

## CHAPTER 1

# Foundations of International Law and International Organizations

### LEARNING OBJECTIVES

After reading this chapter, you will understand:

- why it is necessary for all businesses to possess a current knowledge of the global business environment
- the characteristics of law and what international law is—and is not
- how international law is enforced and implemented
- how international agreements and treaties are created
- the history, characteristics, and purpose of some well-known international organizations and agreements, and their limitations

### CHAPTER OUTLINE

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### Introduction

Effective management in today's global business environment requires that Canadian decision-makers have a current and comprehensive knowledge base that extends well beyond our own borders or even North America. Today's businesses, even if located entirely within Canada, face competition from the rest of the world and will quite likely deal with suppliers or services that are located outside this country.

The growing complexity, interconnectedness, and diversity of the global business environment, coupled with a borderless workforce, advances in information technology, and the increasing importance of trade agreements, have transformed the business environment. To compete effectively, businesses must be supported by a knowledge of the geography, politics, law, and economics of the world at large. Because the global business environment is in a state of constant flux, today's business person must be an astute observer of international organizations and events that may directly or indirectly affect the success of any business venture.

This chapter introduces the concept of international law and describes the two traditionally recognized branches of this discipline—public international law and private international law, with emphasis on the former's sources and enforcement. The chapter continues with a description of some of the organizations and agreements that are significant for business today and discusses their history, purpose, and limitations.

## Why the Study of Legal Aspects of International Business Is Important

By studying law, the business person has a better understanding of the levers of power in society. It is important to understand the different legal and political systems in the world that affect your business. So many business situations are influenced by the law. Whether it is reading and truly understanding a media report, developing the best strategy for a foreign market entry, or resolving a conflict with an entity in another country, knowledge and understanding of the underlying law will assist you in making the right decision.

In addition to the obvious advantage of knowing and understanding the rules that directly affect you, the study of law is an excellent way to develop the critical thinking skills that are so necessary for a successful business career. Practice in abstract thinking combined with a practical problem-solving approach will build your intellectual strength and contribute to a habit of disciplined thinking. Learning how to recognize and seek out primary sources and keeping an open mind when faced with a supposedly factual situation are habits that will contribute to wise decision-making.

## What Is Law?

There has always been some controversy over the definition of law. Most people agree that laws are rules, but of course not all rules are laws. How do we differentiate between rules and laws? William Blackstone, one of the definitive jurists of the English common law, defined the law as “a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”<sup>1</sup> A second definition is that a law is a rule that can be enforced by the courts.<sup>2</sup> Another accepted definition is that the law is a body of enacted or customary rules recognized by a community as binding.

There are many different categories of law. The law with which we are most familiar is the domestic law of Canada. We see examples of this law in our daily lives, whether we read of it in the media or experience it when we receive a traffic ticket or go to court to enforce a debt. This domestic law can be distinguished from international law, which will be discussed further below. The primary sources of our domestic law are:

- constitutional law that is found in our constitution acts of 1867 and 1982,
- legislation passed by either the federal or provincial government, and
- the common law or judge-made law (sometimes described as case law) that we have inherited from the common law tradition of England.

Our domestic law is divided into public law and private law. Public law governs the relationship between individuals and the state, and the law that determines the way the state is governed. Public law includes constitutional law, criminal law, and administrative law. Private law involves relationships between private legal persons—that is, individuals or corporate entities. This area of the law includes the law of contracts and torts.

Legal scholars also distinguish between public and private categories in international law. As a result, Part I of this textbook is titled “Public International Law” and deals with international public law, international organizations, the World Trade Organization (WTO), the global movement toward trade integration through free trade agreements, and Canada’s response to the global trade rules as reflected in domestic policy and legislation.

In Part II, we deal with private international law issues, such as international contracts, intellectual property protection, different market entry strategies, and settlement of private international business disputes. Below, international public law is discussed in detail and briefly contrasted with international private law.

### *What Is International Public Law?*

The international community is most prominently divided into nation states. There are 197<sup>3</sup> sovereign nation **states** in the world. **Sovereignty** is the supreme and independent power and authority claimed by a nation state over its own territory. Sovereignty means a nation state can choose its political, economic, and social structures free from interference and coercion by other nation states. Each sovereign state is equal to any other nation state and can decide how to conduct its internal and external affairs. The principle of state sovereignty underpins international law.

**Public international law** has been traditionally defined as the law regulating relations among nations. It is a set of rules and principles that states follow when dealing with each other. These rules are derived from practice and codified in treaties and conventions. Public international law's most basic purpose is to ensure order and peaceful coexistence among the nation states, and it provides the means for states to maintain diplomatic, economic, and political relations among themselves.

### *What Is Private International Law?*

**Private international law** regulates the affairs of private persons (including corporations) located in different countries. It is also described as **conflict of laws**—it addresses the question of whose country's laws will govern a transaction. This area will be dealt with further when we discuss international business transactions in Chapters 8 and 9.

In recent years, the line between public and private international law has become somewhat blurred because of the proliferation of conventions and bilateral and multilateral trade agreements, which have the effect of directly making rules for businesses or requiring signatory countries to pass legislation that affects the rights of private persons and businesses in signatory countries.

### *The Significance of Public and Private International Law for Business*

International business now must grapple with the consequences of both types of law. Public international law, which in the past involved only government activities in the global political sphere, now influences decision-making at the firm level. This is because the growth of global treaty activity and the increasing desire on the part of countries to increase and regulate global trade and assert a moral dimension in global business have led to an explosion of rules enforceable at the domestic level.

### *Where Does International Public Law Come from?*

Nation states are the principal actors in the creation of international law. In Canada, Parliament and the provincial legislatures are the primary lawmakers. Since each nation state is sovereign, there is no supra-national world authority that transcends national borders and makes international laws for all countries to follow. The two most important sources of international law are treaties and customary law. Nation states create both and choose to abide by them in recognition that they serve their interests and the interests of the greater international community. Additionally, international law is distilled from general principles followed by states, domestic court decisions, and legal scholarship.

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**state(s):** in the international context, a sovereign country

**sovereignty:** the supreme and independent power and authority claimed by a nation state in its own territory

**public international law:** the law regulating relations among nations

**private international law:** regulates the affairs of private persons (including corporations) located in different countries

**conflict of laws:** where individuals or corporations from different jurisdictions have a dispute and it is not clear what law applies to the transaction

Article 38(1) of the Statute of the International Court of Justice lists the sources of law that the International Court of Justice is permitted to use to adjudicate interstate disputes. This provides us with a helpful summary of the sources of international law. They are the following:<sup>5</sup>

- conventions establishing rules between or among contracting states,
- international custom as evidence of a general practice accepted as law,
- general principles recognized by civilized nations, and
- judicial decisions and teachings of various nations as subsidiary means for determining the rules of law.

It is important to note that sources of law listed above are stated here in order of their importance, with conventions carrying the most weight. Only where the first-named source is unavailable or determinative of the dispute will the Court proceed down the list. Each is discussed in greater detail below.

### Treaties

A **treaty** is a legally binding written agreement between two or more states. The word “treaty” is a generic term. There are many other names used to describe treaties, such as “international agreements,” “accords,” “protocols,” “covenants,” “conventions,” and even “an exchange of letters or notes.” All indicate the same notion that two or more states are entering into a legally binding relationship intended to set out their rights and obligations in relation to one another.

Treaties cover a variety of topics—for example, trade, investment, human rights, the environment, control of nuclear weapons, the law of treaties, and international banking and mail. Treaties are negotiated on either a **bilateral agreement** basis, meaning between two states, or a **multilateral agreement** basis, meaning between several states. In December 2015 at the Paris climate conference, 195 countries, including Canada, signed the first-ever universal legally binding global climate deal. The Paris Climate Agreement is an example of a multilateral treaty, while the Canada-Bahrain Foreign Investment Promotion and Protection Agreement is an example of a bilateral treaty. Treaty provisions will set out the obligations between the signatory states and the method by which the treaty is to be enforced, such as through arbitration or a predetermined international organization, like the International Court of Justice or the WTO.

### Limitation of Sovereignty

International treaty arrangements commit national governments to certain actions that will affect their domestic policies. These commitments also limit a national government’s ability to implement domestic policies that conflict with international obligations they’ve undertaken. Treaty commitments represent a limitation on the sovereignty or freedom of action for the signatory government. In a democratic country, governments and policies change in response to the opinions of the voting public, and the idea of constraining future government policy does not always sit well with the electorate.

Treaties usually have no termination date; a country may only withdraw, and such withdrawal is often complicated.

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**treaty:** a binding agreement between two or more countries (states)

**bilateral agreement:** an agreement between two states

**multilateral agreement:** an agreement among three or more states

## Customary Law

Customary international law includes a wide variety of uncodified rules that are binding upon all states irrespective of their explicit consent. Customary law is said to exist when a significant number of countries follow a particular rule in their dealings with each other, understand that the particular rule should be followed, and recognize that they will face sanctions if they do not follow it.

Customary international law is uncodified, meaning it is not written in a treaty or convention. However, frequent or habitual performance of specific actions and a belief that acting otherwise would be illegal makes the customary international rules no less binding than the written rules codified in treaties. Customary law is typically observed by most states most of the time. Box 1.1 discusses sovereign immunity, a principle of customary law that is well established worldwide.

### Box 1.1 Sovereign Immunity: A Principle of Customary Law

Sovereign immunity, or state immunity, is a principle of customary international law whereby one sovereign state and its representatives, like elected officials, ambassadors, and diplomats, cannot be sued before the courts of another sovereign state without the state's consent. International rules affording immunity to state officials have evolved over centuries. Initially, immunity was afforded to kings and queens by virtue of them being considered God's appointed representatives on Earth. Rules regarding immunity proved to be very convenient in conducting international relations, and despite the decline of monarchies in the world, the practice of granting immunity to heads of state and their agents continued into today's time. The repetitive use of and adherence to the rules on immunity and the belief that failure to abide by them would result in negative consequences established state immunity rules as part of the customary international law.

Customary international law includes *jus cogens*, also called peremptory norms, which are international norms that are considered so fundamental that states are not permitted to derogate from them by way of treaty. The most common examples are peremptory norms against torture, slavery, genocide, and aggression.

As long as they do not conflict with existing Canadian legislation, the rules of customary international law are part of Canadian domestic law.<sup>4</sup>

## General Principles of Law

International courts and tribunals rely on general principles of law when they cannot find legal authority in treaties or customary international law. General principles of law are certain legal beliefs and practices of fairness and justice that exist in all developed legal systems around the globe. Good faith and the impartiality of judges are examples of these general principles of law. For instance, good faith means that parties explicitly or implicitly consent not to act in a way that would defeat the objectives of the agreement they have entered into. In other words, the parties to an agreement are obliged to act honestly in performing their contractual obligations. Good faith is a widely recognized principle that everyone intends to comply with when entering into agreements. Courts in many countries will consider whether the parties to a case acted in good faith when determining the outcome of a dispute. In the event that an issue or dispute arises where there is no existing law that applies, international judges can refer to the general principles of law to deduce an answer.

## Judicial Decisions and Legal Scholarship

Article 38 of the International Court of Justice statute includes “judicial decisions and the teachings of the most highly qualified publicists of the various nations”<sup>5</sup> as a subsidiary means of

determining the rules of laws. Suppose the international tribunals and courts cannot distill an answer to a legal problem from the previous three sources of law. In that case, they may consult and quote the writings of legal scholars and judicial decisions. Although judicial decisions and legal scholarship are not an actual source of law, they still play an important role in supplementing the previous three categories by describing rules of law that are widely followed around the globe.

### Other Sources of Law: Soft Law

“Hard law” is a term the international community uses to refer to legal obligations that are precise and binding on states. These include the traditional sources of law discussed above. “Soft law,” on the other hand, is a term used by the international community to refer to non-binding yet highly persuasive documents such as draft multilateral treaties, United Nations General Assembly resolutions, various codes of conduct, guidelines, best practices, official communiqués, reports, multilateral conference accords, and standards. These instruments are not binding but tend to be morally influential or aspirational or may outline broad understandings among state parties that are yet to become legally binding.

The term “soft law” may be confusing since it is not truly law, yet the documents described as soft law are significant in regulating international actors’ behaviour. Soft laws also have potential relevance in that they may become hard law in the future if widely followed, becoming customary law or being ratified by states through treaties.

Just like hard law, soft law affects more than just state actors. Often, soft law instruments impact businesses worldwide. For example, in 2011, the United Nations Human Rights Council endorsed the United Nations *Guiding Principles on Business and Human Rights* (UNGPs)<sup>6</sup> and established a global baseline for business and human rights. The UNGPs are voluntary guidelines that set out how states and companies should protect and respect human rights in business and how to prevent and address business-related human rights abuses. The UNGPs set out specific actions necessary for states to meet their duty to protect human rights. These actions include passing and enforcing laws that require businesses to respect human rights, creating a regulatory framework that facilitates business respect for human rights, ensuring adjudication of human rights abuses, and providing direction to businesses on their obligations.

The UNGPs are expected to become customary in both their use and acceptance as states pass domestic legislation based on them, and businesses worldwide increasingly adopt these voluntary but authoritative international guidelines in their daily operations. For instance, in May 2019, the Office of the Canadian Ombudsperson for Responsible Enterprise (CORE) commenced operations investigating human rights complaints against Canadian companies’ overseas operations.<sup>7</sup> CORE was created under legislative action stemming partly from the Canadian government’s endorsement of the UNGPs. Due to such legislative initiatives, many Canadian companies have adopted the UNGPs to prescribe their operations domestically and abroad.

## How Is International Law Enforced?

Domestically, the state has the power to compel its subjects to comply with laws through the use of its police force, administrative authorities, and threats of punishment, but internationally, there is no overarching authoritative enforcer. International law relies on voluntary compliance, consensual dispute-resolution processes, and economic or political pressures exercised by the offended state and the international community.

### Voluntary Compliance

Most often, international law is followed by states and other entities in their day-to-day actions. The rules and principles of international law provide all participants with a practical, stable, predictable, and overall beneficial framework for conducting international transactions.

International rules are tacitly and explicitly acquiesced to by international bureaucracies. Regular compliance, habit, passive consent, and widespread desire not to question the status quo or rock the boat are the characteristics that give international law its resilience.

### Talking

When conflicts arise, internationally and domestically, the majority of disputes are resolved through negotiation outside of the court system. In the interest of preserving business, strategic, political, and social relationships, individuals and states generally prefer to keep their grievances out of the public view and resolve them quickly and efficiently. Among states, private diplomatic communications and bilateral and multilateral negotiations with and without the assistance of international organizations such as the UN or the International Monetary Fund are frequently used to come to a settlement of a dispute. In conjunction with private talks or when private discussions fail, states will also use sequences of unilateral speeches and press releases to pressure the opposing party to come to a mutually acceptable resolution with respect to alleged breaches of international obligations.

### Treaty Provisions

As discussed previously, treaties are written agreements between states that set out the parties' mutual legal rights and obligations and are governed by international law. Breach-of-agreement provisions are often included in the body of the treaty. The parties to the treaty set out in advance what measures each can take in the event that one or both parties fail to comply with their obligations. Suspending compliance of treaty obligations of the affected state, starting legal proceedings, or seeking compensation are some of the provisions that may be included in the treaty. Similarly, treaties will often include dispute-resolution provisions in case of a breach or disagreement regarding the interpretation of the language of the treaty. These provisions will spell out how the treaty parties are to handle the dispute. Negotiation, arbitration of disputes, or referral to the International Court of Justice are some of the most common dispute resolution mechanisms in treaties. Some treaties include a combination of these mechanisms.

### Treaty Interpretation

The 1969 *Vienna Convention on the Law of Treaties* (VCLT), also known as the “treaty on treaties,” is a cornerstone for ensuring legal certainty, stability, and predictability in the international legal system. VCLT codifies customary international law and fills in gaps by setting out rules regarding what constitutes a treaty, the treaty-making process, validity, and rules on amendments, terminations, suspension, and interpretation. By providing a mechanism for treaties to be effectively negotiated, implemented, interpreted, and enforced, the VCLT facilitates the harmonization of rules and international cooperation and assists in the peaceful resolution of conflicts. One hundred sixteen states have ratified the VCTL, which came into force for Canada in January 1980.<sup>8</sup> It is one of the most widely accepted treaties, making it highly authoritative worldwide.

International courts and adjudicative bodies are primarily tasked with applying the VCLT. However, more and more domestic courts are tasked with its application in light of the many treaty provisions impacting state behaviour internally.<sup>9</sup> Articles 31 and 32 of the VCLT explain how treaties should be interpreted.<sup>10</sup> For instance, the Supreme Court applied VCLT in *Yugraneft Corp v Rexx Management Corp*<sup>11</sup> where it had to determine the limitation period for recognizing and enforcing a foreign arbitral award in Alberta.<sup>12</sup>

Canada ratified the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (discussed in Chapter 12), and to interpret its provisions, the Supreme Court referred to Article 31(3) of VCLT, reiterating that it had to do so “in good faith in accordance with the

ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>13</sup> With the proper application of VCLT’s interpretive guidance, the Supreme Court held that the two-year limitation period applied.

### The International Court of Justice

Some public international law disputes are heard by the **International Court of Justice (ICJ)**, also known as the World Court, in The Hague in the Netherlands. Two factors limit the court’s effectiveness and power. The first is the rule that decisions are binding only on the parties to the dispute, and the second is that a state may not be brought before the ICJ unless that state has accepted the court’s jurisdiction, either generally or for the purpose of the dispute in question. The ICJ does not hear commercial disputes involving private litigants because only countries may be parties before the court. For this reason, the ICJ is of little practical significance for private businesses.

### Reciprocity

Often, states will not engage in a particular short-term beneficial course of action in recognition that it may create reciprocal, long-term disadvantages. States follow international law because of the general or long-term costs that could come from disregarding international law. For example, states everywhere normally respect the rules regarding innocent sea passage. If State A limits innocent passage through its territorial sea, other states will reciprocate and will likely limit innocent passage to ships flying State A’s flag in the future. This induces states to behave reasonably in the expectation that others will also abide by the rules and avoid unnecessary confrontations.

### Retorsions

Imposing unfriendly measures and removing friendly concessions is called “acts of **retorsion**.” They are implemented as a method of retaliation against injurious yet legal activities of another state. Retorsions are meant to influence another state’s actions in furtherance of national-interest goals of the imposing state. For example, states can require hefty visa requirements, suspend study programs, expel diplomats, restrict awards of government contracts, and reduce overflight rights; there is an abundance of different measures that may be used, and the cost to the target state is usually significant.

### Countermeasures

Whereas retorsions are in response to legal yet unfavourable acts committed by another state, **countermeasures** are retaliatory acts in response to illegal actions of another state. Legal countermeasures must be in response to a prior wrongful breach of an international obligation. The countermeasures may be imposed only if the offending state refuses to remedy the illegal action following complaint by the offended state and the countermeasure is necessary to induce the offending state to comply with its obligations. The state imposing the countermeasure must ensure it is proportionate to the breach committed and only direct the countermeasure against the state committing the wrongful act. Further, there is no requirement that the countermeasures taken should be with regard to the same obligation breached by the state acting wrongfully.

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**International Court of Justice (ICJ):** headquartered in The Hague, Netherlands, a court that hears chiefly public international disputes

**retorsion:** acts in retaliation for legal yet unfavourable acts of another state

**countermeasures or reprisals:** acts in retaliation for illegal acts of another state

This means that in response to a breach of one treaty, a state may take action with regard to another treaty, as long as the requirements of necessity and proportionality are respected.

On May 31, 2018,<sup>14</sup> citing Canada as a national security threat, the United States (US) imposed tariffs of 10 and 25 percent on aluminum and steel, respectively.<sup>15</sup> In response, Ottawa imposed \$16.6-billion worth of countermeasures on American steel, aluminum, and consumer product imports.<sup>16</sup> Canada's retaliatory measure was proportional, as it was approximately the same value as the steel and aluminum exports to the US, and the measure was meant to exert pressure on the US to withdraw its illegal tariffs on Canadian metal. Canadian officials stated that the imposed tariffs breached the US's obligations under the WTO agreements. By May 2019, both countries announced that they had lifted their tariffs.<sup>17</sup>

This is an example of a countermeasure pursuant to breaches of treaty provisions. Similar countermeasures can arise in response to breaches of customary international law.

Reciprocal actions, such as retorsions and countermeasures within international trade, may lead to a spiral of out-of-control tit-for-tat consequences negatively impacting the countries involved and the global community overall. For instance, impositions of high tariffs, increased protectionism, and "beggar thy neighbour" policies were partly to blame for the severity of the Great Depression and the subsequent outbreak of the Second World War.

### **Collective Action**

If a state breaches international law, it may face a collective response by a group of states organized through the United Nations (UN) or from among the states themselves. Pursuant to the UN Charter, the Security Council can act to maintain or restore international peace and security through a broad range of enforcement measures. The UN Security Council's resolutions are the only ones binding on all member states. These measures range from all-encompassing economic and trade sanctions to more targeted sanctions, such as arms embargoes, travel bans, and financial or commodity restrictions. The Security Council has applied sanctions to support peaceful transitions, deter non-constitutional changes, constrain terrorism, protect human rights, and promote non-proliferation.

For example, the continued development of nuclear weapons and ballistic missile technology by the Democratic People's Republic of Korea (DPRK, or North Korea) is condemned by most states around the world. The 15-member UN Security Council unanimously passed more than ten rounds of sanctions against North Korea since its first nuclear test in 2006.<sup>18</sup> The UN Security Council's measures against DPRK include a variety of economic sanctions, such as a ban on the export of electrical equipment, coal, minerals, seafood, food and agricultural products, wood, textile, stones, etc.<sup>19</sup>

### **Naming and Shaming**

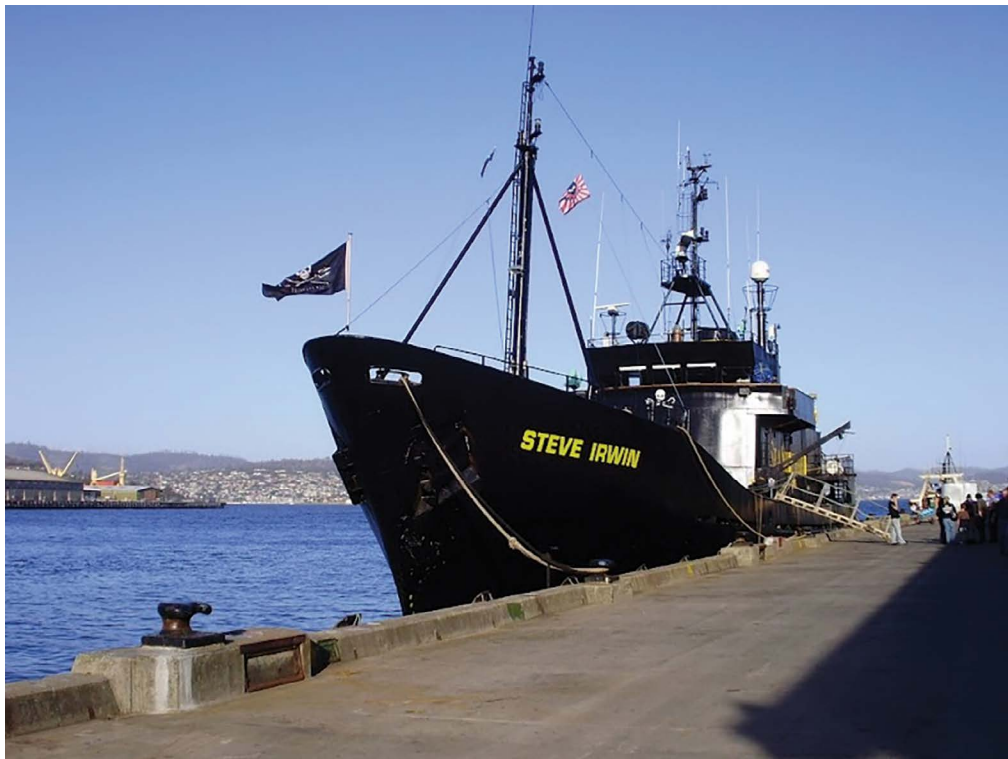
The practice of calling public attention to a state's bad behaviour is called "naming and shaming." Negative publicity and the threat of shaming a state with public statements often help to increase accountability and bring it into conformity with international laws. This enforcement method is often useful in the fields of human rights and environmental law when coupled with collective action. States, non-governmental organizations, news media, and international organizations publicize states' violations in the hope of forcing the offenders to reform and conform to international norms.

For example, Canada's "naming and shaming" campaign and cooperation with its allies in support of the secessionist movement in East Timor historically proved instrumental in securing democracy in this small nation.<sup>20</sup> However, Canada voicing objections to Myanmar's military junta's coup and subsequent killing of civilians or China's violations of the human rights of Uyghurs<sup>21</sup> showed minimal results.<sup>22</sup>

### *Direct Enforcement of International Law by NGOs*

States are not the only actors involved in the enforcement of international law. Domestic and international **non-governmental organizations** also play an important role as watchdogs, advocates, awareness builders, and direct enforcers. For instance, the famous Sea Shepherd Conservation Society (SSCS), in its efforts to stop illegal whaling across Antarctic waters, resorted to direct and often illegal actions with its fleet of ships to enforce international marine law. SSCS used a variety of direct-action tactics to investigate, document, and interfere when necessary to expose and confront illegal activities on the high seas.<sup>23</sup> Some of the interference techniques include ramming and sinking whaling boats, bombarding ships with stink bombs, blocking outflow drains, dropping lines across poachers' ships, confiscating illegal fishing equipment, obstructing passage of fishing vessels, and sinking fishing boats.<sup>24</sup>

Non-governmental organizations like SSCS, Greenpeace, and others compel states and private companies to comply with already-existing international laws through direct and indirect action.



*The MV Steve Irwin was the 59-metre (194 ft) flagship of the Sea Shepherd Conservation Society, and was used in their direct action campaigns against whaling and illegal fisheries activities. Here, it is seen docked in Hobart, Tasmania in January 17, 2009—just three weeks before it collided with two Japanese whaling vessels in the Southern Ocean.*

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**non-governmental organization(s) (NGO):** an organization that is not established by a governmental entity or an inter-governmental agreement; may or may not be a non-profit entity

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## How Are Treaties Created Generally?

It is important to be familiar with the process of treaty creation since treaties are one of the primary sources of international law. The first step is the negotiation of the terms of the treaty by representatives of national governments. Normally, the negotiation's details or the treaty's contents will not be revealed until the parties have reached an agreement in principle on content or wording. This negotiation will result in a draft text for the proposed treaty, which may be signed by representatives of the national governments. Unlike the signature of a domestic contract, the signature of a treaty generally does not automatically result in a legally binding obligation. It simply represents a preliminary and general endorsement of the treaty provisions and indicates that the signatory country intends to undertake a careful examination of the treaty before it confirms its position. At a minimum, signing the treaty indicates that a country commits not to undermine the principles of the treaty and, at the maximum, indicates that a government's policy will be to commit fully to the treaty as it is currently written.

To become binding, a treaty must be ratified and usually be implemented in domestic legislation.

Usually, a treaty will become binding on the parties once it goes through **ratification** (a process also called "accession") by a specified number of the governments of the participating countries. The state's appropriate organ must ratify, which will vary from country to country—for example, its parliament, senate, or Crown. Once ratified, the treaty is usually binding on the signatory. Treaty parties that have ratified the instrument are also called **contracting parties**. A treaty regulates relations only among countries (the contracting parties) that have ratified the treaty. This is similar to our domestic law of **privity of contract**, as rights can only be created and enforced between the contracting parties.

Most treaties, before being ratified, will require the signing country to pass implementing legislation to make the international treaty enforceable at a national level. Technically, a country may be in default of its treaty obligations if it fails to pass the necessary domestic laws. Such a failure is often a result of domestic political issues, particularly if, after the treaty's negotiation, government policy in a country changes with the election of a new government.

### What Is Canada's Approach to Treaty Making and Implementation?

The following section discusses the steps the Canadian government must undertake pursuant to the *Constitution Act, 1867* in order to negotiate, sign, implement, and ratify an international treaty.<sup>25</sup>

#### Negotiations

In Canada, only the federal government's executive branch has the authority to negotiate, sign, and ratify international agreements. Global Affairs Canada and the Minister of Foreign Affairs are responsible for negotiating international treaties on Canada's behalf. Often, they will exercise a supervisory role, depending on the subject matter of the negotiation, and other federal bodies will take on the day-to-day negotiations in light of their expertise. For instance, Environment and Climate Change Canada conducts international negotiations dealing with the environment, and tax matters are dealt with by the Canada Revenue Agency. The people involved in negotiations may include the prime minister, ministers, deputy ministers, diplomatic representatives, and sometimes provincial and territorial participants.

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**ratification:** in international law, the process of individual countries confirming under their own domestic law the international obligations undertaken by their country in a treaty or convention

**contracting parties:** treaty parties that have ratified an instrument

**privity of contract:** the concept that only those who are parties to the contract can create and enforce the rights and obligations it contains

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Parliament is responsible for passing legislation of treaties whose subject matter falls under its jurisdiction. Provincial legislatures are responsible for treaty implementation in areas of provincial jurisdiction. Jurisdiction means the power to make legal decisions or judgments. In other words, the federal government requires provincial governments' consent to ensure international treaty implementation and enforcement in areas of provincial jurisdiction. Federal and provincial divisions of powers are listed in the *Constitution Act, 1867*.<sup>26</sup>

For example, section 91(2) of the Constitution grants the federal government exclusive control over the regulation of trade and commerce, while under section 92(13), the provincial and territorial governments have control over property and civil rights. This includes jurisdiction over:

- business regulation (services and investment),
- standards (consumer protection, health and safety),
- social-welfare issues (labour and environment),
- government procurement, and
- other issues (monopolies, state trading enterprises, technical barriers to trade).

### Signature

Once the negotiating states have reached consensus with respect to the terms of the agreement, the Cabinet needs to approve the signing of the final text of the treaty. By signing the treaty, Canada indicates to the other treaty parties that it agrees in principle and will not undermine the object and purpose of the treaty; however, it is not bound by it yet.

Canada becomes formally bound by a treaty at international law only upon ratification or accession. The Government of Canada also formally presents treaties in Parliament for comment before the Cabinet makes any decisions regarding ratification.

### Implementation

For Canada to comply with its international obligations, the treaty's provisions must be implemented in domestic law before ratification. Most of the time, without domestic implementation, the treaty will not be binding on legal and natural persons in Canada. If the subject matter of a treaty is within federal legislative jurisdiction, the Parliament enacts the necessary legislation. If the subject matter of the treaty is within provincial legislative jurisdiction, then the legislatures must enact the necessary legislation.

Depending on the nature of the treaty, the implementation can be done through executive or administrative action; however, most often, it is done by passing new legislation or regulations or amending existing laws. For example, the *International Sale of Goods Act*<sup>27</sup> makes the *United Nations Convention on Contracts for the International Sale of Goods*<sup>28</sup> applicable in British Columbia.

### Ratification

To ratify or accede to a treaty, Canada must prepare a declaratory statement or a ratification instrument advising the other treaty signatories that it has implemented the treaty provisions domestically. This document signals to the other treaty parties that Canada agrees to be bound by the treaty. The treaty will come into force depending on the treaty provisions or the parties' separate agreement regarding the date.

### *How Do Other Countries Approach Treaty Making?*

The treaty making process varies from country to country due to differences in legal systems, governmental structures, and diplomatic and cultural traditions. The example below illustrates the US's approach.

### The US's Approach to Treaty Making

The US approach to treaties may be described as cautious or even reluctant. This reluctance is based, in part, on its history as a North American nation that broke away from colonial rule by way of a violent revolution. The US Constitution grants power to the president to make treaties with the “advice and consent” of two thirds of the Senate. This is different from other US legislation, which requires approval by a simple majority in both the Senate and the House of Representatives. The US also takes a different view from many other nations concerning the relationship between international and domestic law. Many nations view international agreements as superseding domestic law, but the view in the US is that international agreements become a part of the body of US federal law and, as a result, Congress can modify or repeal treaties by subsequent legislative action, even if this modification amounts to a violation of the treaty. In addition, an international agreement that is inconsistent with the US Constitution is void under US domestic law, just as any other federal law that is in conflict with the US Constitution is void. Technically, the Supreme Court of the US could rule a treaty provision to be unconstitutional and void under domestic law, although this has never occurred. When negotiating a treaty, the US usually requires the inclusion of a **reservation** stating that it will assume no obligations that are in violation of the US Constitution.

### Significant International Organizations and Agreements

Although states are the major players in creating international law, international organizations, non-governmental organizations, and multinational corporations (MNCs) play an equally important part in shaping international law and the world economic order in which businesses operate. This section covers some more prominent international organizations created by treaties and agreements. Although the organizations described here do not directly impose specific rules, they significantly impact the global business environment. It is necessary to know about the characteristics and activities of these organizations, among other things, to:

- make the best possible strategic business decisions;
- ensure compliance, avoid potential legal issues, and align internal practices and operations with international standards;
- use their world-class research and policies to inform internal business planning and operations, identify and mitigate risk, obtain a competitive edge, and protect their interests; and
- access resources, funding, networking, and partnership opportunities.

For instance, the WTO (which is discussed in greater detail in Chapters 2 and 3) plays a crucial role in trade policy. By staying informed about its activities, Canadian businesses can anticipate changes to market access conditions. The World Health Organization (WHO) is one of the largest UN specialized agencies. Canada is among its foremost supporters. WHO is instrumental in tobacco use research and policy development. Canada played a pivotal role in developing the WHO *Framework Convention on Tobacco Control* and was among the earliest to ratify it in 2004.<sup>29</sup> In 2023, Canada was the first to implement regulations requiring warning labels on individual cigarettes.<sup>30</sup> Businesses that were abreast of the relationship between Canada and research activities of the WHO were able to adjust to the regulatory

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**reservation:** a process used in treaties and international agreements whereby signatories to the agreement may exempt themselves from specific obligations under the treaty or agreement

changes first. By following the activities of this foundation, business can assess future trends, learn more about risks in certain jurisdictions, and identify funding and partnership opportunities.<sup>31</sup>

### **The United Nations**

The UN is the first international organization that comes to most people's minds. Founded after the Second World War by 51 countries upon the signing of the United Nations Charter (UN Charter) in San Francisco on June 26, 1945, its mandate is to:

- maintain international peace and security;
- develop friendly relations among nations;
- cooperate to solve problems of an economic, social, cultural, or humanitarian nature; and
- promote and encourage human rights and fundamental freedoms.

Although the UN has no direct role in the legal or regulatory aspects of international business, the impact of its action or inaction on the conduct of international business should not be underestimated.

Currently, the UN has 193 members and is organized as follows:

1. *The General Assembly.* The UN General Assembly is the main policy-making body of the UN. Its principal functions include promoting international cooperation in the economic, social, cultural, educational, and health fields and assisting in the realization of human rights and fundamental freedoms for all. Each member state or country sends a delegate to the UN General Assembly; each state has one equal vote, regardless of size, population, or political influence. The General Assembly is a quasi-legislative body because its function is to discuss matters within the scope of the UN Charter. It may recommend action, but the power to enforce the Charter rests with the Security Council. The General Assembly votes on resolutions brought forward by member states. The resolutions then may be referred to the Security Council to be made binding. Resolutions passed by the General Assembly are highly persuasive but are not legally binding on member states unless also passed by the Security Council. They fall under the category of "soft law" as discussed above.
2. *The Security Council.* The Security Council has 15 members—5 of which are permanent members. The permanent members are China; France; the United Kingdom (UK); the US; and the former USSR, whose seat is now occupied by Russia. The ten non-permanent members are elected by the General Assembly every two years. The permanent members have a veto over non-procedural issues in the Security Council. The Security Council is responsible for maintaining international peace and security, and it is the only UN organization with the authority to use armed force. Only the Security Council's resolutions are binding on all UN member states.
3. *The Secretary-General.* The Secretary-General is the UN's chief administrative officer and is responsible for running the Secretariat, which is the UN's "civil service." Nominations for the Secretary-General are initiated in the Security Council, and elections are held in the General Assembly.

The UN is the only multilateral organization with truly global membership. It serves as an important catalyst for multilateral action on many world problems. Its Sustainable Development Goals are discussed below to illustrate this point.

**FIGURE 1.1 The United Nations Sustainable Development Goals**

### Sustainable Development Goals

In 2015, the UN member states adopted the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs)<sup>32</sup> and invited the private sector to provide input. The SDGs, represented in Figure 1.1, comprise 17 goals and 169 targets focusing on ending poverty, fighting inequalities, and tackling climate change. The SDGs cover the three dimensions of sustainable development—economic growth, social inclusion, and environmental protection—and affect all countries.

The SDGs signatory states have started implementing the goals at a national level. The national plans direct domestic policy, legislation, regulations, stimulus programs, financing, awareness campaigns, and other actions intended to achieve SDGs at a domestic level. The SDGs provide useful guidance for businesses and investors. Since the SDGs inform the direction that signatory states will take domestically, businesses can use these goals to direct their processes. The process of achieving the SDGs opens up as much as US\$12 trillion of market opportunities and may produce up to 380 million new jobs by 2030.<sup>33</sup> To benefit from these opportunities, businesses must incorporate the SDGs into their long-term strategies and stakeholder engagements. Cooperation between governments and the private sector is essential to achieving the SDGs.

In addition to the SDGs, a review of any UN-affiliated organizations and UN-sponsored conventions provides an immediate overview of the organization's impact on many areas of concern in the world.

### Organizations Affiliated with the United Nations

Among the many organizations affiliated with the United Nations are the following:

- United Nations Conference on Trade and Development (UNCTAD),
- United Nations Commission on International Trade Law (UNCITRAL),
- United Nations Relief and Works Agency (UNRWA),
- United Nations Children's Fund (UNICEF),
- United Nations Development Programme (UNDP),
- United Nations Environment Programme (UNEP).

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- International Labour Organization (ILO),
- Food and Agriculture Organization of the UN (FAO),
- World Health Organization (WHO), and
- World Intellectual Property Organization (WIPO).

UNCTAD and the UNCITRAL are of particular importance to international business. **UNCTAD** promotes the integrated treatment of trade and development and the related issues of investment, finance, technology, enterprise development, and sustainable development. UNCTAD also promotes the integration of developing countries into the world economy. It is a knowledge-based organization that aims to inform current policy debates and thinking on development based on the premise that domestic policies and international action should mutually support sustainable development. It carries out the following three key functions:

- serves as a forum for intergovernmental deliberations;
- undertakes research, policy analysis, and data collection for governments and experts; and
- provides technical assistance and cooperates with other organizations and donor countries engaged in helping developing countries and economies in transition.

**UNCITRAL** was established by the General Assembly in 1966 to address the disparities in national laws governing international trade that were perceived as creating obstacles to trade flow. UNCITRAL's mandate is to bring about the progressive harmonization and unification of international trade law. For instance, UNCITRAL was instrumental in establishing a consistent legal framework for the international sale of goods, transport of goods, and dispute resolution. Recent initiatives include work on cloud computing, artificial intelligence, data transactions, digital platforms, and other projects.<sup>34</sup>

### *The Bretton Woods System*

Before the end of the Second World War, the **Allies** held meetings at Bretton Woods, New Hampshire, in the US for the purpose of creating a system to prevent future economic and military catastrophes. This is the origin of the **Bretton Woods Institutions**. Discussions at these meetings concentrated on the financial problems faced by nations in the post-war era. There was a consensus among the Allies that freer trade and the creation of a transnational bank would help in reconstruction after the war. Two major organizations and one “agreement that became an organization” resulted from the Bretton Woods conferences: the **International Monetary Fund (IMF)**, the **World Bank**, and the **General Agreement on Tariffs and Trade (GATT)**.

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**United Nations Conference on Trade and Development (UNCTAD):** the UN's arm for promoting the integrated treatment of trade and development and the related issues of investment, finance, technology, enterprise development, and sustainable development

**United Nations Commission on International Trade Law (UNCITRAL):** an agency that has as its principal objective the harmonization of trade law

**Allies:** countries that emerged as victors in the Second World War, including Great Britain, the US, Canada, France, China, and Russia

**Bretton Woods Institutions:** the IMF, the World Bank, and the GATT

**International Monetary Fund (IMF):** an organization established at Bretton Woods in 1944 to restore and promote international monetary and economic stability

**World Bank:** an organization established at Bretton Woods in 1944 to help countries reconstruct their economies after the Second World War

**General Agreement on Tariffs and Trade (GATT):** an agreement that arose out of Bretton Woods meetings in 1944; a multilateral treaty that prescribes rules for international trade

### The International Monetary Fund

The IMF was established to promote international monetary cooperation, exchange stability, and orderly exchange arrangements; to foster economic growth and high levels of employment; and to provide temporary financial assistance to countries to help ease balance-of-payments adjustment. The IMF is the central institution of the international monetary system, which is the system of international payments and exchange rates among national currencies that enables business to take place between countries. In 1945, when the IMF was first established, its purpose was essentially to promote financial and monetary stability by supporting fixed exchange rates. While nominally this purpose has remained unchanged, IMF operations have developed to meet the changing needs of the evolving world economy. At present, the IMF:

- monitors economic and financial developments and policies in member countries,
- provides loans to member countries with balance-of-payments problems, and
- provides technical assistance and training to countries in financial difficulty.

The IMF provides financing not for particular economic sectors or projects but for the general support of a country's balance of payments and international reserves while the country takes policy actions to address its difficulties. The IMF's performance, mission, and relevance have been the subject of a great deal of criticism.

### The World Bank

The World Bank and the IMF complement each other's work. While the IMF focuses chiefly on macroeconomic performance and financial sector policies, the World Bank is concerned mainly with longer-term development and poverty-reduction issues. Its mission is to fight poverty and improve people's living standards in the developing world. Its activities include providing loans to developing countries and countries in transition to finance infrastructure projects, the reform of particular sectors of the economy, and broader structural reforms. The World Bank consists of five closely associated institutions, each of which plays a distinct role in fighting poverty and improving living standards for people in the developing world. These institutions are the following:

1. *The International Bank for Reconstruction and Development (IBRD)*. The IBRD provides loans, guarantees, and analytical and adviser services to middle-income and creditworthy poorer countries.
2. *The International Development Association (IDA)*. The IDA provides interest-free credits and grants to the world's poorest countries—that is, countries that have little or no capacity to borrow on market terms. IDA resources help support country-led poverty-reduction strategies to raise productivity, provide accountable governance, and improve the private investment climate and access to education and health services.
3. *The International Finance Corporation (IFC)*. The IFC promotes economic development through the private sector. Working with business partners, it invests in sustainable private enterprises in developing countries. It provides equity, low-interest loans, structured finance and risk-management products, and advisory services for its clients. It also finances markets deemed too risky by commercial investors in the absence of IFC participation.
4. *The Multilateral Investment Guarantee Agency (MIGA)*. The MIGA helps promote foreign direct investment in developing countries by providing guarantees to investors against non-commercial risks, such as expropriation, currency inconvertibility and transfer restriction, war and civil disturbances, and breach of contract. It also provides technical assistance and advisory services to help countries attract and retain foreign investment.

5. *The International Centre for Settlement of Investment Disputes (ICSID)*. The ICSID supports foreign investment by providing international facilities for the settlement of investment disputes.

The World Bank is run like a cooperative, with its member countries as shareholders. The number of shares a country has is based roughly on the size of its economy. The US is the largest shareholder, holding approximately 16 percent of the total votes. The next four largest shareholders are Japan, China, Germany, and the UK. By tradition, the World Bank's president is a national of the largest shareholder. Appointed for a five-year renewable term, the president is responsible for the overall management of the World Bank.

### **The General Agreement on Tariffs and Trade**

Although the characteristics of the GATT are discussed in more detail in Chapter 2, it is appropriate to mention the GATT here because it has its origins in the Bretton Woods conferences. Delegates at those meetings had hoped to establish an **International Trade Organization (ITO)** in addition to the IMF and the World Bank. The mandate for the ITO was to promote and stabilize world trade. After several years of discussion, a charter was proposed in 1947 in Havana, Cuba. Sufficient support for ratification of this charter was not achieved because the US Congress failed to approve US participation in the ITO. The result was that the ITO was never formally established. The remnant of these discussions was the GATT, the surviving document that the parties had agreed upon. This agreement became, by default over time, the international agency for trade.

### ***The International Chamber of Commerce***

The International Chamber of Commerce (ICC) was founded in 1919 to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The organization advocates for world business and communicates with governments and intergovernmental organizations, promoting choices favourable to the world business community. The ICC has the highest level of consultative status with the UN and its specialized agencies. Since 1946, the ICC has participated in a broad range of activities with the UN and its specialized agencies, including the Conference on Financing for Development, the World Summit on Sustainable Development, and the World Summit on the Information Society.

Working with national governments all over the world through its national committees, the ICC's activities cover a broad spectrum: for example, providing arbitration and dispute resolution, making the case for open trade and the market economy system, advocating business self-regulation, fighting corruption, and combatting commercial crime. Significant contributions of the ICC include:

- the ICC Court of Arbitration—the longest-established ICC institution and the world's leading body for international commercial arbitration;
- the Uniform Customs and Practice for Documentary Credits (UCP)—the common rules that enable international banks to finance billions of dollars worth of world trade each year;

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**International Trade Organization (ITO):** an association proposed in the Havana Charter in 1947 and intended to be the third Bretton Woods institution; it failed to be established when the US did not ratify the Havana Charter

- Incoterms—the standard international trade definitions commonly used in international contracts; and
- business self-regulation of e-commerce—the codes developed by businesses to establish international norms.

### **Organisation for Economic Co-operation and Development**

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental organization comprising 38 countries that work together to address the economic, social, and environmental challenges of the globalizing world economy. The OECD has played a prominent role in fostering good governance in the public service and corporate activity, and it is well known for its research, individual country surveys, and reviews. Its membership is limited to countries who are committed to a market economy and a pluralistic democracy. At present, its work encompasses the following areas:

- entrepreneurship;
- tax policy and administration;
- sustainability and equal opportunity;
- education and skills;
- labour and employment;
- financial and enterprise affairs;
- science, technology, and innovation;
- economics;
- environment;
- public governance;
- statistics and data;
- trade and agriculture; and
- international cooperation and coordination toward SDGs.

In line with its aims to foster economic growth and level the global playing field, the OECD also has extensive global relations with non-member countries.

The OECD's *Guidelines for Multinational Enterprises*, first issued in 1976 and with the most recent version published in 2023, are highly persuasive and widely adopted recommendations for multinational enterprises operating in or from 51 adhering countries.<sup>35</sup> The guidelines provide non-binding principles and standards for responsible business conduct globally, consistent with applicable laws and internationally recognized standards. The guidelines provide a comprehensive list of recommendations on how foreign direct investment should be conducted concerning human rights; employment and industrial relations; the environment; combating bribery, bribe solicitation, and extortion; consumer interests; science and technology; competition; taxation; and other topics. Although they are not legally binding on multinational corporations, the guidelines promote self-enforcement through transparency, reporting, and internal controls.

### **G7 and G20**

Although the G7 and G20<sup>36</sup> organizations are not supported by a transnational administration, as are all the other organizations we have examined, they are nevertheless important and influential in the current global business environment.

The G7 began as the G6 and has its roots in the 1973 oil crisis and the subsequent global recession. France, West Germany (as the Federal Republic of Germany was known at the time), Italy, Japan, and the UK, under the leadership of the US, agreed to an annual meeting to be organized under a rotating presidency. Canada joined in 1976, and in 1991, following the end of

the **Cold War**, Russia began meeting with the G7. The G7 became the G8 at the instigation of then US President Clinton as a gesture of appreciation for Russia's pursuit of economic reform, although its membership was suspended indefinitely in 2014 following Russia's annexation of Crimea.

The country holding the presidency of the G7 hosts a series of ministerial-level meetings and a three-day summit each year at which topics of current concern, such as global warming, poverty in developing countries, and world health problems, are discussed. Because these topics are controversial, some criticize the G7, described by some as an unofficial "world government." The annual summits are often the focus of anti-globalization protests.

The G20 is an informal forum that seeks to promote an open and constructive dialogue between industrial nations and emerging-market countries on issues that relate to the international monetary and financial system. It also provides a platform for discussion of current international economic issues. G20 members develop a common position on issues that relate to international currency and financial systems, and they foster the establishment of internationally recognized standards and practices to promote transparency of fiscal policy, as well as policies to combat money laundering and the financing of terrorism.

The G20 now brings together industrial and emerging-market countries from all regions of the world. Together, the member countries represent nearly 90 percent of the global gross national product, 75 percent of world trade, and two thirds of the world's population. The G20, like the G7, has no permanent staff of its own. Like the G7, the current chairing country coordinates the group's work and organizes its meetings. Current members of the G20 are the following:

Argentina	European Union	Italy	South Africa
Australia	France	Japan	South Korea
Brazil	Germany	Mexico	Türkiye
Canada	India	Russia	United Kingdom
China	Indonesia	Saudi Arabia	United States

To ensure that the G20's activities are closely aligned with those of the Bretton Woods Institutions, the managing director of the IMF and the president of the World Bank, as well as the chairpersons of the International Monetary and Financial Committee and of the Development Committee of the IMF and World Bank, participate in its deliberations, as do experts from private-sector institutions.

### **World Economic Forum**

Established in 1971, the World Economic Forum is an international organization for public-private cooperation. Any entrepreneur would be wise to pay attention to the World Economic Forum and the policies and agenda items deliberated at the forum's meetings held throughout the year. The meetings are attended by corporate executives, heads of state, civil society leaders, social entrepreneurs, experts, and academics, representatives of international organizations, and youth and technology innovators to collaborate and find solutions to global security issues, problems of the global commons, and the challenges of the fourth industrial revolution. The forum also has world-class research capabilities that produce invaluable data on some of the world's most significant issues; the data is made available to the public. For example, the forum publishes the influential *Global Competitiveness Report*<sup>37</sup> (published since 1979 and now covering 138 countries) and the *Global Gender Gap Report*.<sup>38</sup>

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**Cold War:** following the Second World War, the state of political tension and military rivalry between the US and the Soviet Union and their respective allies

## CRITICAL ANALYSIS: Business Law and Ethics

### **Alleged Breaches of Human Rights Law by a Canadian Mining Company: *Nevsun Resources Ltd v Araya (SCC, 2020)*<sup>39</sup>**

#### **Background to the Lawsuit**

A Vancouver-based mining company, Nevsun Resources Ltd (Nevsun), built an open mine to extract significant gold, silver, zinc, and copper deposits from a remote area in the small east African country of Eritrea. Within the first four years of operation, Nevsun generated \$700 million in profits from its mine. The Eritrean government holds a 40 percent stake in the operation, and Nevsun, through its foreign subsidiaries, holds the remaining 60 percent. Since 1993, the Eritrean government has been run by a dictator, President Isaias Afewerki. The UN and the Human Rights Watch allege that President Afewerki's regime has committed crimes against humanity by using conscripted military labour, akin to slavery, to build and operate the mine run by Nevsun's subsidiaries.

#### **The Lawsuit**

In 2014, the plaintiffs, a group of Eritrean refugees, commenced an action in British Columbia. Among the plaintiffs' claims are that Nevsun violated customary international law (CIL) by knowingly aiding or permitting forced labour, slavery, torture, and other crimes against humanity in the process of building the mine in Eritrea. The plaintiffs seek damages in Canada for the breach of CIL. This is a novel claim. Nevsun failed before both the BC Supreme Court and Court of Appeal to have the courts strike out this portion of the claim on the basis that this was not a recognized private cause of action in Canada. The Court of Appeal permitted the action to proceed to trial. However, Nevsun sought and was granted leave to appeal to the Supreme Court of Canada (SCC). The SCC heard the case in January 2019 and decided, among other issues, for the first time that the Canadian common law should recognize a cause of action for damages based on alleged breaches of CIL norms.

#### **Extracts from the Judgment**

[1] This appeal involves the application of modern international human rights law, the phoenix that rose from the ashes of World War II and declared global war on human rights abuses. Its mandate was to prevent breaches of internationally accepted norms. Those norms were not meant to be theoretical aspirations or legal luxuries, but moral imperatives and legal necessities. Conduct that undermined the norms was to be identified and addressed.

[2] The process of identifying and responsively addressing breaches of international human rights law involves a variety of actors. Among them are courts, which can be asked to determine and develop the law's scope in a particular case. This is one of those cases. ...

[71] Since "[i]nternational law not only percolates down from the international to the domestic sphere, but ... also bubbles up," there is no reason for Canadian courts to be shy about implementing and advancing international law...

[72] Understanding and embracing our role in implementing and advancing customary international law allows Canadian courts to meaningfully contribute, as we already assertively have, to the "choir" of domestic court judgments around the world shaping the "substance of international law" ...

[74] Customary international law has been described as "the oldest and original source of international law"... It is the common law of the international legal system—constantly and incrementally evolving based on changing practice and acceptance. As a result, it sometimes presents a challenge for definitional precision. ...

[120] In the domestic context, the general principle that "where there is a right, there must be a remedy for its violation" has been recognized in numerous decisions of this Court ...

[121] The right to a remedy in the context of allegations of human rights violations was discussed by this Court in *Kazemi*, where a Canadian woman's estate sought damages against the Islamic Republic of Iran for torture. The majority did not depart from the position in *Hape* that customary international law, including peremptory norms, are part of Canadian common law, absent express legislation to the contrary.

#### **Critical Analysis Questions**

1. Why do you think the plaintiffs are suing Nevsun in Canada and not Eritrea?
2. What are the possible ramifications for companies now that the new private cause of action for breaches of norms of customary international law have become part of the Canadian common law?

(Continued on next page.)

3. What is one way discussed in the chapter that Canadian companies can be held accountable for their operations abroad? Can you think of any other ways?
4. What ethical obligations does Nevsun have when operating abroad? Are the ethical obligations the same domestically? Why or why not?
5. How can companies ensure they are not subject to lawsuits for breaches of customary international law?
6. Do you consider this case to be one of international public law or private law or both? Why?
7. Should foreign subsidiaries of Canadian corporations be subject to Canadian law? Why or why not?
8. What role, if any, should Canadian (1) government, (2) corporations, and (3) NGOs play with respect to human rights internationally?
9. Access the SCC website and review its Nevsun decision. What are the main take-aways from the majority's and dissenting's reasons?

## CHAPTER SUMMARY

In this chapter, we discussed:

### Why it is necessary for all businesses to possess a current knowledge of the global business environment.

- By understanding the legal underpinnings of international trade, it is possible to better assess risks, understand the “levers of power,” and make strategic decisions.

### The characteristics of law and what international law is—and is not.

- A law is a rule that can be enforced by the courts.
- Domestic and international laws are subdivided into public law and private law.
- Public international law regulates relations among nations.
- Private international law regulates relations among individuals in different states.
- Main sources of international public law, in order of importance, are: treaties and conventions, international customary law, general principles of law recognized by civilized nations, and judicial decisions and teachings of various nations.

### How international law is enforced and implemented.

- International law is usually followed by most states most of the time.

- International law is enforced through negotiation, reciprocity of retorsions and countermeasures, arbitration and other treaty dispute resolution provisions, collective action, naming and shaming, and direct action.

### How international agreements and treaties are created.

- A treaty is a binding agreement between two or more states.
- This is the process of treaty creation: national governments negotiate treaty terms; text is drafted for the proposed treaty; signing a treaty shows that a country will consider the treaty; once ratified by a specified number of the governments, a treaty comes into force.
- A treaty regulates relations only among countries that have ratified it and passed domestic legislation.
- In Canada, treaty-making authority lies exclusively with the federal executive branch of government.

### The history, characteristics, and purpose of some well-known international organizations and agreements, and their limitations.

- The United Nations and other international organizations contribute to the development and enforcement of international law.

## KEY TERMS

Allies, 18

bilateral agreement, 6

Bretton Woods Institutions, 18

Cold War, 22

conflict of laws, 5

contracting parties, 13

countermeasures or reprisals, 10

General Agreement on Tariffs and Trade (GATT), 18

International Court of Justice (ICJ), 10

International Monetary Fund (IMF), 18

International Trade Organization (ITO), 20

multilateral agreement, 6

non-governmental organization(s) (NGO), 12

private international law, 5

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sovereignty, 5

state(s), 5

treaty, 6

United Nations Commission on International Trade Law (UNCITRAL), 18

United Nations Conference on Trade and Development (UNCTAD), 18

World Bank, 18

## REVIEW QUESTIONS

1. Why is there some debate as to whether international law is really law?
2. What is the difference between public international law and private international law?
3. Why is the International Court of Justice of little practical significance for private businesses?
4. What are the acknowledged sources of public international law?
5. Why is private international law sometimes described as the “conflict of laws”?
6. What is the difference between a treaty and a convention?
7. What is the significance of a country signing a treaty or convention?
8. What is the significance of a country ratifying a treaty or convention?
9. What is meant by “sovereignty,” and what is the significance of this concept in the context of treaties and other international agreements?
10. Describe the different requirements in Canada and the US with respect to ratification of a treaty. How does this reflect the differing attitudes of the two countries toward international obligations?
11. You operate a business in the dairy industry. What branch or branches of government would you likely try to influence with respect to a potential international trade deal?
12. What is the significance of soft law?
13. Which international law enforcement measure is the most effective?
14. What are peremptory norms in international law?
15. Why is the *Vienna Convention on the Law of Treaties* important to regulating the international legal system?
16. Describe the mandate and the present organizational set-up of the UN.
17. Describe the work of UNCTAD and UNCITRAL.
18. What are the Bretton Woods Institutions, and what is the role of each of these?
19. Is the International Chamber of Commerce an intergovernmental organization? Why was it founded and what are some of its achievements?
20. Describe the purpose of the OECD. What is it best known for?
21. What is the G7? How is it structured and how does it achieve its mandate?
22. Describe the origin and purpose of the G20. Go online to <https://www.g20.org> and explain the impact the G20 has.
23. How do international organizations and NGOs shape global business standards and practices? Provide examples of specific organizations and their impacts.

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