FACULTY OF JURIDICAL SCIENCES

Lecture-12

Sources and Principles of International Trade Law

These sources include treaties and conventions, decisions of courts in various countries (including decisions in your own state and nation), decisions of regional courts (such as the European Court of Justice), the World Trade Organization (WTO), resolutions of the United Nations (UN), and decisions by regional trade organizations such as the North American Free Trade Agreement (NAFTA). These sources are different from most of the cases in your textbook, either because they involve parties from different nations or because the rule makers or decision makers affect entities beyond their own borders.

In brief, the sources of international law include everything that an international tribunal might rely on to decide international disputes. International disputes include arguments between nations, arguments between individuals or companies from different nations, and disputes between individuals or companies and a foreign nation-state. Article 38(1) of the Statute of the International Court of Justice (ICJ) lists four sources of international law: treaties and conventions, custom, general principles of law, and judicial decisions and teachings.

The ICJ only hears lawsuits between nation-states. Its jurisdiction is not compulsory, meaning that both nations in a dispute must agree to have the ICJ hear the dispute.

Treaties and Conventions

Even after signing a treaty or convention, a nation is always free to go it alone and repudiate all regional or international bodies, or refuse to obey the dictates of the United Nations or, more broadly and ambiguously, "the community of nations." The United States *could* repudiate NAFTA, could withdraw from the UN, and could let the WTO know that it would no longer abide by the post–World War II rules of free trade embodied in the General Agreement on Tariffs and Trade (GATT). The United States would be within its rights as a sovereign to do so, since it owes allegiance to no global or international sovereign. Why, however, does it not do so? Why is the United States so involved with the "entangling alliances" that George Washington warned about? Simply put, nations will give away part of their sovereignty if they think it's in their self-interest to do so. For example, if Latvia joins the European Union (EU), it gives up its right to have its own currency but believes it has more to gain.

A treaty is nothing more than an agreement between two sovereign nations. In international law, a nation is usually called a state or nation-state. This can be confusing, since there are fifty US states, none of which has power to make treaties with other countries. It may be helpful to recall that the thirteen original states under the Articles of Confederation were in fact able to have

direct relations with foreign states. Thus New Jersey (for a few brief years) could have had an ambassador to France or made treaties with Spain. Such a decentralized confederation did not last long. Under the present Constitution, states gave up their right to deal directly with other countries and vested that power in the federal government.

There are many treaties to which the United States is a party. Some of these are conventions, which are treaties on matters of common concern, usually negotiated on a regional or global basis, sponsored by an international organization, and open to adoption by many nations. For example, as of 2011, there were 192 parties (nation-states) that had signed on to the Charter of the UN, including the United States, Uzbekistan, Ukraine, Uganda, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland, and Uruguay (just to name a few of the nations starting with *U*).

His most basic kind of treaty is an agreement between two nation-states on matters of trade and friendly relations. Treaties of friendship, commerce, and navigation (FCN treaties) are fairly common and provide for mutual respect for each nation-state's citizens in (1) rights of entry, (2) practice of professions, (3) right of navigation, (4) acquisition of property, (5) matters of expropriation or nationalization, (6) access to courts, and (7) protection of patent rights. Bilateral investment treaties (BITs) are similar but are more focused on commerce and investment. The commercial treaties may deal with a specific product or product group, investment, tariffs, or taxation.

Nation-states customarily enter not only into FCN treaties and BITs but also into peace treaties or weapons limitations treaties, such as the US-Russia Strategic Arms Reduction Talks (START) treaty. Again, treaties are only binding as long as each party continues to recognize their binding effect. In the United States, the procedure for ratifying a treaty is that the Senate must approve it by a two-thirds vote (politically, an especially difficult number to achieve). Once ratified, a treaty has the same force of law within the United States as any statute that Congress might pass.

Custom

Custom between nations is another source of international law. Custom is practice followed by two or more nations in the course of dealing with each other. These practices can be found in diplomatic correspondence, policy statements, or official government statements. To become custom, a consistent and recurring practice must go on over a significant period of time, and nations must recognize that the practice or custom is binding and must follow it because of legal obligation and not mere courtesy. Customs may become codified in treaties.

Due Process and Recognition of Foreign Judgments

Issues surrounding recognition of foreign judgments arise when one nation's courts have questions about the fairness of procedures used in foreign courts to acquire the judgment. Perhaps the defendant was not notified or did not have ample time in which to prepare a defense, or perhaps some measure of damages was assessed that seemed distinctly unfair. If a foreign state makes a judgment against a US company, the judgment will not be recognized and enforced in the United States unless the US court believes that the foreign judgment provided the US Company with due process. But skepticism about a foreign judgment works the other way, as well. For example, if a US court were to assess punitive damages against a Belgian company, and the successful plaintiff were to ask for enforcement of the US judgment in Belgium, the Belgian court would reject that portion of the award based on punitive damages. Compensatory damages would be allowed, but as Belgian law does not recognize punitive damages, it might not recognize that portion of the US court's award.

Concerns about notice, service of process, and the ability to present certain defenses are evident in Koster v. Auto mark. Many such concerns are eliminated with the use of forum-selection clauses. The classic case in US jurisprudence is the Bremen case, which resolves difficult questions of where the case should be tried between a US and German company by approving the use of a forum-selection clause indicating that a court in the United Kingdom would be the only forum that could hear the dispute.

Part of what is going on in Bremen is the Supreme Court's concern that due process should be provided to the US company. What is fair (procedurally) is the dominant question in this case. One clear lesson is that issues of fairness regarding personal jurisdiction can be resolved with a forum-selection clause—if both parties agree to a forum that would have subject matter jurisdiction, at least minimal fairness is evident, because both parties have "consented" to have the forum decide the case.

Arbitration

The idea that a forum-selection clause could, by agreement of the parties, take a dispute out of one national court system and into another court system is just one step removed from the idea that the parties can select a fair resolution process that does not directly involve national court systems. In international arbitration, parties can select, either before or after a dispute arises, an arbitrator or arbitral panel that will hear the dispute. As in all arbitration, the parties agree that the arbitrator's decision will be final and binding. Arbitration is generally faster, can be less expensive, and is always private, being a proceeding not open to media scrutiny.

Typically, an arbitration clause in the contract will specify the arbitrator or the means of selecting the arbitrator. For that purpose, there are many organizations that conduct international arbitrations, including the American Arbitration Association, the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes, and the United Nations Commission on International Trade Law. Arbitrators need not be judges or lawyers; they are usually business people, lawyers, or judges who are experienced in global commercial

transactions. The arbitration clause is thus in essence a forum-selection clause and usually includes a choice of law for the arbitrator or arbitral panel to follow.

An arbitral award is not a judgment. If the losing party refuses to pay the award, the winning party must petition a court somewhere to enforce it. Fortunately, almost every country that is engaged in international commerce has ratified the United Nations Convention on the Recognition and Enforcement of Arbitral Awards, sometimes known as the New York Convention. The United States adopted this convention in 1970 and has amended the Federal Arbitration Act accordingly. Anyone who has an arbitral award subject to the convention can attach property of the loser located in any country that has signed the convention.

Principles of International Trade Laws

- National Treatment Principle: Imported and locally-produced goods should be treated equally — at least after the foreign goods have entered the market. The same should apply to foreign and domestic services, and to foreign and local trademarks, copyrights and patents. These principles apply to trade in goods, trade in services as well as trade related aspects of intellectual property rights.
- Most Favored Nation (MFN) Principle: The MFN principles ensures that every time a WTO Member lowers a trade barrier or opens up a market, it has to do so for the like goods or services from all WTO Members, without regard of the Members' economic size or level of development. The MFN principle requires according to all WTO Members any advantage given to any other country. A WTO Member could give an advantage to other WTO Members, without having to accord advantage to non- Members but only WTO Members benefit from the most favorable treatment.

Trade and intellectual property

The World Trade Organization Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement required signatory nations to raise intellectual property rights (also known as intellectual monopoly privileges). This arguably has had a negative impact on access to essential medicines in some nations such as less developed countries, as the local economy is not as capable of producing more technical products such as pharmaceuticals.

Cross-border transactions

Cross-border operations are subject to taxation by more than one country. Commercial activity that occurs among several jurisdictions or countries is called a cross-border transaction. Those involved in any international business development or international trade should be knowledgeable in tax law, as every country enforces different laws on foreign businesses. International tax planning ensures that cross-border businesses stay tax compliant and avoid or lessen double taxation.

Dispute settlement

Most prominent in the area of dispute settlement in international trade law is the WTO dispute settlement system. The WTO dispute settlement body is operational since 1995 and has been very active since then with 369 cases in the time between 1 January 1995 and 1 December 2007. Nearly a quarter of disputes reached an amicable solution, in other cases the parties to the dispute resorted to adjudication. The WTO dispute settlement body has exclusive and compulsory jurisdiction over disputes on WTO law (Article 23.1 Dispute Settlement Understanding).