CHAPTER 1

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

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 latter'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."[1] A second definition is that a law is a rule that can be enforced by the courts.[2] 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 national or 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 or national law can be distinguished from international law, which will be discussed further below. The primary sources of our national or 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 subdivided 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 contract.

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, 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 195[3] 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 is law regulating 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 Chapter 7, Negotiation of International Contracts (Part 2): Contract Challenges and Risk Management.

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 as well as the increasing desire on the part of countries to increase and regulate global trade and to assert a moral dimension in global business has led to an explosion of rules or laws enforceable at the domestic level.

Where Does International Public Law Come from?

In Canada, Parliament and the provincial legislatures are the primary law makers. 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. Nation states are the principal

---

state: 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: the law applicable to private parties involved in international transactions

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

actors in the creation of international law. 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 courts decisions, and legal scholarship.

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 in its adjudication of interstate disputes. This provides us with a useful summary of the sources of international law. They are the following:

- 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 not available 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** basis, meaning between two states, or a **multilateral** 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 World Trade Organization.

Limitation of Sovereignty

International treaty arrangements commit national governments to certain actions and policies 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 voting public.

---

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

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

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 certain 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 normally observed by most states most of the time. Box 1.1 provides an example of a customary law that is well established around the world.

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.[4]

General Principles of Law

International courts and tribunals rely on general principles of law when they are unable to 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 some of the examples of these general principles of law. For instance, good faith means that parties explicitly or impliedly consent to not 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 under a duty to act honestly in the performance of 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.

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.

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"[5] as a subsidiary means of determining the rules of laws. In case the international tribunals and courts are unable to distill an answer to a legal problem from the previous three sources of law, 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 used by the international community 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 communiques, 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 the regulation of the 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)[6] 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 business 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 January 2018, Canada's international trade minister announced the creation of a Canadian ombudsperson for responsible enterprise office to investigate human rights complaints about the overseas operations of Canadian companies.[7] This legislative action stems in part from the Government of Canada's active support in the development and subsequent endorsement of the UNGPs. Due to such legislative initiatives, many Canadian companies are adopting the UNGPs to prescribe their operations domestically and abroad.

How Is International Law Enforced Internationally?

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 a practical, stable, predictable, and overall beneficial framework for conducting international transactions. International rules are tacitly and explicitly acquiesced to by the 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 alike generally prefer to keep their grievances out of the public view and have them resolved 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 used frequently 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 included in treaties. Some treaties include a combination of these mechanisms.

The International Court of Justice

At present, 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 the fact 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

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

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

Imposition of unfriendly measures and removal of friendly concessions are 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. An example of unprecedented retorsions is provided in Box 1.2.

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 refused 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 make sure it is proportionate to the breach committed and must 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. 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.

For example, on May 31, 2018, the United States imposed aluminum and steel tariffs of 10 and 25 percent respectively on Canada, citing that its northern neighbour represented a national

BOX 1.2 Saudi Arabia Imposes Sanctions on Canada for Online Comments

Raif and Samar Badawi are two Saudi Arabian human rights activists imprisoned in Saudi Arabia.[8] Raif Badawi was arrested in 2012 and later sentenced to one thousand lashes and ten years in jail for criticizing clerics online. Samara Badawi was arrested in the summer of 2018.[9] Raif Badawi's wife and children are Canadian citizens living in Montreal.[10] On August 2, 2018, Chrystia Freeland, Canada's minister of foreign affairs, tweeted "Very alarmed to learn that Samar Badawi, Raif Badawi's sister, has been imprisoned in Saudi Arabia. Canada stands together with the Badawi family in this difficult time, and we continue to strongly call for the release of both Raif and Samar Badawi."[11] In retaliation for these statements, the Saudi Arabian government imposed substantial retorsions, namely expelling the Canadian ambassador from Saudi Arabia, stopping all Saudi Arabian flights to Canada, halting all new trade and investment deals, and ordering Saudi Arabian students residing in Canada to study elsewhere or return to Saudi Arabia. The retorsions imposed by Saudi Arabia on Canada may have significant trade and generally economic repercussions on both countries.[12]

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

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

security threat to the United States.[13] In response, Ottawa imposed $16.6-billion worth of countermeasures on imports of American steel, aluminum, and consumer products.[14] Canada's retaliatory measure was proportional, as it was approximately the same value as the Canadian steel and aluminum exports to the United States that were affected by the United States' tariffs, and the measure was meant to exert pressure on the United States to withdraw its illegal tariffs on Canadian metal. Canadian officials stated that the imposed tariffs were in breach of the United States' obligations under the North American Free Trade Agreement and the World Trade Organization agreements and launched consultations under both dispute-resolution regimes.

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 World War II.

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 resolutions that are 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, 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 nine rounds of sanctions against North Korea since its first nuclear test in 2006.[15] The UN Security Council's measures against DPRK include a variety of economic sanctions, such as a ban on export of electrical equipment, coal, minerals, seafood, food and agricultural products, wood, textile, and earth and stones.[16]

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. 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, the fishing industry is of utmost importance to Canada, since it brings approximately $6 billion into the Canadian economy annually.[17] Canada exports fish and seafood products to some 140 countries worldwide.[18]

Under international law, countries are required to cooperate in the conservation and management of living marine resources. Canada, being surrounded by three oceans, plays a leadership role in enforcement of international agreements to help ensure the long-term health of the world's shared ocean resources.

Global fishing is so aggressive that many wild-fish populations are at risk of disappearing unless the industry is restricted. Overfishing and illegal fishing significantly deplete the number

of fish. Recognizing the effectiveness of the "naming and shaming" approach, in April 2018 Canada's fisheries minister called on the G7 members—Canada, France, Germany, Italy, Japan, the United Kingdom, the United States, and the European Union—to use military and other surveillance technology and existing satellite images to name and shame practitioners that are conducting massive illegal overfishing operations.[19]

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, in 2008, the Discovery Channel premiered its documentary called *Whale Wars,* which followed the famous Sea Shepherd Conservation Society (SSCS) ship in its efforts to stop illegal whaling across Antarctic waters.[20] This television show illustrated the direct, and often illegal, actions a non-governmental organization may take to enforce international marine law.

The SSCS was established by the Canadian-American environmentalist Paul Watson in 1977 and is an international non-profit marine-wildlife conservation organization. Its mission is to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species. SSCS uses a variety of direct-action tactics to investigate, document, and interfere when necessary to expose and confront illegal activities on the high seas.[21] Some of the interference techniques include ramming whaling boats, pelting fishers with rotten butter as a diversion while divers cut fishing nets holding endangered tuna, bombarding ships with stink bombs and smoke flares, blocking outflow drains, dropping lines across poachers' ships, confiscating illegal fishing equipment, obstructing passage of fishing vessels, and sinking fishing boats.[22]

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.

How Are Treaties Created Generally?

It is important to be familiar with the process of treaty creation, since treaties, as discussed above, are one of the main sources of international law. The first step is negotiation of the terms of the treaty by representatives of national governments. Normally, details of the negotiations or the contents of the treaties 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. The signature of a treaty, unlike the signature of a domestic contract, does not 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 is **ratified** (a process also called "accession") by a specified number of the governments of the participating countries. Ratification

---

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

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

must be done by the appropriate organ of the state, and this organ will vary from one country to another—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 be created between the contracting parties.

Most treaties, once 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* in order to negotiate, sign, implement, and ratify an international treaty.[23]

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.

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, 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*.

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/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).

---

contracting parties: Treaty parties that have ratified an instrument

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

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. Since 2008, it is the Government of Canada's policy to formally table treaties in Parliament for comment prior to the Cabinet making any decisions regarding ratification.

Implementation

For Canada to comply with its international obligations, the provisions of the treaty must be implemented in domestic law prior to ratification. Most of the time, without domestic implementation, the treaty will not be binding on persons, legal and natural, in Canada. If the subject matter of a treaty is within federal legislative jurisdiction, it is the federal Parliament that enacts the necessary legislation. If the subject matter of the treaty is within provincial legislative jurisdiction, then the provincial 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 through passing new legislation or regulations, or by amending existing laws. For example, the *International Sale of Goods Act*[24] makes the *United Nations Convention on Contracts for the International Sale of Goods*[25] 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.

BOX 1.3 The United States' 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 United States 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 United States 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 United States could rule a treaty provision to be unconstitutional and void under domestic law, although this has never occurred. When negotiating a treaty, the United States usually requires the inclusion of a **reservation** stating that it will assume no obligations that are in violation of the US Constitution.

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

Significant International Organizations and Agreements

As discussed above, although states are the major players in the creation of 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 next section covers some of the more prominent international organizations created by treaties and agreements. Although the organizations described here do not have an immediate effect on businesses in the sense of directly imposing specific rules, they have a significant impact on the global business environment. It is necessary to know about the characteristics and activities of these organizations in order to make the best possible strategic business decisions.

The United Nations

The UN is the first international organization that comes to the minds of most people. Founded after the Second World War by 51 countries upon the signing of the United Nations 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 United Nations 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 co-operation 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 its 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, the United States, 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. Thus, just one of these countries can block any action proposed by 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.

Sustainable Development Goals

The United Nations' Millennium Development Goals (MDGs)[26] were adopted by the world's countries in 2000 as a blueprint for building a better world in the 21st century with a focus on developing nations. These goals represented an ambitious agenda for international development, security, and human rights, with 2015 set as the target for achieving these goals. The MDGs overall were seen as a success. To build on the goals and attempt to complete what they did not achieve, in 2015 the UN member states adopted the 2030 Agenda for Sustainable Development and its Sustainable Development Goals (SDGs)[27] and invited the private sector to provide input. The SDGs, represented in Figure 1.1, are composed of 17 goals and 169 targets focusing on ending poverty, fighting inequalities, and tackling climate change. The SDGs have a wider scope than the MDGs, as they cover the three dimensions of sustainable development—economic growth, social inclusion, and environmental protection—and affect all countries.

Since 2015, 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.[28] To benefit from these opportunities, businesses will need to incorporate the SDGs into their long-term strategies and stakeholder engagements. Cooperation between governments and the private sector is essential to achieving the SDGs.

FIGURE 1.1 The United Nations Sustainable Development Goals

The content of this publication has not been approved by the United Nations and does not reflect the views of the United Nations or its officials or Member States.

In addition to the SDGs, a review of any list of 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),
- International Labour Organization (ILO),
- Food and Agriculture Organization of the UN (FAO),
- World Health Organization (WHO), and
- World Intellectual Property Organization (WIPO).

UNCTAD and 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 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 be mutually supportive in bringing about 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 the flow of trade. UNCITRAL's mandate is to bring about the progressive harmonization and unification of the law of international trade, and it has become the core legal body of the UN system in the field of international trade law. Significant recent initiatives include a new draft *Convention on the Use of Electronic Communications in International Contracts*[29] and a *Legislative Guide on Insolvency Law*[30] to help create a unified international standard for insolvency.

The Bretton Woods System

Before the end of the Second World War, the **Allies** held meetings at Bretton Woods, New Hampshire, in the United States for the purpose of creating a system to prevent future economic

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

and military catastrophes. This is the origin of the reference to **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**, the **World Bank**, and the **General Agreement on Tariffs and Trade**.

The International Monetary Fund

The International Monetary Fund (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 recently.

The World Bank

The World Bank and the IMF complement each other's work. While the IMF's focus is chiefly on macroeconomic performance and on macroeconomic 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 the living standards of people 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 the mission to fight poverty and improve living standards for people in the developing world. These institutions are the following:

- *The International Bank for Reconstruction and Development (IBRD).* The IBRD provides loans and guarantees analytical and adviser services to middle-income and creditworthy poorer countries.

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 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 for the purpose of raising productivity, providing accountable governance, and improving the private investment climate and access to education and health services.
- *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 that are deemed too risky by commercial investors in the absence of IFC participation.
- *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.
- *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 that a country has is based roughly on the size of its economy. The United States is the largest shareholder, holding approximately 16 percent of the total votes. The next four largest shareholders are France, Germany, Japan, and the United Kingdom. The World Bank's president is, by tradition, 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 General Agreement on Tariffs and Trade (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 with the mission of serving world business by promoting trade and investment, open markets for goods and services, and the free flow of capital. The organization serves as an advocate for world business and makes representations to governments and intergovernmental organizations, promoting choices favourable to the world business community. The ICC has the highest level of consultative status

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 United States did not ratify the Havana Charter

with the UN and its specialized agencies. Since 1946, the ICC has taken part 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;
- Incoterms—the standard international trade definitions commonly used in international contracts; and
- business self-regulation of e-commerce—the codes developed by business to establish international norms in this relatively new business area.

Organisation for Economic Co-operation and Development

The Organisation for Economic Co-operation and Development (OECD) is an intergovernmental organization comprising 36 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 individual country surveys and reviews. Its membership is limited to countries having a commitment to a market economy and a pluralistic democracy. It began in 1948 as the Organisation for European Economic Co-operation (OEEC), which was established by western European nations to implement the provisions of the Marshall Plan to aid in the recovery of Europe after the Second World War. Membership was expanded to include the United States, Canada, and Japan, and, in 1961, it became the OECD. As the world economy changed and expanded, so too did the work of the OECD. At present, its work encompasses the following areas:

- economics;
- statistics;
- the environment;
- international law;
- development;
- public governance;
- trade;
- financial affairs;
- taxation;
- science, technology, and industry;
- employment and social cohesion;
- education; and
- agriculture.

The OECD's original focus has also broadened to include extensive contacts with non-member countries, and it now maintains co-operative relations with at least 100 such countries.

Present members of the OECD are the following:

Australia	France	Korea	Portugal
Austria	Germany	Latvia	Slovak Republic
Belgium	Greece	Lithuania	Slovenia
Canada	Hungary	Luxembourg	Spain
Chile	Iceland	Mexico	Sweden
Czech Republic	Ireland	Netherlands	Switzerland
Denmark	Israel	New Zealand	Turkey
Estonia	Italy	Norway	United Kingdom
Finland	Japan	Poland	United States

The OECD's *Guidelines for Multinational Enterprises*, first issued in 1976 and with the most recent version published in 2011, are a highly persuasive and widely adopted set of recommendations for multinational enterprises operating in or from 44 adhering countries. The guidelines provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards. The guidelines provide a comprehensive list of recommendations on how foreign direct investment should be conducted with respect to 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[31] 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 United Kingdom, under the leadership of the United States, 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, there is much criticism of 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.

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

The genesis of the G20 occurred in Berlin in 1999. 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 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	Saudi Arabia
Australia	France	Japan	South Africa
Brazil	Germany	Korea	Turkey
Canada	India	Mexico	United Kingdom
China	Indonesia	Russia	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 with the goal of collaborating and finding 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*[32] (published since 1979 and now covering 138 countries) and the *Global Gender Gap Report.*[33]

CRITICAL ANALYSIS: Business Law and Ethics

Alleged Breaches of Human Rights Law by a Canadian Mining Company: Araya v Nevsun Resources Ltd, British Columbia Court of Appeal Case[34]

Background to the Lawsuit

A Vancouver-based mining company, Nevsun Resources Ltd (Nevsun), built an open mine to extract the 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 was generating $700 million in profits from its mine. The Eritrean government holds a 40-percent stake in the operation and Nevsun, through its foreign subsidiaries, 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 will decide, among other issues, whether for the first time the Canadian common law should recognize a cause of action for damages based on alleged breaches of CIL norms.

Extracts from the Judgment from British Columbia Court of Appeal

> [186] In 2014, the question reached the Supreme Court of Canada in *Kazemi*.[35] The Court held that there was no obligation on signatories to the *Convention Against Torture* to create civil remedies for torture committed outside their respective territorial jurisdictions …
> [187] Abella J. dissented, writing that an individual's right to a remedy for violations of his or her human rights is "now a recognized principle of international law" (at para. 199) …
>
> Abella J. also found that on its face, Article 14 of the *Convention* imposed an obligation on state parties to ensure that all victims of torture from their countries can obtain "redress and ha[ve] an enforceable right to fair and adequate compensation" (at para 215) …
> [189] Nevsun contends, however, that corporations such as itself are subjects of national law and "creatures of statute" that are not directly recognized as actors in international law. In Nevsun's submission:
>
> > … As it stands, international law does not purport to regulate corporations directly, but may oblige states to do so under their own national laws. Corporate liability for human rights violations is not yet recognized under any customary international law …
>
> [190] The plaintiffs respond that Nevsun's objections to the concept of the adoption of CIL into Canadian law rest on a fundamental misunderstanding of Canada's constitutional arrangements and the relationship between criminal and tort law. They take the position that peremptory norms of international law are "automatically" incorporated into the domestic law of Canada in the absence of legislation to the contrary …
> [191] Obviously, the plaintiffs continue, Canada has not passed any laws that legalize slavery, torture, or crimes against humanity. The fact that a breach of these norms is a crime under international law does not mean it may not also be a civil wrong and indeed, the plaintiffs note that s. 11 of the *Criminal Code*, R.S.C. 1985, c. C-46,[36] provides that no civil remedy for an act or omission is suspended or affected by reason of the fact that it is also a criminal offence.

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 should a new, private cause of action for breaches of norms of customary international law become part of the Canadian common law?
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 Supreme Court of Canada website and review its Nevsun decision. What is the main take-away from the decision?

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 formulation of international law.

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 United States 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. Describe the mandate and the present organizational set-up of the UN.
16. Describe the work of UNCTAD and UNCITRAL.
17. What are the Bretton Woods Institutions, and what is the role of each of these?
18. Is the International Chamber of Commerce an intergovernmental organization? Why was it founded and what are some of its achievements?
19. Describe the history and purpose of the OECD. What is it best known for?
20. What is the G7? How is it structured and how does it achieve its mandate?
21. Describe the origin and purpose of the G20. Go online to <https://www.g20.org> and explain the impact the G20 has.

NOTES

1. Sir William Blackstone, *Commentaries on the Laws of England*. 4 vols. (Oxford: Oxford at the Clarendon Press, 1778).
2. Mitchell McInnes et al, *Managing the Law: The Legal Aspects of Doing Business* (Toronto: Prentice Hall, 2003).
3. The Central Intelligence Agency, *The World Factbook* under "Government :: World" (3 June 2019), online: <https://www.cia.gov/library/publications/the-world-factbook/geos/xx.html>.
4. *R v Hape*, 2007 SCC 26.
5. *Statute of the International Court of Justice*, Can TS 7 1945 (entered into force 18 April 1946).
6. United Nations Human Rights, Office of the High Commissioner (New York and Geneva, 2011), online (pdf): <https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf>.
7. "The Government of Canada Brings Leadership to Responsible Business Conduct Abroad" (17 January 2018), online: *Global Affairs Canada* <https://www.canada.ca/en/global-affairs/news/2018/01/the_government_ofcanadabringsleadershiptoresponsiblebusinesscond.html>.
8. Elliot Abrams, "Saudi Arabia and Canada" (7 August 2018), online: *Council on Foreign Relations* <https://www.cfr.org/blog/saudi-arabia-and-canada>.
9. *Ibid*.
10. *Ibid*.
11. Chrystia Freeland, "Very alarmed to learn that Samar Badawi, Raif Badawi's sister, has been imprisoned in Saudi Arabia…" (2 August 2018 at 7:46), online: *Twitter* @cafreeland <https://twitter.com/cafreeland/status/1025030172624515072>.
12. Sylvanus Kwaku Afesorgbor, "The Major Trade Implications of the Canada-Saudi Arabia Spat," *National Post* (14 August 2018), online: <https://nationalpost.com/pmn/news-pmn/the-major-trade-implications-of-the-canada-saudi-arabia-spat>.
13. Andy Blatchford, "U.S. Hits Back with WTO Challenge Against Canada's Retaliatory Tariffs," *CTV News* (16 July 2018), online: <https://www.ctvnews.ca/canada/u-s-hits-back-with-wto-challenge-against-canada-s-retaliatory-tariffs-1.4015066>
14. *Ibid*.
15. United Nations Security Council, Subsidiary Organs, *2019 Facts Sheets* (8 February 2019), online (pdf): <https://www.un.org/securitycouncil/sites/www.un.org.securitycouncil/files/subsidiary_organs_factsheets.pdf>.
16. *Ibid*.
17. Fisheries and Oceans Canada, "Canada's Fisheries Fast Facts 2018" (8 March 2019), online: *Government of Canada Government of Canada* <https://www.dfo-mpo.gc.ca/stats/facts-Info-18-eng.htm>.
18. Fisheries and Oceans Canada, News Release, "Fisheries and Oceans Canada Releases 2017 Trade Figures: Canadian Fish and Seafood Exports Continue to Grow" (9 March 2018), online: *Government of Canada* <https://www.canada.ca/en/fisheries-

oceans/news/2018/03/fisheries-and-oceans-canada-releases-2017-trade-figures-canadian-fish-and-seafood-exports-continue-to-grow.html>.

19. Mike Blanchfield, "Canadian Minister Calls for G7 'Naming and Shaming' on Ocean Overfishing," *National Post* (17 April 2018), online: <https://nationalpost.com/pmn/news-pmn/canada-news-pmn/canadian-minister-calls-for-g7-naming-and-shaming-on-ocean-overfishing>.
20. "Discovery Channel Follows Crusaders of the Sea Shepherd Conservation Society in *Whale Wars*," online: *Discovery Channel* <https://press.discovery.com/asia-pacific/dsc/programs/whale-wars>.
21. Mette Eilstrup-Sangiovanni & Teale N Phelps Bondaroff, "From Advocacy to Confrontation: Direct Enforcement by Environmental NGOs" (2014) 58 International Studies Quarterly 348, DOI: <10.1111/isqu.12132>.
22. *Ibid*.
23. Laura Barnett, "Canada's Approach to the Treaty-Making Process" (5 August 2018), online: *Library of Parliament* <https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/200845E>.
24. RSBC 1996, c 236.
25. United Nations (New York, 2010), online (pdf): <https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.
26. United Nations, online: <https://www.un.org/millenniumgoals>.
27. United Nations, online: <https://www.un.org/sustainabledevelopment/development-agenda/>.
28. Business & Sustainable Development Commission, *Better Business, Better World*: *Executive Summary* (January 2017), online (pdf): <http://report.businesscommission.org/uploads/Executive-Summary.pdf>.
29. United Nations Commission on International Trade Law (New York, 2007), online (pdf): <https://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf>
30. United Nations Commission on International Trade Law (New York, 2005), online (pdf): <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>
31. Online: <http://www.g20.org>
32. World Economic Forum, online: <https://www.weforum.org/reports/the-global-competitveness-report-2018>.
33. World Economic Forum, online: <https://www.weforum.org/reports/the-global-gender-gap-report-2018>.
34. 2017 BCCA 401.
35. *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62, [2014] 3 SCR 176.
36. RSC 1985, c C-46.

FURTHER READING

Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed (Cambridge: Cambridge University Press, 2017).

Elhanan Helpman, *Understanding Global Trade* (Cambridge: Harvard University Press, 2011).

Alexander Orakhelashvili, *Akehurst's Modern Introduction to International Law*, 8th ed (Abingdon: Routledge, 2018).

Paul B Stephan & Julie A Roin, *International Business and Economics: Law and Policy*, 4th ed (Durham, NC: Carolina Academic Press, 2010).

Michael Trebilcock, Robert Howse, & Antonia Eliason, *The Regulation of International Trade*, 4th ed (London: Routledge, 2013).

WEBSITES

Canada's G7 Website: <https://www.international.gc.ca/world-monde/international_relations-relations_internationales/g7/index.aspx?lang=eng>

Group of 20 (G20): <http://www.g20.org>

International Chamber of Commerce: <http://www.iccwbo.org>

International Court of Justice: <http://www.icj-cij.org>

International Law Association: <http://www.ila-hq.org>

United Nations: <http://www.un.org>
International Monetary Fund: <http://www.imf.org>
Organisation for Economic Co-operation and Development: <http://www.oecd.org>
United Nations Audiovisual Library of International Law: <http://legal.un.org/avl/intro/welcome_avl.html>
United Nations Commission on International Trade Law: <http://www.uncitral.org>
United Nations Conference on Trade and Development: <http://www.unctad.org>
United Nations Development Programme: <http://www.undp.org>
United Nations Environment Programme: <http://www.unep.org>
World Bank: <http://www.worldbank.org>

LIST OF CASES

Araya v Nevsun Resources Ltd, 2017 BCCA 401
Hape, R v, 2007 SCC 26
Kazemi Estate v Islamic Republic of Iran, 2014 SCC 62, [2014] 3 SCR 176