transactions, and on the other hand firm, so as to not sacrifice the economic balance between the nation and the internal order.

For that reason, what is currently found in the international scenario is the search for a balance between the two normative bodies on order to, when facing this antagonism between international trade and the idea of a national-State, the Law will find its juristic solutions capable of harmonizing the two *phenomena* not only allowing for the development of the international market, in a way that it follows its natural dynamic flow, but also, stimulating and strengthening its bases, without forgetting the national economic balance, given that the State must preserve itself when facing external interests, protecting itself through norms of authority, Competition Laws, among other means.

In addition to Goldman's definition stated above, Irineu Stenger, brings yet, many other meanings for *lex mercatoria* in order to demonstrate that its hard to establish boundaries for this concept, even though scholars will identify a minimum in common, distinguishing them only through the adopted point of view. Based on his study, Goldman synthesizes the various doctrines in three different views (STRENGER, 1996):

(i) A first on that defines *lex mercatoria* as an independent legal system, created by the parties involved in the case at hand, independent from the Law. This view would thus be the one shared by Loquin, to whom, "*lex mercatoria* est un nouvel ordre juridique, qui se forme au sein d'une communauté internationale d'hommes d'affaires et de commerçants suffisamment homogène et solidaire pour susciter la création de ces normes et en assurer l'application." Irineu Strenger derives from this definition, called by him as institutional and analytical, the precise activity developed by *lex mercatoria*.

(ii) The second view understands that *lex mercatoria* ism in fact, a set of consolidated norms able to solve the case at hand, in replacement of the applicable law. According to this view, irineu Strenger quotes Langen who defines *lex mercatoria* as being "the rules of the game of international trade". Irineu Strenger understands that within such definition lies the understanding that *lex*

mercatoria has the function of acting upon unpredictable cases, usual in the practice of international trade (STRENGER, 1996).

(iii) Finally, a third view defines *lex mercatoria* as a complement to the applicable national law and a means for consolidating mercantile customary practices.

Thus, the author concludes that the mentioned definitions are broad in the sense that they contemplate all directives of *lex mercatoria*, even highlighting its international characteristic. Being the latter specially important for the emphasis that doctrinaires usually give to the principle of free will in the International trade law, due to the fact that international trade is based on principles that are honored all over the world. The author goes even further and states that the diversity of agents is the very basis for the principle of autonomy. He concludes, still, that these definitions, in general, always reveal a certain degree of dissatisfaction with the domestic Law which, in its turn, is seen as a constraint for the solution of trade conflicts at the international level. Finally, it may be noted through these definitions, that *lex mercatoria* by its turn has a metanational quality, disconnected from a national legal system, making possible, hence, a freedom of procedures aiming to meet the demands of international trade. (STRENGER, 1996).

As for the sources of *lex mercatoria*, Irineu Strenger points out to those usually quoted (such as the contract clauses, the model-contracts, arbitral jurisprudence as well as norms dictated by specialized institutions), but adds the very commercial activity and the arrival of new technologies as spontaneous creators of rules. For that same reason, Irineu Strenger states that *lex mercatoria* is, therefore, a process in continued elaboration.

Finally, it remains to be understood how *lex mercatoria* must be apllied by a court, when it lacks jurisdictional support from a State. Scholars will argue that, in spite of that, *lex mercatoria* has binding power. Irineu Stenger states that *lex mercatoria* has a "near-legal" nature. This binding power comes from the fact that domestic Law is not able to settle disputes arising from the international trade realm, among other reasons, for the mere fact that it evolves at a speed that is much higher than that by which internal laws do (STRENGER, 1996). On the other hand, *lex mercatoria*'s binding power gains support, given that the development of its rules grows precisely out of the commercial activity, and for that reason it is recognized by commercial agents.

Thus, *lex mercatoria* is often used to fill in he gap left by applicable law. More often yet, such use is noticed in arbitral courts. Irineu Strenger, quoting Lando, emphasizes that when applying *lex mercatoria*, arbitrators end up finding less diversions among them (STRENGER, 1996).

Clarissa Brandão states that, in addition to that, it is possible to identify *lex mercatoria* as Law through the study of Reflexive Law (ALVES, 2006). The author explains that this doctrine believes in a Law creation technique that is distinct from that often used by Positive Law. Based on this view, it is possible to recognize a norm produced by a system independent from the State. In the words of André-Noel Roth: reflexive law constitutes a "law originated from negotiations, round tables, etc, representing an attempt to find a new form of social regulation, conferring to the State and the Law a guiding role (and not of conducting) society". (ALVES, 2006, p. 245). This, according to the author, is due to the fact that State and Positive Law do not accompany social evolution. Based on that one can say that *lex mercatoria* as a form of Reflexive Law, would be treated as Law.

Conclusion

In spite of the critical analysis in view of the arbitral courts studied, as well as the international organizations, one could say that those do not represent a fragmentation of the international arbitral system, considering that there has never been, in fact, a universal system. Hence, any attempt, as the ones studied, would represent and important move towards integration.

In this sense, we must be optimistic and recognize such forward motion. What this research is questioning, however, is that legally, the process of integration may bring within it new difficulties in view of the diverse international legislations and international bodies that, at first, have many overlapping competences.

Lex mercatoria, by its turn, is therefore the translation of international trade's professional customs, and if not the most, certainly one of the most important methods of integrating International Trade Law, even in a global scale, spontaneously.

Sharing this view, Irineu Strenger argues that *lex mercatoria* will be, in a near future, capable of providing a normative system ready to face the conflicts originated from international trade, even with its own jurisdiction (STRENGER, 1996).

In this sense, one can perceive that the conflict-oriented method has lost ground to the creation of a uniform body of norms that reflect the peculiarities of the complex and multi-disciplinary international trade. The integration of International Trade Law is a natural process, due to its dynamics and its fast paced development, way beyond the legislative capacity of a national-State.

What can be drawn, therefore, is that although multifaceted this integration process gains great importance in view of the domestic Law barriers and national legal systems, representing, thus, an advance that is relevant to the international trade which needs to accompany the dynamics of the current stage of globalization, and for that, needs globally recognized norms to establish itself.

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