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## **The Province of International Business Transactions Defined: Content, Scope and Intersections with International Legal Studies**

Gbenga Oduntan\*

**ABSTRACT:** *The law of International Business Transactions as a subfield within the general field of international commercial law can appear to be quite amorphous to students and practitioners. It may be observed that different authors converge, diverge and intersect in their focus on the various relevant themes and topics within the general phenomena of international commercial transactions. This article offers some explanation for this reality by seeking to establish certain necessary connections between the study of the law of transnational business and allied fields of international studies. The article also seeks to dispel certain myths such as that which views international business regulation as devoid of power politics. The paper, thus, places the study of international business transactions well within the scope of socio legal as well as critical legal theory.*

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*The remoter and more general aspects of the law are those which give it universal interest...connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law. (O.W. Holmes, 1897)<sup>1</sup>*

### **I. INTRODUCTION**

International Business Transactions (IBT) as a legal field of study is referred to by a myriad of terms. This diversity is easily denoted in the title of the leading textbooks that cover this area of study – *Law of International Trade*,<sup>2</sup> *Global Business Regulation*,<sup>3</sup> *Export Trade*,<sup>4</sup>

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<sup>1</sup> Oliver Wendell Holmes, Jr., *The Path of the Law* 10 *Harvard Law Review* (1897) p. 478.

<sup>2</sup> Jason Chuah, *Law of International Trade*, 3<sup>rd</sup> Edition (London: Sweet and Maxwell, 2005).

<sup>3</sup> Braithwaite and Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

*International Business Law*,<sup>5</sup> *The Regulation of International Trade*,<sup>6</sup> etc. While some text writers adopt an emphasis on the study of the regulatory framework provided by the major international financial institutions<sup>7</sup> other writers concern themselves primarily with the legal incidents that surround international business transactions such as the sale of goods and services.<sup>8</sup> Yet there are those who will focus on multinational enterprises and issues such as the transfer of technological know-how, investment issues, taxation, etc.<sup>9</sup> For this reason IBT as a subfield within the general field of international commercial law (ICL) can appear to be quite amorphous to students. It may be observed that different authors converge, diverge and intersect in their focus on the various relevant themes and topics within the general phenomena of international commercial transactions.<sup>10</sup> The legal study of international business transactions necessarily intersects with many areas of international studies and the discipline owes much of its relevance to sometimes older and sometimes more recognised (in terms of the taxonomy of legal subject areas) bodies of jurisprudential epistemologies. This article attempts to reveal some of these connections and thus, contributes to the traditional debates about the source and power of norms that affect international society. The significance of the study lies in the sensitisation of both the student and practitioner to the ethical, philosophical and jurisprudential foundations of the law and practice of IBT. It is hoped that this approach will help simulate a legal and didactic treatment of IBT, which is more wholesome and rewarding for all stakeholders in the field and which addresses not only the commercial but human interests of the international society of states

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<sup>4</sup> Clive M. Schmitoff, *Export Trade*, 11<sup>th</sup> Edition (London: Sweet and Maxwell, 2000).

<sup>5</sup> Ray August, *International Business Law*, 4<sup>th</sup> Edition (New Jersey: Pearson, 2004).

<sup>6</sup> M.J. Trebilock and Robert Howse, *The Regulation of International Trade* (London: Routledge, 1995).

<sup>7</sup> Such as the WTO and GATT as well as the regional agreements and arrangements such as the North American Free Trade Agreement (NAFTA), the Common Market of the Southern Cone (MERCOSUR), and the Economic Community of West African States. In this group are authors like M.J. Trebilock and Robert Howse in their work *The Regulation of International Trade* *ibid*. This may include emphasis on the law and practice of international professional bodies like the International Chambers of Commerce (ICC) in Paris and the law and practice of the leading international arbitral tribunals.

<sup>8</sup> In this group you will find the likes of Clive M. Schmitoff and Indira Carr. See, e.g., Indira Carr, *International Trade Law* (London: Cavendish, 2005) and Schmitoff *op. cit.* .

<sup>9</sup> In this group you will find P.T. Muchlinski, *Multinational Enterprises and the Law*, 2<sup>nd</sup> Revised Edition. (Oxford: Oxford University Press, 2007).

<sup>10</sup> Chuah, *op. cit.*, preface.

## II. IBT – HISTORY, CONTENT, SCOPE AND THE IMPERATIVES OF ETHICS AND CRITICAL LEGAL THEORY

There is a certain degree of fluidity in the understanding of the regulation of IBT, which is worthy of inquiry. Chuah reveals the perplexities of the area of study even for the well informed when he wrote, “[t]he subject matter posed difficult choices for me...”<sup>11</sup> American writers such as Jessup, Vagts and Dalhusien introduce further complexities with the formulation of what has been referred to under the unwieldy description of transnational economic law, which as described by Thomas Wälde is a form of “comparative and international economic regulation and commercial law”.<sup>12</sup>

Wälde himself appears to favour a conception of IBT which blurs any strict distinction from international economic law. He asserts that both systems ought to be analysed jointly and not separated into the distinct disciplines of public international economic law for diplomats and private international commercial law for traders and appears to lament that “this division is still strongly established and rules most of the traditional public international law departments and their off-spring”.<sup>13</sup>

It would, therefore, appear that the scope of the average text on the phenomena of cross border transactions between buyers, sellers and the financial institutions that aid them is quite an arbitrary and subjective exercise. Schmittoff’s leading text on *Export Trade*, for instance, concerns itself with certain aspects of the rules governing the services of representatives abroad (whether directly or indirectly or by some other looser arrangement). The writer, therefore, finds himself in the company of others like Muchlinski who pays particular attention to the international rules and regulations that bind multinational enterprises. Indira Carr’s seminal textbook focuses on “the complexities of an International sale transaction” but also covers electronic transactions and security issues, various forms of

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<sup>11</sup> Chuah *ibid.*

<sup>12</sup> See Dalhusien, *Dalhusien on International Commercial Financial and trade Law* (Oxford: Hart Publishing, 2000). See also Thomas Wälde review of this work in Volume 53 *ICLQ* Number 2 (2004) pp. 521-525.

<sup>13</sup> Wälde *op.cit.*, p. 521.

intermodal transportation as well as the conflict of laws.<sup>14</sup> It, therefore, is imperative if a proper study of the subject area is to be attained that a multiplicity of texts should be consulted. What may not be readily clear to the casual readers of the various topics in this field is the extent to which many of the leading writers have imbued their submissions with a critical legal outlook. In the UK this is particularly evident in the writings of scholars of the critical lawyers tradition championed by the Kent Law School which is considered the home of the Critical Lawyers Group. This perhaps accounts for the remarkable attention paid in the scholarship of distinguished text writers of this school such as Schmittoff,<sup>15</sup> Peter Muchlinski,<sup>16</sup> Maniruzzaman,<sup>17</sup> and Indira Carr,<sup>18</sup> to the effects that contemporary international regulations of business activities produce on national and international society, particularly in relation to developing states.

Indira Carr, for instance, draws attention to the fact that although free trade among nations is largely seen as the key to economic growth, peace and better standards of living (a view expressly promoted in Adams Smith's writings) there are trade theorists who hold fastidiously to the opinion that free trade does not provide the best solution in economic terms.<sup>19</sup> She also notes that:

Over time, the world has become more aware of the global effects of environmental degradation, and the exploitation of the economically disadvantaged and the young by commercial enterprises. Social and ethical issues in the context of trade have taken on a new

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<sup>14</sup> Indira Carr, *International Trade Law* (London: Cavendish, 2005) preface.

<sup>15</sup> Schmittoff, *op.cit.* 241-243 *et seq.*

<sup>16</sup> For critical perspectives on the shortcomings on international regulation of businesses see generally P.T. Muchlinski, *Enron and Beyond "Multinational Corporate Groups and the Internationalization of Governance and Disclosure Regimes"*, Vol. 37 *Connecticut Law Review* No. 3 *et seq.*; P. Muchlinski, "The Rise and Fall of the Multilateral Agreement on Investment: Where Now", Vol. 34 *The International Lawyer* 2000 p. 1033; Peter T. Muchlinski, *Multinational Enterprises and the Law* (Oxford: OUP, 2007).

<sup>17</sup> A. F. M. Maniruzzaman, *The international law of foreign investment in the age of globalization: from panic to panacea* In response to the paper by M. Sornarajah, "a law for need or a law for greed? restoring the lost law in the international law of foreign investment", Vol. 6 *International Environmental Agreements: Politics, Law and Economics*, No. 4, 2006 pp. 329-357.

<sup>18</sup> Carr *op. cit.*, and *et seq.*

<sup>19</sup> This school of thought include Krugman who argues that protectionism and market intervention may indeed provide greater economic benefit to a country. See Krugman, *Increasing returns, Monopolistic Competition and International Trade*, 9 *Journal of International Economics* No (4) p. 467. See also Adam Smith *An Inquiry into the Nature and Causes of the wealth of Nations*, 1776.

meaning and non-governmental organisations have successfully harnessed citizens to question the role of the World Trade Organisation (WTO) and the philosophy of free trade as enshrined in GATT 1994, so much so that there is widespread agreement that trade needs a human face.<sup>20</sup>

Needless to say that these perspectives are needed to provide students of the discipline with a holistic appreciation of the positive legal rules, as well as, how they impact upon various geopolitical groupings. IBT must, therefore, be taught and learnt in its socio-legal context. The aim is not to study IBT in a way that will justify or sanctify a particular ideological worldview but to explore both the doctrinal and practical approaches to the subject in a way that provides a more holistic experience and understanding of this area of legal studies. This view of course is somewhat unpopular with other writers like Dalhusien who appears to regret that a so called gravity of interest and balancing of State and other legitimate interests have in time “diluted” the precision of the past and placed judges and arbitrators in a position whereby they may have become selective of the rules they apply to fit the particular type and context of the relationship at issue. For these writers developments in European Union (EU) trade law, for example, have been unduly motivated by the consumer protection policies, predominant in the political and academic discourse of the 1980s. The value judgment informing such views is based on the assertions that:

Cross-border commercial and financial transactions are not for widows and orphans. They are trained, certified and well paid professionals on both sides...This is a game for men and women, and not for boys and girls – caveat emptor and literal respect for a contract is more appropriate than importing easy escape from contractual commitments (duty to negotiate;

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<sup>20</sup> Carr op.cit., p. 6; see also Carr, “Towards Reconciling Free Trade and Environment”, in Economides, Bitten, Bridge et al (eds), *Fundamental Values*, Hart Publishing, 2000); Bhagwati, in *Defense of Globalisation*, OUP,2004. For incisive critique on the shortcomings of the international regulation of corruption in international business see Indira Carr, “Strategic Improvements In The Fight Against Corruption In International Business Transactions” *Journal of Business Law*, 2006 pp. 377-378.

large scope for recognition of error/mistake; *force majeure*; hardship, renegotiation) or using law to impose duties where no duties have been negotiated though they could have been.<sup>21</sup>

The preferred view would be one which holds that precisely because IBT takes place in a milieu where there is no common system of extra-contractual values to make reference to, it is incumbent on judges, jurists and lawyers everywhere to resort to the undeniable pool of jurisprudence of ethics and international equity that exist, which can be found in both public international law, international commercial and economic law; as well as in the enviable corpus of European legal tradition.

IBT, properly so called, involves contracts under which goods or services leave one country and are destined for another. If goods are involved they may be transported by land, sea or air usually in containers or as ordinary cargo.<sup>22</sup> A characteristic feature of contracts for the international sale of goods which distinguishes them from domestic commercial contracts is that the former are usually entwined with other contracts such as contracts of carriage of goods, contracts of insurance, loan and other banking transactions.<sup>23</sup>

Accordingly, Chuah states that the study of International Trade Law entails (a) the legal relationships between parties who sell and buy goods [to and] from each other; (b) their relationships with persons willing to carry the goods from one place to another; (c) the arrangements they have with insurers to protect the goods in the event of loss or damage, and; (d) any financing or payment agreements with banks or financial institutions.<sup>24</sup>

The IBT students must therefore, cope with an array of legal subject areas, legal instruments and materials. These include an appreciation of the relevant aspects of national

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<sup>21</sup> Wälde op. cit., p. 523.

<sup>22</sup> Note, however, that some contracts (such as *ex works* contract) will by all appearances be “performed” in one country but this does not remove their international contractual character because the goods deposited by the seller to a warehouse within the seller’s country are still for the benefit of a foreign party and will be eventually transported internationally.

<sup>23</sup> As Schmittoff aptly put it “within an export transaction there are many constituent transactions...” Schmittoff, op.cit. p. 2.

<sup>24</sup> Chuah p. 1. He appears unfortunately not to have stressed the transnational quality that must attach to the criteria he provided before it can be properly said to represent “international” trade law.

case law, European law and cases, public international law and cases, private international law and cases, international treaties and conventions, and model laws and rules.

## II. A. The Myths of Modernity of International Trade

Certain myths pervade common understanding of international business which ought to be briefly highlighted here. (reconsider the structure of this sentence) There is an assumption that the regulation of IBT is a very modern phenomenon and one which exists solely as a result of sophisticated governmental regulation and intergovernmental diplomatic relations. The correct view is that each epoch since antiquity and even beyond has produced its own interethnic or international business transactions based upon what is traded at the period and according to various levels of sophistication. Charles Darwin in his *Voyage of the Beagle* denoted the truth of the fact that international trade is a human instinct. He described the natives of Tierra del Fuego as primitive, yet he noted: “[t]hey had a fair idea of barter. I gave one man a large nail (a most valuable present) without making any signs for a return; but he immediately picked out two fish, and handed them up on the point of his spear.”<sup>25</sup>

It hardly needs to be told that the merchants of Europe were clearly not one of the first traders to engage in significant transnational trade. Letters of credit, for instance, existed among the black civilisations along the Nile including ancient Egypt. In time it spread through the ancient Greek to Roman civilisations, the Islamic civilisations and ended up in its modern manifestations as we have it in the world today. Indeed there is real evidence of a Babylonian clay promissory note dating back to about 3000 BC and there are accounts of bills of exchange used by Phoenician merchants.<sup>26</sup>

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<sup>25</sup>Some will indeed argue about the sufficiency of the value of a large nail in exchange for two fish and point to accounts like this evidence of the lopsidedness and unfairness of much of the trade in the colonial era. See Charles Darwin, *The Voyage of the Beagle* (Chapter 10 – Tierra Del Fuego) Literature.org The Online Literature Library available at <http://www.literature.org/authors/darwin-charles/the-voyage-of-the-beagle/chapter-10.html>

<sup>26</sup> See generally Braithwaite op.cit., pp. 45-47; see also M.M. Postan, *Medieval Trade and Finance* (London: Cambridge University Press, 1973) p. 57; Trimble, R.J. 1948 The Law Merchant and the Letter of Credit, *Havard Law Review* pp. 982, 984. no vol.



Eventually merchants driven by economic goals began to speak in a common language.<sup>27</sup> Perhaps the culmination of this age long reality is the development of the *lex mercatoria* and the use of modern sophisticated shorthand that today constitutes the standard trade terms in cross border trade – FOB, CIF, FAS, ex Works, etc – under the impressively sounding INCOTERMS 2000 drafted by the International Chamber of Commerce (ICC). By virtue of this evolution a seller and buyer in different continents can deal with a shipment by use of the term FOB (“free on board” and be certain as to the understanding that that the seller undertakes to place the goods on board a ship that has been appointed by the buyer, which has berthed or will berth at an ascertained port off shipment; and that all charges such as stowage, freight and marine insurance, unloading charges and import duties will be borne by the buyer).

International governmental relations and diplomacy has facilitated international trade particularly in this period of late modernity but that is not to say governmental involvement in international trade is completely indispensable or that the close involvement of governments in international business is a virtue in and of itself. It is not difficult to trace several instances of the threats that government regulation has posed to the idea of international trade. Although governments are certainly considered principal beneficiaries of a successful conduct of international trade they have also produced some of the strongest threats to the conduct of trade. Only recently have governments, perhaps, learned to aid the development of international trade by reduction of interference and deregulation. Throughout time and space governmental interference has come in many ways

Traditional empires, being despotic, restricted trade to the palaces and temples, forbidding *hoi polloi* from trading or travelling. In ancient and even up to the medieval times in some places only priests and princes and certain privileged merchants (who were closely regulated) traded and travelled. Hence the obvious necessity of establishing an explicit code of maritime law, founded on principles which shall conform to that invariable standard of

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<sup>27</sup> Carr, op. cit., 4.

natural equity that constitutes the only true basis of the “law of nations”.<sup>28</sup> The governments of powerful states assumed considerable hostility to the idea of trading on equal terms for everyone and on a fair and equal playing field.<sup>29</sup> The freedom of navigation for ships with goods over the seas was a difficult principle to accept even by many of the leading industrialised and economically powerful states of today. A commentator attests to this difficulty in the pre-modern era of international law when he wrote:

Notwithstanding all that had been written by Grotius on the Rights of War and Peace, we find Pufendorf declaring his opinion, long afterwards, that the questions of Free Navigation remained unsettled... In a letter addressed to M. Groning, by this celebrated writer on Universal law, (respecting a design which the former had announced, of writing a treatise on Free Navigation,) he makes these observations... “It is a curious subject; and what no person as yet, which I know of, has particularly handled”.<sup>30</sup>

At the close of the 19<sup>th</sup> century it was observed:

As long, however as arbitrary and unreasonable interpretations of the Law of Nations, shall be permitted to direct the conduct of several and independent states with respect to their foreign trade; so long will those injurious infractions of their respective maritime rights, which have furnished so many pretexts for naval wars, be continued: and so long also will the irritation,

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<sup>28</sup> Terence Kealey, “Why is a Hindu temple like a Soho phone box? Must I draw you a picture?” *The Times*, September 18, 2006 p. 19.

<sup>29</sup> Egregious use of gunboat diplomacy to overpower militarily weaker peoples and to disrupt pre-existent standards of mutually civilised trade diplomacy was a strong feature of Great Britain and other colonial powers. They utilised their vastly superior military power to dictate illiberal and grossly lopsided conditions of international trade. Examples of this approach abound in Africa, Asia and the Middle East. The African sovereign Jaja of Opobo, who was a trading partner of Britain, was lured into a meeting with the British consul aboard a warship, in the Gulf of Guinea and was arrested and forcefully sent to Accra on exile, sealing forever the sovereignty of his people. Jaja's fate came as a result of his having voiced the quite reasonable interpretation that trade with Britain ought not to preclude African independence in the practice of international trade nor involve a submission to foreign territorial intrusion in West Africa. Ike Okonta, “The Lingering Crisis In Nigeria's Niger Delta And Suggestions For a Peaceful Resolution” a *Report To Of The Centre For Democracy & Development* March 2000 available at [http://www.cdd.org.uk/resources/workingpapers/niger\\_delta\\_eng.htm](http://www.cdd.org.uk/resources/workingpapers/niger_delta_eng.htm) visited 9 February 2007.

<sup>30</sup> William Barton, *A dissertation on the freedom of navigation and maritime commerce, and such rights of states, relative thereto, as are founded on the law of nations adapted more particularly to the United States and interspersed with moral and political reflections, and historical facts*, (Philadelphia : J. Conrad, 1802).

that is naturally proved by such acts of injustice, supply a constant source of both public and private.<sup>31</sup>

Each epoch and generation inevitably produces the content of its international trade and its store of value that has international currency. An account informs us:

And one lucrative trade that the priests and princes often monopolised was the oldest and most despotic of all, prostitution. Temple prostitution was, therefore, a feature of Hinduism and other imperial cultures – and a profitable one too. There were, for example, some 400 women on the payroll at the Rajarajesvara temple in Tanjore in the 11th century. They were procured by priests who roamed the land in search of pretty young girls.<sup>32</sup>

### III. IBT AND ITS CONNECTIONS TO INTERNATIONAL LAW

It has been suggested that in the long march of mankind from the cave to the computer a central role has always been played by the idea of law and the conviction that a legal order is necessary and chaos inimical to a just and stable existence. Every society no matter the size or description more often than not creates for itself a framework of principles upon which permissible and forbidden conduct is explicitly laid bare. The same is necessarily true of what today is known as international law, the essential difference being that the principal subjects of international law are nation states and not individuals. International law is the body of legal rules, which apply between sovereign states, and such other entities as have been granted legal personality. The term international law was coined by Bentham and was synonymous with law of nations.

If aspects of International Business Law such as the *lex mercatoria* are seen as nebulous or difficult to pin down with particular reference to their legal quality, international

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<sup>31</sup> The writer, thus, embarked on an ambitious thesis “Shewing That Free Ships Make Free Goods; According to the Law of Nations, as Understood and Generally Acted upon, Prior to the Year 1780”. Ibid.

<sup>32</sup>Kealey, op.cit., p. 19.

law on the whole fares much worse in comparison.<sup>33</sup> First of all there is no supreme body to draft international law. Secondly the legal regime is overwhelmingly but not exclusively one, which requires the consent of those that it seeks to govern. Thirdly, there is no international court before which those who break the laws may be dragged without much ado. Fourthly there is no single standing legislature to keep the law abreast of latest needs in the international society. Fifthly, there is no executive power to enforce the law in the same way the executive of a state can and there is no police or standing army. Sixthly, the principle of state sovereignty and sovereign equality of states retains till present a potency that makes clear that it is generally unrealistic to expect any greater level of cohesion and sanction in international law than presently exist.

There are enough reasons however to dispel the notion that international law is not law.<sup>34</sup> What distinguishes international law from international relations generally is that it is a distinctive mode of discourse because of the rules, the procedure and process, which it employs in dealing with questions. Even the formulation of questions in a dispute of a

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<sup>33</sup> The challenge that bugs an international lawyer from the cradle of his practice to grave is one that calls upon him to justify his field of study as a legal discipline. Indeed from the time it assumed its shape as a separate discipline, some jurists have always doubted if international law is indeed “law” in the proper connotation of the term. Hobbes and Pufendorf concluded quite simply that international law was not “law”. Austin’s positivist analysis also denied that international law had any quality of “law”. In his view, law is the body of rules for human conduct enforced by a sovereign political authority on members of an independent political society from whom he receives habitual obedience. A breach of the sovereign command is followed by sanctions. The sovereign himself being politically superior would owe obedience to no other superior authority. Having defined his subject this way he was concerned with positive law as well as with what the law is and not what it ought to be. Austin, thus, had no problem in coming to the conclusion that international law is in fact “law improperly so called” and at best “positive morality”. He, therefore, proceeded to rank it alongside law by analogy, constitutional law and laws of fashion. Indeed it must be admitted that there are some differences between international law and municipal law, which have been pointed out by its cynics. Domestic lawyers particularly, think of law as certain, enforceable and subject to sanction in the event of non-compliance. They, therefore, often have great difficulty accepting as “legal” a system of rules, which appears appallingly negotiable, with unclear rules that are sometimes unenforceable and with no clear sanctions in the event of non-compliance.

<sup>34</sup> To begin with the problem with the Austinian view is that it was obviously limited by the experiences and realities of the era in which it was formulated. Austin understandably would have been handicapped by the 19th century English Constitutional Law approach to which he was familiar. His conclusions arose from an examination of the nascent field of international law through the spectacle of the municipal law, which he knew best. His view was limited by his own definition of law as well as by the undue influence of positivism, which exaggerated the consent theory of law in his time. Since the 19th century a lot of jurisprudence has pretty coherently and cogently argued that the idea of law even without sanctions still makes a lot of sense. Those who seek sanctions *simpliciter* may be shown to have misunderstood the legal process and the legal method. Sanctions are indeed a very unimportant part of legal enforcement.

political or social nature between peoples and states is going to be affected by the input of international law knowledge. Every state does accept the existence of international law as something that is distinct from every day international intercourse. That acceptance of the reality of international law is important in refuting the proposition that international law is not law. The validity of international law as a field of legal discourse necessarily validates other disciplines that depend on it for their sustenance. It is in this way that international law validates IBT. Much of IBT takes place within the purview of the principles, rules and formalities of public international law.

There is, moreover, a clear juncture where public international law (PIL) and international business law meet so much as to be nearly inseparable. This area is that of Treaty Law. It is through treaties that many aspects of international business law have traversed the entire world especially since the dawn of the United Nations era. The United Nations Commission on International Trade Law (UNCITRAL) mechanisms, bilateral and multilateral investments treaties, the dispute resolution mechanisms such as that of the International Centre for Settlement of Investment Disputes (ICSID), etc. are all products of the sister discipline of public international law. Perhaps one of the best evidences in favour of the legal value of international law (and by extension international commercial law) is that it is accepted and treated as part of the law of the land in many national constitutions. Thus, Gray J. said in the *Paquete Habana*,<sup>35</sup> “International Law is part of our law, and must be ascertained and administered by the Courts of Justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”. The British Lord Chancellor, Talbot, also said in *Barbuit's Case*<sup>36</sup> “the law of nations in its fullest extent is and forms part of the law of England”. The practical effect of this is that municipal law, which to positivists remains the best expression of law, is interpreted so as to give effect to international law. Indeed in many jurisdictions it has been the position for long that whenever there is a clash between international law and municipal law in a case before municipal courts,

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<sup>35</sup> (1900) 175 US 677 at 700.

<sup>36</sup> (1735) 25 E.R. at 777.

the rule under international law shall prevail. It is through this discourse that many aspects of the laws of IBT derives the validity and the respect that is given to the constituent precepts, concepts and agreements; not only by businessmen but by courts and tribunals worldwide. It is also in this way that public international institutions (including the UN and the ICJ, and private international law institutions such as the ISCID, International Bank for Reconstruction and Development (World bank (IBRD), and International Monetary Fund (IMF)) continue to treat the contents of public and private international law as legally binding and not just as a set of ethical rules or regulations. Indeed it must be emphasised that many of these bodies owe their very existence to the precepts, rules and existence of international law.<sup>37</sup>

The intersectional ties between IBT and international law are many. To begin with and as correctly noted by Chuah, the law of international trade may also be examined from the perspective of the states from which goods emanate and/or are shipped to. This primarily raises issues of public international law.<sup>38</sup> There are aspects wherein they allegedly share the same vagueness as for instance in relation to the concepts of *lex mercatoria* (in IBT) and *opinion juris* (in PIL). There are also areas where the two bodies of laws are in close collaboration and the laws develop together and in reliance on the logic of each other. These include the area of sovereign immunity and the regulation of commercial transactions of foreign governmental bodies with each other or with private persons. Indeed there are celebrated instances throughout the course of the last century where PIL has come to the rescue of the sanctity of IBT sometimes at the expense of the settled principles of PIL itself.<sup>39</sup> There have been cases in which an English court's judgment in applying international law has been equivocal so as to affect adversely the sanctity of business and commercial transactions.

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<sup>37</sup> It may, thus, be considered today that the never-ending dispute as to whether international law is law is in fact artificially kept alive. The question has become merely rhetorical and at best is useful as a line opener at cocktail events. While the dispute may continue as an intellectual exercise, it does not affect the value of the subject one way or another. Treaties are still being made and respected and international courts and tribunals continue to hand out judgements, which are more honoured in their observance rather than in their breach. That there are differences between international law and municipal law is undeniable. The point, however, is that they are both bodies of law. It will therefore appear that international law is a law of co-ordination and not one of subordination. Whereas domestic law is vertical in structure international law is horizontal.

<sup>38</sup> Chuah op. cit., p. 1.

<sup>39</sup> See for instance the celebrated *Trendtex case* discussed below.

In *West Rand Central Gold Mining Co. v. R.*,<sup>40</sup> a petition of right was denied on the basis that the conquering state (Great Britain) was not successor to the financial liabilities of the conquered state (the South African Republic) before the outbreak of war. Central to such decisions is the controversy relating to whether a treaty is law within the UK if it has not been formally incorporated into national law. The issue of incorporation was advanced before the court and Lord Alverstone, C.J., was of the view that the PIL doctrine of incorporation holds good but at the same time he shared the concern of Cockburn, C.J., regarding questions of evidence of the rules of international law. Thus, the judgment pronounced interestingly also contained elements of the principle of transformation in the form of requirement of some “assent” by Great Britain.

However, in the more recent case *Trendtex Trading Corporation v. Central Bank of Nigeria* a complete turn around to the incorporation approach was made and the decision reached remains the *locus classicus* on the issue with serious implications for foreign public bodies engaged in IBTs. The Central Bank of Nigeria modelled on the Bank of England issued an irrevocable letter of credit for over \$14,000,000 in favour of the plaintiff, a Swiss company, to pay for 240,000 tons of cement, which the plaintiff had sold to an English company. The cement was to be shipped to Nigeria where it was to be used to build government barracks. The plaintiff shipped the cement to Nigeria but there was congestion in the port of discharge and the Central Bank declined to make payments claimed to be due for the price and for demurrage. The plaintiff claimed against the Central Bank for payments due in respect of the bank’s breaches and repudiation of the letter of credit. The plaintiff’s appeal was allowed for the reasons: (1) the bank, had been created as a separate legal entity with no clear expression of intent that it should have governmental status and therefore, was not an emanation, arm, alter ego or department of the State of Nigeria and could not be entitled to immunity from suit; and (2) even if the bank were part of the Government of Nigeria, since international law now recognised no immunity from suit for a government department in respect of ordinary commercial transactions as distinct from acts of a governmental nature, it

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<sup>40</sup> [1905] 2 KB 391

was not immune from suit on the plaintiff's claim in respect of the letter of credit. The modern principle of restrictive sovereign immunity in international law, giving no immunity to acts of a commercial nature, is consonant with justice, comity and good sense. The Court led by Lord Denning stepped outside precedent in this judgment. The preferred view following the incorporation approach was to make a distinction between *juri imperii* and *jure gestionis* (acts of State and acts of a commercial nature) conceding immunity for the one but not for the other.<sup>41</sup> Whereas changes in customary law will continue, international law not being bound by *stare decisis*. It was, therefore, necessary to free the UK from the shackles of the transformation approach for the assimilation of customary rules of international law. It is notable that an attempt was made to normalise the situation through legislation namely by the State Immunity Act 1978. The incorporation approach was clearly reaffirmed by the Court of Appeal in *Maclaine Watson v. Department of Trade and Industry*. In conclusion the position is that in Britain a customary rule of International law or indeed a customary practice of the international merchants will be applied provided it is not inconsistent with statute. If municipal law is clearly in conflict, the courts will no doubt apply municipal law, leaving the issue to be settled at the international level through diplomatic action.

With these few points in view it is clear that there is much merit in Chuah's conclusion:

International trade law cannot be emancipated from European or international law by virtue of the relationships it engenders and also the fact that English law is now irrevocably tied to EU law and various international provisions.<sup>42</sup>

#### **IV. IBT AND ITS CONNECTIONS TO EUROPEAN UNION LAW**

Suffice to mention that the facilitation of international trade was the primary motive and remains the driving force in the formation of EU Law. EU law, therefore, remains one of the

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<sup>41</sup> Arguably the danger fraught in the pre-existing situation, which probably accounts for Lord Denning's preference for the incorporation view, is that once a "transformed" or adopted rule is applied in English Court it becomes part of *res judicata* to which the principle of *stare decisis* will apply.

<sup>42</sup> Chuah op. cit., p. 13.



important laws that govern relationships in international trade. This is more so in the territories that fall within the union. In certain restricted cases EU regulations on IBT may have extraterritorial applications or effects, such as in relation to the prohibition of corrupt acts.<sup>43</sup> In England, EU law is a primary source of law and this includes international business rules and regulations. Note may be taken of Section 2 of the European Communities Act 1972 which provides that EU law shall have effect in this country as if it were made by the United Kingdom Parliament. The implications of this position include that EU law reigns supreme over national law and where there is a conflict between national law and EU law, the latter must prevail. This position was eminently enshrined in the *locus classicus* case of *R. v. Secretary of State for Transport Ex p. Factortame Ltd (No.2)*.<sup>44</sup> The pervasiveness of EU law within IBT is evident in many areas including: insurance, banking and credit arrangements, consumer protection, competition law, custom and excise regulations, mergers and acquisitions, procurements, etc.

## V. IBT AND ITS CONNECTIONS TO PRIVATE INTERNATIONAL LAW

Private international law or what is also referred to as the conflict of laws is of a central nature to IBT. The exportation of goods would ordinarily involve parties in different legal jurisdictions. The resolution of any dispute between them falls within the purview of private international law or the conflict of laws. It is, therefore, essential not only for the students and practitioners of IBT to relate closely to the field of conflict of laws but to pay particular attention to developments in national laws as well as trends in the opinions of legal officers

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<sup>43</sup> On March 30<sup>th</sup> 2004, the EU parliament became the first parliamentary institution to pass legislation dealing with the issue of revenue transparency in mainstream financial services legislation. An amendment to the “Transparency Obligations Directive” reads, “EU states should promote public disclosure of payments to governments by extractive companies listed on European stock exchanges”. EU Transparency Obligations Directive: European Parliament takes historic step on oil and mining transparency; PWYP Newsletter, Edition 2, May 13<sup>th</sup> 2004, [www.publishwhatyoupay.org](http://www.publishwhatyoupay.org). Note also the Publish What You Pay Campaign which promotes mandatory disclosure of all payments made by MNCs in oil and Gas as well as disclosure of all revenues received by governments. See Henry Parham, Publish What You Pay-Extractive Industries Transparency Is in Everyone’s Best Interests in Traub-Merz and Yates op. cit., p. 123 cf. the “Declaration on Fighting Corruption and Improving Transparency” issued at the G8 Evian summit (2003) available at <http://www.g8.fr/evian/english/home.html> visited March 23 2006.

<sup>44</sup> [1991] 1 A.C. 603.

and other aspects of national judicial thinking. The physics of the possible conflicting jurisdictions and the desirability of a comparative method are reflected in Jaffey's statement:

...an English businessman sells goods to a French businessman, the goods to be delivered and the price to be paid in Italy. In an action for breach of contract brought by the French buyer in the English court, a question arises on which the rules of English, French and Italian law are different. Which law is the court to apply?<sup>45</sup>

Hight provides a more interesting allegory in the following account:

Consider two castaways who make an agreement while on a rubber raft in the middle of the Sargasso Sea, relating to the disposition of the raft in exchange for a pocket watch. If they were to attempt to deny expressly any governing law system, and insist at all times that their mutual undertaking, one to buy the raft and the other to sell it was enforceable in accordance with its terms by virtue of their collective will, they would have something that would look like a contract. It might even work like a contract as between themselves. But their so-called contract can only go so far and no further. The castaways might have a successful exchange of raft and watch; however, I would urge that what they have concocted is not a contract as we know it. The castaways' agreement could become a contract only if they were to wash ashore, for example in North Carolina or Bermuda, and the person with the watch were to refuse to hand it over for the now useless raft.<sup>46</sup>

Because countries adopt differing choice of law rules the resolution of a dispute may involve different conclusions depending on where the matter comes up for decision. The field of private international law lays out the principles, rules and methods by which conflicting laws belonging to different jurisdictions are resolved. The various possible conundrums within the field of conflict of laws, which are nearly endless, have in fact had the effect of

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<sup>45</sup> See A.J.E Jaffey, *Introduction to the Conflict of Laws* (London: Butterworths 1988) p. 133.

<sup>46</sup> Keith Hight, *The Enigma of the Lex Mercatoria*, 63 *T. UL . L. R. EV* .p. 615. In this interesting allegory he discarded the idea of stateless contracts and concluded that there being no contract what will be needed the moment one seeks to enforce the contract, or to confirm an arbitral award based upon the contract would be the influence of a specific states contractual laws; "like the weightlessness of astronauts returning to earth, the contract's statelessness vanishes".

increasing the appetite of states for transnational harmonisation of contractual rules. This explains much of recent developments in the international regime governing the International Sale of Goods. Examples of this include the Uniform Laws on the International Sale of Goods (applicable in England under the Uniform Laws on International Sales Act 1967 where the parties adopt this instrument) and the United Nations Convention on Contracts for the International Sale of Goods 1980.

The decisions of diverse national courts may assume great significance especially when they snowball into changes in the law that affect both public and private international law via the route of the law of IBT. In the area of foreign state immunity, for instance, the connections of public and private international law not only come become easier to spot but the disciplines would appear to clash somewhat “violently” and in such a manner that good understanding of the two disciplines and particularly the relevant aspects of IBT would be required in the resolution of emergent disputes. The distinctions between the public and private activities of state agencies regularly come up for consideration before national courts. As far back as the 1920s the view of the US government was that,

agents of foreign governments engaged in ordinary commercial transactions in the United States enjoyed no privileges or immunities not appertaining to other foreign corporations, agencies and individuals doing business here and should conform to the laws of this country governing such transactions.<sup>47</sup>

The opinion of legal officers on this aspect of IBT in time affected judicial decisions and thereafter, both factors become evidence of state practice and customary international law.<sup>48</sup> In time the *Trendtex Trading Corporation* case discussed above came to cement the

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<sup>47</sup> Kuhn, *ibid* p. 773.

<sup>48</sup> The World Bank has estimated that the amounts involved in money laundering are in the region of US\$ 800 Billion – US\$ 1 trillion and according to the IMF money laundering accounts for 2 to 5 percent of the world GDP. US Senator Carl Levin admits: “It is estimated that half of that money comes to the United States”. James Petras, “‘Dirty Money’ Foundation of US Growth and Empire - Size and Scope of Money Laundering by US Banks” *La Jornada* [Mexico], 5/19/01 also available at [http://www.fromthewilderness.com/free/economy/053101\\_banks.html](http://www.fromthewilderness.com/free/economy/053101_banks.html) ; Indira Carr, “Corruption In Africa: Is The African Union Convention On Combating Corruption The Answer” *Journal of Business*

law at least for much of the common law jurisdictions. The influences of the various forms of laws on each other are apparent. This realisation is reflected in the conclusion reached by Louis Sohn:

In other areas, such as international transactions, public and private-law doctrines are interacting, and one has to be very careful in distinguishing clearly between the impact of such public fields as antitrust and taxation on the public side of these transactions, and the influence of the practices of the business community on the private-law aspects of the problem.<sup>49</sup>

## VI. IBT AND ITS CONNECTIONS TO POLITICS AND INTERNATIONAL RELATIONS

One of the most enduring myths that exist in the minds of students and practitioners of the laws governing international business transactions is that which believes that the study of the laws of IBT is essentially if not entirely a strictly legal affair and that the field is devoid of political, sociological and psychological considerations. IBT as a legal field, however, is as dependent on socio-legal realities as any other field of legal ordering. Developments in the law governing international business soon thereafter affect and impact upon international relations.<sup>50</sup> One area in which this connection becomes increasingly glaring is in the regulation of corruption in international business transactions. The intolerable levels of corruption in international business transactions and the phenomenon of “grand corruption” is arguably traceable to the parochial agenda of free fall liberal capitalism which is part and parcel of the architecture of globalisation. Corruption costs represent five per cent of the world economy – or more than US\$ 1.5 trillion a year, according to World Bank figures published at a United Nations conference on corruption. Yet it appears that the relatively slow

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*Law* (2007), Issue: March, p. 111, 123, 124. See also In S. Rose-Ackerman, *Corruption and Government*, (Cambridge: Cambridge University Press, 1999) p. 27. On arguments about the hypocrisy and conspiracy of the leading western financial jurisdictions in the international money laundering problem see J. Ziegler, *Switzerland Exposed* (London: Allison & Busby, 1978).

<sup>49</sup> Louis B. Sohn, “The Many Faces of International Law”, Vol. 57 *American Journal of International Law*, No. 4. (1963), pp. 869-870.

<sup>50</sup> Arthur K. Kuhn, “Sovereign Immunity Limited to Essential Government Functions: *New York v. United States*”, Vol. 40 *American Journal of International Law*, No. 2. (1946), pp. 374-376. See also Arthur K. Kuhn, “The Extension of Sovereign Immunity to Government-Owned Commercial Corporations”, Vol. 39 *American Journal of International Law* No. 4 (1945), pp. 772-775.

pace of the development of international anticorruption laws accounted for by international politics and the vested interests of powerful multinational organisations. Indeed a cynical view holds it that much of the relative progress and international legal attention given to anticorruption laws is a result of the unfortunate September 11, 2001 terrorist events that affected the United States.<sup>51</sup>

Legal and political commentators of the critical tradition like Noam Chomsky make the point that redressing the massive inequities in international economic and commercial relations is not just a lofty ideal, but constitutes the very essence of the survival of the global economy. The writers invite scholars to question whether western-imposed economic models and solutions that have been peddled as panacea for economic growth have in fact delivered the promised levels of growth and positive indicators in their own economies, needless to mention those of the many developing regions and countries that have been locked into satellite-metropole relationships. These writers persuasively invite us to consider whether the massive levels of rising poverty in Africa, Asia and many parts of Latin America undeniably prove “the urgency of establishing trade based on true democratic agreements among people.”<sup>52</sup> Asif Qureshi also persuasively concludes that “[t]he role of law is an important safeguard against power oriented diplomacy”.<sup>53</sup>

Sociological and psychological phenomena are also not beyond the field of interest of anyone studying the law of international business transactions although it takes acute and elaborate evaluation to detect these influences. It is possible to identify evidence of Holmes’ thesis that the “prophecies of what the courts will do in fact” is the basis of much lawyerly and judicial action in law.<sup>54</sup> Judicial prejudices are rife in the jurisprudence of national courts

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<sup>51</sup> As a writer put it “it wasn't until the attacks of 11 September 2001 that concerted, coordinated international efforts began to catch the launderers. Among the many lessons learned from that day was that without laundered money there would be no terrorism, so regulations were passed to try and stop the funding of militant activities” Michael Buchanan, *Dirty Money World Agenda: The BBC International Journal* Feb 2006 p. 8.

<sup>52</sup> Noam Chomsky “Starving the poor” *The News International* (Pakistan) | 16 May 2007 available at [http://www.thenews.com.pk/daily\\_detail.asp?id=56097](http://www.thenews.com.pk/daily_detail.asp?id=56097) accessed May 16 2007. By

<sup>53</sup> AH Qureshi, “Some Lessons From 'Developing' Countries' Trade Policy Reviews in the GATT Framework: An Enforcement Perspective” Vol. 18 *World Economy* 1995 No. 3 p. 502.

<sup>54</sup> Holmes op. cit., pp. 459-460.

and the unwary eye may miss this in the examination of cases relating to business transactions. In the decision to stay an application on grounds of *forum non conveniens* an English court will, for instance, act in a biased manner to prevent the possibility of a foreign public policy considerations being applied where there are English public policy issues as well. Thus the primacy of what is the subjective exercise of English public policy is enough ground to prevent foreign treatment of the case even where all other substantive indications point to the desirability of the case being heard elsewhere. Judicial perception of foreign lands will also negatively prejudice a litigant who wants the case to be heard elsewhere.<sup>55</sup> It is possible to argue that sometimes in subtle ways prejudices and sentiments may quite unfairly interfere with judicial action. In *Minores Finance Ltd v Afribank Nigeria Ltd*.<sup>56</sup> The court readily accepted that there will be considerable delays in obtaining Nigerian Exchange Control approval in remitting US dollars and that there will be considerable delays in enforcing a judgment in Nigeria whereas an English judgment could be enforced against assets in Ireland.<sup>57</sup> In this way it may be deduced that notional prejudices and mindsets are part and parcel of the making of laws and judicial precedence in IBT. This reality perhaps accounts for the accelerated development of denationalised modes of international commercial dispute resolution mechanisms as well as the increasing recourse to the principles of the so called *lex mercatoria*. The extent to which psychological and cultural preferences play a role in the founding or refusal of jurisdiction of courts, the grant of stays in favour of arbitration abroad and in the refusal of enforcement of foreign judgments under considerations of public policy deserves closer study by today's lawyers and other social scientists.

The reality is that just as constitutional lawyers study political theory, and political theorists inquire into the nature and substance of constitutions, so too should the scholars of IBT and those of international politics seek to learn from one another. This idea has been

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<sup>55</sup> *Banco SA v. The British Bank of the Middle East* [1995] 1 Lloyd's Rep. 134 (504).

<sup>56</sup> [1995] 1 Lloyd's Rep. 134.

<sup>57</sup> In some cases the prejudice is based largely on whimsical considerations such as the conclusion that a Texas action ought not to be encouraged because the party who started the action desired a negative declaration. The English court readily granted an injunction to restrain the foreign proceeding. *Sohio Supply Co v Gatoil (USA) Inc.* [1989] 1 Lloyd's Rep. 588.

attenuated with much merit in the scholarship of legal theorists like Anne-Marie Slaughter, who noted that “If social science has any validity at all, the postulates developed by political scientists concerning patterns and regularities in state behaviour must afford a foundation and framework for legal efforts to regulate that behaviour”.<sup>58</sup>

In this way “critical legal scholarship” as well as socio-legal theory have a unique usefulness in informing the law and practice of IBT. Allowing these schools of thought to infiltrate the discipline of the law of international business transactions will no doubt provide it with a new sensibility and self-consciousness. Just as liberal international lawyers have reached out to international relations scholarship to recast the ways in which rules and power are approached so also has a growing number of leading experts of international business transaction found it necessary to make constant runs into the province of international politics to enrich their analysis. The traditional debates about the source and power of norms have been invigorated by these approaches.<sup>59</sup> When this approach is adopted, much of what masquerades as present day international commercial law will be identified in its true colours as very much based in the relations of power between political entities. In the 1840s when China as Britain’s trading partner woke up to the tragic consequences of the massive supplies of opium on its population and prohibited further supplies by British traders via India, Britain unleashed intense naval operations and occupied Chinese ports and cities. The late English historian J.M Roberts wrote of this incident as follows,

Outright bullying forced on China a peace treaty in 1842 which required the opening of her ports to foreign trade, the levying of a single rate of fixed duty on imports, and the cession of

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<sup>58</sup> Anne-Marie Slaughter Burley, “International Law and International Relations Theory: A Dual Agenda” Vol. 87 *American Journal of International Law*, No. 2 (1993), pp. 205.

<sup>59</sup> Note the interesting exposition of David Deese in relation to political wheeling and dealing in the making of international trade law. David A. Deese, *World Trade Politics: Power, Principles and Leadership* (Abingdon, UK: Routledge, 2008). Cf the explorations of Simpson on the interconnectivity of international law with international relations. G. Simpson, “The situation on the international legal theory front: the power of rules and the rule of power”, Vol. 11 *European Journal of International Law*, No. 2, 2000 , pp. 439-464.

Hong Kong to Britain.... These were Europe's first interferences with China's internal sovereignty. The episode is not one on which many Englishmen now look back with pride.<sup>60</sup>

The situation has arguably scarcely changed as rich and powerful states with surprising frequency and ease still determine the work of various fora of multilateral legislation relating to international business and trade law. The scope of unilateral action may have reduced for individual powerful economies but acting in cooperation, in a manner that gives newer expression to the "game theory", richer and powerful states affect the course of nearly all aspects of international business regulation. A writer highlights this reality in the following words: "what becomes apparent at the [multilateral] negotiation session is often less a product of that meeting than a result of painstaking groundwork that has occurred, on a bilateral basis, in the weeks or months preceding".<sup>61</sup> Another author notes, "One way of cooperating is to ignore voices of dissent and work with those with a shared interest...Process opportunism describes efforts to garner influential allies and prevent the emergence of opposing coalitions"<sup>62</sup> Legal analysis of IBT must, therefore, make generous allowances for *real politic* both as a cause and effect of the international regime of regulation of IBT. The

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<sup>60</sup> J.M. Roberts, *A History of Europe* (Oxford: Helicon Publishing Ltd. 1996) p. 390.

<sup>61</sup> Lax David and James K. Sebenius "Thinking Coalitionally: Party arithmetic, Process Opportunism, and Strategic Sequencing," in H. Peyton Young ed., *Negotiation Analysis* (Ann Arbor: University of Michigan Press, 1991) p. 166 quoted in Deese op. cit., p. 31. The game theory principle was introduced primarily as a doctrine within the field of theoretical economics. Yet this principle arguably also has applications within the fields of international law and international relations.

<sup>62</sup> Deese *ibid.*, p. 31. Philippe Sands' account of discussions on the stabilisation of green house gas emissions at the Rio Convention (31 I.L.M. 849 (1992)) is illuminating of the ease with which the wishes of developing states, some with very large populations, can be sidelined and compromised. "The OPEC countries signalled their objection. It has never been clear to me whether the United States might secretly have been hoping they would succeed. On the last day of negotiations, late into the night, the French chairman of the negotiations, the avuncular French diplomat Jean Rippert, met with a representative group of states, the so-called 'friends of the chair' He appeared the following morning to present to the assembled plenary a compromise text. This was to be taken up or rejected, it was not open to further negotiation or discussion. The clock had stopped. We had an hour to review the draft. When we returned Saudi Arabia, Iran, Nigeria and other OPEC countries objected. To adopt the text as it stood would undermine their economic prospects, they insisted. The chairman asked whether there were any formal objections to the adoption of the text. He looked around the large conference room at the United Nations headquarters in New York packed to the rafters with official delegates and observers from industry and the NGOs. Many OPEC countries vigorously waved their nameplates in the air, trying to attract M. Rippert's attention. He did not see them although everyone else did. Declaring that he could see no objections, the chairman announced the Convention's text to have been adopted, to great applause and relief. This was consensus in international law-making –not the same as unanimity. International law on global warming was up and running". Philippe Sands, *Lawless World: Making and Breaking Global Rules* (London: Penguin books, 2006) pp. 85-86.



ardent practitioners of international business will at any rate benefit from being adept at the skills of diplomacy. Yet lawyers must refuse to submit to the logic of power and force as justification of right in the field of international commercial law.

## VII. CONCLUSIONS

The study of the law governing international business transactions is necessarily multidimensional and cuts across many disciplines within and without the law. The students and practitioners of international business transaction law must keep a close eye on national laws, public international law, European law, private international law and even politics and international relations. He/she must have a keen sense of history of legal ideas and will be well served by a critical legal approach to the phenomena of IBT.

The 21<sup>st</sup> century presents a very opportune time to examine the content and scope of the regulation of IBT. Ground breaking changes and developments in the fields of education, technology, international legislation and international relations all impact on the function of international business lawyer and the scope of IBT widens each year as commercial activities between states increase. The astronomical increase in IBT is symptomatic of the globalisation project. Business activities now require sophisticated regulation and multidisciplinary legal competence. The training of the international business lawyers must, therefore, be more wholesome and perhaps more demanding. The explosion of transnational networks, mergers and acquisition deals, the advent of joint venture regimes as standard mechanism for joint exploitation of resources and markets, increased franchise operations along with other incidences of movement of goods and services between states are all symptomatic of the effect of globalisation. These developments provide much scope for career specialisation by legal practitioners. They must, however, be reminded of the need to retain a wider appreciation of their calling as legal practitioners and to retain a keen appreciation of the ends of justice.

The successes of international harmonisation and unification of IBT as witnessed in INCOTERMS,<sup>63</sup> the Uniform Customs and Practice for Documentary Credits (UCP),<sup>64</sup> UNIDROIT and UNCITRAL rules, as well as the emergence of fast developing states of China, India, South Africa and the opening up of markets everywhere all denote the imperative of a re-examination of the job of the international business lawyers. These developments combine to make the task before IBT students, lawyers and practitioners both exciting and rewarding on the one hand while being perilous and terribly exacting on the other.

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<sup>63</sup> The intervening editions of Incoterms were dated 1953, 1967, 1976, 1980, and 1990. The ICC is understood to intend the ten-year interval to continue, so the next edition may take effect in 2010. Houston Putnam Lowry and Peter W. Schroth, "Survey of 1999 Developments in International Law" 74 *Connecticut Bar Journal* (2000) 406.

<sup>64</sup> The UCP represents over 70 years of legal discussion, formulation and revision. The last revision UCP 600 recently took effect in July 1, 2007. The previous issues were in 1933, 1951, 1962, 1974, 1983, and 1993.