

Chapter One

A Brief History of International Commercial Law

History of trade and history of commercial law

[1.1] International commercial law (defined broadly as a group of loosely connected rules, norms or customs governing trading and commercial activities between states) has developed abreast with international trade and commerce. Information on the history of international commercial law is sometimes as scanty as information on the history of international trade itself.¹ A detailed survey of the enormous history of the rules and customs governing the trading and commercial activities of human society throughout all the continents is beyond the scope of this book. Indeed, it is impossible even to examine in great detail the history of international commercial law in selected countries in a book of this nature. Bearing in mind Australia's common law tradition and its geographical and commercial connections with the Asia-Pacific region, we will briefly examine the history of international commercial law in a number of selected European and Asian countries which may have historical or contemporary implications for the study of international commercial law in Australia.

[1.2] In this chapter we will investigate the historical developments of the rules and norms governing international trade and commerce in ancient Europe, and examine the development of law merchant (*lex mercatoria*) in England. We will also examine briefly the earlier forms of the rules and norms governing trading and commercial activities in a number of Asian countries, such as China, Japan and India. The purpose of the review is to provide an outline of the historical perspective of the body of legal rules, norms, treaties, conventions, domestic laws, customs and usage which we call international commercial law.

1. For example, Casson states that unfortunately 'our information about merchants and their methods of doing business [in classical Athens] is scanty': Casson, *Ancient Trade and Society*, Wayne State University Press, Detroit, 1984, p 23.

Foreign trade and law governing foreign trade in Ancient Greece

[1.3] Classical Athens was known for its trading activities as early as the fifth or fourth centuries BC. Athens was said to have imported grain from south Russia, Sicily and Egypt; and salt fish from Spain or the Black Sea. Its warships were built of timber from Macedon, Asia Minor and the Levant. Its altars burned incense imported from Arabia. Its 'upper class enjoyed choice foods, textiles, and other luxuries from all over the Mediterranean'.² Behind this prosperous picture, the trading activities in this period were, however, inevitably primitive, slow and limited. Thus, the international trade in classical Athens was described as only a 'supply of necessities',³ or corn and grain trade.⁴ This meant that rules governing the trading activities were simple, general and scarce. In addition, the cosmopolitan trade within the territory of Athens was carried out 'almost exclusively by non-citizens'.⁵ The foreign dominance of ancient trade in Athens also marked the development of the early forms of commercial rules or customs in ancient society.

[1.4] There were the so-called 'emporial laws' in classical Athens. These laws dealt with import and export, supply of food (mainly corn and grain) or other necessities, and bottomry business (ie, bottomry loans).⁶ Litigation under the emporial laws was called 'emporial suit', and involved mainly foreigners. The emporial suit was 'heard before a special court, originally by the *Nautodikai*, and from the middle of the fourth century onwards before the *Thesmothetai*'.⁷ The content of the emporial laws is not known in great detail. However, it can be assumed that commercial expediency was the major concern of the 'law' in those days.⁸

Foreign trade and commercial treaties in Imperial Rome

[1.5] In the ancient world, Rome too attracted extensive trade and commerce from many parts of the globe. 'So many are the merchant vessels that arrive there that Rome has practically become a common workshop for the whole world.'⁹ Unlike classical Athens, where trade and commerce was largely regulated by the state legislation and customs of the trade,

2. Casson, *ibid*.

3. Hasebroek, *Trade and Politics in Ancient Greece*, Hafner Publishing, London, 1965, p 111.

4. Hasebroek, *ibid*; and Casson, *supra* note 1, p 70.

5. Hasebroek, *supra* note 3, p 171.

6. *Id*, pp 169–71. 'Bottomry' was a word often used between the seventeenth and early nineteenth century to describe a legal relationship based on mortgage or pledge. For example, a shipowner might borrow some money to carry on a voyage from a lender who would then accept the ship which was still in possession of the owner until the loan was repaid together with stipulated interest or premium at the end of the voyage. 'Bottomry' also meant a species of loan contract based on the mortgage of ship, or an act of mortgaging or pledging a ship (or some other valuable perhaps) to secure a loan or debt.

7. *Ibid*.

8. Hasebroek noted that if 'prizes were offered to the courts for the justest and swiftest of disputes, so that a litigant anxious to sail could do so without delay, this, too, would encourage traders to come more readily and in greater numbers to Athens': *id*, p 172.

9. Charlesworth, *Trade — Routes and Commerce of the Roman Empire*, Georg Olms Verlagsbuchhandlung, Hildesheim, 1961, p 1.

trade and commerce in the Roman Empire was regulated and protected not only by its ancient codes,¹⁰ but also by commercial treaties between the Empire and other nations concluded from time to time.¹¹ As the then strongest power in the world, 'Roman merchants found their way to Petra or to the courts of the kings of the Cimmerian Bosphorus, or took up their abode permanently in the capital of the Marcomannic king, Maroboduus'.¹² The activities of the Roman merchants gave rise to a need to protect their interests outside Rome and the state was presumably forced to play an active role in developing commercial relations with foreigners. It is said that treaties of commerce and 'intercourse doubtlessly existed, and perhaps even closer relations; otherwise it would be hard to account for the presence of what looks suspiciously like a Roman Resident Adviser at Palmyra'.¹³ The substance of the Roman law governing trade and commerce is not relevant for the purposes of our study. What we should note is the proposition that commercial treaties, which are one of the main sources of international commercial law today, were used by the Romans to resolve conflicts of commercial interests between themselves and foreigners.

Maritime law and international commercial law in historical perspective

[1.6] The expression 'maritime law' today refers to a body of rules based on international conventions, treaties, customs and domestic laws dealing with matters arising from maritime adventure, such as shipping, salvage and sea navigation. We use this expression in a much looser sense in this chapter, referring to the rules dealing with maritime trade and commerce in the early history of human society. This is because, historically, 'maritime law' and 'law merchant' always co-existed and in some circumstances were inseparable.

[1.7] The earliest form of the body of rules and customs which we now call international commercial law was found in the rules and customs governing merchants and maritime matters, which were then broadly called maritime law. In Europe, the earliest maritime law emerged in the lands adjoining the Mediterranean Sea, where sea-borne commerce was governed by trade usage or customs.¹⁴ The law regulating and guiding sea-borne commerce was thus developed. One of the earliest maritime and commercial codes was the Law of Babylon, 'based on earlier Sumerian laws and codified by Hammurabi about 2200 BC'.¹⁵ After the destruction of the Phoenicians by Alexander the Great in 332 BC, Greek maritime law became the most influential set of rules governing maritime

10. For a discussion of the ancient codes in the Roman law, see Maine, *Ancient Law*, Dent & Sons, London, 1972, pp 1–12.

11. Charlesworth observes that for the purpose of carrying on normal intercourse with other countries securely, the Romans 'not only trained themselves as a nation of warriors, but they exercised their legal genius in drawing allies to themselves by covenants, contracts, and treaties': supra note 9, p 2.

12. Id, p 11.

13. Id, p 12.

14. Plucknett, *A Concise History of the Common Law*, Butterworths, London, 1956, p 657.

15. Gold, *Maritime Transport*, Lexington Books, Lexington, 1981, p 5.

matters and international commerce. The *Lex Rhodia de jactu* was a body of law developed in the island of Rhodes two or three centuries before Christ,¹⁶ and was perhaps the 'first comprehensive maritime code'.¹⁷ This code had a strong influence on the Roman law which dominated international maritime trade and commerce for some time.¹⁸ The ancient Rhodian sea laws also contributed to the existence of *Catalonian Consolato del Mare*, the Laws of Wisby, the Laws of the Hanse Towns and the Laws of Oleron in the Mediterranean ports.¹⁹ The Laws of Oleron and other codes were applied by the Borough courts of the English ports and seaboard towns in the Middle Ages.²⁰ As a result of the continuous rise and fall of the great powers in Europe, the Amalphitan Table (a 'new collection of maritime laws') came into existence in the Republic of Amalphi and was accepted 'by all the city republics of Italy'.²¹ In the thirteenth century, the city states in Italy, such as Venice, Florence and Milan, 'began to develop and to formulate famous systems of maritime and commercial law, which would later spread far from the Mediterranean and be the basis of a large part of the mercantile law of today'.²²

Although there were regionally accepted codes or laws for international trade and maritime matters, the rules and customs governing foreign trades in each European state were largely based on local law and customs. As a result, the so-called maritime law varied from city to city and country to country.²³ After the fifteenth and sixteenth centuries, sea-borne trades and commerce were greatly internationalised, moving from the Mediterranean Sea to the Atlantic, motivated by the discoveries of the new continents. This raised a more urgent demand for the uniformity of maritime and international commercial law. Partly on the basis of these maritime laws a body of rules governing international trade and commerce, which we call international commercial law, has developed.

Foreign trade and maritime law in English history

[1.8] Perhaps because of its isolation from the rest of Europe by the English Channel, or perhaps due to the fact that 'England was industrially and commercially far behind other lands' before the thirteenth century,²⁴ England 'had hardly come into contact with' the European sea-borne trades in the Middle Ages, although there appeared to be more foreign merchants in England than English merchants in Europe.²⁵ The first wave of expansion in English overseas trade took place between 1475 and 1550. During this time,

16. Plucknett, *supra* note 14, p 7.

17. Gold, *supra* note 15, p 7.

18. *Id.*, pp 10–20.

19. Kiralfy, *Potter's Historical Introduction to English Law and Its Institutions*, 4th ed, Sweet & Maxwell, London, 1962, p 185.

20. Windeyer, *Lectures on Legal History*, 2nd ed, Law Book Co, Sydney, 1957, p 176.

21. Berman, 'The Law of International Commercial Transactions (*Lex Mercatoria*)' (1988) 2 *Journal of International Dispute Resolution* 235 at 239.

22. Windeyer, *supra* note 20, p 75.

23. Plucknett, *supra* note 14, p 658.

24. Ashley, *An Introduction to English Economic History and Theory*, Augustus M Kelley, New York, 1966, p 103.

'the volume of sales of well-known commodities (broadcloths and some other types of woollen cloth) in long familiar markets of central Europe suddenly began to grow rapidly because these markets were becoming more prosperous'.²⁶ The English merchants finally settled in Antwerp, which was the centre for merchants from France, Germany, Greece, India, Italy, other Mediterranean states, the Netherlands, Portugal, Spain and Syria. During the seventeenth century, 'the value of [English] overseas trade rose fivefold'.²⁷ In fact, the value of exports rose from £6 million in 1700 to £40 million in 1800, and cotton exports alone reached £70 million in 1870.²⁸ In the nineteenth century, English merchants virtually dominated Indian trading, and frequently visited the Persian Gulf, East Africa, China, Japan, Southeast Asia and Australia.

[1.9] Although maritime law and law merchant in England were developed mainly after the Middle Ages, the Piepowder courts in England did exercise jurisdiction over commercial disputes involving merchants who travelled from country to country. The Piepowder courts were held in fairs and market towns for the purpose of giving 'speedy justice to the travellers',²⁹ which is why the Piepowder courts were also called the courts of fairs and boroughs. In the thirteenth and fourteenth centuries, the judges of Piepowder courts were themselves merchants.³⁰ The courts operated under the belief that 'the man who came with dusty feet, *pieds poudres*, and who must recover his debts ere he left for the next mart', must be given 'speedy justice' and thus, his 'plea must be answered within a day and the case disposed of before the tide had thrice ebbed and flowed'.³¹ 'The *consuetudo mercatorum* was enforced in the Piepowder courts' for determining disputes.³² The Piepowder courts gradually disappeared after the seventeenth century, perhaps as a result of the incorporation of the law merchant into common law in England.

English maritime courts, mainly local courts in seaport towns (for example, the Cinque Ports which consisted of five coastal towns), played a crucial role in the development of maritime and international commercial law in England. There was also the Court of Admiralty which was 'held in the name of the Lord High Admiral who was appointed by the Crown'.³³ The power of the English maritime courts increased as a result of England's domination of the sea after the fourteenth and fifteenth centuries. Although the local maritime courts contributed to the early development of maritime and commercial law in England, the Court of Admiralty exercised the most influential power in the shap-

25. Holdsworth, *Source and Literature of English Law*, Clarendon Press, Oxford, 1952, p 208. Similarly, Ashley observed that 'Foreign merchants visited this country and carried on a considerable trade both of export and import, at a time when few Englishmen ventured to cross the sea': id, p 103.

26. Davis, *English Overseas Trade 1500–1700*, Macmillan, London, 1973, p 7.

27. Id, p 9.

28. Jones, *Two Centuries of Overseas Trading*, Macmillan Press, London, 1986, p 2.

29. Windeyer, supra note 20, p 176.

30. Kiralfy, supra note 19, p 187.

31. Windeyer, supra note 20, p 176.

32. Ibid.

33. Plucknett, supra note 14, p 661.

ing of maritime and commercial law in England, which contained many rules that we call international commercial law today. In the sixteenth century, the Court of Admiralty dealt not only with domestic cases, but also complaints 'arising out of mercantile dealing abroad'.³⁴ After the law merchant became part of the common law in England in the seventeenth and eighteenth centuries, the Court of Admiralty became less involved in mercantile transactions.

Lex mercatoria and international commercial law in historical perspective

[1.10] *Lex mercatoria*, law merchant, can be regarded as one of the early forms of what we today call international commercial law or international trade law. In fact, in the history of international commercial law, *lex mercatoria* was often inseparable from maritime law. Merchants were often those who sailed across seas. Both the law merchant and maritime law dealt with the commercial transactions involving merchants, even though the law merchant might have been regarded rather as a special law for 'mercantile transactions than a special law for merchants'.³⁵ It appears from the English literature that 'law merchant' might have been a special term of English law, although *lex mercatoria* did not originate from English. Before the seventeenth or eighteenth centuries, law merchant represented a body of special legal rules separate from the common law. There was even a power struggle between the English Court of Admiralty and the common law courts as to who had appropriate jurisdiction over the enforcement of *lex mercatoria* before the middle of the seventeenth century. The matter was finally settled in the eighteenth century by the work of Lord Mansfield and *lex mercatoria* has since become 'a part of the ordinary law of England'.³⁶ Today, *lex mercatoria*, or law merchant, is more or less used as a synonym of the more modern term 'commercial law'.

[1.11] The development of international trade law can be divided into three stages. 'The first was the period of the medieval law merchant, the old *lex mercatoria*. The second was the incorporation of the medieval *lex mercatoria* into the national systems of law in the seventeenth to nineteenth centuries. And the third period is the contemporary phase which began in earnest after the Second World War.'³⁷ For the purpose of our study, we will briefly review the first stage of *lex mercatoria* only.

[1.12] Before the Middle Ages, law merchant, *lex mercatoria*, was largely based on customs. In Edward II's day in England merchants were summoned to give evidence on the customs of the trade before the King's Bench when there were doubtful points in *lex mercatoria*.³⁸ Its enforcement in a foreign jurisdiction was largely effected by reprisals between

34. North, *Cheshire's Private International Law*, 9th ed, Butterworths, London, 1974, pp 33-4.

35. Pollock and Maitland, *The History of English Law*, 2nd ed, Cambridge University Press, Cambridge, 1968, p 467.

36. Windeyer, *supra* note 20, p 177.

37. Schmitthoff, 'The Law of International Trade', in Cheng, ed, *Schmitthoff's Selected Essays on International Trade Law*, Martinus Nijhoff, Dordrecht, 1988, pp 219 and 220.

countries. 'This meant that if a merchant was unable to obtain justice against a foreigner in the foreigner's court, then his own government would authorise him to recoup himself out of the property of any merchant of the foreign jurisdiction in question whom he could find.'³⁹ The spirit of this primary rule of justice is still seen in the present rules of conflict of laws applicable to commercial disputes.

The *lex mercatoria* slowly grew into part of the English law. The Statute of Merchants (or Statute of Acton Burnell), passed in 1283,⁴⁰ was intended to bring speedy settlement of commercial disputes between merchants trading in England for the purpose of attracting more foreign merchants to that country. The statute allowed a creditor (probably a seller) to sue a debtor (often a buyer) before the Mayor of London, York or Bristol, who had power to sell the property (most likely movables) of the debtor to satisfy the legitimate claim of the creditor. If necessary, the mayor could ask the Chancellor to issue a writ directing a sheriff of another town, who had jurisdiction over the movables of the debtor to sell them to satisfy the creditor's claim. In 1303 the *Carta Mercatoria* was made. The Act recognised law merchant as part of the English law. It exempted foreign traders from local taxes and gave them a freedom to trade throughout England.⁴¹ It also allowed a jury for a commercial dispute involving a foreign merchant to consist of half Englishmen and half the countrymen of the foreign merchant.⁴² In 1311, the government stated in ordinances that the Statute of Merchants 'should only apply to merchants, and to debts arising from the sale of goods', and extended the application of the statute to twelve cities or towns.⁴³ In 1353, the Statute of the Staple was passed. This statute created the Courts of Staple for dealing with disputes between merchants. It allowed the disputes to be 'ruled by the law merchants' and not by the English common law.⁴⁴

Attracting more foreign merchants to England and commercial expediency appeared to be the major concerns of these English statutes. Commercial customs and usages might have been used to support the notion of speedy justice.⁴⁵ For English merchants engaged in commercial disputes, the right of reprisal by the King was the major means through which the government attempted to ensure justice for its merchants trading overseas.

[1.13] Two people played important roles in incorporating mercantile customs into the English common law.⁴⁶ Lord Mansfield, who became the Chief Justice of the King's

38. Pollock and Maitland, *supra* note 35, p 467.

39. Plucknett, *supra* note 14, p 664.

40. Ashley, *supra* note 24, p 204.

41. Conybeare, *Trade Wars*, Columbia University Press, New York, 1987, p 102.

42. Ashley, *supra* note 24, p 205.

43. These cities or towns were Bristol, Canterbury, Exeter, Lincoln, London, Newcastle, Northampton, Norwich, Nottingham, Shrewsbury, Southampton and York. Ashley, *supra* note 24, p 205.

44. Kiralfy, *supra* note 19, p 184.

45. Kiralfy observes that the Chancellor in 1475 was of the opinion that merchants should not be bound by English statutes unless the statutes declared 'ancient law', namely declared 'nature'. The law merchant was then regarded as the law of nature and was considered to be universal throughout the world: *id.*, p 183.

46. Windeyer, *supra* note 20, pp 232-42.

Bench in 1756, believed that 'any satisfactory system of commercial law must be in harmony with the recognised mercantile customs of other civilised nations'.⁴⁷ Similarly, Sir John Holt, the Chief Justice of the King's Bench in the early eighteenth century was said to have also believed that 'any sound commercial law should be based on mercantile customs'.⁴⁸ Indeed, there are reported cases going back as early as the reign of Edward I, where the customs of merchants were considered for determining liabilities between merchants in commercial disputes. For example, in the thirteenth century, the customs of merchants were applied by the courts to determine the existence of a debt between the merchants.⁴⁹ Later, in *Milton's case*,⁵⁰ decided in 1668, the parties disagreed as to whether an English custom, that a merchant who had accepted a bill of exchange was 'chargeable with the sum therein contained', should apply. Hale CB was of the opinion that 'it was worthwhile to enquire what the course has been amongst merchants, or direct an issue for trial of the custom amongst merchants in this case'.⁵¹ Similarly, the customs of merchants were accepted as applicable rules in *Woodford v Wyatt*,⁵² *Browne v London*,⁵³ and *Sarsfield v Witherley*.⁵⁴ After the seventeenth century, the law merchant became part of English common law.

Commercial treaty and international commercial law

[1.14] The commercial treaty between countries, which refers to an international treaty between two countries for dealing with the trade and commercial matters of their concern, has been one of the major sources of international commercial law. It was the most effective means of protecting mutual commercial interests between countries before the Second World War,⁵⁵ and is still widely used by countries today.

[1.15] The commercial treaty was used in the Roman Empire (see **[1.5]**) and Ancient Greece to deal with commercial relationships between countries. Treaties were made between Athens and other countries to secure imports of corn and other necessities.⁵⁶ For example, a treaty between Athens and Leucon I of Bosphorus was made in the middle of the fourth century. It exempted from import duty the ships of Bosphorus merchants, which carried corn to Athens, and guaranteed them priority in unloading ships in Athens. This treaty appeared to be more like a concession made by Athens to Bosphorus than a commercial treaty granting reciprocal benefits to the parties. A similar treaty was later

47. Id, p 237.

48. Id, p 232.

49. Kiralfy, supra note 19, p 188.

50. Baker and Milsom, *Sources of English Legal History*, Butterworths, London, 1986, p 248.

51. Id, p 249.

52. Id, p 458.

53. Id, p 459.

54. Id, p 460.

55. This is so because multilateral treaties, conventions and international organisations (as opposed to bilateral treaties) became an effective means of adjusting political and commercial relationships between countries only after the establishment of the United Nations.

56. Hasebroek, supra note 3, p 113.

made between Athens and Parisades of Bosphorus.⁵⁷ There were also treaties between other cities, such as the Treaty of Alliance of 389 to 383 BC between Amyntas of Macedonia and the Chalcidian cities, the commercial treaty between Mytilene and Leucon I of Bosphorus, and the commercial treaty between the cities of Ceos and Histiaa, which were, to some degree, concerned with the import and export of goods between them.⁵⁸

[1.16] The commercial treaty was also used as a means to resolve the conflict of commercial interests, granting commercial benefit, between Mediterranean countries before the Middle Ages. In 1082, 'Emperor Alexius I sought military aid from Venice — in exchange for exempting Venice from the normal 10 percent customs duty'.⁵⁹ In 1177, Genoa entered into a treaty of commerce with Egypt, under which Genoa enjoyed a number of trading privileges.⁶⁰ The specific terms of these treaties are not the real concern of our study. The fact that, as early as the eleventh century, Mediterranean countries resorted to treaties (although these may not have been 'commercial treaties' in the modern sense) for defining their trading relationships and dealing with commercial disputes, is important for an understanding of the history of international commercial law.

[1.17] Commercial treaties were used widely in the history of England to deal with commercial relationships between England and other countries. The earliest 'bilateral commercial treaty' entered into by England was the commercial treaty with Norway in 1217,⁶¹ although the treaty of King Offa II of Mercia and Charlemagne of 795 granted German merchants physical protection in return for gifts to the King.⁶² In 1388, a commercial treaty was entered into between England and Prussia. It dealt with the English merchants' access to the local market in the Prussian town of Danzig.⁶³ This treaty was followed by the commercial treaties of 1408 and 1437 between the two countries, recognising explicitly 'reciprocity in trading rights'.⁶⁴ The trading relationships between England and the Hanseatic countries fluctuated between 1300 and 1700. During the seventeenth and eighteenth centuries, England had a number of trade treaties with the Dutch and the Portuguese.⁶⁵

[1.18] The Treaty of Commerce and Navigation was commonly used in the nineteenth century between England and other countries. Although a Treaty of Commerce and Navigation between England and Denmark was made as early as 1660, it could be argued that it was the 1860 Treaty of Commerce and Navigation between England and France

57. Id, p 115.

58. Id, pp 114–15.

59. Conybeare, supra note 41, p 93.

60. Id, p 94.

61. Nwogugu, *The Legal Problems of Foreign Investment in Developing Countries*, Manchester University Press, Manchester, 1965, p 121.

62. Conybeare, supra note 41, p 102.

63. Id, p 103.

64. Id, pp 103–4.

65. For details, see id, pp 130–6.

which began a new era in the history of international commercial law, in which the bilateral treaty became an important means of defining the commercial relationships between countries. The so-called free trade policy was the essential characteristic of the English–French Treaty of Commerce and Navigation.⁶⁶ The Treaty even led to the French adopting more free and liberal commercial policy within the country.⁶⁷ Another feature of the English–French Treaty was the incorporation of the most favoured nation (MFN) clause. In the late eighteenth century a number of Treaties of Commerce and Navigation had been made between England and other European countries. As at 31 July 1879 England had entered the Treaty of Commerce and Navigation with 43 countries.⁶⁸ Most of these treaties contained an MFN clause. The Treaty of Commerce and Navigation established an important precedent, ie the MFN clause, for the present-day bilateral treaties of trade and commerce.

[1.19] After the Second World War, commercial treaties entered into a new era of development. A new form of treaty, the treaty of friendship, commerce and navigation (FCN), was developed between the United States and a number of its trading partners. This form of treaty was based on the earlier model of the treaty of commerce and navigation, but extended treaty protection to a number of areas which do not fall within the traditional categories of foreign trade, such as foreign investment and foreign corporations. This form of commercial treaty has now been replaced by many special types of commercial treaties between countries. Due to extensive international cooperation in the area of international trade and commerce and the existence of many international conventions on trade and commerce, countries have directed their attention to more specific issues in bilateral treaties, such as taxation, investment, copyright or technology cooperation. Bilateral treaties on specific issues form an important part of international commercial law.

66. Bowley, *A Short Account of England's Foreign Trade in the Nineteenth Century*, revised ed, Swan Sonnenschein & Co, London, 1905, pp 62–3.

67. Levi, *The History of British Commerce and of the Economic Progress of the British Nation 1763–1878*, 2nd ed, Irish University Press, Shannon, 1971, p 521.

68. These countries and the year of the relevant treaty were: Argentine Confederation (1825 and 1853), Austria (1868 and 1876), Belgium (1862), Bolivia (1840), Borneo (1847), Chile (1854), China (1858), Columbia (1866), Costa Rica (1849), Denmark (1660), Dominica (1850), Ecuador (1851), France (1860 and 1873), Germany (1865), Greece (1837), Italy (1863), Japan (1858), Liberia (1848), Madagascar (1865), Morocco (1856), Muscat (1839), Netherlands (1856), Nicaragua (1860), Persia (1857), Peru (1850), Portugal (1842), Prussia (1865), Romania (1876), Russia (1859), Salvador (1862), Sandwich Islands (1851), Servia (1879), Siam (1859), Spain (1814), Sweden and Norway (1826), Swiss Confederation (1855), Tunis (1863 and 1875), Turkey (1861), United States (1827), Venezuela (1834), Zanzibar (1939), and Zollverein (1865). See id, pp 565–7.

Trade and law in early Chinese history

[1.20] Ancient China was one of the world's oldest civilisations, possessing advanced technology and rich natural resources. It is not clear exactly when Chinese merchants began to trade with foreign merchants, but Chinese knives were found in Bronze Age graves of the East Urals, and Chinese silk, lacquerware, bronze mirrors and jade carvings were found in early Iron Age graves west of Lake Baikal by Soviet workers.⁶⁹ Also, 'customs barriers and duties were mentioned [in Chinese books] in considerable detail' in 522 BC.⁷⁰ But these customs barriers and duties were probably applicable mainly to the trading activities between the small Chinese states (although certain Sinologists may disagree as to whether these small states were Chinese or not). Although it is believed that in the fourth or third century BC Chinese silks reached India, and Chinese merchants traded with Koreans,⁷¹ trading with foreigners in that period must have been very limited.

[1.21] The Silk Road refers to a route of trade in the northwest of China linking China with central Asia, the Middle East and Europe, in particular with Iran. This route was established as a passage for traders in the Han Dynasty (206 BC–220 AD). Frontier trade fairs between merchants from inland China and people in the areas near the Silk Road (for example, the region known today as Tibet), were recorded in 140 BC.⁷² Certain trading activity between ancient China and ancient Rome, through either the Silk Road, or maritime trade, existed in 106 BC.⁷³ Many foreign merchants visited China in the first and second centuries.⁷⁴ The Turks began to trade with the Chinese in the fifth century and Arabian merchants came to trade in China in the Tang Dynasty in the seventh century.⁷⁵ Chinese merchants sailed to Indian ports, the Red Sea, the Persian Gulf and the east African coast in the fifteenth century.⁷⁶ For centuries, Japanese, Koreans, Iranians, Indians, Arabians, Vietnamese, and merchants from Southeast Asia arrived in China by sea. Chinese textiles, porcelain and crafts flowed out of China through the Silk Road and ships, and Atlatl gold, Indian and Iranian gems, soybean and grapevines flowed into China through the Silk Road and ships too. In the sixteenth century, Portuguese ships visited China. This was the beginning of a larger scaled Sino-Western trade. In the seventeenth and eighteenth centuries, besides exporting its textiles, porcelain and crafts, China was the major supplier of tea to Europe.

69. Simkin, *The Traditional Trade of Asia*, Oxford University Press, London, 1968, p 4.

70. Parker, *China, Her History, Diplomacy, and Commerce, From the Earliest Times to the Present Day*, 2nd ed, John Murray, London, 1917, p 43.

71. Gernet, *A History of Chinese Civilisation*, translated by Foster, Cambridge University Press, Cambridge, 1982, pp 73 and 130.

72. Parker, *supra* note 70, p 46.

73. Simkin, *supra* note 69, p 34; and *id.*, pp 50–1.

74. Gernet, *supra* note 71, p 153.

75. Parker, *supra* note 70, pp 53–4.

76. Souza, 'Maritime Trade and Politics in China and the South China Sea', in Gupta and Person, eds, *India and the Indian Ocean*, Oxford University Press, Calcutta, 1987, p 317.

[1.22] Commercial law in ancient China did not receive much legislative attention, nor was there any rule equivalent to the law merchant in England. The underdevelopment of Chinese commercial law has its root cause in Confucianism, which regarded merchants as one of the lowest classes in a complex social hierarchy. In early Chinese legal history there were only scattered records of law directly or indirectly dealing with foreign trade. It appears that the Qin Dynasty (221–205 BC) legislated for the control and taxation of commercial transactions, but did not set out rules for determining liabilities of merchants in commercial transactions.⁷⁷ In the Han Dynasty (206 BC–220 AD), the Phoenicians, Carthaginians and Syrians were said to have carried out maritime trade with the Chinese.⁷⁸ The Han Government adopted a licence system to control foreign trade, although no legal rule of foreign trading was recorded. Trading with foreigners without a licence was punishable by the death penalty.⁷⁹ It appears that although the Chinese Government at that time did not prohibit foreign trade, it did exercise close control. Such close control of foreign trade, in particular the sea-borne trade conducted in the coastal cities of southern China, was seen in the Sung Dynasty (960–1368 AD), where the government interfered with foreign trading activities in Canton by adjusting customs policies, regulating the measures and means of payment and stationing armies in the markets or fairs.⁸⁰ A similar idea of government control of the merchant markets was also seen in the Ming Code (*Daminglu*), which existed between 1368 and 1644 AD.⁸¹ As part of the government policy of controlling foreign trade, Zheng He was sent as an official representative of the Ming Emperors to carry out seven diplomatic and commercial missions to a number of countries in the Indian Ocean situated around the Red Sea, the Persian Gulf and the area currently known as Southeast Asia.

[1.23] The earliest Chinese law which made direct reference to foreign trade in China was perhaps the Tang Code (*Tanglu*) which existed between approximately 581 and 960 AD. A provision of this code stated that disputes between foreigners of the same nationality should be determined by referring to their own customs and laws, and disputes between foreigners of different nationalities should be resolved under the code.⁸² 'Foreigners' in this provision referred to both foreign merchants and visitors. There were many foreign merchants in Tang times because it was one of the strongest and richest dynasties in Chinese history. It is believed that the earliest bills of exchange in China were created in 806–820 AD during the Tang Dynasty. They were named *feiqian*, meaning 'flying money'.⁸³ Taxation of foreign merchants was dealt with in the Ming Code.⁸⁴ It can be

77. Chang et al. *A History of Chinese Legal System (Zhongkuo Fa Zhi Shi)*, Sichuan Social Science Academy Press, Chengdu, 1987, in Chinese, p 62.

78. Parker, supra note 70, p 48.

79. Chang et al. *A History of Chinese Legal System (Zhongkuo Fa Zhi Shi)*, People's Press, Beijing, 1986, in Chinese, pp 144–5.

80. Parker, supra note 70, pp 56–7; and Gernet, supra note 71, pp 322–4.

81. Chang et al, supra note 77, p 201.

82. Chang et al, supra note 79, p 214.

83. Gernet, supra note 71, p 265.

assumed that Chinese governments interfered with the commercial markets by direct or indirect control before the seventeenth century, but did not create any system of commercial law or law merchant.

[1.24] Historically, Chinese governments consistently adopted a restrictive policy toward foreign trade. The policy of banning overseas trade was adopted by the Ming Dynasty for the first time in Chinese history. This policy prohibited Chinese citizens from sailing overseas and from selling a number of goods to foreign merchants.⁸⁵ This policy continued in the Qing Dynasty (1644–1911),⁸⁶ and led to the 1840–1842 Opium Wars. The government was forced to abandon the policy of banning foreign trade as a result of the Wars. In the early nineteenth century, the Chinese adopted a number of codes, which were based on the German and Japanese model of law. The General Rules of Merchants (*Shang Ren Tong Li*) were formulated in 1903. These rules contained nine provisions, setting out general principles for mercantile transactions in China. This was the first time in Chinese history that the general rules applicable to merchants were codified.⁸⁷

[1.25] The history of Chinese commercial law had hardly any impact on the development of the existing system of international commercial law. However, an understanding of the basic history of the Chinese law dealing with foreign trade enables us to appreciate the present development of Chinese law governing foreign trade and investment. The current Chinese Government's practice of formulating special laws for foreign investments in China can by analogy be traced back to the Tang Code which provided that disputes between foreign merchants from the same country should be governed by the relevant foreign law.

Trade and law in early Indian history

[1.26] "The history of India's trade and commerce goes back to Phoenician times when spices, silks, fine cottons and precious stones were carried by intrepid Indian merchants to Egypt and the countries of Asia Minor and the near East and later to Greece and Rome."⁸⁸ Roman merchants also visited India and the Indian ocean.⁸⁹ In 269–232 BC, Indian merchants regularly visited the Persian Gulf, South Arabian ports, Aden or Socotra, and foreign merchants also came to Indian ports.⁹⁰ Direct trade between India and China was recorded as early as 128 BC.⁹¹ In the second century, Indian merchants traded in Southeast Asia.⁹² Portuguese vessels visited India in the fifteenth century. The

84. Chang et al, supra note 77, p 201 and Chang et al, supra note 79, p 288.

85. Chang et al, supra note 77, p 226.

86. Chang et al, supra note 79, p 317.

87. Chang et al, supra note 77, p 244.

88. Agarwala, *The History of Indian Business*, Vikas Publishing House, New Delhi, 1985, p 1.

89. Charlesworth, supra note 9, pp 58–73.

90. Simkin, supra note 69, pp 15–17.

91. Id, pp 21–2.

92. Id, pp 23–4.

English East India Company was established in 1600. In the seventeenth century, Dutch and English merchants began to travel to India. In the eighteenth century, the East India Company became the dominant foreign power in India,⁹³ and until the Second World War, Indian foreign trade was dominated and largely controlled by the East India Company.

[1.27] Indian law before colonisation by European countries in the sixteenth and eighteenth centuries — the indigenous law of India — was based on Hindu and Muhammadan law and customs,⁹⁴ beliefs which were held to have society's best interests at heart.⁹⁵ The English consolidated their dominance in India in the eighteenth century, and successfully introduced English common law into India, whose legal system has been dominated by the common law tradition since then. It should be noted that the East India Company settled in India in the seventeenth century, more than 100 years before the first settlers landed in Sydney, and thus English law was transplanted to the colonies of India a century earlier than it was introduced to the Australian colonies. The English history of law merchant and maritime law after the seventeenth century may also apply to the legal history of India in that period. The Indian law on foreign trade and commerce between the eighteenth and early twentieth centuries was based on common law, because the foreign trade and commerce of India in that period was dominated by the East India Company. Indian law became independent from English law in 1947, when India obtained its independence from the United Kingdom.

Foreign trade and law in early Japanese history

[1.28] Before the sixteenth century, the Japanese predominantly traded with the Chinese and Koreans. As early as 206 BC–214 AD (the Chinese Han Dynasty), if not earlier, Chinese civilisation spread to Korea and Japan. Many Chinese and Korean merchants and artisans immigrated to Japan at that time.⁹⁶ Many more followed in the Chinese Tang Dynasty (618–960 AD),⁹⁷ whilst the Japanese merchants sailed to China to purchase copper coins, porcelain, incense, books, paintings, perfumes and medicines.⁹⁸ In the seventh century, *ritsuryo* (legal codes) were developed on the basis of the Chinese Tang Code.⁹⁹ In about the fourteenth and fifteenth centuries, the Japanese forms of bills of exchange, called *kaisen*, *saitu* or *warifu*, were developed to facilitate commercial transactions.¹⁰⁰ In the sixteenth century, the Portuguese visited Japan, and more European countries followed.

93. For a discussion of the East India Company, see Lawson, *The East India Company History*, Longman, London, 1993.

94. Sengupta, 'From Indian to Anglo-Indian Legal and Political System' in Bhatia, ed, *Origin & Development of Legal & Political System in India*, Deep & Deep Publications, New Delhi, 1978, pp 1 and 37–8.

95. Jha, *History and Sources of Law in Ancient India*, Ashish Publishing House, New Delhi, 1987, p 14. On p 18 Jha observes that the 'highest object of law in ancient India was to bring happiness to the mankind'.

96. Latourette, *The Development of Japan*, Macmillan Company, New York, 1941, p 20.

97. *Id.*, p 25.

98. Simkin, *supra* note 69, p 104.

99. Oda, *Japanese Law*, Butterworths, London, 1992, p 15.

In the seventeenth century, Japanese merchants traded not only with Chinese and Europeans, but also with people in Southeast Asia and India. Commercial transactions in Japan then were largely conducted under customs.¹⁰¹ This situation remained unchanged until the 1890s when the Japanese laws were codified on the models of the French and German codes.

[1.29] Certain fundamental changes took place in Japan in the nineteenth century. In the middle of last century, Western influence increased in Japan, following the making of a number of unequal treaties between Japan and the Western powers. In the 1860s, certain radical forces in Japan sought to improve the strength, or international status, of the country by staging a military coup, which led to the establishment of a new political system based on the highest authority of the Emperor (or alternatively, to the restoration of the Emperor's power). Japan opened its doors wide to Western culture and technology after the so-called restoration of the Emperor in 1868. By the end of the nineteenth century it had been transformed into a strong military force in Asia. Whilst it had to provide privileges to certain European countries and the United States under the unequal treaties imposed upon it, Japan had obtained special privileges from China through its military victories against the Chinese. In the early twentieth century, the Japanese took on the Russians in Manchuria (part of the northeast of China) and were granted concessions by the Russians as the result of the war. All these developments led to a new age of Japanese foreign trade.

Japanese international trade developed rapidly after 1869. For example, the total value of Japan's imports and exports in 1868 was 27 million yen, but in 1900 it reached a sum of 49.1 million yen.¹⁰² Although in 1897 the value of the exported domestic products per capita in Japan was fairly low (US\$1.88 million), the total of exported domestic products by Japan in the same year was about US\$80 million, higher than French exports (US\$71.9 million) in the same year.¹⁰³ Japanese exports were then concentrated mainly on silk, tea, rice, copper, textiles and artistic works. Between 1879 and 1899, the Japanese Government-owned bank, Yokohama Specie Bank established offices in New York, Liverpool, London, San Francisco, Shanghai and Tianjin (the last two are Chinese cities).¹⁰⁴ This development not only facilitated Japanese imports and exports, but also gave the Japanese an opportunity to penetrate foreign financial markets. In the nineteenth and early twentieth centuries, Japanese merchants traded with the English, Americans, Chinese, French, Germans, Indians, Koreans, people from Hong Kong and Southeast Asia and a number of European countries.

100. Akroyd, *The Coalescence of Foreign and Indigenous Elements in Japanese Commercial Law*, unpublished PhD thesis, The City University Graduate Business Centre, UK, 1978, p 87.

101. *Id.*, p 126.

102. Hattori, *The Foreign Commerce of Japan Since the Restoration 1869-1900*, The Johns Hopkins Press, Baltimore, 1904, p 8.

103. *Id.*, p 10.

104. *Id.*, p 16.

[1.30] Japanese law governing foreign trade and commerce in the nineteenth and early twentieth centuries was affected by German, French and English law. The Japanese Commercial Code, which was initially formed in 1890, was drafted by Herman Roesler, the German adviser to the Japanese Government.¹⁰⁵ The code is a combination of French and German law, thus initiating Japanese law into the family of continental law. Reflecting Japan's treaty obligations under the unequal treaties between Japan and the Western powers, the Japanese law dealing with trade and commerce was characterised by the special privileges and immunities of foreigners from the Western powers. Japanese domestic law was made or modified to comply with the treaties. For example, Japanese law in the late nineteenth century allowed a foreigner to hold mortgages on immovables, and a foreign juridical person to hold a mining licence, though a foreign natural person was not normally allowed to own land nor to hold a mining licence in Japan.¹⁰⁶ Such arrangements encouraged the inflow of foreign capital, whose access to the Japanese market was granted in the treaties.

[1.31] This brief review of the Japanese trade history may assist us in understanding the trading relationships between Japan and other countries today. Japan is a very important trading partner of Australia, and also one of the largest foreign investors in Australia. The legal issues surrounding trade between Australia and Japan must also be appreciated in the light of the historical, cultural and economic differences between the countries.

Trade and commercial law in Australia after the eighteenth century

[1.32] For the purpose of studying international commercial law, we only examine the history of Australia after 1788, when the first English settlers arrived at Sydney. English law applied to the colonial states of Australia directly before 1901, when the Commonwealth of Australia was established. After Federation, Australia's independent legislative power was still restrained by the Colonial Laws Validity Act 1865 (UK), which provided that Australian law must not be repugnant to British statutes or regulations which were directly or expressly applicable to Australia. English law maintained a dominant position in Australia until 1942, when the Statute of Westminster 1931 (UK) was adopted in Australia through the Statute of Westminster Adoption Act 1942 (Cth). This statute released Australia from the obligation to be bound by British law which was directly or expressly applicable to Australia by the will of the British Parliament. Australian law began to achieve its own identity after 1942. The Australia Act 1986 (Cth) ultimately terminated the power of the British Parliament to legislate for Australia, and clarified the doubts and uncertainties regarding the legislative sovereignty of Australia after the passing of the Statute of Westminster Adoption Act 1942 (Cth). The history of commercial law and international commercial law in Australia bears the distinctive marks of English law. For

105. Oda, *supra* note 99, p 261.

106. Hattori, *supra* note 102, p 31.

example, in *Hume v Palmer* (1926) 38 CLR 441 the High Court of Australia held that the British Merchant Shipping Act 1894 restricted the Federal Parliament's power to legislate under ss 51(i) and 98 of the Australian Constitution. Much of what we have said about law merchant and maritime law in English history may thus apply to Australian law too.

[1.33] Australia was predominantly an agricultural society in the nineteenth century. It exported mainly primary products, such as fruits, sugar and coal, to English markets. The exported goods were shipped overseas mainly by English registered vessels. For example, in 1881 a contract for the first direct oceanic mail service between Queensland and England was granted to an English company.¹⁰⁷ The dominance of the foreign shipping industry in Australian exports meant that foreign carriers were able to impose exclusion clauses or exclusion of jurisdiction clauses in bills of lading for carrying exported goods from Australia. If an Australian merchant was forced to accept a bill of lading which provided that the dispute arising from the bill should be submitted to an English court, he or she would have to travel a long way to England for any legal action against the carrier under the bill. This was one of the major concerns of the Australian legislature in passing the Sea-Carriage of Goods Act 1904 (Cth).¹⁰⁸ As a result, s 6 of the Sea-Carriage of Goods Act 1904 (Cth) provided that contracts for carrying goods from Australia to a foreign country were governed by Australian law and subject to the exclusive jurisdiction of Australian courts. The same provision was incorporated into s 9 of the Sea-Carriage of Goods Act 1924 (Cth), and continued in s 11 of the Carriage of Goods by Sea Act 1991 (Cth). Australia is still predominantly a shipper's (cargo-owner's) country. Protection of Australian shippers' interest is still one of the major concerns of Australia's domestic law dealing with international commerce, and of the international conventions to which Australia is a member.

[1.34] The development of international commercial law in Australia entered a new era after the Second World War. The World Food and Agriculture Organisation (FAO, see [2.52]) was set up under the Constitution of the Food and Agriculture Organisation in 1945. Australia accepted the constitution in the same year, and was one of the FAO's original members. In 1946, Australia became a member of the International Monetary Fund

107. Jones, *supra* note 28, p 140.

108. For example, Senator Sir Josiah Symon made the following statement in the second reading of the 1904 Bill:

In September last, there was a conference of fruit-growers in Adelaide, and from the *Garden and Field* of 17th September, I propose to read a sentence or two from the conclusion they arrived at ...

...

The delivery of large quantities of fruit to England in bad condition, consequent upon neglect or fault of the ship's officers, together with the low price ruling for apples during the season, has brought before the public the very unfair conditions inserted in all bills of lading for fruit. The owners of these vessels charge shippers about double ordinary freights, but at the same time repudiate all responsibility for exercise of reasonable care and attention.

...

This is asking for bread and getting a stone (*Hansard*, 23 November 1904, p 7287).

(IMF) (see [2.73]), and the International Bank for Reconstruction and Development (IBRD): see [2.60]. Both organisations were based on the Bretton Woods Agreement of 1944. In 1947, Australia was one of the original members of the General Agreement on Tariffs and Trade (GATT) (see [2.53]) which came into operation provisionally in 1947. In 1948, Australia signed the Havana Charter, which was intended to establish an International Trade Organisation (ITO). The charter failed because the US Congress refused to approve it on the ground that the US President had no power to enter into a treaty which was intended to establish an international trade organisation. Australia was a member of the International Commodity Agreements (see [2.66]), such as the Wheat Agreement (see [2.80]), the Tin Agreement (see [2.78]) the Coffee Agreement (see [2.65]) and the Sugar Agreement: see [2.75]. These agreements had a limited life and expired at the end of the fixed terms unless the parties to the agreements agreed to renew or modify them. Since 1945, Australia has made many bilateral treaties with its trading partners to deal with various issues of trade and commerce between them. Australia is also a signatory to a number of international conventions or organisations dealing with international trade and commerce. These conventions and organisations will be discussed in Chapter 2.

International commercial law in the nineteenth and twentieth centuries

[1.35] The development of international commercial law in the nineteenth century was characterised by an extensive use of bilateral commercial treaties. As we have seen, England entered into a large number of treaties of commerce and navigation in the nineteenth century. Most of these treaties contained the MFN clause, which is still the most popular term of bilateral commercial treaty between countries today.

[1.36] In the twentieth century, in particular after the Second World War, bilateral treaties became an essential and necessary means to define and adjust trade and commercial relationships between countries. Many countries in Asia, Africa and Latin America obtained independence after the Second World War. These countries dealt with their relationships under the guidance of the principles of the Charter of the United Nations (UN). The new world order established on the UN Charter forces countries to treat each other equally and reciprocally. Bilateral treaties provide the best way to settle particular concerns of each contracting country and have been used one way or another by most countries in the world.

[1.37] Multinational treaties are another important development of international commercial law in the twentieth century. This is due to the establishment of the United Nations and the increased level of economic cooperation and interdependence among its member countries. For example, Europe has been in the process of becoming a single market since the 1960s; the United States and Canada established a Free-Trade Zone in the 1980s, the United States, Canada and Mexico tripartite treaty on free trade came into existence in the 1990s, the ASEAN (see [2.33]) countries developed closer economic cooperation after the 1960s and the Australia-New Zealand Closer Economic Relations

— Trade Agreement was entered into in 1983: see [2.34]. The multinational treaty, which refers to an international convention, such as the United Nations Convention on Contracts for the International Sale of Goods 1980 (Vienna Sales Convention, see Chapter 5 and Appendix 1), and the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules, see [6.11]), is an effective means of developing and strengthening international economic cooperation. The current system of international commercial law is, to a large extent, dependent upon the economic cooperation and interdependence between countries.

[1.38] Commercial customs and usage have been sources of international commercial law. The important development of this source of international commercial law is the codification of these customs and rules by the International Chamber of Commerce (ICC): see [2.62]. The ICC is a non-governmental body established for the purpose of promoting international trade and commerce. It owes its existence to the earlier model of chambers of commerce in France. There is disagreement as to when the first Chamber of Commerce came into existence. One observer states that the Chamber of Commerce existed in Marseilles as early as the fifteenth century.¹⁰⁹ Another argues that although the merchants in Marseilles formed a kind of organisation in 1599, 'the name Chamber of Commerce' occurred only in 1650 and the chambers of commerce 'were not formally organised in France until 1702'.¹¹⁰ While the main functions of the chamber were to advise the government on matters of industrial and commercial concern, improve commercial legislation, and promote cooperation and development of industry and commerce,¹¹¹ the La Rochelle Chamber of Commerce was said to have functioned 'as the major institutional buffer against the power of the state and as an officially recognised forum in which to articulate their [the merchants'] opinions'.¹¹² Similar chambers emerged in England in the nineteenth century. The present International Chamber of Commerce was formed in 1919. It has played an important role in the codification and unification of commercial customs and usage in international trade and commerce. Its rules are codified customs, which do not have binding force at all. However, they can be incorporated into any contract and be binding as the terms of the contract. This is how the rules of the ICC operate. The ICC modifies its rules from time to time to reflect commercial reality today. For example, the present version of the Incoterms, initially published in 1936 (see [4.16]) was revised in 1990; and the Uniform Customs and Practice (UCP) for Documentary Credits, first published in 1933, was recently revised in 1993 (UCP 500): see [7.59].

109. Levi, *supra* note 67, p 333.

110. Clarke, *La Rochelle and the Atlantic Economy During the Eighteenth Century*, The Johns Hopkins University Press, Baltimore, 1981, p 11.

111. Levi, *supra* note 67, p 333.

112. Clarke, *supra* note 110, p 13.