

## Max Planck Encyclopedia of Public International Law



### **Commercial Treaties**

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**Content type:** Encyclopedia entries

**Product:** Max Planck Encyclopedia of Public International Law [MPEPIL]

**Article last updated:** April 2014

**Subject(s):**

International minimum standard — Expropriation — Intellectual property — Anti-dumping — Technical barriers to trade — Taxation — Equal treatment — Non-discrimination — Most-favoured-nation treatment (MFN) — Customary international law — State practice — General principles of international law — Unilateral acts — NAFTA (North American Free Trade Agreement)

Published under the auspices of the Max Planck Foundation for International Peace and the Rule of Law under the direction of Rüdiger Wolfrum.

## A. Notion

### 1. Definition and Objective

**1** Commercial treaties are bilateral or multilateral → *treaties* of public international law for the purpose of regulating conditions of, and establishing mutual rights to, trade and other commercial activities among the parties. They provide the relevant foundation of → *international economic law* (→ *International Economic Law*), which is essentially based on treaty law. Other → *sources of international law*, in particular → *customary international law*, are of limited relevance, arguably with the exception of procedural customary rules, → *State responsibility*, and → *minimum standards* for the treatment of → *aliens*, in particular expropriation (→ *Property, Right to, International Protection*). In addition to classic treaty law, commercial activities across national borders are informed by a variety of other legal sources, which need to be distinguished from commercial treaties: → *private international law* on commercial activities—be it harmonized or not (→ *Unification and Harmonization of Laws*; → *Hague Conventions on Private International Law and on International Civil Procedure*; → *UNIDROIT*)—as well as domestic public law on external economic relations, which implements commercial treaty law or regulates market access to, and conditions of competition within, the domestic market autonomously (see also → *International Law and Domestic [Municipal Law]*).

**2** Commercial treaties are usually concluded between States. → *Subjects of international law* other than States, such as international organizations and → *customs unions* possessing full autonomy in the conduct of their external economic relations, may also be contracting parties to commercial treaties, subject to their constituent legal foundations and their possession of legal capacity in international relations (see Art. XII Marrakesh Agreement Establishing the World Trade Organization). Although the proper subjects of commercial treaties are the contracting parties—as rights and obligations are usually conferred directly only onto them—the prime beneficiaries of commercial treaties are, of course, individuals and firms, ie traders, service suppliers, holders of intellectual property rights (→ *Intellectual Property, International Protection*), investors, and consumers (see also → *Individuals in International Law*). To this end, the effectiveness of commercial treaties largely depends on the proper implementation of rights and obligations in domestic law and practice. Unless agreed upon by specific treaty law to the contrary, general public international law (→ *General International Law [Principles, Rules and Standards]*) traditionally grants a certain freedom to States as to the specific method of implementation (see Art. 26 → *Vienna Convention on the Law of Treaties [1969]*). This also holds true for commercial treaties. In case of no or wrongful implementation, their practical impact essentially depends on the controversial issue of granting or denying direct effect to those treaty provisions which confer rights upon individuals and are drafted in a sufficiently precise manner in order to be applied by the domestic judiciary, ie, to be qualified as self-executing (→ *Treaties, Direct Applicability*). → *State practice* varies considerably, depending both on the type of commercial treaty and on the State concerned.

**3** The objective of commercial treaties is generally to establish an agreed framework within which mutually beneficial economic relations can take place. Traditionally, they aim at reducing national obstacles to transnational commercial activities and at granting market access rights to foreign products and commercial actors. In doing so, commercial treaties are pivotal in ensuring predictability and stability in international relations, as they reduce the discretion of governments to change their laws on external economic matters unilaterally (see also → *Unilateral Trade Measures*). At the same time, specific stimulants not exclusively driven by commercial interests may be at work. In some instances, the desire for political stabilization and improved foreign relations is at least as important a

catalyst for the conclusion of commercial treaties as are the economic benefits perceived to be gained from increased commercial exchanges.

## 2. Content and Typical Provisions

4 In order to achieve the objective of fostering and institutionalizing commercial activities, a commercial treaty may cover a wide range of subject-matters and apply miscellaneous measures. They are as manifold as commerce itself. Under general international law, States are essentially free to regulate foreign commercial activities by means of domestic law or treaties of any kind and content. In 1931, the → *Permanent Court of International Justice (PCIJ)* confirmed that States are not obliged to communicate with one another or to grant freedom of commerce or navigation (Railway Traffic between Lithuania and Poland 118-9). The same holds true for contemporary international law. In external economic matters, there are very few limitations to the principle of State → *sovereignty* beyond those found in the → *United Nations Charter*. By the same token, norms relating to → *ius cogens* (see Arts 54 and 63 Vienna Convention on the Law of Treaties) hardly affect commercial relations, except for the prohibition of → *slavery* in its different forms and of policies supporting racial segregation (see also → *Racial and Religious Discrimination*). A related, yet more controversial issue concerns the extraterritorial application and enforcement of trade measures by States unilaterally or bi-/plurilaterally towards third States, ie the regulatory control of commercial activities that cut across national borders and operate in a 'twilight zone' (Matsushita Schoenbaum and Mavroidis 864) of domestic jurisdictions (see also → *Extraterritoriality*; → *Jurisdiction of States*). The legality of extraterritorial application of trade measures, typically diffused in areas such as competition law in which no substantive body of international law has emerged (→ *Antitrust or Competition Law, International*), is controversially discussed under current public international law (see eg → *US-Shrimp Case* for the application of unilateral trade measures to protect the environment beyond national jurisdictions under the → *World Trade Organization [WTO]*).

5 Historically, commercial treaties mainly dealt with liberalizing trade in goods, in terms of granting market access to products of foreign origin by defining allowed quantities, by reducing tariffs and, gradually gaining predominance, by disciplining → *non-tariff barriers to trade*, such as customs formalities and administration, → *rules of origin*, technical regulations, standards, subsidies (→ *Subsidies, International Restrictions*), dumping (see → *Anti-Dumping*), and safeguards (see also → *Customs Law, International*; → *Technical Barriers to Trade*; → *Sanitary and Phytosanitary Standards*). Always closely related to trade in goods has been the issue of transportation (→ *Traffic and Transport, International Regulation*; → *Transit of Goods over Foreign Territory*), in ancient times in particular by sea, later also on land and by air (see also → *Navigation, Freedom of*; → *Air Transport Agreements*). More recently, agreements on market access for services and service suppliers (→ *Services, Trade in*) as well as on trade-related aspects of intellectual property rights and on investment protection (→ *Investments, International Protection*) have moved centre stage, thus keeping international economic law abreast of actual developments in international trade. Newer topics also include monetary and tax issues (→ *Monetary Law, International*; → *Taxation, International*; → *Antitrust or Competition law, International*), free movement of → *migrant workers*, and economic cooperation. Moreover, as a result of the unprecedented global → *interdependence* in economic matters since World War II, transnational commercial activities and the pursuit of other legitimate policy goals such as the protection of → *human rights* (see also → *Trade and Human Rights*), of labour rights (→ *Trade and Labour Standards*), of culture (→ *Trade and Culture*), and of the environment (→ *Trade and Environment*) are increasingly intertwined. Therefore, it is often difficult clearly to distinguish commercial treaties from other types of treaties and from other forms of international cooperation. In some cases, commercial treaty provisions may also be explicitly incorporated in treaties of a more general scope. Lastly, the level of economic

integration pursued with commercial treaties varies widely. Their scope may range from economic cooperation treaties of a general nature, preparing the ground for closer relations without necessarily agreeing on specific rights and obligations, such as European Union Association Agreements (→ *European Community and Union, Association Agreements*) and United States Trade and Investment Framework Agreements ('TIFAs'), to → *customs unions* encompassing common external economic relations, such as → *MERCOSUR* and the union between Switzerland and the Principality of Liechtenstein of 1923, to common markets, such as the → *European (Economic) Community* before it aimed at political integration beyond a common market (see also → *European Union, Historical Evolution*). As this overview on the content, scope, and level of integration of commercial treaties suggests, any rigid classification would prove inappropriate. In fact, some authors define commercial treaties in a stricter sense, only encompassing treaties traditionally dealing with customs matters, mainly tariffs, and other treatment accorded to goods (Jackson, Davey, and Sykes 205). Such a narrow definition, however, is neither supported by a majority view, nor would it be useful.

6 Specific provisions contained in commercial treaties are as diverse as the subject-matters covered and measures applied. Still, common patterns exist (see also → *World Trade, Principles*). States have, over the years, developed standard treaties and include the same general clauses and, in some cases, even identically worded provisions in their commercial treaties. Pertinent examples are the → *Treaties of Friendship, Commerce and Navigation* concluded by the United States with its trading partners or the free trade agreements concluded by the European Union with third States. The same holds true for many bilateral investment treaties which often contain standardized provisions (→ *Investments, Bilateral Treaties*). Moreover, many provisions contained in the General Agreement on Tariffs and Trade ('GATT') 1947 and WTO framework have served, since the second half of the 20<sup>th</sup> century, as prototypes for provisions in bilateral arrangements (→ *General Agreement on Tariffs and Trade [1947 and 1994]*).

### 3. Non-Discrimination and Reciprocity as Guiding Leitmotifs

7 Systemically, bilateral or multilateral undertakings in commercial matters are often sought on the premise of non-discrimination, operating with the → *most-favoured-nation clause* and the principle of national treatment (→ *National Treatment, Principle*). These two principles are not mandated by general international law. If agreed upon between two or more States by treaty law, they are expressions of and variations on the idea of equality and equal treatment among States (→ *States, Equal Treatment and Non-Discrimination*). The most-favoured-nation clause obliges a party to accord unconditionally and immediately all privileges granted to a product originating in, or to another commercial activity offered from, the territory of one party to → *like products* originating in, or to other commercial activities offered from, any other party. According to the → *International Court of Justice (ICJ)*, 'the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned' (→ *United States Nationals in Morocco Case* 192). National treatment applies the principle in relation to domestic products and commercial activities and obliges signatories to accord the same treatment to foreign counterparts. Economically, both principles seek to bring about level playing fields and fair conditions of competition for products, which have different origins, and, to some extent, even for foreign people. Given the radical impact of equal treatment obligations on States, it is apparent, however, that they are often not given full but merely limited effect. Most-favoured-nation and national treatment were selectively applied in bilateral commercial treaties in medieval times and, more frequently, throughout the 18<sup>th</sup>, 19<sup>th</sup>, and early 20<sup>th</sup> centuries (see section B.2.). Non-

existent in customary international law, they were eventually multilateralized in the GATT 1947/WTO framework (see section C.1.).

**8** Furthermore, commercial treaties are usually negotiated on the basis of → *reciprocity*, of a *quid pro quo*, whereby each signatory is expected to make adequate → *concessions* in terms of market access. Negotiating a commercial treaty with a view to achieving approximate equivalence of mutual advantages is normally a prerequisite for the general acceptance and due performance of its obligations (see also → *compliance*). However, reciprocity does not amount to a legal concept required under general international law. It denotes a postulate on the political level, serving as a guiding principle of → *negotiation[s]*. Exceptionally, non-reciprocal commercial treaties are concluded, notably by industrialized countries for the stated purpose of protecting and fostering the economic development of least-developed and → *developing countries*, thus granting preferential access to their markets without requesting a similar concession in exchange (see para. 23 below). Not surprisingly, commercial treaties are frequently criticized to produce unbalanced rights and obligations and not to be mutually advantageous, typically to the detriment of developing countries. This criticism is prominently voiced with respect to the → *Uruguay Round* results, leading to the establishment of the WTO, which explicitly call upon its membership to enter ‘into reciprocal and mutually advantageous arrangements’ (preamble Marrakesh Agreement Establishing the World Trade Organization and GATT 1994) and to take into account ‘the needs of less-developed countries for a more flexible use of tariff protection to assist their economic development’ (Art. XXVIII *bis* GATT 1994).

#### **4. Participation and Institutional Arrangements**

**9** Commercial treaties can be concluded bilaterally or plurilaterally, or they can be of a multilateral nature. Apart from the multilateral system under the WTO and regional integration efforts, there are thousands of bilateral commercial treaties currently in force (see sections C.1., C.3.). Under general international law, States are essentially free to decide upon their commercial partners. The sovereignty and equality of States entails the power to choose one State and to discriminate against another (→ *States, Sovereign Equality*). The principle of *pacta tertiis nec nocent nec prosunt* (a treaty must neither benefit nor impair a third party) is of equally limited effect. Short of specific treaty provisions, it does not limit the conclusion of preferential and discriminatory treaties, having the potentially distorting effect of trade diversion. Non-existent in customary international law, principles of non-discrimination, in particular the most-favoured-nation clause, need to be positively agreed upon among commercial partners (see section A.3.). Most relevantly, the WTO legal framework substantially limits the scope for its membership to set up → *free trade areas* and customs unions. In practice, however, various WTO members do not refrain from concluding bilateral or plurilateral commercial treaties which are, in light of WTO law, problematic (see section C.2.).

**10** Institutionally, commercial treaties may either abstain from detailed organizational arrangements and resolve disagreements on their proper interpretation and application by taking recourse to diplomatic means of dispute resolution, or they may contain elaborate rules on institutional matters and on dispute resolution (→ *Judicial Settlement of International Disputes*), typically allowing for retaliation as a response to non-compliance. Under traditional dispute resolution systems set up by commercial treaties, individuals usually cannot initiate proceedings, let alone have standing (see also → *International Courts and Tribunals, Standing*). Governments decide to submit a case, reflecting → *diplomatic protection* of individuals under general public international law. It may also be possible to bring a case before the ICJ if the parties have approved of its jurisdiction (see → *Military and Paramilitary Activities in and against Nicaragua Case [Nicaragua v United States of America]*; → *Elettronica Sicula Case*). More modern commercial treaties, however, do grant

individuals the right to submit specific claims to → *arbitration* on their own behalf, as is common under bilateral investment regimes (see also → *Investment Disputes*; → *North American Free Trade Agreement, Dispute Settlement*).

## **B. Historical Overview**

### **1. From Ancient Times to Mercantilism**

**11** Commercial relations between merchants from different statal entities and empires date back to the dawn of recorded history—as do commercial treaties (see → *History of International Law, Ancient Times to 1648*). According to cuneiform tablets found at Tell el-Amarna, a commercial treaty, mainly on the obligation of foreign merchants to pay duties upon the importation of certain goods, existed between the kings of Egypt and Babylonia around 2,500 BCE. Later examples include the commercial treaties between Rome and Carthage in 508 and 348 BCE, the latter of which contained a general prohibition of discrimination against foreign merchants (Herrmann Weiss and Ohler 43) and hence resembled the principle of national treatment, the commercial treaty between the Roman Empire and Persia in 408–9, and the → *peace treaties* between Byzantium and Persia of 532 and 562, which were signed in order to renew peaceful relations after years of war and included mutual guarantees for merchants of a more favourable treatment than the arbitrary one accorded to aliens. In addition to fostering peace and administering market access rights, safeguarding trade routes on land and, in particular, maritime interests were the main objectives of treaties in ancient times, and treaties of friendship, commerce, and navigation became familiar instruments for securing closer commercial relations between statal entities and empires.

**12** Medieval practices developed a series of bilateral treaties on commerce and navigation in particular in Western Europe from the 12<sup>th</sup> century onwards. Groups of city-States, such as the Hanseatic League and the Italian city-States Florence, Genoa, and Venice, established close commercial treaty networks, often on the basis of reciprocity, which contributed to their flourishing trade and other commercial activities. At first, many arrangements were made between guilds rather than between public authorities. They typically covered the right of merchants to enter foreign territories, to engage in commercial activities, and to leave again with their wealth. Commercial treaties often provided for the admission of commercial attachés (→ *Consuls*) who assisted in promoting transnational commercial activities and in protecting merchant communities and maritime interests abroad. One of the first commitments to this effect was contained in the commercial treaty between France and the Ottoman Empire of 1535 (see → *Consular Treaties*). Furthermore, the first use of the principle of most-favoured-nation treatment, albeit unilaterally granted, can be traced to the 11<sup>th</sup> century, when the Italian town of Mantua obtained from the Roman Emperor Henry III the guarantee that it would benefit from customs privileges granted to ‘whatsoever other town’ (Ustor 159). The commercial treaty between England and Brittany of 1486 and the Anglo-Danish treaty of 1490 are usually cited as the first to explicitly provide for most-favoured-nation treatment on a bilateral and reciprocal basis.

**13** With the rise of nation States, the regulatory landscape changed (see also → *History of International Law, 1648 to 1815*). States considered the regulation of conditions of competition within their borders and of market access for foreign goods and services essential elements of their sovereignty, ideally not being unduly bound by international commitments. Moreover, coinciding with the rise of political nationalism, mercantilism emerged as a prominent school of thought in the 17<sup>th</sup> and 18<sup>th</sup> centuries. While mercantilism was not in general hostile towards international trading activities, it argued for close State intervention in order to maintain a favourable balance of trade. Against this background, commercial treaties granting preferential treatment to carefully selected

partners were particularly relevant in minimizing legal insecurity and economic costs resulting from mercantilist foreign trade interventions up to the mid-19<sup>th</sup> century. Prime examples are the treaty between England and Portugal of 1703 (Methuen Treaty), which allowed English clothes to be imported to Portugal duty-free, whereas Portuguese wines were subject to a considerably reduced tariff rate (compared to wines imported to England from France), and the Treaty of Commerce between England and France of 1786, which was concluded in the aftermath of the peace treaty between these two countries in 1783, mainly reducing custom duties on various products. Shortly after its declaration of independence, the United States also began to formalize international economic relations. From the formative years of the republic onwards, the conclusion of commercial treaties assumed a central foreign policy role in fostering peaceful relations and in securing vital commercial interests abroad, starting with the 1778 Treaty of Amity and Commerce with France. Relevantly, this treaty provided for conditional most-favoured-nation treatment in general and for unconditional most-favoured-nation treatment with respect to duties and access to → *ports*.

## 2. 19<sup>th</sup> Century Free Trade and its Decline

14 A new chapter was opened with the Cobden-Chevalier Trade Treaty between the United Kingdom and France of 1860. It was concluded in the aftermath of the repeal of the English Corn Laws, which for centuries had been the centrepiece and symbol of the protectionist system of the British Empire, and provided the starting point for a period of unprecedented free trade on the European continent. The Cobden-Chevalier Treaty laid down, on a long-term basis, the framework for liberal trade relations and served as a prototype for numerous commercial treaties between European countries, including a comprehensive commercial treaty between France and the → *Zollverein (German Customs Union)* in 1862. Commercial treaties of the second half of the 19<sup>th</sup> century typically granted to foreigners rights of entry, commercial establishment, protection of property, access to courts, and recognition of foreign legal persons. Furthermore, they provided for substantial reductions of customs duties and other charges imposed upon the importation of goods at the border, and they covered the freedom of contract and of payments at stable exchange rates based on the gold standard. The two deployments of the principle of non-discrimination, the most-favoured-nation clause and national treatment, fully emerged in the liberal period of the 19<sup>th</sup> century and found their way into commercial treaties (see section A.3.). Some of the treaties of that time are currently still in force, but they have been narrowly construed ever since → *migration* was generally restricted in Europe after World War II (eg Treaty of Friendship, Commerce and Reciprocal Establishment between the United Kingdom and Switzerland of 1855). Parallel to the evolution of a tight network of bilateral agreements, the 19<sup>th</sup> century was characterized by a first set of plurilateral and multilateral treaties on international trade and other commercial activities, typically in the following fields: *a*) transportation (eg Conventions for the Navigation of the Rhine of 1831 and 1868), *b*) trade in certain commodities such as sugar (eg International Sugar Convention of 1864; see also → *Commodities, International Regulation of Production and Trade*), *c*) monetary issues (eg Latin Monetary Union of 1865), *d*) telecommunication and postal services (eg → *Universal Postal Union [UPU]* of 1874; → *Postal Communications, International Regulation*), *e*) intellectual property rights (eg Paris Convention on Industrial Property of 1883, see also → *Industrial Property, International Protection*; Berne Convention for the Protection of Literary and Artistic Works of 1886), and *f*) customs tariffs (eg International Customs Tariff Bureau of 1890).

**15** Towards the end of the 19<sup>th</sup> century, however, most European countries, distressed by war and depression, returned to policies of unilateralism (→ *Unilateralism/Multilateralism*), terminating bilateral treaties or considerably loosening their obligations towards other trading partners. By 1870, Germany was the first country to have changed its external economic policy. Others followed suit. In 1882, France succeeded in persuading the United Kingdom to agree on substantial changes to the Cobden–Chevalier Treaty. At the beginning of the 20<sup>th</sup> century, World War I disrupted international trading relationships still further. The → *Versailles Peace Treaty (1919)* and the → *League of Nations* largely failed to address economic issues (see also → *History of International Law, World War I to World War II*), leaving trade policy and law to unilateralism and hence open to high risks of protectionism. The 1920s were characterized by the absence of international disciplines on transnational commercial activities and by beggar-thy-neighbour policies. The unstable political and economic situation led most countries to adopt massive trade restrictions (eg the Hawley-Smoot Tariff Act of the United States of 1930), to opt for competitive exchange rate devaluations and to nationalize foreign property in an attempt to protect domestic production and employment (→ *Nationalization*).

### **3. From World War II to the Present**

**16** The years after World War II were marked by a gradual return to trade liberalism and by a noticeable trend towards multilateralism. As early as 1934, the United States Congress had enacted the Reciprocal Trade Agreements Act which delegated powers to the President to negotiate commercial treaties with a view to lowering tariffs. This act was revolutionary in external economic relations. It implicitly acknowledged that tariffs should be negotiated between interested States bilaterally or multilaterally, rather than be adopted autonomously. During the period from 1935 to 1945, the United States concluded 32 commercial treaties on a bilateral basis. They laid the groundwork for the establishment of an economic system based on multilateral relations rather than on unilateral policies. Equally important, the → *Atlantic Charter (1941)* explicitly acknowledged the desire ‘to bring about the fullest collaboration between all nations in the economic field’. In 1945, the → *International Monetary Fund (IMF)* and the → *International Bank for Reconstruction and Development (IBRD)* were established (→ *Bretton Woods Conference [1944]*), whereas the International Trade Organization (‘ITO’), intended to become the prime pillar of a new liberal world trading regime, failed to come into existence largely due to opposition in the US Congress. Still, the draft text of the → *Havana Charter (1948)* continued to be of importance. The GATT 1947 emerged and absorbed the rules on commercial policy set out in Chapter IV of the Havana Charter. Upon the collapse of the ITO project, the GATT 1947 effectively became the centre of multilateral trade regulation and the framework for successive rounds of multilateral tariff reductions, remaining a de facto organization until its replacement by the WTO in 1995 (see section C.1.).

**17** In parallel to the GATT 1947/WTO framework and the Bretton Woods institutions, other multilateral treaties and organizations dealing with commercial matters also have been influential (see also → *Economic Organizations and Groups, International*). Trade policy among industrialized countries has often been formulated within the → *Organization for Economic Co-operation and Development (OECD)*, first created in 1948 as Organization for European Economic Co-operation (‘OEEC’) in support of European reconstruction, then converted into an organization with global reach in 1961. The United Nations Charter remains vague with regard to international economic relations (Art. 55 United Nations Charter), and the Economic and Social Council was not installed as a centre for trade policy formulation (→ *United Nations, Economic and Social Council*). The United Nations eventually provided the umbrella for the creation of the → *United Nations Conference on Trade and Development (UNCTAD)* in 1964. It emerged as an important forum in the articulation of developing countries’ trade policy, paralleling the work of the OECD, and

acted as an important proponent of the movement towards a → *New International Economic Order (NIEO)* in the 1970s which sought enhanced market access to industrialized countries, combined with policies favouring State intervention (see also → *Charter of Economic Rights and Duties of States [1974]*). The UN strongly influenced the drafting of the 1982 Convention on the Law of the Sea (→ *Law of the Sea*) and related agreements, which are of paramount importance to transnational commercial activities. Furthermore, recent years have witnessed increasing interlinkages between the regulation of commercial activities and specialized UN organizations (see also → *United Nations, Specialized Agencies*). Trade-related issues are addressed in particular by the → *World Intellectual Property Organization (WIPO)*, the → *World Health Organization (WHO)*, the → *Food and Agriculture Organization of the United Nations (FAO)*, the → *International Telecommunication Union (ITU)*, the → *International Civil Aviation Organization (ICAO)*, and a variety of programmes and commissions such as the → *United Nations Environment Programme (UNEP)*, the → *United Nations Development Programme (UNDP)*, and the → *United Nations Commission on International Trade Law (UNCITRAL)*. The → *World Customs Organization (WCO)* as well as various efforts to create a uniform framework for commercial arbitration (→ *Commercial Arbitration, International*) and to regulate trade in commodities are also relevant. In contrast, efforts to establish a multilateral agreement on investment ('MAI'), under the auspices of the OECD, and to harmonize national competition laws have not yet materialized.

**18** Alongside the evolution of multilateralism, the rise of regional trading blocs and bilateral trade agreements constitutes the other development in international economic relations of systemic significance since World War II (see section C.1.).

## **C. Current State of Law and Practice**

**19** As indicated in the preceding section (B.3.), the current state of law and practice is marked by two principal trends.

### **1. Multilateralism and Bilateralism**

**20** Transnational commercial activities are decisively shaped by multilateral arrangements, the most influential of which is the WTO. It provides the multilateral trading system with a sound institutional framework and contributes to stability and predictability in international commercial relations. Whereas the GATT 1947 dealt only with trade in goods—achieving tariff reductions on industrial products among industrial countries from 40% on average in 1947 to 3.9% in 1995, and setting the stage for first efforts to discipline non-tariff barriers—the WTO resulted from a substantial expansion of coverage. The Uruguay Round opened new fronts by seriously addressing the remaining barriers to trade in goods, in particular in agriculture and in textiles and clothing, and by evolutionarily turning to set up a regulatory basis for trade in services and for the protection of intellectual property rights and of trade-related investments. The → *General Agreement on Trade in Services (1994)* ('GATS') has created an overall framework to serve as the basis for progressive liberalization and for enhancing market access in the coming decades. The → *Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)* ('TRIPS Agreement') has successfully brought intellectual property protection under the umbrella of the multilateral trading regime, building upon, and incorporating, the 1883 Paris and 1886 Berne Conventions and enacting, in addition, procedural norms. The Agreement on Trade-Related Investment Measures ('TRIMs Agreement'), which came into effect in 1995, confines its regulatory scope to a few specific measures that had proven problematic in GATT 1947 practice. Prominently stipulated through all the covered agreements, the WTO framework renders commercial activities across national borders subject to the most-favoured-nation clause and to the principle of national treatment (see section A.3.). This holds in particular true for the GATT 1994 and the TRIPS Agreement, whereas in the case of the GATS national treatment and

market access obligations fully apply only to specific commitments to which individual members have positively agreed. Moreover, the WTO established a unified and compulsory dispute settlement mechanism for all the covered agreements. This mechanism ranks among the most sophisticated and efficient tools for the judicial settlement of international disputes on offer in contemporary international law.

**21** At the same time, the current legal situation is characterized by the proliferation of commercial treaties on a bilateral and plurilateral basis. Regional integration by economic means was initiated and spearheaded by post-World War II → *European integration* and, in many ways, replaced the former colonial systems of preferential trade (see also → *colonialism*). The European continent has been pervaded with a tight network of bilateral commercial treaties since the 1960s, with the → *European Free Trade Association (EFTA)*, the → *European Economic Area (EEA)* and a series of (almost identical) free trade agreements between the European Union and non-members complementing the integration pursued within the common market. States on other continents have followed suit. Prominent examples include the → *North American Free Trade Agreement (1992)*, MERCOSUR, the → *Caribbean Community (CARICOM)*, the → *South Asian Association for Regional Co-operation (SAARC)*, the → *Association of Southeast Asian Nations (ASEAN)*, the → *Arab Free Trade Area Agreement (1997)*, the → *Common Market for Eastern and Southern Africa (COMESA)*, and the Southern African Customs Union ('SACU'). Furthermore, the European Union has actively sought, since 2002, to enlarge its network of preferential trade relations with African, Caribbean, and Pacific ('ACP') countries, most of them former colonies of European States, with the conclusion of Economic Partnership Agreements ('EPAs'), replacing the → *Lomé/Cotonou Conventions*. Today, almost all States are, in some form, parties to a considerable number of bilateral commercial treaties. The trend towards increasing such bonds continues unabated, and the uncertain prospect of the deadlocked Doha Development Agenda—the ninth round of multilateral negotiations under the auspices of the GATT 1947/WTO (→ *Doha Round*)—adds impetus to the conclusion of bilateral commercial treaties. Recent developments show increasing recourse to preferential commercial activities in South-East Asia (see also → *International Law, Regional Developments: South and South-East Asia*). For many years, Japan and Singapore were the only major powers exclusively operating on the global system. The rise of the People's Republic of → *China* as the dominant economic power of the region in the 21<sup>st</sup> century is inducing countries to join forces with a view to enhancing their future bargaining powers vis-à-vis China. The planned Transatlantic Trade and Investment Partnership (TTIP) between the European Union and the United States would result in substantial reductions of existing barriers to commercial activities across the Atlantic, although its creation is still subject to certain opposition. The planned Trans-Pacific Partnership (TPP) Agreement would set up a free trade area across the Pacific, with Australia, Brunei Darussalam, Chile, Malaysia, New Zealand, Peru, Singapore, Vietnam, the United States, and possibly also Japan, as potential partners.

## **2. Relationship of Friction and Supplementation**

**22** The process of regional integration within a system of global multilateralism raises major conceptual and legal policy issues. On the one hand, it is believed that regional trading blocs are beneficial for, and complementary to, the multilateral and non-discriminatory system of the WTO. Here, bilateral commercial treaties are seen as reinforcing the global trading system rather than putting its integrity and stability at risk. The experience of European integration tends to prove the complementary functions of the multilateral and the regional systems. While fostering peace among European nations, many countries benefit from market access to Europe under the WTO legal framework. On the other hand, regionalism is considered as a major threat to a cooperative and multilateral order. According to this view, preferential treatment generally leads to trade

diversion rather than encouraging trade creation, and the multitude of preferential arrangements results only in a complex web and 'spaghetti bowl' (Bhagwati, Greenaway, and Panagariva 1128) of rules of origin, which render trade more cumbersome.

**23** WTO law reflects a policy of encouragement and containment of preferential commercial activities. In substance, it sets strict requirements for bilateral treaties, which touch upon its regulatory scope and deviate from the principle of most-favoured-nation treatment. The basic rules are stipulated in Art. XXIV GATT 1994 for free trade areas and customs unions in the field of goods, and in Art. V GATS for economic integration in the field of services (whereas the TRIPS Agreement does not contain any similar provision). In particular, according to Art. XXIV GATT 1994, a free trade agreement or an agreement establishing a customs union needs to cover 'substantially all the trade' in products originating in the territories of the parties. Similarly, the GATS requires 'substantial sectoral coverage'. Hence, policies of pick and choose or à la carte are not consistent with WTO rules. This requirement, if properly enforced, prevents a gradual erosion of trade on a multilateral basis. In practice, however, many existing commercial treaties do not meet the legal standards set out by Art. XXIV GATT 1994 and Art. V GATS. In addition to the rules on regional integration, WTO law specifically allows deviations from most-favoured-nation treatment by mutual recognition agreements in the field of technical regulations and standards pursuant to Art. 6 Agreement on Technical Barriers to Trade and by arrangements granting differential and more favourable treatment to developing countries pursuant to the Enabling Clause. The Enabling Clause, established in 1979 by the then-GATT 1947 contracting parties and still valid today, allows industrialized countries unilaterally to grant preferential market access to developing countries (Generalized System of Preferences ['GSP']). To date, Australia, Canada, Japan, New Zealand, Norway, Switzerland, the US, and the European Union accord preferences under the GSP to developing countries, although the effectiveness of current GSP schemes is increasingly doubted (Cottier and Oesch 564). In particular, the Enabling Clause does not provide for a multilateral system of preferences. It allows making the availability of preferences conditional on the fulfilment of policy goals such as environmental standards and labour rights. Accordingly, national GSP schemes often lack legal security and predictability. Lastly, WTO law prohibits, in Art. 11 Agreement on Safeguards, voluntary export restrictions and orderly marketing arrangements, as such (often secret) treaties have in the past proven to be incompatible with the spirit of GATT 1947/WTO law.

### **3. Treaties within and outside the Scope of the WTO**

**24** Since the second half of the 20<sup>th</sup> century, various bilateral commercial treaties have explicitly referred to GATT 1947/WTO law. They implement it, they impose rights and obligations in excess of those agreed upon on the multilateral level—so-called 'WTO-plus' treaties—or they make use of permitted exceptions, such as the above-mentioned exceptions from the principle of most-favoured-nation treatment (section C.2.). During the period from 1948 to 1994, the GATT 1947 received 124 notifications of free trade areas and customs unions relating to trade in goods, and since the creation of the WTO in 1995, over 300 additional arrangements covering preferential market access commitments for trade in goods or services have been notified. It is commonly held that a considerable number of additional treaties to this effect are not notified at all, and others are agreed upon in principle but have yet to come into force.

**25** In addition, there is a host of commercial activities still outside the scope of the WTO legal framework. There remain important areas, such as transportation, taxation, currency and payment matters, government procurement, and investment, which are—at least partly and with respect to some States—not affected by WTO law and hence can be promptly regulated in commercial treaties on a bilateral basis. For instance, there are currently over

2,800 bilateral investment treaties (UNCTAD 84) and over 3,000 → *double taxation* treaties in force (UNCTAD 95 N 20). Moreover, the WTO has yet to achieve truly universal reach. At least, in 2012, an important achievement was accomplished, in this respect, with the accession of the Russian Federation (→ *Russia*) to the WTO. Still, some of the new States of the former territory of Yugoslavia (→ *Yugoslavia, Dissolution of*) remain, at least for the time being, outside. The same holds true, inter alia, for Algeria, Libya, Sudan, Ethiopia, Syria, Iraq, Iran, Afghanistan, Belarus, Kazakhstan, and Uzbekistan. Of course, these countries are, with respect to their sovereign power to conclude commercial treaties, not bound by WTO law.

## D. Evaluation

**26** There is hardly a walk of life untouched either directly or indirectly by commercial treaties. They are of prime importance in fostering predictability and legal security in transnational commercial relations and provide the backbone of international economic law. Classical fields of import and export regulation of goods and services still comprise the core of the subject-matter. Yet, it increasingly encompasses domestic regulations as they define market access and conditions of competition in all sectors of the economy. The status of non-nationals is affected and increasingly defined by commercial regulation, as cross-border trade and presence are important conditions for the provision of services abroad. Systemically, the legal evolution of commercial treaties shows an impressive continuity. The classical principles and standards of commercial treaty practice, such as negotiating absolute commitments to reduce trade barriers (tariffs, quotas), basing commercial relations on the principle of non-discrimination, ie agreeing on market access rights in relation to, and depending on, the treatment granted to other competitors (most-favoured-nation clause and national treatment), and reliance on the political leitmotiv of reciprocity, typically continue to be included in commercial treaties, be they of a bilateral, plurilateral or multilateral nature. These principles and standards allow, case-by-case, a reconciliation of the need for international cooperation and coordination of external economic policy decisions by treaty law, on the one hand, and the diversity of national economic and legal systems and their partly different perceptions of the sensitivity and negotiability of rights and obligations, on the other hand. Still, uneven negotiation powers and other political and economic factors frequently lead to the—in various cases sound—allegation that commercial treaties are not mutually advantageous, typically to the detriment of developing countries. Most prominently, the WTO faces such criticism. Symptomatically, the Doha Round—the ninth round of multilateral trade negotiations under the auspices of the GATT 1947/WTO which was initiated at Doha, Qatar, in November 2001—has been termed a ‘development round’, officially dedicated to improving trading conditions for developing countries.

**27** The unprecedented proliferation of commercial treaties since World War II indicates the common understanding that basic economic policy objectives can no longer be achieved unilaterally and without international collaboration. The contractual validation of market access rights and conditions of competition within domestic markets has become a centrepiece for the orderly functioning of any national economy and for securing their export interests; participation in commercial treaties and economic organizations has become a *conditio sine qua non*. This is well reflected in the current situation. The WTO, comprising 159 members, provides the multilateral framework, which sets the basic rules and guidelines for trade in goods and services and for trade-related aspects of investments and intellectual property rights, essentially operating with the most-favoured-nation clause and national treatment. Parallel to the evolution of multilateralism, an almost uncountable number of bilateral treaties and regional integration efforts are the second mainstay of commercial treaty networks. The relationship between these two trends—multilateralism and bilateralism—is, however, ambivalent and often leads to tensions or even conflicts of

law (see also → *Treaties, Conflicts between*). It has yet to be clarified and constitutes the first of the two major challenges to be resolved in the near future with respect to commercial treaties.

**28** The second challenge for 21<sup>st</sup> century institutionalized commercial relations across national borders concerns the fact that commercial treaties do not operate in isolation. They are closely intertwined with other, equally legitimate, policy goals. The relationship of commercial treaties and other areas of international law primarily emerged, as a practical and political issue, in the context of multilateral environmental agreements (→ *Environment, Multilateral Agreements*). More recently, the debate has prominently gained momentum in relation to trade and human rights, constituting fundamental principles and values also in disciplining external commercial activities. Whereas the scope and objectives of some commercial treaties may concur with norms of other international legal instruments in a mutually supportive way, others may create tensions or even conflicts of law. Being a trend that raises concern in contemporary international law in general, the → *fragmentation of international law* poses particular problems in the field of international economic law. In the short run, it requires enhanced coordination in policy-making and in the interpretation and application of existing commercial treaties and other legal instruments. In the longer run, the quest for coherence has initiated a process which is commonly known as ‘constitutionalization’ of international law. This term depicts the continuing process of the emergence, creation, and identification of constitution-like elements in the international legal order (Peters 582). In the context of interfacing commercial treaty law with other fields of law, the essence of constitutionalization primarily consists of bringing about an appropriate balance of competing policy interests and powers of governance, of guaranteeing adequate protection of individuals and their fundamental rights, of enhancing democratic legitimacy of commercial treaties, and of further promoting the legalization of dispute settlement.

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