INTERNATIONAL BUSINESS LAW

双语教学版

国际商法

张文志 主编

黑龙江人民出版社

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前　言

世界经济的全球化以经济市场化为本质，将市场统一化的地理范围扩大到全球的领域，形成了二十一世纪初市场化、全球化的显著特征。这种市场统一化的实现不是借助强权，而是凭借着市场背后的统一运作规则。国际公约、国际条约、国际惯例就是这些统一运作规则的最好诠释，其中以 WTO 最为显著。中国入世标志着中国经济与法律开始与国际接轨，而要融入国际社会就要以统一的规则为核心，以趋同的法律原则为基础，以便更好地指导和规范国际商务实践。由此，国际商法在全球化的背景下也愈发体现了法律制定原则与具体实施规则的统一，这便迫切要求我们掌握并利用好这方面的相关法律知识，以我为主，为我所用，积极培育动态比较优势，迅速地与国际接轨。为此，结合国际法律、法规的最新发展动态，考察国际商务实践的现行规则，吸收国外法学教育的先进成果，根据建构主义教学理论与双语教学的理论与实践，我们编写了这本教材。

鉴于国际商法具有较强的实用性和可操作性，本书的编写过程坚持创新与实用为特色，以讲授与自学相结合为模式，注重运用历史分析和比较分析的方法，力求兼顾原理与案例、规则与法例。理论层面，综述了国际商法的理论研究的前沿成果；知识层面，将本学科的基本内容进行科学的系统整合；操作层面，将行文中的解释性案例与篇章后的索引性案例有机结合；应用方面，通过采取旁白注释的方式，增强了学生自主学习的兴趣，同时每章配有相应的“本章小结”、“关键词提示”、“复习思考”、“团队协作”、“案例分析”、“在线查询”等操练内容，拓宽学生自主学习的途径，提高学生的高端思维能力。

在教材编写的语言层面，本书突出了法律英语的学科特色，保留了英文原版教材的专业性，通过旁白注释的方式增加专业知识的可读性和可理解性，使学生在熟悉理解国际商法专业知识的同时，提高法律英语的阅读和运用能力，实现通过外语学专业，通过专业学外语的目的。

本书主要内容涵盖六个部分，各部分内容安排如下：国际商法理论问题综述；国际货物销售合同法；国际货物运输法；国际服务贸易与技术贸易规则；国际投资法；国际商事争议的解决与救济法。

本书可作为高等院校法学专业和经济与管理专业的双语教学教材与教学参考书，或商务英语专业与法律英语专业的法律英语教材和教学参考书，也可以作为经贸实务、法律实务及法律英语爱好者的自学参考资料。

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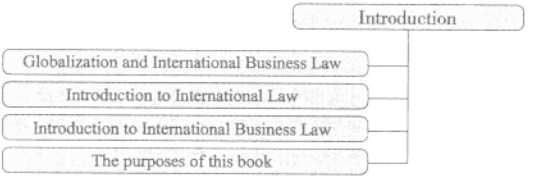

International business law, as a branch of international economic law, develops with the cross-border economic transaction and plays a very important role as the rules regulating human business activities particularly in the 21st century. The opening chapter-Introduction-of this book discusses the relationship between **globalization** and international business law, introduces the basics of international law and sets out some preliminary problems that help you understand what international business law is and other relevant fundamental issues, such as **the sources** of international business law.

◎全球化

◎(法律)渊源

0.1 Globalization and International Business Law

In this section, we will examine three issues: the definition of globalization, the economic and legal analysis of globalization, and international business law in the age of globalization.

0.1.1 What is globalization?

Before learning or doing research on something, we are likely to deal with a basic issue, say, what is it? But, de facto, it is very difficult to articulate the definition in precise. Bear in mind, any way of defining could only be simple, rough, or similar-which is never to show the whole truth. Engels contends that the conception of one thing and the reality of that are like two lines, going forward together, getting close to each other, but never overlapping.

Let's look back upon the life of the past, it's easier to accept that most human beings were born, lived, and died within a limited geographical area, and that around them are only their own people's faces and/or cultural backgrounds. But the modern life style changes dramatically in a way called "globalization". You can also characterize today's world as a "global village" because of the rapid expansion of worldwide transportation and communication networks. For example, we can now board a plane and fly anywhere in the world in a matter of hours. Communication satellites, sophisticated television **transmission** equipment, and the World Wide Web now allow people throughout the world to share information and ideas instantaneously.

◎传输,播送

Globalization is not just a unique phenomenon. Various globalization phenomena exist in different areas: economics, culture, politics, laws, etc. Each of these areas interrelates and interacts with each other. Thus, globalization is a complex phenomenon, contested in terms of its definition, extent and implications and therefore in terms of the most appropriate response to it. Economists, political scientists, sociologists, **anthropologists** and lawyers, among others, have all debated the meaning of the term within the context of their respective academic disciplines.

◎人类学者

In general, globalization has been defined as the process of denationalizing markets, laws, politics, and the like, in order to attain the interrelation of nations and individuals for their common good. Whether this process would in fact achieve the desired result, however, is debatable. Internationalization, as opposed to globalization, is the medium that allows nation-states to meet their national interests whenever they lack domestic resources for doing so. Internationalization involves cooperation among sovereign states, whereas globalization erodes the sovereignty of the states.

The sociological view of globalization defines it as a more pervasive force throughout the world. That is, globalization occurs when the constraints of geography on social and cultural arrangements recede as people around the world become increasingly aware that such constraints are receding.

Former United Nations secretary Butros Gali states that "there is not just one but several globalizations, such as the case of information, drugs, plagues, ecology, and, of course, finance above

all. This poses a big challenge because globalizations advance at very different speeds. All phenomena taking place during the globalization process are subject to interaction through negative feedback or, in most cases, with positive feedback which, given its characteristics, is more difficult to restrain.

Political scientists regard globalization as the reason for the decline of the **"Westphalian"** model of international relations which was based on the sovereignty of states. This corresponds to a new and progressive view of public international law as a "truly transnational law" of global or **"supraterritorial"** governance which no longer serves to coordinate the relations between individual states but is shaped and developed by the activities of non-governmental organizations (**NGOs**) and private entities such as multinational corporations.

◎(地名)威斯特伐利亚

◎跨领土的，跨地域的

◎非政府组织

A more critical view of globalization, based on Marxist philosophy, argues that globalization is what people in the Third World have already experienced for several centuries. It is called colonization. Proponents of this school of thought maintain that capitalist Western countries exploit raw materials and cheap labor found in the Third World countries at the enormous expense of the peoples of the Third World countries.

After all, there are and will be different opinions on "globalization". It is hard to articulate it by a uniform and correct way. Regarding the nature of this book, the focus will be brought on the connection between globalization and law, particularly international business law. The following section goes to the topic of globalization in the economic and legal approach.

0.1.2 Economic and legal analysis of globalization

In no doubt, today's society is at least in the midst toward globalization. If, as **Grotius** asserts, *ubi societas ibi ius* ("where there is society, there is law"), how will the globalization process affect the law? Certain hypotheses can be formulated, but they are only sketched answers to this question.

◎(荷兰)格老秀斯

As a consequence of the transformation of society, the globalization process in terms of the law (especially business law) -which usually follows economic and social phenomena-is in its preliminary stage. Some scholars even point out that there is no such

a thing as globalization of law, but rather that there are strong globalization forces influencing the modern world, which are dragging along the law.

Let' s put our eyes on the implications of globalization for international economy. In the mid-1990s, the IMF's World Economic Outlook defined globalization as the growing **Interdependence** of countries world-wide through the increasing volume and variety of cross-border transactions in goods and services and of international capital flows, and also through the more rapid and widespread diffusion of technology. This definition is a useful starting point, highlighting interdependence, the increasing number and range of cross-border transactions and the important role played by technology. However, it is incredibly difficult to define such a multi-layered and complex phenomenon as globalization in one sentence or to reflect the significance of the different elements of the definition and how they spill over into non-economic area law. In order to understand globalization in terms of its deeper meaning and significance, it is essential to analyze the connection between economic globalization and legal globalization.

◎相互依存

Since World War II, international trade has grown exponentially and with it the importance of international business law. With the increased business between companies in different nations, the need for increased harmonization of business laws has become apparent.

Economic globalization has increased international competition and given rise to the need for an increasingly integrated and evolving **legal system**. A number of trends have contributed to the accelerated globalization of industry and the integration of international economies. For instance, the growing similarity in available infrastructure, distribution channels, and marketing approaches has enabled companies to introduce products and brands to a universal marketplace. Fluid global capital markets, falling tariff barriers, and technological innovation have led to an increasing ability for global competitors to reach international markets that were once beyond their grasp. In addition, technological advancements and e-business have enabled firms to significantly improve the efficiency of operations, innovations in supply chain management, and increasing vertical and horizontal integration and industry concentration. The fall of Soviet Union communism and the consequent market reforms of transitional

◎法律制度

developing economies have given rise to the emergence of multilateral global trade agreements and organizations such as the World Trade Organization ("WTO"), free trade areas such as the North American Free Trade Agreement ("NAFTA"), and customs unions such as the European Union ("E.U."). These trends have triggered significant changes in the structure of entire industries. With the emergence of the global marketplace, governments have promoted global competition through the increase in international trade, while developing legal systems to ensure industrial competitiveness.

0.1.3 International business law in the age of globalization

From the above section, we can see that the economic globalization is the key driver of legal globalization. Herein, we put eyes on the connection between globalization and international business law.

Law has traditionally been the province of the nation state, whose courts and police enforce legal rules. By contrast, international law has been comparatively weak, with little effective enforcement powers. But globalization is changing the contours of law and creating new global legal institutions and norms. The International Criminal Court promises to bring to justic odious public offenders based on a worldwide criminal code, while inter-governmental cooperation increasingly brings to trial some of the most notorious international criminals. Business law is globalizing fastest of all, as nations agree to standard regulations, rules and legal practices. Diplomats and jurists are creating international rules for **bankruptcy**, intellectual property, banking procedures and many other areas of **corporate law**. In response to this internationalization, and in order to serve giant, transnational companies, law firms are globalizing their practice. The biggest firms are merging across borders, creating mega practices with several thousand professionals in dozens of countries.

◎破产
◎公司法

a. Globalization of business and particularly contract law

Just like the difficulties to define "globalization", there are various connotations to the term "Globalization of law". It may be viewed as a concomitant of the globalization of markets and the business practices of the multi-national corporations that operate in those markets. There has been some movement toward a relatively

uniform global contract and business law. It is well established that
○立法制度 contracts are a kind of private **lawmaking** system. By that we mean that a contract may be defined as a law between the parties to the contract. The two or more contracting parties create a set of rules to govern their relationships, as laid down under the terms of their agreement. In international trade too, the parties enter in contracts and the contracting parties invariably agree to submit to a
○仲裁机制 nongovernmental **arbitration mechanism** or the courts of some particular nation state, or both, to resolve contract disputes. They may also chose the governing law of the contract under which any contract dispute between them shall be resolved.

In today's world of inter-dependence and international business, there is increasing importance of growth of harmonization of international business law. Most of the countries have now recognized the need for a uniform, predictable and transparent system of law for encouraging foreign investment and international trade with other countries. As a result of this, the courts and law of most of the countries recognize and enforce the judgments of the others. Hence there is a tentative movement towards the formulation of international business law through contracts.

In the global context, because of the economic position of the United States and some of the countries of Europe, these countries substantially influence the process of globalization of law. The obvious reason is that they contribute substantially to foreign investments in other parts of the world and have a strong role to play in international trade. Other than American economic power, another reason for this is the receptivity of common law to contract and other commercial law. It is widely believed in Europe that European Community legal business flows to London because English lawyers are more adept than civil law lawyers at legal innovation to facilitate new and evolving transnational business relationships. For whatever reasons, it is now possible to argue that American business law has become a kind of global just commune incorporated explicitly or implicitly into transnational contracts and beginning to be incorporated into the case law and even the statutes of many other nations. In speaking of China, the importance of Chinese economic power and legal reform becomes more and more obvious. Especially, after the WTO access, China is trying to be in line with WTO rules.

b. The Arguments on the globalization of international business law: transnationalization rather than globalization

◎跨国化

The theory of international business law is divided into two camps. The one contends the transnationalization of business law, the other not. The term transnationalization is used here, instead of using globalization. The rationale lies in the belief that globalization is just a starting point of which the early stage presents as transnationalization. The **conflictualists** accuse the doctrine of the transnationalization of business law as being nothing more than a "mere sociological phenomenon", a "trip into legal weightlessness", a "legal utopia" or simply "palm tree justice". In their view, every transborder commercial transaction has its "seat" or center of gravity in a domestic legal system to be determined by the applicable conflict of laws rules. The **transnationalists** reject this view. They maintain that there is a "third" legal system besides domestic laws and public international law. In their view, the application of transnational law to cross-border commercial transactions has two major advantages. First, it avoids the uncertainties of traditional conflict of laws methodology. Secondly, the new law merchant is better able to cope with the complexities and specificities of and the need for a flexible and adaptable legal framework for modern commercial transactions. René David has exposed the transnationalists' vision as early as 1969:

◎冲突主义者

◎跨国化主义者

"[T]he lawyer's idea which aspires to submit international trade, in every case, to one or more national systems of law is nothing but bluff. The practical men have largely freed themselves from it, by means of standard contracts and arbitration, and states will be abandoning neither sovereignty nor prerogatives, if they open their eyes to reality and lend themselves to the reconstruction of international [business] law."

At present, David's statement is more up to date than ever. The reason is the increasing globalization of the world economy, i.e. the integration of hitherto separate national markets. International businessmen no longer conclude their contracts across domestic borders. Instead, they act in a global market place in which they take care of their own affairs irrespective of the applicable domestic law. The "new economy" as a new form of business organization

necessarily influences the law creation process in international business. The revolution of information technology and the rapid development of e-commerce allows for new and integrated ways of business communication. This has caused the phenomenon of "time compression", a fundamental change of our perceptions and expectations regarding of what are, and are not, acceptable delays. "Cyberspace", by its very nature, is at odds with the traditional conception of the world as legal territories surrounded by fixed borders, and suggests the usefulness of a law that knows no boundaries. In fact, some say that globalization means the end of geography.

0.2 Introduction to International Law

International law derived from the interaction between sovereign states, experienced mainly three stages, say, ancient age (from about 13th century B.C.), modern age (from 15th century), and contemporary age (from 20th century). Nowadays, the trend of economy-based globalization drives the development of a vast network of international law and the creation of dozens of international organizations.

The system of international law involves or governs a great deal of subjects, the following subsections briefly describes some basic issues: what international law is, the sources of international law, the relation between international law and **domestic law**, and international persons, as well as the rights of individuals under international law.

◎国内法

0.2.1 What Is International law?

It is hard to articulate precisely what international law is. But, there are two basic approaches to define international law. First, in the broadest sense, international law refers to a body of principles, rules and systems that regulates three cross-boundary relationships: those between states and states, those between states and persons, and those between persons and persons. Second, we can define it based on the nature of subject matter or the above three different relationships. There arise some branches of international law because of the rapid changes on the subject matter. The classical distinction is between public international law and private international law. Traditionally, international law dealt only with

conduct between states/governments and was called the law of nations. Later, it came to be called public international law, in part to distinguish it from private international law. Private international law is the name given to the rules that regulate the affairs of private persons internationally. Furthermore, in recent years, more and more people advocate a new branch of international law-international economic law-which is an independent branch with its own characteristics.

Chinese scholars usually divide international law into three branches: guojifa (international law or public international law), guojisifa (international private law), and guojijingjifa (international economic law). How international business law relates to international economic law will be discussed in§ 0.3.1.

Generally, contemporary international law now regulates organizations and individuals as well as nations, and the division between public and private law has become blurred. At present, the term international law can be applied to any conduct outside the boundaries of states, whether of a public or a private nature.

Moreover, there is dispute on whether international law exists. The rationale goes to that there is no world government, thus the problem whether international law is really law is questionable.

However, most people believe it is law. Simply put, because most, if not all, states and individuals regard it as such. This can be clarified by the comparison between international law and international comity. Comity is the practice, or courtesy, between states of treating each other with goodwill and civility. It is not law, however, because states do not regard it as something they are required to respect. Take an example, until it became a matter of legal obligation under the 1961 **Vienna Convention on Diplomatic Relations**, it was long considered to be a customary courtesy to allow foreign diplomats the privilege of importing goods they intended for their own private use free of customs duties. The privilege was not a legal right guaranteed by international law, however, because states did not feel compelled to grant the privilege except as a courtesy.

◎维也纳外交关系条约

0.2.2 Sources of international law

The sources, or evidences, of international law are what international tribunals rely on in determining the content of international

◎国际法院

law. Article 38 (1) of the Statute of **the International Court of Justice** lists the sources that the Court is permitted to use. Most writers regard this list as being reasonably complete and one that other international courts should use as well. Article 38(1) stipulates:

> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
>
> international treaties or conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
>
> international custom, as evidence of a general practice accepted as law;the general principles of law recognized by civilized nations;
>
> Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

A problem is that, when two or more types of sources exist, which is to be applied first. The above list implies a hierarchy, or order, in which these sources are to be relied on. That is, treaties or conventions are to be turned to before custom, custom before general principles of law, and general principles before judicial decisions or 'publicists' writings. Strictly speaking, Article 38 (1) does not set up a hierarchy; but in practice, the ICJ and other tribunals turn first to treaties. This is appropriate because treaties (especially those ratified by the states parties involved in a dispute) are clear-cut statements of the rules the court should apply. Also, customary law, which is based on practice, is more appropriate than general principles, which are usually found inductively by legal writers who have examined the long-standing practices of states. Finally, all of these are considered more reliable than either court decisions or lawyers' writings because the latter are used only to apply or interpret the former.

◎条约
◎公约

a. Treaties and conventions

In general, treaties are legally binding agreements between two or more states and conventions are legally binding agreements between states sponsored by international organizations, such as the United Nations. Both are binding upon states because of a shared sense of commitment and because one state fears that if it does not respect its promises, other states will not respect their promises.

Today, most of the customary rules that once governed treaties are contained in the Vienna Convention on the Law of Treaties,

which came into force in 1980. It only applies to treaties adopted after a party ratifies the agreement; nevertheless, its wide acceptance by states and its codification of customary rules has made it the de facto standard for interpretation.

Article 2(1)(a) of the Vienna Convention states that " 'Treaty' means an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation." To avoid complexity, this definition excludes certain agreements, including oral promises, unilateral promises, agreements relating to international organizations, agreements governed by municipal law, and agreements that were not intended to create a legal relationship. Because these agreements are excluded in the Convention' s definition, however, does not mean that international tribunals will ignore them or that they do not have effect.

b. Custom

◎习惯，惯例

Customary laws refer to some rules that have simply been around for such a long time or are generally accepted. International customary law, however, is not fixed. Simply because certain practices were once followed in the international community does not mean that they are still followed today. Indeed, the development and evolution of customary international law is in a continual state of flux. For example, In the arena of international business law, the rate of change is fast. Much of this reflects developments in modern technology. Laws governing the flow of data across international borders (such as messages sent by satellite or transoceanic cable) are presently in a state that might best be described as "confused". Many countries want to regulate the movement of such information, others demand free and undisturbed movement, and still others want guarantees against invasions of privacy. At present, the regulation is left to each government, and little "common" law exists.

There are two elements to show that a customary practice has become customary law-one objective or behavioral and one subjective or psychological.

The first-called usus in Latin-behavioral element requires consistent and recurring action (or lack of action if the custom is