International Trade and Investment Law
concepts and innovations

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CONTENTS

- Introduction: Development of the Law of international trade and International Investment
- International organisations
- Sources of the Law of International Trade and International Investments
- International Transactions (overview)
- Protection of International Investments
I - Development of the Law of international trade & international investments → different stages

First stage → ancient, primitive, commercial usages and practices
Second stage (Middle Ages) → Law merchant in the *mercatorum societas* in Europe
Third stage → Emergence of national states in Europe → National restrictions → Setback of the Law merchant → national codes of commerce
Fourth stage (after the end of Second World War) → Trend towards putting an end to national restrictions → international conception of the law of international trade → Globalization - establishment of several international organisations -
II - International organisations

1 - International governmental organisations

2 - International non-governmental organisations
1 - International governmental organisations

- World Trade Organisation (WTO)
- World Bank
- International Monetary Fund
- UNCITRAL
- UNCDAD
- UNIDROIT
- HCCH
- OHBLA
- Etc.
The World Trade Organization (WTO)

WTO was officially established on January 1, 1995 under the Marrakesh Agreement, replacing the General Agreements on Tariffs and Trade (GATT), which commenced in 1947.

GATT only concerns trade in goods; it does not cover trade in services. It does not cover intellectual property.

Since the Marrakech Agreement, WTO supervise other agreements reached under the Uruguay Round:
- General Agreement on Trade in Services: GATS (Annex 1B)
- Agreement on Trade-Related Aspects of Intellectual Property Rights, TRIPS (Annex 1C)
- Understanding on Rules and Procedures Governing the Settlement of Disputes, DSU (Annex 2)
- Trade Policy Review Mechanism, TPRM (Annex 3)
The World Bank Group (WBG)

A family of five international institutions that gives loans, generally to developing countries.

It came into formal existence on December 27, 1945 following international ratification of the Bretton Woods agreements, which emerged from the United Nations Monetary and Financial Conference (1 July – 22 July 1944).

Its five institutions are:
- International Bank for Reconstruction and Development (IBRD)
- International Development Association (IDA)
- International Finance Corporation (IFC)
- Multilateral Investment Guarantee Agency (MIGA)
- International Centre for Settlement of Investment Disputes (ICSID)
The **International Monetary Fund (IMF)** = an international organisation that oversees the global financial system by following the macroeconomic policies of its member countries.

Created in July 1944, during the United Nations Monetary and Financial Conference originally with the goal to stabilize exchange rates and assist the reconstruction of the world's international payment system.

The IMF provide financial assistance to countries that suffer from financial and economic difficulties. In return, countries are required to launch certain reforms.

Headquarters: Washington D.C.
UNCITRAL (The United Nations Commission on International Trade Law)
Established by the United Nations General Assembly by its Resolution 2205 (XXI) of 17 December 1966
Located in Vienna, it is composed of delegates from 36 states, representative of the composition of the General Assembly
It creates uniform law for international trade and co-ordinates the work of the various international institutions and private organisations
It has already drawn up conventions and model laws for, inter alia, the limitation period sale of goods (New York Convention 1974), the international sale of goods (Vienna Convention 1980), UNCITRAL arbitration model law (1985) etc.
UNCDAD (The United Nations Conference on Trade and Development)

Established in 1964 as a permanent intergovernmental body.

It is the organ of the United Nations General Assembly dealing with trade, investment, and development issues.

The organization's goals are to "maximize the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis”

Headquartered in Geneva
UNIDROIT (The International Institute for the Unification of Private Law)
Independent intergovernmental organisation
Set up in 1926; re-established in 1940 on the basis of a multilateral agreement. Its seat is in Rome, Italy.

Purpose: study needs and methods for modernising, harmonising, and coordinating private international law and in particular commercial law between states, and to draft international Conventions to address the needs

UNIDROIT has over the years prepared many international Conventions
UNIDROIT drafted also the Unidroit Principles of International Commercial Contracts, the first edition of which was published in 1994, and the second in 2004

Seat: Rome, Italy
HCCH (The Hague Conference on Private International Law)

Formed in 1893 to "work for the progressive unification of the rules of private international law"

Sixty-eight nations are currently members of the Hague Conference

HCCH has over the years prepared many international Conventions in the field of private international law. Many of these conventions are related to international trade.
OHBLA (The Organisation for the Harmonisation of Business Law in Africa) - OHADA in French (Organisation pour l’harmonisation en Afrique du Droit des Affaires)

Created in 1993

Made up of 17 French-speaking African states

Main objective: “the harmonization of business laws in the contracting States by the elaboration and adoption of simple modern common rules adapted to their economies, by setting up appropriate judicial procedures, and by encouraging arbitration for the settlement of contractual disputes”
Organisations aiming at a wider economic integration of their members:

**Free trade zone**: Members of a free trade zone agree to abolish customs duties between them so that they can import goods between them duty free or at reduced tariffs. Example: NAFTA: The North American Free Trade Agreement

**Custom union**: Not only are customs duties between Member States abolished, but customs duties in respect of third countries are also equalised. Example: MERCOSUR

**Common market**: includes, besides the free movement of goods, free movement of persons, free movement of services and free movement of capitals. The most important common market is the E.U.
2 - INTERNATIONAL NON-GOVERNMENTAL ORGANISATIONS

- **FIDIC** (Fédération internationale des ingénieurs-conseils)

- **IATA** (International Aviation Transport Association)

- **ICC** (International Chamber of Commerce)
  The ICC drafts standard contracts, guidelines, codes of conduct or other documents for specific trade. For example: the “Uniform Customs and Practices for Documentary Credits” (UCP) and the Incoterms.
  The ICC has also established Arbitration Rules and a Court of Arbitration which allows enterprises to settle their trade disputes efficiently by arbitration.

Etc.
III - Sources of the Law of International Trade and International Investments

Governmental Sources
- Domestic law
- International law (Treaties)

Non-Governmental Sources
- Trade usages and practices - Customary Law (standard clauses, standard contracts, Incotermes, etc.)
  (Incotermes = International Commercial terms. For example: CFR = Cost and Freight; CIF = Cost, Insurance and Freight, etc...)
- UNIDROIT Principles
- Increasing role of arbitration
- Lex Mercatoria
IV - International transactions

Most important international transactions

- International sales
- Distribution Agreements
- International Construction Agreements
- International carriage of goods/persons
- International transfer of technology
Etc.
Parties to international transactions:

- individuals (natural persons)
- Private legal entities (companies, corporations)
- States
  - Applicable law to state contracts
  - Problem of immunity
V – Protection of International Investments

International Investment issues involve:
- the capital exporting state (i.e. the home state of the investor),
- the capital importing state (i.e. the host state), and
- the private foreign investors

International Law → States have a general freedom to regulate the entry of foreign investments (pre-establishment) and a general discretion as to how they treat that investment post-entry (post establishment)

Main question: How to protect foreign property against expropriation and unfair treatment?
1 - Protection of investments through contractual arrangements

- Stabilisation clauses
- choice of law clauses and
- arbitration clauses

Are such clauses valid in state contracts?
2 - Protection of investments through Bilateral Investment Treaties (BITs)

A BIT is an agreement establishing the terms and conditions for private investment by nationals and companies of one state in the other state. BITs grant investments made by an investor of a Contracting State in the territory of the other (host state) a number of guarantees, mainly fair and equitable treatment & protection from expropriation. BITs allow an investor whose rights under the BIT have been violated to refer to international arbitration, often under the auspices of the ICSID (International Centre for the Settlement of Investment Disputes), rather than suing the host State in its own courts.
Article 25§1 of ICSID Convention stipulates as follows:
"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally"
Conditions to bring a dispute to ICSID:

- The dispute must relate to an investment.
- Both the host state and the state of which the private investor is a subject, must be party to the ICSID Convention
- The investor as well as the host country must have accepted the ICSID jurisdiction

In *Southern Pacific Properties (Middle East) Ltd. v Arab Republic of Egypt* (1988), an arbitration panel decided that the host state may adopt ICSID Arbitration in a domestic investment law.

In *Asian Agricultural Product Ltd v. Republic of Sri Lanka* (1990), an arbitration panel decided that the host state may consent to ICSID arbitration in an investment treaty concluded with the investor’s state.
ICSID Arbitration and applicable law

Article 42 §1 of ICSID Convention
“The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable”.