

INTERLEGES
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LEX MERCATORIA
AND WORLD TRADE ORGANISATION LAW
IN RELATION TO INTERNATIONAL COMMERCIAL CONTRACTS

We have entered the age of globalization. The ease of travel, the development of communication technologies and the advent of the Internet are contributing to the convergence of national societies in a shift from territorial to functional differentiation at world level. The diminishing importance of state boundaries is especially visible concerning the economy, although it is taking place in the most various sectors e.g. science, culture, technology or communication media.

The field of law is also becoming "globalized". The diverse sectors of the new "world society" are developing their own legal frameworks, thereby displacing the importance of state produced law and legal centralism. Examples of this new paradigm are found in the internal legal regimes of multinational enterprises, in labour law, and also in areas such as human rights, ecology, telecommunications or sports. Yet, the most significant example of transnationally developed law concerns the field of international trade and finance. Long before the process of globalization became a reality it has been spoken of the existence of a *lex mercatoria*, a global law of trade and commerce created by merchants themselves, outside the legal monopoly of the state.

At the global marketplace, cross-boarder transactions are more frequent than ever and vast sums of money flow through the global financial system. The traditional regulation of international transactions through private international law rules is not the most adequate to facilitate the flow of international commerce and finance. Under a traditional view, rooted in the principles of sovereignty and territoriality, whenever an agreement contains a foreign element, a so-called *conflict of laws* may arise. This is a situation in which the legal systems of two or more states claim simultaneous application to a given private law relationship. The applicable law to international contracts, also known as *lex causae* may thus be defined as the national legal system that governs the international contract and the parties' obligations under it. First, it determines the existence and validity of the agreement. Second, it sets a mandatory framework, which limits the parties' freedom of contract by means of rules that intend to obtain certain domestic, social or economic objectives e.g. consumer protection. Finally, the applicable law interprets and fills gaps in the agreement, providing a set of dispositive rules, which regulate the issues left uncovered by the parties.

Normally, the parties to international commercial agreements are given the freedom to choose the applicable law. In the event that no governing law is stipulated in the contract, private international law determines which legal system applies. The conflictual method is not adequate to satisfy the simplicity and certainty required in international transactions. For several decades

states have attempted to tackle this problem through the adoption of international conventions and model laws, aimed at harmonizing the rules of different jurisdictions. The legal instruments commonly employed for the purpose of harmonizing commercial law include: *international conventions* (e.g. the 1956 Geneva Convention on the Contract for the International Carriage of Good by Road – CMR, the outmost successful 1980 U.N. Vienna Convention on Contracts for international Sale of Goods – CISG, the 1995 UNCITRAL Convention on Independent Guarantees and Standby Letters of Credit etc.); a set of *bilateral treaties* and *model laws* (e.g. the 1985 UNCITRAL Model Law on International Commercial Arbitration).

As seen above, some fields of substantive commercial law have been harmonized by means of international conventions and model laws, but the result has been far from satisfactory. The process of negotiation and adoption of these legal instruments is difficult and time-consuming (e.g. the drafting of CISG took over 20 years). And, if a final text is ever adopted, it is not flexible enough to respond to the changing needs of international commerce. Usually, reservations are allowed in order to adopt a final text. This leads to partial harmonization, different interpretations of the same convention, and to the risk of having a petrified regulation, which cannot be revised to adapt it to the further developments of international trade.

Meanwhile, the high degree of autonomy enjoyed by parties engaged in international trade has allowed for the creation of their own self-regulatory framework through the development of substantive rules, the use of “de-nationalizing” techniques and, especially, by submitting the solution of their disputes to international commercial arbitration. Traders have found alternatives to escape the deficient regulatory framework derived from the supremacy of national law and the conflict of laws in the regulation of international contracts. The creation of legal rules by businessmen and trade organizations in the interest and convenience of the trade is known as self-regulation.

Self-regulation takes place in different ways. First, it may be a spontaneous process. The repetition of the business procedure of few leading enterprises may develop into *trade usage or custom*. Traditionally, a distinction has been made between custom and trade usages. Custom has been regarded as a source of law, with general validity. Contrarily, trade usages have been considered as mere contractual practices generally observed, which are used as proof of the will of the parties and they do not have an obligatory character because the parties may contract them out. The creation of customary rules by market forces is a spontaneous and gradual process which often starts as the business procedure of a few leading enterprises; then becomes a general practice in a particular trade; later grows into a trade usage and eventually acquires the certainty

and legal status of custom. Usages and custom may regulate a great variety of issues within a given branch of trade e.g. examination of goods, limitation of liability, conformity of goods, conditions of payment, duty to cooperate etc.

Second, the self-regulation may result from a deliberate enterprise. Trade organizations e.g. International Chamber of Commerce, may undertake the unification of rules that are generally observed. We can refer to *standard contracts* or *legal guides* as the examples. In a broad sense, the expression standard contract refers to a text formulated in advance that intends to regulate specific parts of the contract. It is aimed at replacing the dispositive rules of national law by its own solutions. In a narrow sense, the term standard contract comprises *contract forms and general conditions*. Both are always in written form and prepared in advance but, whereas contract forms can be altered and adapted by the parties, general conditions are submitted as definitive and unalterable. The use of standard contracts dominates the practice of the commodity trade and plays an important role in trade sectors as sea and air transport, banking, construction of industrial works or international finance. Deliberate self-regulation may also take place by means of the so-called legal guides. These are issued by international organizations in areas that are not yet ready for the formulation of standard contracts. Legal guides are model texts which help market operators structure and draft their contracts.

Finally, international commercial arbitration may contribute to a mixed type of self-regulation. Arbitrators spontaneously apply non-national rules that have been consolidated by other arbitral tribunals. In many cases, they also create non-national rules deliberately, as a way of detaching the dispute from the ruling of national law.

The high degree of self-regulation has led some authors to speak of existence of a *lex mercatoria*, a notion with historical roots, which may be broadly described as the body of rules, different in origin and content, created by the community of merchants to serve the needs of international trade. Yet, the settled definition of the *lex mercatoria* cannot be found. Other expressions are also used by the authors in the same sense, e.g. transnational law, international business law, or general principles of law.

There are as many possible concepts of the *lex mercatoria* as there are authors having dealt with the subject. The question of the sources of the *lex mercatoria* is also unsettled. Schmitthoff considered mercantile customs formulated by international bodies, such as Incoterms or Uniform Customs and Practice for Documentary Credits by International Chamber of Commerce, and international legislation (international conventions and model laws) as sources of *lex mercatoria*.

From the autonomist concept of *lex mercatoria*, Goldman reduced the list of sources of *lex mercatoria* to the usages of international trade and general principles of law. Kahn added international commercial arbitration as a source of *lex mercatoria*. Various elements named in these lists would collectively make up transnational commercial law and not *lex mercatoria*. *Lex mercatoria* is by nature customary and spontaneous and that implies that only general principles and uncodified usages are amongst its sources.

The business community usually refers to *lex mercatoria* in such phrases as “internationally accepted principles of law governing contractual relations” that more clearly indicate the intent, but some reservation must be expressed to their unconsidered use based on the uncertainty they represent. General principles of law play an important role as structural elements and possible sources of *lex mercatoria*. Lord Mustill attempted to enounce the general principles of international contract law, as applied by arbitrators. The list included up to twenty legal principles, although some are procedural and not substantive:

- (1) *Pacta sunt servanda* (contracts should be enforced according to their terms);
- (2) *Rebus sic stantibus* (substantially changed circumstances can entail a revision of contract terms);
- (3) *Abus de droit* (unfair and unconscionable contracts should not be enforced);
- (4) *Culpa in contrahendo*, pre-contractual liability;
- (5) Good faith and fair dealing;
- (6) Bribes render a contract void or unenforceable;
- (7) A state may not invoke its internal law to repudiate an arbitral agreement;
- (8) The controlling interest of a group of companies is regarded as contracting on behalf of all members;
- (9) Parties should negotiate in good faith if unforeseen circumstances arise;
- (10) ‘Gold clause’ agreements are valid and enforceable;
- (11) One party may be released from its obligations if there is a fundamental breach by the other;
- (12) No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation;
- (13) A tribunal is bound by the characterisation of the contract ascribed to it by the parties;
- (14) Damages for breach of contract are limited to the foreseeable consequences of the breach;
- (15) A party which has suffered a breach of contract must mitigate its losses;

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

(17) A party must act promptly to enforce its rights, lest lose them by waiver;

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

(19) Contracts should be construed according to *ut res magis valeat quam pereat* (lawful or effective meaning of a contract term prevails in case of doubt) ;

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

The list has been progressively completed with rules on e.g. *force majeure* or *estoppel* and today it embodies up to seventy-eight principles.

There are also important divergence among scholars as regards the concept of *lex mercatoria*. Yet, it is possible to place the different definitions into two groups. The first one embodies concepts, which primary focus on the relation between the *lex mercatoria* and national law. The second one relates to the substantive quality of the *lex mercatoria*.

Concerning the relation with national law, it can be spoken of an autonomist and a positivist concept of *lex mercatoria*. The autonomist concept regards the *lex mercatoria* as having an autonomous character, independent from any national system of law. From a positivist approach, in turn, the *lex mercatoria* is defined as a body of rules, transnational in their origin, but which only exists by virtue of state laws, which give them effect. None of these two concepts of *lex mercatoria* reflects the reality of international trade law. In the first place, *lex mercatoria* cannot exist totally independent from national law as far as a supranational court with competence to enforce decisions based on non-national rules is missing. At least, the public policy rules of the country of enforcement have to be taken into account to ensure the efficiency of the decision. In the second place, not all legal rules are ultimately dependent on state sources. Traders are capable to produce legal rules that find compliance within their branch or profession without the intervention of the state.

There are also different understandings of the term *lex mercatoria* to be found in legal writings, based on its substantive quality. These may be basically reduced to three main concepts. The first one conceives the *lex mercatoria* as an autonomous legal order, *a tertium genus*, supra-national legal order, distinct from both national and international public law, which emerges spontaneously in the framework of international trade, and whose field of application the parties enter when they conclude an international contract, especially, if they submit the disputes to arbitration. The second one characterizes it as a body of rules capable of operating as an alternative to an otherwise applicable national law. *Lex mercatoria* neither excludes the application

of national law nor provides an answer to every aspect of international transactions. Under this view, *lex mercatoria* appears to be submitted to the same restrictions as foreign law, namely *ordre public* and internationally mandatory rules. Finally, the third concept equates *the lex mercatoria* with international trade usages.

Lex mercatoria cannot be reduced to a mere supplement of national law because some international transactions lack regulation in national legal systems. But, *lex mercatoria* is by no means a system that provides an answer to all possible legal questions. For this reason, a pragmatic concept of *lex mercatoria*, which regards it as a *de facto* substantive alternative to the traditional conflictual mechanism, is to be preferred.

Traditionally, only national law has been able to function as the applicable law to international contracts. Still, in the field of international commercial arbitration, decisions may be based on "rules of law", as opposed to a single national law. Likewise, arbitration rules prompt arbitrators to take trade usages into account. Sometimes the parties to international contracts wish to avoid the application of national law. In such case, the parties may stipulate to have the contract governed by transnational rules. The term *lex mercatoria* is rarely mentioned as such, although references to trade usages, the general principles of international trade law or similar expressions are usually interpreted by arbitrators as an intention to de-nationalize the agreement. The application of *lex mercatoria* is questionable when the parties have not agreed on a decision based upon transnational rules. Not only must the arbitrators be allowed to resort to non-national rules as applicable law. The expectations of the parties should not be frustrated, whatsoever. Traditionally, national private international law rules have pointed to the law of a state in the absence of choice. In the field of international arbitration, however, the special character of the *forum arbitri* has permitted the detachment of arbitrators from the conflict rules of the *lex fori* and therewith, from the necessary application of national law.

Even if the award is rendered on the basis of national law, arbitrators often make reference to general principles of law, international conventions or other transnational rules in order to supplement the applicable law or to adequate the decision to the international character of the agreement. This is one of the most significant features of arbitral adjudication, namely, the possibility of adjudicating on the basis of rules from different origin, as opposed to provisions from a single legal system. This combination of national law and general principles of law has been quite frequent in arbitral awards concerning agreements between states and foreign companies. Arbitrators are sometimes faced with the dilemma of having to give consideration to rules that solely reflect the domestic public policy of a state but which claim application to

international situations. These may be public policy rules of the place of arbitration or of the third countries. As regards the former, it is generally admitted that only to the extent necessary to ensure the international effectiveness of the award, shall the arbitrators take account of the public policy rules of the forum.

From a pragmatic point of view, the crucial issue regarding *lex mercatoria* is to determine how far a decision may ignore national law being still enforceable. In the absence of supranational commercial court, the enforcement of decisions based on transnational rules ultimately depends on its recognition by national courts. It is extremely rare to see references to *lex mercatoria* outside international commercial arbitration. In this regard, it is important to draw a distinction between the application of *lex mercatoria* in judicial litigation, on the one side, and the recognition and enforcement of arbitral awards based on *lex mercatoria*, on the other.

In the past years the debate on *lex mercatoria* has received a new impulse after the release of *the Unidroit Principles of International Commercial Contracts* (hereinafter *the UP*) and *the Principles of European Contract Law*. These principles are exponents of the new phenomenon of private codification, where the harmonizing work is carried out without the involvement of domestic legislatures, outside the state's monopoly of law making. Some have characterized these principles as new sources of *lex mercatoria*. Both sets of principles consist of rules that cover most aspects of contract law with a precise and well-defined content. In this way, *lex mercatoria* could be now served by rules that are predictable, consistent and complete, doing away with the traditional theoretical objections against the theory on transnational commercial law.

The UP provide common rules for international commercial contracts with the aim to overcome the inadequate regulation of international trade. As seen, the solutions reached by traditional conflictual techniques and the following application of domestic law are not satisfactory. Harmonization of commercial law by means of international conventions and model laws is costly, time-consuming and rarely leads to legal uniformity. An alternative reference to *lex mercatoria* may run the risk of producing greater uncertainty and unpredictability regarding the legal consequences of the transaction, considering the divergent theories on *lex mercatoria*.

The UP are aimed to enunciate rules which are common to most existing legal systems. For such purpose the methodology used in their drafting was that of functional legal comparison. They consist of a Preamble and 119 articles divided into seven chapters: "General Provisions" (Chapter 1); "Formation" (Chapter 2); "Validity" (Chapter 3); "Interpretation" (Chapter 4); "Content" (Chapter 5); "Performance" (Chapter 6) and "Non-performance" (Chapter 7). The

different provisions are drafted in a clear and readily accessible language. They are accompanied by comments and, where appropriate, by illustrative examples intended to explain how the rule may operate in practice. Some of the provisions are formulated in general terms e.g. the principle of *freedom of contract* (Article 1.1) , *good faith* and *fair dealing* (Article 1.7) or the *relevance of usages* (Article 1.8). Others are more detailed e.g. currency of payment (Article 6.1.9) or the right to cure (Article 7.1.4). It has been noted that the broad character of some provisions is not a defect; instead, the interplay between specific rules and general principles and standards allows for a coherent decision among apparently contradictory rules. This is in accordance with the general experience that in the field of the law of contracts, the application of the law always oscillates between the strict principle *pacta sunt servanda* and general fairness considerations.

The UP do not merely re-state existing international contract law. Besides the new terminology, their content is innovative, at least for a number of national contract laws. This obeys to two main reasons, namely, the desire to better meet the special needs of international trade practice and the necessity of having rules that reflect the different socio-economic conditions in the various parts of the world. A first group of rules intends to meet the specific needs of international trade practice e.g. by limiting the number of cases in which the existence or validity of the contract may be questioned or in which it may be terminated before time (e.g. the principle *favor contractus*); a second group of provisions takes account of the special conditions that exist in North-South and East-West economic transactions. Finally, a number of underlying principles reinforce the objectives of *the UP* as a whole, namely, to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied; that are sufficiently flexible to take account of constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice and ensure fairness in international commercial relations. These principles are of outmost importance to decide on issues not expressly settled, but within the scope of *the UP*.

The UP, not having taken the form of a convention or model law, are not automatically binding. They may be yet applied in practice because of their quality. Due to their quality, they may serve as a model for future legislation in the field of general part of contract law or specific transactions, both at national and international levels. At a national level, they may be a useful tool for countries wishing to enact a more developed body of contract law or update the existing one, at least in relation to international trade. Likewise, they may provide some guidance in the drafting of conventions and model laws, where conceptual divergence amongst different texts are well-known.

But the first and most significant function of *the UP* is their role as the law governing the contract. Parties to international contract may have solid reasons to submit their transactions to *the UP*. For instance, by choosing a neutral set of rules none of the parties is placed a priori in a better position than the other. Likewise, *the UP* contain concise rules which are accompanied of comments and examples of their application in practice, having been published in numerous languages. This allows both parties to anticipate the consequences of their choice. Pursuant to the second paragraph of their Preamble, *the UP* shall apply whenever the parties choose them. According the paragraph 3 of the Preamble they may be applied when the parties have agreed to have their contract governed by general principles of law, the *lex mercatoria* or the like. The application of *the UP* here seems to be facultative. It is up to the decisionmaker to determine whether or not a reference in an international contract to the *lex mercatoria*, the general principles of law or the like can be taken as an indirect indication of the application of *the UP*. Finally, pursuant to paragraph 4 of the Preamble, *the UP* may apply when it proves impossible to establish the relevant rule of the applicable law.

The release of *the Unidroit Principles* has revived the debate on *lex mercatoria*. They constitute important achievements towards making adjudication on the basis of transnational rules more definite and predictable. The possibility of referring to a neutral set of contract rules without risking the uncertain outcome which the application of *lex mercatoria* otherwise produces, contributes to facilitate the flow of international trade and finance, especially between parties with different socio-economical backgrounds. That explains the considerable success of *the UP* so far. Notwithstanding their success, it is wrong to characterize *the UP* as a sufficient expression of *lex mercatoria*. *Lex mercatoria* is reflexive law. It originates in international practice as a reaction to the problems arising from international trade. A commission of legal experts cannot obviate that fact and freeze *lex mercatoria* into a determined set of rules. Therefore, the application of *the UP* should be accompanied of a case-by-case analysis of the solutions acknowledged in arbitration and contract practice.

Also the creation of the *World Trade Organisation* (hereinafter *the WTO*) is one of the most important events in the international law sphere during the last decade of the twentieth century. As a new branch of international law, *WTO law* consists of rules which particularly regulate the transactions concerning trade in goods, trade in services, investment and trade-related intellectual property rights among *WTO* Members. The 1994 *Agreement Establishing the WTO* has laid the basis for a highly complex international treaty system consisting of some 30 multilateral international agreements with supplementary "Under-standings", "Protocols", "Ministerial Decisions",

"Declarations" and more than 30,000 pages of "Schedules of Concessions" for trade in goods and "Specific Commitments" for trade in services. The legal complexity of *WTO law* is further increased by its numerous references to other international agreements and general international law rules. After the initial practice of *the WTO* and its dispute settlement mechanism (consultations, panels and the Appellate Body), it is now generally accepted that *WTO* rules are the part of the wider corpus of public international law. The emergence and wider recognition and acceptance of the *WTO* system essentially depends on a threefold development: the expansion of coverage, the effective dispute settlement and the attraction of *WTO law* enforcement for linking trade and other regulatory issues.

The development of the current regulatory framework under the umbrella of *the WTO* has evolved gradually. The GATT came into being provisionally in 1948 and remained in force, as a de facto international organisation, until the creation of *the WTO* in 1995. One of the essential functions of the GATT 1947 framework was to host a series of major multilateral trade negotiations, called "rounds", of which there were eight during the GATT 1947. *The WTO* incorporated the GATT (now GATT 1994), with a considerably expanded coverage of subject matters, and was truly established in the form of an international organisation with legal personality. *The WTO* legal texts indicate that *the WTO* shall act in continuity with GATT 1947 law and practice.

The scope of *WTO law* can be looked at from different angles. First, it defines the subject matter and instruments addressed by the various *WTO* agreements. The bulk of agreements, the GATT 1994 and its side agreements, deal with trade in physical goods, ranging the industrial products to agriculture. The GATS deals with all kind of services and the TRIPs Agreement addresses information by defining the demarcation of appropriation, exclusive rights and public availability of information (or its expression) which is of crucial importance for producing goods and providing services in a competitive environment.

Second, the scope of *WTO law* relates to different instruments and generations of trade measures and barriers. It comprises a great variety of different trade policy instruments: tariffs and non-tariff measures such as quantitative restrictions, subsidies, dumping, technical standards and norms, food safety standards as well as norms relating to the offer and supply of services. It deals with the different forms of intellectual property rights and addresses procedural requirements such as transparency and domestic judicial protection.

Third, the scope of *WTO* instruments no longer focusses mainly on border measures such as tariffs and import or export restrictions. While such measures remain important, newer generations of instruments increasingly focus on domestic regulations with a view to bringing about equal conditions of competition for imported and domestic goods and services. In doing so, *WTO law* also addresses domestic taxation of products.

Overall, the scope of *WTO law* is difficult to define in terms of classifications. The subject matter as well as instruments may increase as needs are articulated and accepted. There are no logical or inherent limits to trade regulation, and it remains a matter of political expedience and negotiations, rather than theory and legal classifications, to define the scope of *WTO law*.

The proper subjects of *WTO* rights and obligations are its members (today about 150). These comprise states and, as a peculiarity, separate customs territories which lead an autonomous trade policy but are not sovereign nations. The EC is a genuine *WTO* member, as are its member states. Non-state actors, in particular the private sector, are not directly entitled and obliged under *WTO law* and they have no direct voice in or access to the work of *the WTO* or its meetings. Rights and obligations inherently do not extend to conduct of private parties but focus on the responsibilities of governments. The general principle of state responsibility entails that a party in breach of an international obligation must make full reparation to another state concerning any damages incurred to the latter. Such reparation can entail monetary compensation or – rarely applied – restitution in kind.

The *WTO* agreements establish the prime but not the only sources of law of the multilateral trading system. They are the starting point in the process of application. Additional sources complement the treaty system and provide an indispensable context in identifying relevant norms. Identification of relevant norms within *the WTO* often arises in the context of dispute settlement. Panels and the Appellate Body are competent to interpret and apply the provisions contained in the agreements, so-called “covered agreements”, consist of those agreed upon during the Uruguay Round negotiations. Apart from the texts of the covered agreements, the most relevant sources of law are panel and Appellate Body reports. They considerably add to the body of law by the process of applying and interpreting the covered agreements. Although the adjudication before panels and the Appellate Body is clearly limited to clarify the existing provisions, their reports nonetheless substantially contribute to the law-making process and the refinement of *WTO law*. Panels and the Appellate Body also do not intend to exclude general principles or customary law as sources of law. Apart from general principles of law and custom, treaties other than the *WTO* legal texts play an important role in the *WTO* legal system.

International agreements whose origin lies outside *the WTO* legal system and which are not formally part of the *WTO law* are the most contentious sources of *WTO law*. First of all, several *WTO* agreements explicitly refer to other international agreements. It is recognised that such treaties have become part of the corpus of *WTO law* by incorporation and therefore serve as a direct or immediate source of law in *WTO* dispute settlement proceedings. Second, there is a growing body of international agreements to which *WTO* members are signatories but which are not explicitly referred to in the *WTO* agreements. Therefore, they are not formally incorporated into the corpus of *WTO law* but may nevertheless become operational among parties.

Interpretation of *WTO law* is a core function of panels and the Appellate Body. They have not hesitated to actively shape the elements of interpretation and to establish interpretative principles which have over the years attained prominent status in *WTO* dispute resolution. One of the most fundamental norms of international law is the principle of *good faith*. This principle ensures that expectations of members as to the conditions of competition between their products and those of other members are protected. It has several outgrowths two of which are particularly relevant in *the WTO* legal system: the doctrine of *abuse of rights (abus de droit)* and the principle of *legitimate expectations*. The former prevents a party to an agreement from exercising its rights in a way that is unfair and unreasonable in light of the spirit of the agreement. The doctrine of protection of legitimate expectations demands that if a party had a reason to believe, based on the actions or words of another party, that a situation or occurrence would or would not change in a particular manner, the other party may not change the situation in such manner. The principles and rules of *WTO law* share a common feature of international law : they are binding upon the parties, and violations and non-compliance essentially trigger state responsibility. Moreover, they share the quality and purpose of law to stabilise human conduct and to protect legitimate expectations.

WTO law's proper sphere of influence is in interstate relationships. Now, it is generally accepted that *WTO* rules are the part of public international law which means that non-state actors, in particular the private sector, are not entitled and obliged under *WTO law*. *Lex mercatoria's* proper sphere of influence is in private commercial relations with international element. It is by nature customary and spontaneous and that implies that only general principles and uncodified usages are amongst its sources. On the contrary, *WTO law* is generally written. The core consists of written international treaties and supplementary documents. As seen, *WTO law* and *lex mercatoria* represent two different normative systems with different scope of view and different subjects that cannot meet each other. But, today's global world needs unified, globalized transnational law, that's why linkages between public and private commercial law are sought.