

CUSTOM AS A SOURCE OF LAW IN INTERNATIONAL TRADE: TRADITION AND MODERNITY

Cornelia Beatrice Gabriela ENE-DINU¹

Abstract: *The study explores the role and relevance of custom as a source of law in international trade, analyzing how it evolves in the context of modernity. The main objective of the research is to assess how legal traditions based on recurring commercial practices influence modern norms, providing stability and predictability in global trade relations. The study's main conclusion is that, although modernity brings new forms of regulation, custom continues to play a crucial role in filling legislative gaps and in the flexible adaptation of norms to the cultural and economic diversity of the parties involved.*

Key words: *custom, source of law, commercial traditions, international trade, modernity.*

1. Introduction

International trade is an essential element of the global economy, facilitating the exchange of goods and services between nations. However, interactions between different legal, cultural, and economic systems often involve significant challenges. In this context, clear and efficient regulation of international trade is necessary, and international law plays a crucial role in establishing these rules. The sources of international law, including treaties, national legislation, and custom, form an essential framework for regulating transactions and resolving disputes between states.

The sources of law in international trade are multiple and varied, reflecting the diversity of interests and actors involved in these economic processes. The most important sources are international treaties, custom, and general principles of law, but jurisprudence and doctrine also significantly contribute to the development of applicable legal rules. Treaties are formal agreements between states that establish clear and precise rules for different aspects of international trade. On the other hand, custom plays a more subtle but no less important role, being the result of a consistent and uniform practice between states, accepted as law.

Custom, in international law, is defined as a general, consistent, and uniform practice of states, followed with the belief that it is legally binding ("*opinio juris*"). Unlike formal

¹ "Nicolae Titulescu" University of Bucharest.

treaties, custom is not written in a single document but is recognised as having the force of law. In international trade, customs play a fundamental role, especially in situations where no precise regulations or applicable treaties exist. These customs can function as implicit rules that guide the behaviour of parties in the absence of formal legislation (Shaw, 2017, p. 52).

2. Custom: A Fundamental Source of International Law

Custom is one of the oldest and most fundamental sources of law within the international legal system, playing a crucial role in shaping relations between states. The origin of custom in international law lies in the repeated behaviours of states in various contexts, behaviours that have gradually been accepted as legally binding (Miga-Beşteliu, 2012, p. 45). This transition from informal practices to recognised legal norms has occurred over time and is an essential part of the process of norm formation in international law (Cassese, 2005, p. 21).

According to the definition provided by the International Court of Justice (ICJ), custom is based on two essential elements: a general and uniform practice of states and the legal belief (*opinio juris*) that this practice is obligatory (North Sea Continental Shelf Cases, 1969, p. 44). The first component refers to a consistent and uniform practice of states, which may include actions or inactions in international relations, such as treaty negotiations, conflict resolution, or the application of sanctions. States must follow these practices repeatedly and consistently for them to become customary (Shaw, 2017, p. 54). The second element, *opinio juris*, constitutes the belief by states that following these practices is not optional but is required by a legal obligation. *Opinio juris* thus distinguishes ordinary international behaviour from customary norms by introducing the legal dimension, which transforms a simple diplomatic routine into a binding rule.

Custom is an essential source of international law, especially in areas where treaties or national legislation do not provide a clear regulatory framework. It applies in various fields, from the law of the sea and international trade to human rights and environmental protection. In these fields, custom functions as an implicit set of rules guiding the behaviour of states, thus providing stability and predictability in international relations (Miga-Beşteliu, 2012, p. 89; Shaw, 2017, p. 56).

One of the fundamental advantages of custom is its flexibility. Customs develop organically and dynamically, adapting to changes in international relations and new global challenges. While treaties are formal instruments requiring a complex process of negotiation and ratification, customs evolve with state practices, allowing them to be more responsive to changes in international society (Cassese, 2005, p. 26). Thus, customs can more quickly reflect new international realities, such as technological developments or emerging global security threats.

Moreover, custom applies universally, meaning it influences all states, regardless of whether they were directly involved in the formation of a particular customary norm. This feature ensures universal applicability, which is essential in areas such as international trade or environmental protection, where global coordination is crucial (Miga-Beşteliu, 2012, p. 93; Shaw, 2017, p. 61). The legal recognition of customs, even in

the absence of official codification, grants them binding legal force, making it obligatory for states to respect unwritten rules of international conduct, without the need for formal agreements in all cases (Cassese, 2005, p. 31).

Although custom plays an essential role in international law, it differs significantly from other sources of law, such as treaties, national legislation, or international jurisprudence. Treaties, for example, are formal, written agreements between states that explicitly regulate certain aspects of international relations. They are rigid and require ratification procedures to come into force. In contrast, customs are unwritten and result from the repeated behaviours of states in their interactions. This distinction is important because it reflects the different ways in which international law develops: treaties require clear and explicit agreement between parties, while customs emerge from the usual practices of states and are more flexible (Shaw, 2017, p. 58).

In the context of international trade, customs play an especially important role, providing an implicit framework of rules governing the economic interactions between states, particularly in the absence of clear regulations or specific treaties. For example, in the maritime transport sector, many customary rules have emerged over the centuries and continue to be respected by states, even though they are not formally codified in treaties (Miga-Besteliu, 2012, p. 134). These rules facilitate commercial transactions and ensure predictable behaviour by states and private actors, reducing the risks associated with legal uncertainty.

Commercial customs function as generally accepted international standards, providing a common basis for negotiating and executing international transactions. Additionally, they facilitate the resolution of commercial disputes by offering a set of well-known and accepted rules, even when no formal treaty exists to regulate the specific situation (Shaw, 2017, p. 145).

3. Custom in International Trade – a Brief Historical Overview

Custom has historically played a central role in international trade, functioning as an unwritten set of norms that governed commercial interactions between states. Before the development of formal treaties and legal frameworks, custom served as the principal mechanism for regulating trade relations. These international commercial traditions were essential for facilitating exchanges between societies and cultures with different legal systems and norms. Providing an informal yet highly effective framework, custom governed the rights and obligations of merchants, ensuring predictability and trust in cross-border transactions.

The evolution of these commercial customs can be traced back to ancient times, but they gained particular prominence during the medieval period. This era saw the emergence of structured trade practices, which gradually developed into widely accepted norms across different regions, especially in Europe. As trade expanded between regions with diverse cultures and laws, merchants required a common framework to resolve disputes and facilitate smooth transactions. Such customs were crucial for the functioning of international commerce, particularly when formal legal instruments were absent (Bermann, 2020, p. 87; Goode, 2005, p. 103).

One of the most significant developments in the history of commercial custom took place in medieval Europe with the rise of the *Lex Mercatoria*. This system of customary trade law was developed to provide a standardised framework for merchants operating across borders. With no formal international legal structure to regulate commerce, *Lex Mercatoria* emerged as a practical solution to the complexities arising from different local laws and regulations. It facilitated trade by creating a common legal environment for merchants from various parts of Europe and beyond (Matsushita, 2015, p. 67).

The *Lex Mercatoria* system was based on customary practices that merchants had developed over time through repeated interactions at markets, fairs, and trading ports. These customs were not formally codified but were widely recognised and respected due to their effectiveness in promoting fair trade. By the 12th century, *Lex Mercatoria* had become a widely accepted legal regime among European merchants, providing a common set of rules for conducting international business. It was instrumental in overcoming the legal fragmentation that had characterised medieval Europe, where local laws varied significantly between regions and states (Bermann, 2020, p. 112). The success of *Lex Mercatoria* can be attributed to several key principles that it upheld: good faith, prompt dispute resolution, and the sanctity of contracts. These principles ensured that merchants could conduct their business with confidence, knowing that there were clear and predictable rules for resolving disputes.

Italian city-states such as Venice and Genoa were at the forefront of shaping these commercial customs. Through their extensive trade networks across the Mediterranean, Italian merchants interacted with traders from the Middle East, North Africa, and other parts of Europe. These interactions facilitated the exchange of not only goods but also commercial practices, contributing to the development of a shared understanding of trade norms. Venice, in particular, became a hub of international commerce, where merchants from various regions met and conducted business under common rules that evolved from customary practices (Kohn, 2005, p. 88).

The historical significance of commercial custom extends far beyond the medieval period. As international trade expanded and states began to codify their own commercial laws, many of the practices that had originated in customary law were incorporated into national legal systems and bilateral trade agreements. For example, the principles of *Lex Mercatoria* have been reflected in modern commercial law, particularly in international arbitration and dispute resolution mechanisms, where the emphasis on good faith and fair dealing remains central (Goode, 2005, p. 108).

Moreover, the customs that governed trade in the Middle East and Asia have also influenced modern international trade law, particularly in areas such as maritime law and the protection of merchants' rights. These traditions were often incorporated into formal legal codes as states sought to establish predictable and uniform rules to govern international commerce (Bermann, 2020, p. 134). As such, the legacy of custom in international trade continues to be felt today, particularly in the development of global trade organisations such as the World Trade Organization (WTO) and in the drafting of international trade agreements (Matsushita, 2015, p. 95). The role of custom in international trade has been indispensable throughout history. From the unwritten

norms of medieval Europe's *Lex Mercatoria* to the commercial traditions of the Middle East and Asia, custom has provided the framework for regulating international commerce long before the development of modern treaties and legal systems. Its principles continue to influence international trade law today, underscoring the enduring importance of custom as a source of law in a globalised economy.

4. Globalisation and Changes in International Trade

Globalisation has fundamentally reshaped the structure of international trade, amplifying the interconnection between states and transforming global economic flows. This process has not only led to a significant increase in cross-border trade but has also had a major impact on the sources of international law, forcing states to adapt their legislation and legal practices to align with new economic realities. In this context, customary law, as a source of international law, has undergone a significant transformation, adapting to the challenges and opportunities created by rapid globalisation and technological advancement (Bermann, 2020, p. 156).

Globalisation has had a profound effect on international law, particularly on the structure and application of its sources. This phenomenon has led to increased economic interdependence among states and the need for more complex and harmonised international regulations to facilitate trade and ensure the stability of global markets. Additionally, international law has faced new challenges, such as the regulation of multinational corporations, protection of foreign investments, and the management of cross-border commercial disputes (Bogdan, 2015, p. 67).

One of the major consequences of globalisation on the sources of international law is the growing importance of treaties and multilateral agreements. In recent decades, states have adopted numerous trade agreements that regulate various aspects of international economic relations, including trade in goods and services, investments, and the protection of intellectual property rights. International treaties have often taken over the role that commercial customs used to play, providing a formal framework for the regulation of international transactions (Miga-Beșteliu, 2018, p. 112).

However, custom remains an important source of international law, especially in areas that treaties do not fully cover or where they are not applicable. Globalisation has generated new forms of commercial interaction that were not anticipated in existing treaties, necessitating the adaptation of commercial customs to meet these needs. For instance, the evolution of e-commerce and new digital technologies has led to the development of new commercial practices that have gradually become recognised as international customs (Popa, 2021, p. 89).

The globalisation process has forced international commercial customs to adapt rapidly to new economic and technological realities. Historically, commercial customs were largely governed by traditional interactions between merchants and commercial practices that evolved slowly over centuries. However, in the current context of globalisation, economic and technological changes are occurring at an accelerated pace, necessitating a swift adaptation of customs to new international trade standards (Crawford, 2012, p. 105).

A relevant example in this regard is e-commerce. In the past two decades, international trade has increasingly moved to digital platforms, where the buying and selling of goods and services take place virtually. E-commerce has created significant legal challenges, particularly regarding the application of national laws and existing international treaties. In the absence of clear regulations in many states, digital commercial practices have started to crystallise into recognised international customs, which are accepted by parties as having legal force (Bogdan, 2015, p. 78).

Technological changes in transportation and logistics have also forced a revision of commercial customs related to the delivery of goods and the transfer of risks in international transactions. New technologies, such as electronic tracking of goods and the use of smart contracts, have introduced new norms and commercial practices that have begun to be commonly recognised in international transactions (Crawford, 2012, p. 112).

Another area where international customs have evolved under the influence of globalisation is global supply chains. In the globalised economy, the production and distribution of goods often involve multiple countries and regions, each with its own rules and commercial customs. The commercial practices within these global supply chains have begun to be codified into recognised commercial customs, respected by all parties involved, regardless of national regulations (Miga-Beşteliu, 2018, p. 143).

While international treaties and national legislation have taken on a significant role in regulating international trade, custom continues to be invoked in numerous modern cases. In situations where no applicable bilateral or multilateral trade agreements exist, international customs are often used to guide the resolution of international commercial disputes and establish the norms applicable to transactions between states or multinational corporations.

In the context of globalisation, custom has continued to be invoked in numerous international commercial cases, both in national courts and in international arbitration. These cases illustrate how traditional customary principles are continuously applied to resolve commercial disputes, especially when there are no clear regulations or treaties addressing specific aspects of the dispute.

International commercial arbitration, such as in the case of *Himpurna v. Republic of Indonesia* (Himpurna California Energy Ltd. V Perusahaan Listrik Negara, pp. 11-432), often invokes international commercial customs to resolve disputes between companies and states. In this case, the arbitrators acknowledged the validity of customs regarding the enforcement of international contracts, emphasizing that adherence to contractual obligations is a fundamental principle in international trade, even in the absence of specific national regulations (Davies, 2010, p. 45). The case demonstrates how custom is invoked as a source of law to fill legislative gaps or clarify the interpretation of ambiguous contractual clauses.

Another relevant example is the application of custom in resolving disputes regarding electronic commerce and emerging technologies. In the case of *eBay Inc. v. MercExchange, L.L.C.* (2006), the United States Supreme Court invoked custom regarding equitable principles and the proportionality of legal remedies in the context of electronic commerce. Although the case was resolved under U.S. national law, the court

recognized the importance of applying international customary principles to ensure a fair and predictable approach to disputes in electronic transactions (Lowenfeld, 2008, p. 137).

These contemporary cases demonstrate the continued relevance of customs in modern international trade. Despite increasingly sophisticated national and international regulations governing international trade, international commercial customs remain a valuable and complementary source of law, particularly in cases where existing regulations are not comprehensive enough or do not address the specific needs of the parties involved.

5. Relevant Cases and Jurisprudence regarding these Conflicts

A significant case that illustrates the conflict between traditional custom and modern regulations is the *Case concerning the Continental Shelf (Libya v. Malta)*, decided by the International Court of Justice (ICJ) in 1985. In this case, the ICJ was tasked with determining how the customary principles governing the delimitation of the continental shelf should be applied in the absence of a specific treaty between the parties. Traditionally, the principle of equidistance had been regarded as a customary norm for determining the boundaries of the continental shelf. The ICJ acknowledged the validity of this customary international law, recognizing that states have long used the equidistance principle in such cases. However, the court also emphasized that this customary rule must be interpreted in the context of recent developments in international maritime law, particularly the 1982 United Nations Convention on the Law of the Sea (UNCLOS), which introduced new rules on maritime boundary delimitation (North Sea Continental Shelf Cases, 1985). The ICJ ultimately balanced the application of customary principles with the more contemporary legal frameworks provided by UNCLOS, which reflects modern international consensus. This ruling exemplifies the inherent tension between adhering to traditional customs and adapting them to align with evolving international regulations and treaties. Customary law, while rooted in consistent state practice, must remain flexible enough to accommodate new legal and geopolitical realities. The *Libya v. Malta* case thus highlights the complex relationship between tradition and modernity in international law (Shaw, 2017, pp. 529-531).

In addition to maritime delimitation cases, similar tensions are evident in international commercial arbitration. A notable example is the *Himpurna California Energy Ltd. v. Republic of Indonesia* (1999) arbitration, where both customary principles and modern regulations were invoked. This case arose from a contract dispute during Indonesia's political and economic turmoil in the late 1990s. The arbitral tribunal had to determine the enforceability of an energy supply contract between Himpurna and the Indonesian government, which was challenged on the basis of economic hardship and force majeure due to the crisis.

On the one hand, Himpurna invoked traditional customary principles concerning the sanctity of contracts in international trade, often referred to by the Latin term *pacta sunt servanda*—the idea that agreements must be kept. These principles, deeply embedded in international commercial customs, prioritize the obligation of parties to

honor their contractual commitments regardless of external difficulties. On the other hand, the Indonesian government argued that modern international contractual law, particularly the inclusion of force majeure clauses, allowed for greater flexibility in contract enforcement during extraordinary circumstances like economic crises (Davies, 2010, p. 67).

The tribunal acknowledged the relevance of both customary law and modern contractual regulations. While it recognized the importance of adhering to contractual obligations under customary principles, the tribunal ultimately ruled that the force majeure clauses in the contract, as interpreted under modern international law, provided the necessary legal flexibility to excuse Indonesia from strict liability. This decision underscores how arbitral tribunals must balance the rigidity of customary principles with the practicalities introduced by modern regulations that account for unforeseen economic and political crises (Redfern & Hunter, 2009, pp. 430-432).

These cases - *Libya v. Malta* and *Himpurna v. Indonesia* - illustrate how customary international law, despite its deep historical roots, can sometimes come into conflict with modern legal developments. In both instances, international courts and tribunals faced the challenge of interpreting customary principles within the framework of more recent, codified regulations. The ICJ, in the *Libya v. Malta* case, showed that even well-established customs such as the equidistance principle must evolve in the face of new international treaties like UNCLOS. Similarly, in the *Himpurna* arbitration, the tribunal recognized that while the principle of *pacta sunt servanda* remains a cornerstone of international commercial law, modern contractual doctrines—like force majeure—must also be considered, particularly in light of extreme economic conditions.

These cases reflect the ongoing negotiation between traditional practices and contemporary legal frameworks. Customary law continues to play a critical role in international jurisprudence, especially where treaties or regulations may be lacking or unclear. However, the need to adapt these customs to modern realities, such as global economic crises or evolving international treaties, is increasingly apparent. As international law continues to develop, courts and tribunals will likely face more instances where they must reconcile the flexibility of custom with the rigidity of modern law.

6. Conclusions

Customary law, as a source of law in international trade, has had a profound influence over the centuries, providing a flexible and dynamic framework for commercial relations between states and non-state actors. From international commercial traditions like *Lex Mercatoria* to the codification of customs in modern treaties and trade agreements, this type of legal source has offered a solid foundation for resolving disputes and establishing unwritten commercial norms. In the context of modernity, customs have retained their relevance despite the increasing number of codified international regulations, demonstrating flexibility and the ability to adapt to global economic and technological changes.

However, customary law faces significant challenges, especially in the context of conflicts between legal traditions and new modern regulations. Cases such as the

Gabcikovo-Nagymaros Project or *Texaco v. Libya* have highlighted the tensions between traditional customary principles and modern legal needs, emphasizing the importance of finding a balance between the two. On the other hand, the trend of codifying customs, as seen in examples such as Incoterms and other international trade regulations, underlines the need to formalize these practices to ensure predictability and uniformity in their application.

Looking toward the future, customary law will continue to play an important role in international trade but will increasingly be integrated into modern regulations through processes of codification and standardization. Customs will remain relevant in areas not fully covered by modern regulations or where flexibility and adaptability are essential. Additionally, in emerging fields such as e-commerce and blockchain technologies, customs will serve as a guide in the absence of well-established international norms.

For future research, an in-depth study is needed on how custom can coexist with modern regulations and how it can be more efficiently integrated into them. Research can also explore the influence of globalization on the evolution of customs and assess how certain traditional practices can be preserved in a constantly changing economic environment. In practice, harmonizing customs with codified regulations will be crucial for ensuring better enforcement of international norms and facilitating the efficient resolution of commercial disputes.

Customary law will maintain its relevance in international trade, but it will need to continually adapt to the demands of a globalized environment, offering practical and flexible solutions to the legal challenges of the future.

References

- Bermann, G. A. (2020). *Global Perspectives on Commercial Law*. Oxford University Press, pp. 87, 112, 134, 156. DOI: [10.1093/oso/9780198845478.001.0001] (<https://doi.org/10.1093/oso/9780198845478.001.0001>).
- Bogdan, M. (2015). *Comparative Law and Globalisation: The Changing Face of Law*. Edward Elgar Publishing. DOI: [10.4337/9781785365745] (<https://doi.org/10.4337/9781785365745>);
- Cassese, A. (2005). *International Law*. Oxford University Press (pp. 21, 26, 31). DOI: [10.1093/he/9780199259397.001.0001] (<https://doi.org/10.1093/he/9780199259397.001.0001>).
- Crawford, J. (2012). *Brownlie's Principles of Public International Law*, (8th ed.). Oxford University Press. DOI: [10.1093/he/9780199699698.001.0001] (<https://doi.org/10.1093/he/9780199699698.001.0001>).
- Davies, P. (2010). *Customs in International Commercial Arbitration*. Oxford University Press, p. 67.
- Davies, P. L. (2010). *Gower's Principles of Modern Company Law*. Sweet & Maxwell. DOI: [10.5040/9781849460660] (<https://doi.org/10.5040/9781849460660>);
- Ebay inc. Et al. V. Mercexchange, I. L. C., Supreme Court of the United States, no. 05–130. argued march 29, 2006 - decided may 15, 2006, <https://supreme.justia.com/cases/federal/us/547/388/>

- Goode, R. (2005). *Commercial Law in the Next Decade*. Oxford: Oxford University Press. (pp. 103, 108). DOI: [10.1093/acprof:oso/9780198260813.001.0001] (<https://doi.org/10.1093/acprof:oso/9780198260813.001.0001>);
- Himpurna California EnergyLtd. vPT. (Persero) Perusahaan Listrik Negara, Final Award 4 May 1999, Albert Jan van den Berg (ed), Yearbook, Commercial Arbitration 2000 - Volume XXV, pp. 11 – 432
- International Court of Justice, Continental Shelf (Libyan Arab Jamahiriya/Malta) Judgment of the Court, No. 85/11 3 June 1985, <https://www.icj-cij.org/sites/default/files/case-related/68/9939.pdf>
- Kohn, M. (2005). *The Origins of Western Economic Success: Commerce, Finance, and Government in Pre-Industrial Europe*, Princeton University Press, p. 88;
- Lowenfeld, A. F. (2008). *International Economic Law*, (2nd ed.). Oxford University Press, p. 137, DOI: [10.1093/acprof:oso/9780199226931.001.0001] (<https://doi.org/10.1093/acprof:oso/9780199226931.001.0001>);
- Matsushita, M. (2015). *The World Trade Organization: Law, Practice, and Policy*. Oxford University Press, (pp. 67, 95). DOI: [10.1093/law/9780198728597.001.0001] (<https://doi.org/10.1093/law/9780198728597.001.0001>);
- Miga-Beşteliu, R. (2012). *Drept internațional public (Public International Law)*, Vol. I. Universul Juridic, pp. 45, 93, 134;
- Miga-Beşteliu, R. (2012). *Dreptul Internațional Public: O perspectivă contemporană (Public International Law: A Contemporary Perspective)*. Universul Juridic.
- Miga-Beşteliu, R. (2018). *Drept internațional public: surse și aplicabilitate (Public International Law: Sources and Applicability)*. București: Universul Juridic.
- North Sea Continental Shelf, Judgment, I.C.J. Reports 1969, p. 44, <https://www.icj-cij.org/sites/default/files/case-related/52/052-19690220-JUD-01-00-EN.pdf>
- Popa, N. (2021). *Teoria generală a dreptului (The General Theory of Law)*. București: C.H. Beck.
- Redfern, A., & Hunter, M. (2009). *Law and Practice of International Commercial Arbitration*. Sweet & Maxwell, pp. 430-432.
- Shaw, M. N. (2017). *International Law* (8th ed.). Cambridge University Press. DOI: [10.1017/9781316979815] (<https://doi.org/10.1017/9781316979815>).