



# Trade, Aid, and Arbitrate

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The Globalization of  
Western Law

Ronald Charles Wolf

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RONALD CHARLES WOLF

*Member of the Bars of New York and Vermont, USA*

ASHGATE

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Published by

Ashgate Publishing Limited

Gower House

Croft Road

Aldershot

Hants GU11 3HR

England

Ashgate Publishing Company

Suite 420

101 Cherry Street

Burlington, VT 05401-4405

USA

Ashgate website: <http://www.ashgate.com>

### **British Library Cataloguing in Publication Data**

Wolf, Ronald Charles

Trade, aid, and arbitrate : the globalization of Western  
law

1.Arbitration, International 2.International law

I.Title

341

### **Library of Congress Cataloging-in-Publication Data**

Wolf, Ronald Charles.

Trade, aid, and arbitrate : the globalization of western law / Ronald Charles Wolf.  
p. cm.

Includes bibliographical references and index.

ISBN 0-7546-2285-1

1. Foreign trade regulation. 2. Arbitration and award. 3. Debts, Public. 4. International  
trade. 5. Globalization. I. Title.

K3943.W65 2003

343'.087--dc22

2003052366

ISBN 0 7546 2285 1

## TRADE, AID, AND ARBITRATE

*In remembrance of Maggie's parents, Minnie and Harry Fein, and  
their home on Windermere Road, Auburndale, Massachusetts.*

# Preface

## *Let us pretend*

The practice of law is an empirical adventure with an emphasis on social conflict and daily evaluation of community norms. From this milieu, the counselor-at-law naturally begins to form ideas about the nature of the law and society. Cast forth from the halls of study, the attorney daily confronts the dramas of human life. Quickly, the practicing lawyer discovers that behind the contractual conflicts, the strident judicial contests, the anguished claims, the dialectical court sentences, are, for the most part, economic questions. The headline court cases affecting the heart are the exception. Pass by a court house and any tribunal clerk will inform you the litigation calendar is replete, more likely inundated, with contractual claims and inheritance disputes.

Mercantile needs germinate legal principles much as the earth sprouts forth its plant life. The broad scheme of the present investigation has been succinctly described by an eminent scholar, '... the social practice comes first and the law comes tumbling after'.<sup>1</sup> Or even more pithily from the same author, 'Society calls and the law responds'.<sup>2</sup> Clearly economic principles cannot be separated from social consequences. Envisioning the law, with its pillar of commercial principles, as an independent compartment of human society alongside other cultural institutions, is a mistake. Society is substantially an economic social pattern stabilized by legal principles. Economics weaves its wants into all facets of society, dragging along with it the relevant legal concepts.

Law, then, is a fertile field for the exploration of sociological phenomena. Accordingly, the material presented in this book is almost exclusively a factual exploration into the many less familiar aspects of international economic life which are determining the course of social history. Various conclusions are extricated throughout this treatise; but in general it can be affirmed that private international commercial law is subject to the hegemony of Western law which is itself substantially influenced by US law. Western commercial law is going global with its neoliberalism and market economy policies and principles. The description of the globalization of Western law is '... the story of the law merchant all over again',<sup>3</sup> where the words 'law merchant' have been expanded to now include international commercial practices.<sup>4</sup> The methodology<sup>5</sup> adopted to reach this conclusion is one familiar to all investigators: the examination of data, a synthesis of the facts, and finally a general deduction as to principles. Anyone who finds the facts convincing but not the conclusions deduced or inferred at least has the advantage of the reported data.

But before we begin our journey certain further assumptions need to be explicitly stated. This permits the reader to evaluate the material offered within a general theory of the sociology of the law. It would be unfair to plunge the reader into a

wide array of disjointed data without an initial theoretical framework which will serve to coordinate the ensuing chapters. There are new, important sources of norms governing the social communities of most nations streaming forth from autonomous institutions. It has aptly been denominated by an prominent scholar of globalization 'global governance without global government'.<sup>6</sup> They range from the unobtrusive international arbitration panels to the sovereign credit-rating agencies to the recondite Bank for International Settlements in Basle. The standards emanating from all these founts, and many others to be portrayed, eventually regulate the lives of citizens everywhere. The international institutions are dictating the rules which are generating global legal principles. Their functioning and effects commands our understanding just as we want to comprehend better how our national assemblies operate.

But these extra-judicial creeds are not just a *mélange* of assorted values. They bear substantial similarities in their content. They are significantly under the influence of Western social and economic mores and in particular those of the US. They are derived from Western principles of what is a just society and a sensible economic system. In short, democracy and free markets are considered the correct postures for social life and this message is forcibly conveyed to other nations through the various multilateral institutions dominated by the industrialized nations.

Moreover, as these values emerge from sources not chosen by the electorate, the result is the prevailing beliefs diffused are denationalized. They have little to do with the identity of nations and everything to do with the political and economic tenets of organizations and their functionaries. The values in question, then, have not evolved from the particular history of a nation but are rather superimposed on sovereigns by authority figures. Citizens everywhere are disenfranchised and violently display this sentiment on the streets for there is no one elected institution which can respond to their cries of alienation.

Buttressing this trend is the composition of the many multilateral and supranational associations now a constant feature, some would argue threat, of human organization. They are constituted by technocrats, gifted and trained professionals, who dominate thoroughly the issues and problems brought to their establishments. Thus, one of the significant movements of the twenty-first century is the denationalization of intellectual capital and its indispensability. Heretofore, nations and entrepreneurs have had recourse to material capital to secure their power positions. The twenty-first century is witnessing the emergence of intellectual capital able to be furnished by a variety of people without regard to family fortunes, race, creed, sex, or any of the traditional false divisions erected by societies. Technical prowess cannot tolerate artificial barriers and world trade requires the trained specialist.

Furthermore, the integration of financial markets and the ease of international communications — one of the hallmarks of economic globalization<sup>7</sup> — spurred by the advent of the information society, now makes it possible for new forms of business organizations to coordinate the production, marketing, and sale of goods and services through the virtual network. No longer is it necessary to rely on the capital-intense, brick and mortar, stodgy multinational headquarters to command

worldwide commercial affairs. Contracts implemented by digital information transfer means the virtual corporation, invisible to governments, difficult to locate, immune to national laws, subject only to international arbitration through legal covenants, escapes the application of national legal doctrine. Through arbitration, the new law merchant, or *lex mercatoria*, as it is denominated — and christened 'new' because its origins in the medieval English law merchant are now transplanted onto the global scene — is becoming the standard for international commercial transactions. But of course, the legal principles of the *lex mercatoria* are a consensus of Western mercantile law as developed through centuries of trading. National precepts enunciated by municipal courts are becoming irrelevant to the development of international commercial law. With the emergence of the *lex mercatoria* as a corpus of international commercial law, the dominance of Western legal principles is further solidified on a global scale as the Western nations are the principal international traders.

Hence the publication in your hand is both a sociological and legal review of the consequences of international trade and the laws generated from this activity. Of course, the attentive reader is pleased to be informed as to the nature of our inquiry, a description as to the attributes of 'law', so that we all may agree as to our subject matter. Unfortunately, the nature of the law defies a consensus of opinion as to its characteristics. The amount of tomes seeking to define the law exceed the yearly avalanche of culinary publications. And while at least the results of the latter may be accompanied by a fine glass of wine, and disappointment assuaged with mellow reminiscences, the former often drives us to despair and the need for a more elevated degree of alcohol. Without doubt, the social scientist requires patience.

Nevertheless, one premise is certain. What we recognize as law is pluralistic and hardly dependent on local courts for its proliferation. Summarizing one scholar,<sup>8</sup> it is not possible to distinguish in practice between legislative laws and community norms. By community, we of course include the various international associations and multilateral institutions. This is what is meant by pluralism: society is governed by laws from a variety of origins, and whether we call them norms, mores, legislative acts, judicial decisions, group and peer pressures, their function is the same. A plurality of sources governs social conduct and is recognized as such by the members of the community. We may describe this as the daily encounter with the prescribed rules of social conduct and they are learned early. The law profession does not have a monopoly on the understanding of laws.

But this book is not another venture into the intellectual problems of legal pluralism.<sup>9</sup> It proceeds from the fact of its existence. On the one hand, for many writers legal pluralism is marginalized. To these scholars, the law is monist, wherein the state has a monopoly, and positivist — what is not created by the state is not law. Such a view has been clearly shown to be erroneous by a distinguished philosopher of the law.<sup>10</sup> To your author, also, legal pluralism is uncontestable. One further step is taken. This treatise departs from the premise that if we are governed by a pluralism of laws it is because the law is a grammatical construction which serves to prevent the dissolution of any society which is itself imagined.<sup>11</sup>



Being in great part fables woven by power alliances, the idea of law can be advocated by any group for any reason provided it seeks to consolidate beliefs. The laws of a country club are no more sacred than the edicts of a national assembly. We might even stride further in our theoretical implications and classify the law as a 'triumph of image over substance'.<sup>12</sup>

Any stable community is a truce where the lines of power and protection of rights are drawn.<sup>13</sup> Some societies do it well; others fail. All is in flux. Law and society have no existence other than in the mind of the beholder. Drawing on material from anthropological, sociological, economic, and legal texts, there is here presented evidence of the mutable, fluid, adaptable nature of the law which permits members of a community to more or less function with a minimum amount of recourse to violence. We may envision society as a constellation of varied bodies, ruled from without and within, by principles and policies from diverse sources, the whole held together by the grandiose scheme of law but no one can find, at least easily, the unifying dogma. If the search for a unifying principle has eluded physicists, so has it the social scientist. But, for the most part, community life functions, almost, for social order is always prone to disintegrate into chaos when norms are seriously challenged.

Such a scheme is not meant to be utopian; far from it. Nor does it presume 'this is the best of all possible worlds'; surely this can hardly be true. In fact, stumbling towards cohesion and trying to hold hands describes better how most societies are organized. The seesaw between cooperation and aggression characterizes communal life in the majority of nations, particularly the industrialized populations where the right to dissent is emphasized. From this proposition, it is natural that the law commands respect from social forces by offering incentives to its members. Relative social harmony is one, as is an ambient for conducting business. If law has no sacred origins, then clearly the law must offer practical rewards for the underlying norms to be accepted. This proposition permits an explanation of many of the phenomena of our present international community of nations.

With such a professed vision of society, there is also collated in this book the varied and, at times, unusual sources of material and social forces which are mounting an assault upon the cultural diversity of sovereign nations. The result is a tidal wave of influences prodding community life in the trading nations towards a globalization of commercial law. Many of the vital issues affecting community life in countries wishing to join the integrated commercial markets will be determined by the basic principles of Western law with its underlying economic and political beliefs. One may be tempted to characterize this book as a portrait of legal imperialism. Such is not the intention. Indeed, conquest by any means, cultural or military, hardly explains the origins of the occupation. The democratic process in the West, even if erected on a disinterested citizenry, is still subject to social pressures. The annals of human activity recorded in this book point to the merchant class as a prime cause of norms. The political sector has spawned an entire industry of lobbying. To assume the polity of a nation is composed of idealistic representatives defies the information available in any media source. Commerce enables the citizen. Commerce creates power and the average person dons with energy the role of the power broker.

There are no value judgments in these assertions. And the conclusion is confined to those sovereigns and their nationals who are desirous of being part of the international commercial route for such is the material gathered in this text. Yet, the assertion is probably true for any organized society, as all communities exercise trade. This is the price to be paid. International trade, and then international aid, usually accompanied by the agreement to arbitrate, constructs norms of behavior. It is a circle dominated by the industrialized nations. Law is an expression of a community's mores without which there would be no society. Presently, the dominant mores emanate from the West for reasons of capital and trade.

To understand better this process, the ensuing chapters describe many of the fountainheads which are forging the legal globalization of commercial norms. The chapters are broad brush strokes. Each chapter warrants a separate book. It would be presumptuous, therefore, to attribute any philosophical analysis to the myriad topics analyzed. Rather, by identifying the functioning of entities such as the International Monetary Fund (IMF), the World Bank, the Organization for Economic Co-operation and Development (OECD), combined with a description of various other sources of legal norms, there is revealed to the reader how unending is the process of legal globalization. The presentation which follows is an empirical reflection. This should permit further investigation.

Of course, commercial life is not sensibly separated from other spheres of civil life. Because of this, the legal globalization of commercial life on a global scale will have its repercussions in other aspects of social life. The exploration of patent rights must inevitably collide with the social weal. Property rights are invariably linked to civil duties. Commentators often link globalization with the loss of personal liberties. This is determining the winners and losers without offering either alternatives to the process of globalization or failing to explain what 'win and lose' means. Such a determination requires the construction of an entire body of community norms. Such a laudable mission is not considered in this study.

Ultimately, the present volume must be considered more as an investigation into the wide-ranging, highly-influential commercial activities of our present era rather than as the elaboration of a theoretical model. Our point of departure is the international commercial aspects dominating our present epoch and with these words of explanation, and also leaving behind any pretense to constructing a sociology of the law, we will commence our chronicles.

## Notes

<sup>1</sup> Shapiro, Martin, *Globalization of Freedom of Contract*, pages 269-298, footnotes pp. 361-363, in Chapter Nine of *The State and Freedom of Contract*, ed. Harry N. Scheiber, Stanford University Press (1998) at p. 270.

<sup>2</sup> Ibid at p. 297.

<sup>3</sup> Ibid at p. 271.

<sup>4</sup> Ibid. This equation is not to be attributed to Prof. Shapiro. It is my own interpretation.

<sup>5</sup> I am grateful to Dr. Rachel Sieder, Senior Lecturer in Politics, at the Institute of Latin American Studies, University of London, for her analytical review of one of the drafts of this book and her insightful observations which led me to address certain questions in this introduction.

<sup>6</sup> Stiglitz, Joseph, *Globalization and its discontents*, Penguin Books (2002) at p. 21.

<sup>7</sup> Ibid, at page 9, but this strict interpretation of globalization emphasizes market economics without considering other social consequences. As will be divulged throughout the chapters in this text, our definition of globalization is more broad for we are describing a general set of rules generated by world markets and institutions. Rules, not markets, are the attributes of legal globalization, a definition advocated by Martin Shapiro, *The Globalization of the Law*, Indiana Journal of Global Studies, 1(1) (Fall 1993) and adopted by your present author.

<sup>8</sup> Woodman, Gordon R., *Customary Law in Common Law Systems*, <[www.ids.ac.uk/ids/govern/acc/ust/pdfs/idswoodman.pdf](http://www.ids.ac.uk/ids/govern/acc/ust/pdfs/idswoodman.pdf)>, accessed 9 April 2003, and see references in this article replete with insightful observations and scholastic critiques.

<sup>9</sup> For a comprehensive definition of legal pluralism and further references see Griffiths, John, under entry 'Legal Pluralism' in the International Encyclopedia of the Social Sciences (2001).

<sup>10</sup> Twining, William, *Globalisation and Legal Theory*, Northwestern University Press (2000).

<sup>11</sup> Unger, Roberto Mangabeira, *The Critical Legal Studies Movement*, Harvard University Press (1986), '... society is understood to be made and imagined rather than merely given' at p 18.

<sup>12</sup> Tomkins, Richard, *No logo can sell the true horrors of battle*, The Financial Times, 20 March 2003, at p. 15, where, in another context, the author summarizes the view that present-day warfare has become a marketing campaign for public support and the true battlefield is consumer loyalty to the cause, normally described in appealing terms such as 'Operation Blus Spoon' (US invasion of Panama) or 'Operation Desert Storm' (US invasion of Iraq). In fact, the same logic applies to legal precepts. Their initial emergence is essentially a marketing exercise in the sale of a product.

<sup>13</sup> Ibid.

# Acknowledgements

In 1999, I undertook studies in the Department of Social Studies at the University of Manchester, UK to obtain an M. Phil. in the social sciences. I was privileged to be accompanied by two outstanding scholars and teachers: Professor John Gledhill, Department of Social Sciences, and Professor David Milman, Faculty of Law. I am indeed indebted to them for their encouragement and academic guidance which eventually led to receiving my degree in 2001.

After receiving my degree, I decided to expand my thesis into a book by incorporating more material and furthering my analysis. When I submitted an outline of my intended text to John Irwin, Consultant Publisher, Ashgate Publishing Ltd., I received a positive reply and immediate support. Through the subsequent years of gathering material and writing, John Irwin made many valuable suggestions as to my intended presentation.

After many revisions, I sent the text to numerous scholars. I received many pertinent and critical observations which tempered my thoughts. Without in any way implying endorsement of the present book, I would like to thank, in alphabetical order, the following scholars: John Griffiths, Faculty of Law, University of Groninger, Groningen, The Netherlands; Anita Kon, Pontifica Universidade Catolica de São Paulo, São Paulo, Brasil; Rachel Seider, Institute of Latin American Studies, University of London, London, UK; Martin Shapiro, School of Law, University of California at Berkeley, Berkeley, CA; Francis Snyder, Co-Director, Academy of International Trade Law, Macão, China; William Twining, School of Law, University of Miami, Coral Gables, FL; Gordon R. Woodman, School of Law, University of Birmingham, Birmingham, UK.

The editing of my manuscript was done under the aegis of Sarah Horsley, Desk Editor, Ashgate.

Finally, to my wife, Marilyn, my gratitude for her loving support during the many years I was sequestered in my study. It was indispensable to know she was always present.

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PART 1  
INTERNATIONAL TRADE AND  
THE GLOBALIZATION OF  
WESTERN LAW





## Chapter 1

# The Globalization of Western Law

*The general idea is ... trade, aid, and arbitrate*

Without deliberate design, economics fashion laws and dictate social principles. Dependent on commerce and the recognition of property rights for survival, the isolated, culturally homogenous community bows to regulation, whether informal or enforced. From this description, law can be explained in a variety of ways: a cultural phenomenon of which law is one component; a relationship of class domination where property rights are protected to reinforce dominant social positions; or even a method for problem-solving so as to restrain social conflict.<sup>1</sup>

Yet there are further explanations. Law is also a grammatical construction to venerate a reality which does not exist and permits the realization of income. A parcel of land is leased. The expression 'lease' requires a definition. You do not find leases in nature. The definition of a lease is a social and economic statement. The law is thus an artifice permitting a dominant economic process to expand its reach through analytic and juridical reasoning. Patent rights for computer-chip manufacturing are licensed to a third party. The 'right' conceded contains a lengthy history of economic philosophy.

Law, then, not being a reality, admits and requires various explanations and social insights to understand its functioning at any particular moment of history. In our present century, the social organizing function of hamlet economics has given way to international commerce and institutional lending. The ensuing consequences are varied but global in their repercussions. These forces of international trade and aid are greater than the cultural anchors of a particular society; the need for survival is greater than the habit of individuality conferred by an indigent culture. Trade and aid insist upon legal convergence in the name of commerce. As business goes frenetically international and markets become more integrated each day, the results are predictable: we are swept up in a trend towards legal globalization generated by the explosion in world trade.<sup>2</sup>

The formulations of laws are no longer confined to national frontiers and sanctified by the enforcement powers of the sovereign nation. Transnational institutions, international arbitration boards, global regulatory agencies, standard documents, generalized commercial customs, and ad hoc tribunals are founded on the assumed general laws of justice. From a concern with dried fodder to genetically modified foods, the wand of regulators sees a sensible, moral