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Content

Foreword

This Textbook has been prepared with the support of...... This Textbook, mainly directed to students, provides a picture of the legal aspects of the most relevant international trade issues. While recognizing the differences between the international 'public' and the 'private' trade law, the authors recognized that the two different disciplines cannot be studied separately. Lawyers and legal experts must have a thorough knowledge of all the aspects involving an international transaction, from the competent jurisdiction to settle any pathologic aspect of an international contract to the market access' rights protected by the WTO in a third country. Besides that, the Textbook is also a combination of global (WTO, Vienna Convention of the International Sales of Goods) and regional (EU, NAFTA and ASEAN) relevant rules. The result is a Textbook which captures different views regarding the law regulating international trade. The need to improve the trade relations requires the ability to understand these different attitudes and, when possible, to identify the best international practices which could be reproduced into the domestic legal framework.

I. INTERNATIONAL TRADE AND BUSINESS AND RELATED TRANSACTIONS

1. Historical Development of International Trade and Business Transactions

International trade and business transactions and the law governing these are not a new phenomenon. According to historians, since humans first lived in tribal societies, they have known how to exchange goods. The prehistoric equivalent of fairs existed in the boundary areas between tribal territories. The first international trade network discovered by archæologists appeared in approximately 3,500 BC in the ancient Mesopotamia (modern-day Iran and Iraq). Mention must also be made of the trade networks existing in China during 1,000-2,000 BC, the 'Silk Road'. Before Greek civilization, the Mediterranean Sea was an international trade centre very successfully organized by Phoenicia. Greek city-states started to compete with Phoenicia from 800 BC onwards in a growing trade network alongside their developing civilization. Alexander the Great's Conquest created trade paths extending to Asia and the Mediterranean Sea. Later, the Romans built a vast Empire with trade expanding to include what is nowadays the United Kingdom (hereinafter the 'UK') and Northern Europe.

International trade in Europe in the pre-mediæval period experienced a depression arising from the collapse of the Roman Empire. Later, during the Middle Ages, Arabian merchants continued the tradition of international trade, creating broad trade networks around the Persian Gulf, Africa, India and South-east Asia. In that period, the international trade between China and India, Malaysia and South-east Asia also developed. Seasonal fairs were created in the European cities in the Middle Ages. These were places where merchants brought goods from different countries for sale. Since then, emperors, such as the Emperor of Lombardy (Italy) in the eleventh century, had the policy of imposing a sales tax applicable in fairs and tariffs on goods transported to fairs.

During the late Middle Ages, the regional trade networks had developed considerably in Europe, such as the region along the coast of Mediterranean Sea, Venice, Florence, Genoa, and northern Africa. In northern Europe, in the mid-fourteenth century, approximately eighty trading cities and their merchants joined to create a flexible political union, the Hanseatic League; they had their own common commercial rules and enough military and political power to counter any invasions by emperors or other invaders. In that period, emperors and other heads of state began to conclude treaties aimed at the protection of commercial interests, and the application of a tariff policy in favour of their merchants.

In the late fifteenth century, when Christopher Colombus discovered America, and science, technical progress and maritime development opened the era to the conquering of world trade by Europeans. Then the European states created a worldwide colonial network. The task of their respective colonies was the provision of the raw materials for their European cities and manufacturing bases. The cities produced the completed products then colonies imported the finished goods produced by European centres.

A new international economic order began to appear when the World War II was coming to an end. At the Bretton Woods Conference of 1944, the global economic organizations the International Monetary Fund (hereinafter the 'IMF') and the International Bank for Reconstruction and Development (*hereinafter the „IBRD"*) were born. A global trade organization also appeared in the Havana Conference of 1948, i.e., the International Trade Organization *(hereinafter the „ITO"*). However, the ITO failed to survive; it was replaced by a 'provisional' mechanism governing international trade in goods, i.e., the General Agreement on Tariffs and Trade 1947 (*hereinafter the „GATT 1947"*). This 'provisional' Agreement governed the global trade in goods for nearly 50 years, until the creation of the World Trade Organization (*hereinafter the „WTO"*) in 1995**.**

Since the end of World War II, the global trade system, which has continuously developed over more than 65 years, is now standing in the multi-route crossroads. Where the WTO will head, together with global commitments to the liberalization of trade in goods; trade in services; protection and enforcement of intellectual property rights (*hereinafter the „IPRs"*), and international investment issues, among other issues, remains to be concluded. To overcome the relative ineffectiveness of the commitments to the liberalization of global trade, regional economic integration is now becoming the most appropriate foreign trade policy planned by most states.

The models of regional economic integration, such as the European Union (*hereinafter the „EU"*), the North American Free Trade Area (*hereinafter the „NAFTA"*), and ASEAN Free Trade Area (*hereinafter the „AFTA"*), to name but a few, have became familiar topics in many basic textbooks and casebooks of international trade law. Bilateral trade agreements will also play an important role**.**

2. Relative Distinctions between International Trade Involving Mainly States and Public Entities, and International Business Transactions Involving Mainly Traders

A. International Trade and Trade Policy

1. Why Do States Trade?

There are two main reasons advanced for why states trade with each other, such as

a) economic reason; and

b) political reason.

(a) Economic reasons

Free trade is not a new idea. It exists in different economic theories since - between the fifteenth and the eighteenth centuries in Europe, such as mercantilism, Adam Smith's absolute advantage theory, and the Ricardian comparative advantage theory, among others. According to Adam Smith,

The tailor does not attempt to make his own shoes, but he buys them from the shoemaker. The shoemaker does not attempt to make his own clothes, but employs a tailor.… What is prudence in the conduct of every private family can scarce be folly in that of a great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it… we have some advantage.

Adam Smith's arguments, mentioned above, regarding *specialization* and *absolute advantage* in international trade, were further developed by David Ricardo who, in his book *The Principles of Political Economy and Taxation* of 1817, offered the theory of *comparative advantag'*.

Comparative advantage is a concept central to international trade theory; it holds that a country should specialize in the production and export of those goods, and should concurrently import those goods in which it has a comparative disadvantage. This theory formed the basis for increasing the economic welfare of a country through international trade. The theory usually favours specialized production in which the country is relatively well endowed, such as raw materials, fertile land, skilled labour, or accumulation of physical capital. The comparative advantage theory is the explanation for why developed and developing countries can and do benefit from international trade. Following this theory, even the poorest countries with little or no absolute advantage can participate in international trade and benefit, on the basis of its comparative advantages. It seems not excessive to say that David Ricardo is the 'architect' of the current WTO. Economists in the nineteenth and twentieth centuries have endeavoured to refine the models of David Ricardo, such as Heckscher-Ohlin, Paul Samuelson, and Joseph Stiglitz, etc.

Economists through the ages saw so clearly, the citizens of a state benefit from getting as large a volume of imports as possible in return for its exports or, equivalently, from exporting as little as possible to pay for its imports. Openess to trade and investment promotes growth in a number of ways, including: it encourages economies to specialize and produce in areas where they have a comparative advantage over other economies; trade expands the markets to where domestic producers can access; trade diffuses new technologies and ideas, increasing domestic workers' and managers' productivity; eliminating tariffs on imports gives consumers access to cheaper products, increasing their purchasing power and living standards, and gives producers access to cheaper inputs, reducing their production costs and boosting their competitiveness.Liberalized trade and rapid growth, in not few countries, are responsible for much of the poverty reduction, such as China, India, Thailand, and Vietnam.

(b) Political reasons

It is often stated that *if goods do not cross frontiers, soldiers will*. In reality, trade protectionism is frequently a source of conflict. In 1947, representatives from 23 countries met in Geneva (Switzerland) to negotiate the GATT aiming at lowering import tariffs under the nondiscrimination principle and the rule of law, since they understood all too clearly that the *beggar-thy-neighbour* protectionist policies of the 1930s had been truly an economic disaster of the humanity, even one of reasons led to World War II.

Therefore, international trade becomes one of the most important foreign policies of most states today. The thinking is that countries which trade with each other are less likely to declare war against each other; the risk of armed conflict is reduced.

For many developing countries, economic power is a determinant factor of the existence and position of a state in the international arena. All are well aware of the impact of the international trade on national trade policy. Besides, international trade is a very important tool of the international integration process performed by states.

Following supporters of international trade, free trade among states is seen as the key to economic growth, peace and higher standards of living. However, the philosophy of free trade has not gone unchallenged.

2. Why Do States Restrict International Trade?

The reasons for international trade restrictions are multiple, including both economic and political. There are trade theorists who think that *free trade does not provide the best solution in economic terms. Protectionism and unfair trade practice are seen as providing greater economic benefit to a country*. Since the fifteenth century, economists have been advising that states should follow policies aimed at promoting international trade in their own interest on the basis of their comparative advantage; however politicians, do not always appreciate this advice as they have various reasons to pursue a protectionist policy.

The first is the national security and self-sufficiency arguments. These arguments serve the United States Government to protect its steel industry and agricultural products. A thriving domestic steel industry is needed for the US national defense.

The second is the infant industry argument. Sometimes states need to protect a domestic industry and employment, including an infant industry, from competition generated by imports and foreign services or service suppliers. A potential industry that, if once established and assisted during its growing pains, could compete on equal terms in the world markets. The third is *beggar-thy-neighbour* argument (see above).

In practice, this nationalistic international trade policy is highly likely to promote retaliation by other countries. Besides, public morals, public health, consumer safety, environment, cultural identity and other societal values would become reasons for protectionism. Governments are influenced by interest group pressures or national interests, and may determine various and sophisticated forms of protectionism, if necessary.

This kind of protectionist decision, in quite a lot of cases, would be good politics for many governments of both developed and developing countries.

3. What Is the States' Decision?

The answers differ case by case. Should states choose international trade or an isolationist policy? Protectionism or liberalization? Nowadays, the states' decisions usually focus on international trade, as political logic often prevails over economic logic. Like any international treaty, both domestic politics (influenced by political pressure) and international politics (based on compromise) of a state inevitably play a part in the negotiation and final outcome of an international trade treaty.

4. What Is International Trade Law?

Quite simply, it is the law governing international trade. The questions remain:

a) what is international trade?
b) in addition to states and international economic organizations which are main subjects, who are also the actors/subjects/players of international trade? Finally,
c) what are international trade rules?

(a) What is international trade?

International trade should be understood as international relations at the trade policy level, such as the tariff and non-tariff policy, offensive or defensive trade policy, or the economic integration policy, of a state. For example, there is a choice of global, regional, bilateral or unilateral approaches to trade cooperation **(see Part One of the Textbook)**; the interface between international trade commitments and domestic law. Currently, the treatment of developed countries is now one of the concerns of international trade. Thus, trade policy is certainly expressed in international trade treaties; and economic objectives remain at the centre of any international trade treaty.

(b) Who are the actors/subjects/players of international trade?

Main subjects of the international trade relations mentioned above are states and international economic organizations. In addition, new global „players" are emerging on the international trade scene.

It is not wrong to say that large countries and large economies still dominate the world trade. But international trade is also important for developed coutnries and least developed countries. The US, the EU and Japan remain key players but they are no longer dominant. 'Emerging powers', like China, India and Brazil, have played increasingly important role in international trade. They are emerging as key subjects in the production of manufactured goods and provision of services on the international markets, then are setting a new trend for other developed countries to follow. Although having an inconsiderable amount of total global trade, least developed countries as a whole are major producers of primary products, fuels, clothing and food products. It notes that their economic capacity varies widely depending upon a number of factors, including political stability and trade policy. International economic organizations involve strongly in international trade relations, among these it should note the WTO, IMF, WB, EU, ASEAN, etc.

Although the WTO is not the only relevant international organization, but it is right the broadest and most comprehensive, and to some extent governs regional and bilateral trade agreements. The potential expansion of regional economic integrations is clearly seen. Greater Asian regionalism would have global implications, reinforcing a trend toward three trade areas that could become quasi-blocs: North America, Europe and East-Asia.

The creation of such quasi-blocs would have implications for the ability to achieve future global WTO agreements. Regional economic integrations also become important actors in international trade relations, together with traditional subjects which are states.

Non-state actors, such as businesses, are now a growing influence on the trade agreements which are states' scene. For example, the Traderelated Intellectual Property Rights Agreement (hereinafter the 'TRIPS Agreement') that promotes stricter IPRs protection were clearly a response to lobbying by Western companies that owned and developed IPRs, such as pharmaceutical, entertainment and software companies.

The territories which are not states, such as Hong Kong and Macau, are now in a position equal to that of other actors in international trade. Hong Kong and Macau, together with China, are full members of the WTO.

The multiplicity of actors on the international trade scene could add both to the potential strength and the fragmentation of the international trading system.

(c) What are international trade rules?

International trade rules provide the rules of the game for the *„international trade game“*. It is a wide range of rules that are international and relate to *trade or economics having legal or regulatory nature*.

As international trade rules are the expression of trade policy, it is linked more closely to economics than almost any other area of law. International trade rules focus on the legal instruments that govern international trade flows. This includes international treaties relating to trade, as well as a part of demestic regulations affecting trade flows.

The WTO agreements are almost fully global treaties on the international trade matter. It provides a binding set of rules on a wide range of international international trade-related topics. In addition to the WTO agreements, there are numerous regional and bilateral trade treaties, and all these constitute a system of multilateral trade rules. The most prominent of the regional trade treaties are the EU, the NAFTA**,** MERCOSUR (the Southern Common Market) and the ASEAN Free Trade Area (*hereinafter the „AFTA“*)**.**

Having increased in large numbers in recent years, bilateral trade treaties are gaining in importance in the trade policy of many countries in the world.

Traditionally, international investment treaties have taken the form of bilateral investment treaties. Yet recently, investment provisions have been now incorporated in many bilateral and regional trade agreements, thus both trade and investment have been combined into a single agreement.

At the state level, states make provisions governing the cross-border movement of goods, services, labour, capital, and currencies, for example, concurrently possibly concluding treaties with other states and international organizations aimed at facilitating trade. If a state needs to promote international trade, it should create a legal environment that helps to increase the competitiveness of its goods, services, and labour in comparison with those of other states. Conversely, if a state needs to protect its domestic industries, employment, and technologies or to prevent capital flow going out from its territory, it should create a legal framework with a defensive orientation.

Thus, what is the role of rules governing international trade? How do international trade rules allow states to realize the gains of international trade? According to *Bossche*, there are basically four reasons explaining why there is a need for international trade rules.

Firstly, international trade rules restrain countries from taking trade-restrictive measures and help to avoid an escalation of trade-restrictive measures taken by states.

Secondly, these rules satisfy the need of traders and investors for a degree of security and predictability which will encourage trade and investment.

Thirdly, these rules help states cope with the challenges presented by economic globalization, such as public health, clean environment, cultural identity and minimum labour standards, etc.

Fourthly, it is the need to achieve a greater measure of equity in international economic relations.

B. International Business Transactions

1. Why Does A Business Expand Abroad?

The fact of a business expansion abroad usually aims at increasing turnover and profit, creating new markets, strengthening the business's reputation in international level, or ensuring the sourcing of raw materials. In the case where an enterprise decides to do international business, a firm knowledge of international business law and related law would be indispensable.

2. What Is International Business Law?

It is the law governing international business transactions. The understanding of international business law is not far from that of *international commercial law*.

(a) What are international business transactions?

There are various forms of international business transactions. The simplest way of doing international business is through direct sales done with a client abroad, i.e., importation and exportation. However, in some cases, it would be not easy to obtain a client and understand foreign markets. Therefore, business can decide to use an intermediary for the sale of goods or provision of services to or from a foreign supplier. There are two familiar intermediaries in international business: agency, and distribution.

A business may decide to produce its products abroad instead of producing these in its home country then exporting to foreign countries. It is the case that a business decides to license its IPRs to other businesses abroad and to allow this foreign business to produce and sell its products.

The international transfer of IPRs is one of several effective business activities, and creates opportunities internationally to disseminate their IPRs. There are various forms of IPRs transfer, such as the licensing of objects of industrial property rights (e.g., patents or trademarks), licensing of copyright, technology transfer, or franchising.

A Dutch pharmaceutical company may license its patent on a specific drug to a Slovak company producing pharmaceutical products i.e., the Dutch company allows the Slovak pharmaceutical company use the patent owned by the Dutch pharmaceutical company to produce this drug and sell it in Slovakia.

Similarly, an US movies company may license the copyright of a film to a French company for the duplication and sale of this film in EU markets. Besides, many companies, such as KFC, McDonald, and Pizza Hut are very successful in international franchising.

In following a strategic vision to some foreign market, a business may decide to invest directly in this foreign market. Foreign direct investment (hereinafter the 'FDI') could be under different forms, such as a branch, a subsidiary, a joint-venture, setting up a 100 per cent foreignowned enterprise, or *merger and acquisition* (*hereinafter the M&A*).

Besides, there are many other international business transactions and related transactions, such as international logistics, including international transport**,** lending, leasing, employment, foreign portfolio investment (*hereinafter the FPI*), international banking transactions, and international financial transactions (such as international taxation, international insurance), etc.

(b) Who are the subjects/actors/players of International Business Transactions?

Various subjects/actors/players participate in driving international business.

i) The main subjects are traders who one trades (for example, sales of goods, provision of services, FDI), including both individuals and businesses. The concept of 'trader' is not defined completely the same by different domestic laws.

ii) Besides, certain international organizations play a considerable role in advancing international business transactions, such as United Nations Commission on International Trade Law (hereinafter the 'UNCITRAL'); United Nations Conference on Trade and Development (hereinafter the 'UNCTAD'); International Chamber of Commerce (hereinafter the 'ICC').

UNCITRAL has moved towards formulating model laws which provide a legal framework for states to adopt and adapt to suit their own needs. For example, the Model Law on Electronic Commerce.

ICC also plays a dominant role in ensuring a level of harmonization through the formulation of rules for incorporation by those engaged in international business transactions. International Federation of Freight Forwarders Association *(hereinafter the FIATA)* plays an important role in the harmonization of rules through the promotion and use of standard forms such as the FIATA Multimodal Transport Bill of Lading.

iii) States involve in international business transactions also, yet as a special subject and sometimes do not behave as equally as other subjects, since this subject is the beneficiary of 'jurisdictional immunity'. Thus, what is the state's 'jurisdictional immunity'? Why a state becomes a 'special' subject involving in international business transactions?

The principle of the equality of states' sovereignty implies that the judges of one state may not pass judgment against a foreign state without the consent of the latter. This explanation originated from the rule 'par in parem non habet juridictionem' ('an equal has no power over an equal') in ancient international law. Although all of the states recognize the 'jurisdictional immunity' based on the rule mentioned above (in Latin), they do not have the same point of view as to the question whether this immunity is 'absolute' or 'restrictive'?

'Jurisdictional immunity' in international law concerns the question of the extent to which states, or their agencies or state-owned enterprises, may be sued in the civil courts of other states? and how far there may be execution on property of a foreign state? Originally in international law, the theory prevailing was that of 'absolute' immunity; this proved difficult to apply without consent from the foreign states. In fact, the 'restrictive' (or 'relative') immunity theory is fundamentally being applied.

'Absolute' immunity was supported by the principle of the equality of states' sovereignty and the 'Act of State' Doctrine. The 'Act of State' Doctrine originated from an US Court. The doctrine says that a nation is sovereign within its own borders, and its domestic actions may not be questioned in the courts of another nation. The 'Act of State' Doctrine was declared in the case *Underhill v. Hernandez [1897]* in which the New York Court reasoned: '…

Every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory'.

In 1964, the US Supreme Court applied the 'Act of State' Doctrine to the famous case Banco Nacional de Cuba v. Sabbatino [1964]. The case arose when Cuba nationalized its sugar industry, taking control of sugar refineries and other companies in the wake of the Cuban revolution. A large number of Americans who had invested in those companies lost their investments without compensation when the Cuban government assumed control. However, despite the losses suffered by US nationals, the Supreme Court upheld the 'Act of State' Doctrine by assuming the validity of Cuba's domestic action and therefore rejected the claim of US nationals against Cuba for their lost investments.

Besides, an argument supporting 'restrictive immunity' was found long ago in the Belgian case law, following that 'jurisdictional immunity' could be offered to a foreign state only for its acts of sovereignty (acts accomplished 'jure imperii'), not for its acts of private management, such as commercial (acts accomplished 'jure gestionis').

On 17 July 1878, for the first time, a Belgian tribunal refused to accept the 'jurisdictional immunity' of a foreign state in a civil case, in which the Government of Peru claimed its immunity in litigation concerning a transaction of the sale of guano. Following this judgment, the case related to commercial contract, therefore Government of Peru must accept jurisdiction of the Belgian commercial tribunal.

'Jurisdictional immunity' has relevance in only domestic juristictions, and none in international jurisdictions. *„…The distinction between acta jure imperii and acta jure gestionis… has no relevance in a public international forum, with respect to a state or to any other international actor which is subject to its jurisdiction".*

Justifications of 'restrictive' immunity are multiple. In the context of modern international trade and business transactions, the maintenance of 'absolute' immunity leads the state to a position more favoured than others. This is difficult to accept, since it affects fair competition in international trade and international business transactions. Following the point of view on 'restrictive' jurisdictional immunity, a state may itself restrict its jurisdictional immunity in order to act the same as other actors. This view was incorporated into the legislation of some states, particularly the US, and in some treaties.

A foreign state shall not be immune from the jurisdiction of courts of the US or of the states in a case in which the foreign state has waived its immunity either explicitly or by implication; or the action is based upon a commercial activity carried on in the US by the foreign state; or upon an act performed in the US in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the US in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the US; or rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the US in connection with a commercial activity carried on in the US by the foreign state; or rights in property in the US acquired by succession or gift or rights in immovable property situated in the US are in issue; or money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the US and caused by the tortuous act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; etc.

Besides, the view of 'restrictive' jurisdictional immunity could be found in the United Kingdom State Immunities Act 1978, Washington Convention of 1965 on International Center for Settlement of Investment Disputes (hereinafter the 'ICSID'), and others.

The fact that states are beneficiary of jurisdictional immunity, although which is 'absolute' or 'restrictive', makes these subjects 'special' in the relation between them and other actors in doing international business transactions.

(c) What are the rules governing international business transactions?

The rules concerning the rights and obligations of the subjects/actors entering into international business transactions need to be clear and certain. The lack of legal certainty has the potential to act as an impediment to do international business. These rules take on the task of addressing various legal aspects affecting international business transactions, such as international sales of goods contracts, carriage of goods, agency agreements, distribution agreements, international IPRs transfer, international logistics (including international transport), international payment, FDI transactions, international insurance, e-commerce, resolution of international commercial disputes, etc.

Given the plurality of legal systems and the variations in liability schemes, the harmonization through international trade treaties is widely seen as the best option.

(d) Inter-cultural view on understanding international business transactions

Today, companies divide their operations across the world, from the design of the product and manufacturing of components to assembly and marketing, creating international production chains. More and more products are in reality 'Made in the World', rather than 'Made in England', 'Made in France' or 'Made in the USA'.

Trading partners, clients, suppliers and colleagues involved in international business transactions could be from different societies with various understandings of trade and business, as well as social values. International Business Law should consider the harmonization of different understandings of international business transactions, even sometimes appreciate the differences and use these in order to compete successfully in the international market.

II. SOURCES OF THE INTERNATIONAL TRADE AND BUSINESS LAW

There are some problems, as follows:

Problem 1:

A/ *Vietnamese trader doing business in 'fashionable' clothes headquartered his company in Hanoi. In November 2011, he travelled to Italy and ordered 1,000 'in fashion' suits for men. He returned to Hanoi and received the goods shipped by sea by the Italian seller to Hai Phong Port after one month. What are the legal issues that traders have to know in this business transaction?*

- In order to arrive in Italy, the Vietnamese trader should have a passport issued by the Vietnamese authorities and a visa of entry into the EU.
- whether the sale of clothes contract between the traders could be governed by United Nations Convention on Contracts for the International Sales of Goods 1980 ('CISG'), while Vietnam was not yet member of the Convention?
- whether the Laws on Customs of both Vietnam and Italy have some connection with the WTO agreements?
- in the case where the Vietnamese trader considered that the goods sold by the Italian partner are 'out of fashion' suits, what is the law traders can apply, and what is the forum with the competence to solve their dispute?
- Vietnamese law, Italian law, or what law could be applicable to this business transaction?
- can contracting parties choose the law applicable?
- what are the criteria governing the choice of law?
- in the case where the Italian trader loses the lawsuit following the Italian tribunal's judgment, will this judgment have legal effect and be enforceable in Vietnam?

The application of international business rules will become more and more complex in the case where the business transaction in question is not international sale of goods, but FDI, FPI and other complex international business transactions.

Problem 2:

The state A imposed anti-dumping (hereinafter the 'AD') duties on coffee imported from the state B from 2005. The Department of Commerce of the state A (hereinafter the 'DOC') initiated the original investigation in January 2004, issued an AD duty order in February 2005, and has since undertaken periodic reviews and a 'sunset review'. The DOC calculated the margin of dumping based on a comparison of normal value (hereinafter the 'NV') and export price (hereinafter the 'EP') or 'constructed export price'. The NV in question involving a non-market economy (hereinafter the 'NME') was based on the producer's factors of production, which included individual inputs for raw materials, labour, and energy, based on the actual production experience of the individual respondent. The DOC relied on 'surrogate' values to determine the price at which the factors of production would be acquired in a market setting, relying on a specific 'surrogate' country for this exercise.

In the case of the state B, this 'surrogate' country has been state C. The DOC then applied ratios for the overheads, selling, general and administrative expenses, and profits into the calculation of the NV of coffee imported from the state B.. The resulting NV was compared to the EP, which is the price at which the product was first sold to an unaffiliated purchaser. In investigations, the DOC utilized 'zeroing practice' usually aplied in the state A, following which any instances of negative dumping are set to zero, as opposed to allowing the negative dumping to offset the positive dumping.

In this case, questions for legal experts are several:

- Whether the DOC's 'zeroing practice' is consistent with the state A's WTO's obligations and with the WTO's Anti-Dumping Agreement (hereinafter the 'ADA')?
- whether 'Zeroing' had no impact on the margins of dumping determined by the DOC?
- whether the state B's claim regarding 'Zeroing' has merit?
- what are the legal sources parties may use in this case? the ADA and/or WTO's cases?
- what cases are pertinent? US-Zeroing (Japan) [2009]? USZeroing (EC) [2009]? Or others?
- who bears the burden of proof?
- in those cases where there is an infringement of the obligations assumed under a covered agreement, what is the legal consequence?

An international trade or an international business transaction, although involved in by states, traders or any other actors, could be governed concurrently by several legal sources, such as domestic law, and international law (including treaties, international mercantile customs and usages, international cases) and other means.

1. Domestic Law

A. Various Sources of Domestic Law

Domestic law is very important in international legal practice. Domestic law in question, as separate from international law, includes law of foreign countries. In reality, the understanding and application of laws of other countries are always a 'nightmare' for both international traders and lawyers. The sources of domestic law are various and it could focus on some followings.

1. Legislation

Ancient international trade and business rules were created in order to protect foreign merchants and govern international transport in goods. The first written rules existed in the Hammurabic Code (2,500 BC), in which were stipulated the protections for foreign merchants and the breach of contract issue.

In general, domestic rules applying to domestic business transactions would concurrently apply to international business transactions. Besides, since states need to protect its national interests in international trade and business transactions, it should regulate policy such as on trade in goods, and on trading partners. Concretely, which goods/technologies would fall into the lists of prohibited import-export or restricted import-export? Which trading partners would not be beneficiaries of preferential treatment? Should it strictly regulate the strong foreign currency transfers abroad? In which sectors should it restrict FDI? An important source of domestic law concerning the international trade and business law consists in trade law statutes. For example, in the US legal system, the US Tariff Act 1930, US Trade Act 1974, US Trade Agreements Act 1979, US Uniform Commercial Code (hereinafter the 'US UCC') and others are very important sources of international trade and business law. Besides, various statutes concerning contract law, civil law, and civil procedure law, etc and included in the domestic law of countries are also truly pertinent legal sources. In terms of domestic law, the key areas covered are the so-called 'trade remedies' and customs law. Regulations on 'trade remedies' (mainly consisting of AD, countervailing duty and safeguard measures) are truly 'legal' trade barriers to both fair trade and unfair competition. Also important are customs regulations, under which governments collect import-export duties and regulate import-export.

2. Domestic Case Law

Another source of domestic law concerning international trade and business transactions is case law. Many are highly significant for legal experts, such as the Belgian case of 1878 concerning the 'restrictive' jurisdictional immunity; or the case United City Merchants (Investments) Ltd v. Royal Bank of Canada [1983] passed by an UK tribunal clarified the fraud exception of the principle of autonomy of the credit in the field of international payment, while the UCP 600 does not stipulate this kind of exception; and Banco National de Cuba v. Manhattan Bank [1981] related to the application of the 'Act of State' Doctrine by the US Court.

3. Other sources of domestic law

Domestic law includes national mercantile customs and usages as well as general principles 'in foro domestico'. These are the general principles found in domestic law and accepted by all legal systems. It originated usually from Roman law or was formulated in Latin, such as 'non bis in idem', 'nemo judex in propria causa', 'ex injuria jus non oritur', etc. Besides, the principles of due process, proportionality, non-retroactivity, etc are quite familiar with most legal systems all around the world. These principles are applied only as a subsidiary source, in the case of the nonapplication of other legal sources.

B. Limits of Domestic Law in Governing International Trade and Business Transactions

The effect of the domestic law of a state is usually limited to governing acts done by subjects who are its citizens and performed in its territory. The determination of a MNC's nationality becomes very important and complex in the case where government needs to protect the interest of its MNC in international business activities. The limit of domestic law in governing international trade and business transactions sometimes conflicts with the issue of the extraterritoriality of jurisdiction. The extra-territoriality of jurisdiction of a state is the competence to govern by law:

- Acts of breach of law done by its citizens and performed outside of its territory. For example, a Chief Executive Officer ('CEO') who is a Japanese citizen and performed the act of bribery in Slovakia would be put on trial by Japanese tribunal;
- acts done by foreigner and performed abroad injuring national security or other interests of state;
- acts of breach of law performed abroad of which victim is its citizen;
- acts of international crimes, such as sea piracy, air piracy, slave trade, genocide, etc.

The extra-territoriality of jurisdiction issue frequently leads to incidents in diplomatic relation.

2. International Law

A. International Mercantile Customs and Usages

1. Concept of International Mercantile Customs and Usages

International mercantile customs and usages are a very significant legal source of International Business Law. Traders, driven by economic goals, have always spoken in a common language, that of international mercantile customs and usages. International mercantile customs and usages could be understood as a whole of unwritten rules generated from the acts/behaviours of merchants and were considered as 'the law' by them. For example, International Commercial Terms (hereinafter the 'INCOTERMS'); Uniform Customs and Practice for Documentary Credits (hereinafter the 'UCP'); or International Standard Banking Practice (hereinafter the 'ISBP')

2. Lex mercatoria ('Merchant Law')

The true development of international trade and business law begun since Middle Ages, when international mercantile customs appeared and developed in fairs in Europe on the late seventeenth century. During the Middle Ages, merchants would travel with their goods to fairs and markets across Europe and use their mercantile customs. Over time, emperors allowed merchants from different countries and regions to use their mercantile customs for dispute settlement, therefore these customs came into effect. From beginning, lex mercatoria ('merchant law') was an 'international' law of commerce, since it existed independently of emperors' law. It was based on the general customs and practices of merchants, who were common throughout Europe, and was applied almost uniformly by the merchant courts in different countries.

During the Middle Ages, lex mercatoria included the whole of international mercantile customs and usages, with strong effects, and stipulating the rights and obligations of merchants. The scope of lex mercatoria was very broad, governing many commercial issues, such as the value and legal force of contract, breach of contract, letters of credit, accounting books, bills of lading, the setting up of a company, partnerships, bankruptcy, mergers, and trademarks. It emphasized freedom of contract and freedom of alienability of movable property.

„Their disputes would be settled by special local courts, such as the courts of the fairs and boroughs and the staple courts, where judge and jury would be merchants themselves. These merchant courts would decide cases quickly and apply the lex mercatoria as opposed to the local law".

Most significantly of all, it was speedily administered by merchant courts that avoided legal technicalities and often decided cases 'ex aequo et bono' (in equity). The lex mercatoria derived its authority from voluntary acceptance by the merchants whose conduct it sought to regulate. The lex mercatoria really suited merchants' needs during that period. As the centre of European commercial life, Italy had pride place in the development of lex mercatoria in the Middle Ages. Its merchants and lawyers were creative in the development of maritime and commercial instruments, such as the bill of lading and the bill of exchange, all of which gave rise to a corpus of substantive rules based on mercantile usage. The influence of the Italian merchants was felt throughout Europe, such that even the great fairs of the Champagne region (France) were dominated by Italian traders.

Later, when emperors gained wider powers, and more nation-states were created in the late Middle Ages in Europe, lex mercatoria tended to be integrated into domestic legal systems. For example, in the UK, lex mercatoria was a part of the UK law applied by commercial tribunals. The lex mercatoria was fully incorporated into the common law and this was largely done through the work of Sir John Holt (Chief Justice from 1689 to 1710) and Lord Mansfield (Chief Justice from 1756 to 1788).

However, most lex mercatoria changed through being applied by tribunals of different countries. From the nineteenth century, states started to conclude treaties relating to international trade and business transactions. Subsequently, lex mercatoria seems to remain of only historical significance. However, lex mercatoria, which is sometimes complemented by lex maritima ('the law for merchants of the sea'), still has an impact on the development of modern international trade and business law concerning the international sale of goods, international payment, and international transport of goods.

3. International Chamber of Commerce (ICC) and Compilation of International Mercantile Customs and Usages

The ICC is an international non-governmental organization serving world business. The ICC plays a dominant role in ensuring harmonization through the compilation of international mercantile usages for incorporation by those engaged in international business transactions. The ICC has produced numerous uniform rules, adopted by incorporation into contracts. These fall broadly into three groups: banking and insurance, international trade and international transport.

Many of these rules are based on what the merchants may have adopted as customs or standard practices over time for their own convenience. For example,

1. International Commercial Terms ('INCOTERMS')
2. Uniform Customs and Practice for Documentary Credits ('UCP')
3. International Standard Banking Practice ('ISBP')

4. International Standby Practices ('ISP')
5. or the UNCTAD/ICC Rules for Multimodal Transport Documents.

Bankers throughout the world have adopted the UCP, now used almost universally in documentary credit transactions.

B. Treaties

Treaties are dominant source of international trade and business law. There are different means of the classification of treaties. International trade and business treaties would be bilateral agreements or multilateral agreements, including global and regional levels.

At the global level, good examples of international trade and business treaties include WTO agreements; United Nations Convention on Contracts for the International Sales of Goods 1980 ('CISG'); United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter the 'New York Convention'); The Hague-Visby Rules and the Hamburg Rules (see Section Two - Chapter Six of the Textbook), etc.

Within the framework of the WTO agreements, there are 'plurilateral' trade agreements. These are agreements voluntarily concluded by some WTO members, thus came into effect for these members only. Plurilateral agreements are not binding on other WTO members who do not conclude them. On the date from when WTO entered into force (1 January 1995), there were four plurilateral trade agreements: the Agreement on Trade in Civil Aircraft; the Agreement on Government Procurement; the International Dairy Agreement, and the International Bovine Meat Agreement. The Information Technology Agreement 1996 was a recent plurilateral agreement. In late 1997, the International Dairy Agreement and International Bovine Meat Agreement were terminated. The conclusion of plurilateral agreements aims at allowing smaller groups of WTO's members to move forward, outside the single undertaking, on issues important to them.

At regional level, states usually conclude such as Free Trade Agreements (hereinafter the 'FTAs'), for instance, NAFTA, AFTA; or Bilateral Trade Agreements (hereinafter the 'BTAs'). European states have concluded those such as the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters EEC 1968 (hereinafter the 'Brussels Convention'); Council Regulation (EC) No 593/2008 of 17 June 2008 on the Law Applicable to Contractual Obligations (known as Rome I Regulation), etc.

Treaties relating to international trade and business law should have a direct effect or should be 'nationalized' into the domestic legal system.

C. International Cases

WTO cases and decisions/judgments passed by international jurisdictions, such as international courts, international arbitrations, are very important in the legal source system. For example, the WTO's case *Japan-Alcoholic Beverage* [1996] clarified the concept 'like product' in litigation concerning the application of the principle of national treatment, a cornerstone principle of international trade law, while WTO agreements cannot do this.

Besides, international cases in the FDI's field are very important. In the case Factory at Chorzow [1927] decided by the Permanent Court of International Justice (hereinafter the 'PCIJ'), the expropriation, nationalization and compensation standards were clearly explained. Similarly, the case Barcelona Traction [1970] decided by the International Court of Justice (hereinafter the 'ICJ') showed the rule on determination of the MNC's nationality. The European Court of Justice's cases (it is now Court of Justice which is a part of the Court of Justice of the European Union) form a substantive body of law binding EU institutions and its member states. The leading case Van Gend en Loos [1963] is an example.

The final dispute settlement panel determinations within NAFTA have made significant contributions to the jurisprudence of international trade law, and to investor-state arbitration law in particular. We may look at two cases, Metalclad v. Mexico and Thunderbird v. Mexico, within the framework of NAFTA.

D. Other Sources

General principles of international law are significant for issues such as those relating to state responsibility, or to fair and just compensation within the FDI's field. One of these is the principle of good faith, which controls the exercise of rights by states. General principles of international law are, in principle, binding on all states.

Pursuant to Article 38(1) of the Statute of the International Court of Justice ('ICJ'), the 'teachings of the most highly qualified publicist' are subsidiary means for the determination of rules of international law. 'Soft law' is popularly mentioned by academics. 'Soft law' is rules which are not legally binding, but which in practice will normally be adhered to by those who subscribe to them. The 'Calvo Doctrine' is a foreign policy doctrine which holds that jurisdiction in international investment disputes lies with the country in which the investment is located. The Calvo Doctrine thus proposed to prohibit 'diplomatic protection' practice or armed intervention by the investor's home country of the investor. An investor, under this doctrine, has to use the local courts, rather than those of their home country. The Doctrine, named after Carlos Calvo, an Argentine jurist, has been declared since the nineteenth century and applied throughout Latin America and other areas of the world. The 'Drago Doctrine' is a narrower application of Calvo's wider principle.

Other 'soft law' in the field of international business law which should be known is

UNIDROIT Principles of International Commercial Contracts (hereinafter the 'PICC'); the Principles of European Contract Law (hereinafter the 'PECL') prepared by the Commission on European Contract Law; and UNCITRAL Model Law on Electronic Commerce.

Although 'soft law' has no legally binding force, it would be worth recommending and highly orienting for law-making by states as well as in the negotiation of international agreements.

It would be not unreasonable for DCs to consider that international trade and business law reflects mainly the interests of developed countries. Lex mercatoria was born of the Mediterranean Sea trade centre and European fairs of Middle Ages. Although the endeavour is to harmonize the 'trade rules of the game' all around the world, the modern international trade and business law takes little or no interest in the experience and trade capacity of DCs. The question now is how to manage a globalized world of deep integration and multiple 'powers'?

Summary of the Chapter One and Two

International trade and business transactions and the law governing them have experienced a long history, since the beginning of recent civilization. The revolutions of science and technology through the ages have strongly influenced the development of global trade. Both international trade involved in mainly by states and public entities, and international business transactions involved mainly by traders, are complex, governed as they are by both domestic law and international law.

The position of International Trade and Business Law falls into the overlap between international law and domestic law. The International Trade and Business Law is one of products born of the complex relationship between international law and domestic law.

Academics worldwide have various points of view on this field of law. Scholars verbalize a whole or a part of content of this field of law as 'international trade law', 'world trade law', 'global trade law', 'international trade regulations', 'international commercial law', 'international business law', 'international economic law', 'droit economic international', 'droit de commerce international', 'droit international de commerce', and many other names. However, the importance is that this field of law governs both issues relating to:

i. the state's foreign trade policy (such as tariff and non-tariff barriers, customs valuation, dumping, or subsidies), and
ii. acts done by subjects/actors (including states and public entities as well as private entities) in the international business transactions (such as international sales of goods contracts, international payment, international transport of goods).

International trade and business law should be viewed as the totality of the law's response to the needs and practices of the trade relations between states and the mercantile community. A regulatory framework that promotes free trade seems insufficient to stimulate growth in trade. It needs an adequate legal framework in fields that affect international trade and business, such as transportation, banking, marketing, or communication. International trade and business law is link more closely to economics than almost any other area of the law, as their rules are the expression of trade policy.

Besides, international trade and business transactions as well as the law governing them would not be developed if politicians fail to see the interests generating from international trade and business transactions. If an issue looks legally simple, it may still be diplomatically difficult and require long negotiations. The commercial interests of traders could depend on the political interests of states, as in the case Barcelona Traction [1970]: when politicians lose interest, investors could lose money. Therefore, before deciding to conduct international business, a trader should fully evaluate the impact of treaties as well as domestic law of the foreign country on his/her business transactions, such as regulations on protection of corporate ownership (including IPRs); ineffectiveness of a treaty, or the complexity of different legal systems.

Thus, international trade and business law needs a multi-disciplinary approach, such as economics, politics, diplomacy, inter-cultural communication, and obviously mainly law approach, including public international law and domestic law, including private international law.

No law is perfect; each one embodies contradictions, uncertainties and, on occasion, injustices. International trade and business law has its problems that are difficult to resolve, too. There exist certain gaps between the points of view of countries on certain issues of international trade and business law.

Questions/Exercises

1. Why do states trade?
2. Why is international economic integration increasing?
3. What is traded and who trades internationally?
4. How international trade has played and continued to play an important role in the world economy?
5. What is free trade? Does free trade benefit everyone? What affects winers and losers from international trade?
6. Who benefits from international trade and business rules and why?

III. INTERNATIONAL TRADE LAW

LAW OF THE WTO

The World Trade Organization (WTO) is one of the most important international institutions of the contemporary world. Although it is a fairly young organization, officially beginning its existence only on 1 January 1995, the original trading system of the WTO is almost a half a century older than the organization itself. To understand the WTO, it is necessary to know about its history, particularly the GATT 1947, which remains the bedrock of the world trading system. This Section reviews the evolution of the WTO and cursorily looks at the institutional aspects of the WTO.

1. Historical Antecedents

The origins of the WTO date back to the concluding years of World War II, thus in the context of post-war planning negotiations. There was then a strong desire among the post-war planners, led by Churchill (the United Kingdom's Prime Minister) and Roosevelt (the United States' President), to avoid repeating the political and economic disaster partly caused by protectionism between World War I and World War II.

Besides the economic rationale explained in Chapter One, the basic assumptions, which have ever since constituted the essential premises for the law of international trade, are clear: it was necessary to encourage cross-border trade by limiting government interference with the movement of goods, conducted primarily by private companies. Upon these assumptions, the discussions between officials from the United Kingdom (hereinafter the 'UK') and United States (hereinafter the 'US') on trade commenced from 1943 and culminated in the so-called 'Proposals for Expansion of World Trade and Employment' in late 1945 (hereinafter the 'Proposals').

The Proposals envisaged a code of conduct relating to government restrictions on international trade and the creation of an International Trade Organization (hereinafter the 'ITO') to administer the code. In early December 1945, after the public release of the Proposals, the US issued invitations to fifteen states to negotiate tariff reductions. Every invited country, except the Soviet Union, accepted the invitation by January 1946 although the talks did not take place until early 1947.

The US also pursued a second track within the framework of the United Nations, also established in 1945. In its first meeting in February 1946, the Economic and Social Council of the United Nations, at the proposal of the US, adopted a resolution calling for an International Conference on Trade and Employment and appointed a Preparatory Committee to draft a document to be considered at such a conference. The goal of this Conference was not to negotiate tariff reductions; rather, it was to prepare a much broader charter for an International Trade Organization ('ITO'). The US had by that time drafted a Suggested Charter, a revision of the 1945 Proposals, as the basis for the ITO Charter negotiations.

Altogether four meetings were held to negotiate the ITO Charter. The meeting of the Preparatory Committee took place in London in October-November 1946 and produced a first draft of a Charter for the ITO which was revised after a second technical drafting committee meeting held briefly at Lake Success, New York, in early 1947. A third and principal preparatory meeting was held in Geneva from April to October 1947 and was followed by the Plenary Conference on Trade and Development convened by the United Nations in Havana from November 1947 to March 1948 to complete the ITO Charter. The ITO never, however, entered into force, the principal reason being the lack of support from the US Congress. That the US, the world's leading economy and trading nation, would not be a member of the ITO dissuaded other countries from the establishment of the ITO. While the ITO was a stillborn, its most important trade liberalising instrument, i.e., the General Agreement on Tariff and Trade (hereinafter the 'GATT 1947'), survived. Initially envisaged as Chapter IV in the US' seven-Chapter Suggested Charter for the ITO, the GATT 1947 was drafted in a series of negotiations of the above-mentioned Preparatory Committee for the ITO. The first meeting of the Preparatory Committee in London discussed GATT 1947 provisions within its wider mandate of preparing articles for 'a Charter of, or Articles of Agreement for an International

The Suggested Charter was composed of seven chapters:
I - Purposes;
II - Membership;
III - Employment Provisions;
IV - General Commercial Policy;
V - Restrictive Business Practices;
VI - Intergovernmental Commodity Arrangements;
VII - Organization.

The provisions of Chapter IV later became the basis for the GATT negotiations. It was at the New York meeting that the GATT 1947 was separated from the larger ITO draft. It was also clear at the New York Meeting that the GATT 1947 would precede the entry into force of the ITO. Few substantive changes were made to the New York GATT 1947 draft at the Geneva meeting. The Geneva meeting was, however, significant as it provided a forum for the first multilateral tariff-cutting negotiation among the US, the fourteen countries to have accepted the US December 1945 invitation and eight other countries subsequently invited by the US.

In this first negotiation between April and December 1947, the 23 countries, which later became the GATT 1947's original members, had made no fewer than 123 bilateral agreements covering 45,000 tariff items, affecting roughly 10 billion USD worth of trade or, in other words, about one half of the value of world trade.

With the conclusion of both negotiations on the GATT 1947 text and the tariff concessions, the GATT 1947 was opened for signature on 30 October 1947 and entered into force provisionally through the Protocol on Provisional Application on 1 January 1948. The reason for the GATT 1947's provisional application needs some explanation. In some countries, for the GATT 1947 definitively to enter into force, it must, under their constitutions, be submitted to the parliaments for ratification. However, as these countries had also anticipated the need for their respective parliaments' ratification of the ITO Charter once adopted, they feared that 'to spend the political effort required to get the GATT 1947 through the legislature might jeopardise the later effort to get the ITO passed' and hence they preferred to take the GATT 1947 and the ITO Charter to the parliaments as a package.

When the ITO failed to come into being, the GATT 1947, 'provisionally' applied for nearly fifty years, has stood the test of time.

Over the years, the GATT 1947 has become a 'de facto' international organization, providing a forum for its members to meet and negotiate reducing tariffs and non-tariff barriers (hereinafter the 'NTBs'). Seven rounds of such negotiations were conducted between 1947 and 1979. While the first five rounds focusing solely on tariff concessions proved to be very successful, negotiations from the sixth round, also known as the Kennedy Round (1964-1967), turned out to be less so when the subject matters were extended to cover also NTBs (which were rapidly becoming a more serious barrier to trade than were tariffs).

The Tokyo Round (1973-1979), although arguably producing a more satisfactory result than did the Kennedy Round, had limited impact on global trade because the Tokyo Round agreements were limited as far as their parties are concerned.

After the Tokyo Round, the US and a few other countries were in favour of a new round with a very broad agenda, including new subjects such as trade in services and the protection of IPRs, while other countries either objected to a broad agenda or were opposed to a new round altogether. Against that background, the famous Uruguay Round that gave birth to the WTO was conducted.

2. Uruguay Round: the Birth of the WTO

In September 1986, trade ministers of the GATT 1947 members met in Punta del Este, Uruguay; after some days of arguments, they agreed to initiate the Eighth Round of Multilateral Trade Negotiations, the so-called Uruguay Round, no later than 31 October 1986. The Punta del Este Declaration also stated that the 'launching, the conduct and implementation of the outcome of the negotiation shall be treated as part of a single undertaking'. The Declaration identified some fifteen subjects for negotiation, covering, 'inter alia', trade in goods (agricultural products and textiles), NTBs and, most notably - for the first time in history, trade in services. Most of the negotiations ended in Geneva in December 1993 (although some market access talks remained) and the deal was signed on 15 April 1994 at the Ministerial Meeting in Marrakesh, Morocco. About the Uruguay Round, the following comments have been made:

It took seven and a half years, almost twice the original schedule. By the end, 123 countries were taking part. It covered almost all trade, from toothbrushes to pleasure boats, from banking to telecommunications, from the genes of wild rice to AIDS treatments. It was quite simply the largest trade negotiation ever, and most probably the largest negotiation of any kind in history.

Indeed, the Uruguay Round was by far the most ambitious round of multilateral trade negotiations, covering 'virtually every outstanding trade policy issue'.

To the surprise of many, the Uruguay Round had fulfilled much of the goals set out in the Punta del Este Declaration. Moreover, the Uruguay Round went beyond its modest objective in terms of the GATT 1947's institutional reforms by establishing a new international organization for trade, this time called the 'World Trade Organization' ('WTO').

The Marrakesh Agreement Establishing the WTO (WTO Agreement), contained in the Final Act signed at the Marrakesh Ministerial Meeting mentioned above, is the charter of the organization. This agreement is the umbrella that covers all parts of the more detailed and technical texts (including the schedules of commitments). All of the agreements reached at the Uruguay Round are laid out in four annexes of the WTO Agreement. The first three annexes are mandatory (i.e., all members must accept them) while Annex 4 contains optional 'plurilateral agreements'.

Annexes 2 and 3 are the 'Dispute Settlement Understanding' and the 'Trade Policy Review', respectively. Annex 1, the backbone of the world trading system, is then sub-divided into three parts that correspond to three major basic agreements, namely, goods (GATT 1994 and its related agreements and other texts), services (GATS and its annexes), and trade-related aspects of intellectual property rights (TRIPS).

As envisaged in the Final Act, the WTO Agreement entered into force definitively on 1 January 1995. The WTO has now become the second most important international organization in the world after the United Nations. Since the following sections discuss the substantive aspects of the WTO's trade rules, some explanation is given here on the WTO as an international organization in order to set the discussion into context.

3. The WTO as An International Organization

A. Objectives

The raison d'être and policy objectives of the WTO are set out in the first establishment of a 'Multilateral Trade Organization'. It was however not until December 1993 that the US, then isolated on the matter, formally agreed to the establishment of the new organization on the condition that the Canada's proposed name be adopted two Preambular paragraphs of the WTO Agreement, which read:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,

Recognizing further that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development, …

Peter Van den Bossche teases out from these two paragraphs the following **four ultimate objectives of the WTO:**

- the increase in the standard of living;
- the attainment of full employment;
- the growth of real income and effective demand; and
- the expansion of production of, and trade in, goods and services.

However, as rightly pointed out by Bossche, the same two paragraphs also stress that these objectives must be realized in a way that is detrimental neither to the environment nor to the needs of developed countries.

B. Functions

Article 2(1) of the WTO Agreement stipulates the primary function of the WTO as providing 'the common institutional framework for the conduct of trade relations among its members in matters related to the agreements and associated legal instruments included in the annexes to [the] Agreement. To this end, Article III entitled 'Functions' provides for the WTO's five broad functions in the following terms:

1. The WTO shall facilitate the implementation, administration and operation, and further the objectives, of this Agreement and of the Multilateral Trade Agreements, and shall also provide the framework for the implementation, administration and operation of the Plurilateral Trade Agreements.
2. The WTO shall provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the agreements in the annexes to this Agreement. The WTO may also provide a forum for further negotiations among its members concerning their multilateral trade relations, and a framework for the implementation of the results of such negotiations, as may be decided by the Ministerial Conference.
3. The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter the 'Dispute Settlement Understanding' or 'DSU') in Annex 2 to this Agreement.
4. The WTO shall administer the Trade Policy Review Mechanism (hereinafter referred to as the 'TPRM') provided for in Annex 3 to this Agreement.
5. with a view to achieving greater coherence in global economic policy-making, the WTO shall cooperate, as appropriate, with the International Monetary Fund and with the International Bank for Reconstruction and Development and its affiliated agencies.

In addition to the explicit functions referred to in Article III, *Bossche* also argues that technical assistance to DC members is undisputedly an important function of the WTO since it allows these members to integrate into the world trading system.

C. Membership

The WTO membership is not exclusive to states. Separate customs territories possessing full autonomy with regard to their external commercial relations and other matters covered by the WTO Agreement are also eligible to join the WTO.

For example, Hong Kong, China (commonly referred to as Hong Kong), Macau, China (commonly referred to as Macau). The European Communities is also a member of the WTO, but this is a special and the only case by virtue of Article XI(1) of the WTO Agreement. To date, the WTO has more than 153 WTO members, and with Russian accession in sight, the WTO will soon embrace almost every significant economy in the world, accounting for 97 per cent of world trade.

D. Institutional Structure

Article IV of the WTO Agreement provides for the basic institutional structure of the WTO; subordinate committees and working groups have been added to this structure by later decisions. According to a WTO Deputy Director-General, there are, at present, a total of seventy WTO bodies, of which thirty-four are standing ones.

At the highest level of the WTO institutional structure stands the Ministerial Conference, the supreme body of the WTO and composed of minister-level representatives from all members; it has decision-making power on all matters under any multilateral WTO agreements.

At the second level are the General Council (which is composed of ambassador-level diplomats), the Dispute Settlement Body ('DSB') and the Trade Policy Review Body ('TPRB'). All these three bodies are actually the same. The General Council is responsible for the continuing, day-to-day management of the WTO and its many activities and exercises, between sessions of the Ministerial Conference, the full powers of the latter. The General Council becomes the DSB when it administers the WTO dispute settlement system. Likewise, the General Council acts as the TPRB when administering the WTO trade policy review mechanism. At the level below the General Council, the DSB and the TPRB are three so-called specialized councils, namely, the Council for Trade in Goods (CTG), the Council for Trade in Services ('CTS') and the Council for TRIPS. This is envisaged by Article IV(5) of the WTO Agreement. The explicit function of these specialized councils is, according to Article IX(2) of the WTO Agreement, to make recommendation on the basis of which the Ministerial Conference and the General Council adopt interpretations of the multilateral trade agreement in Annex I of the WTO Agreement overseen by these Councils. The specialized councils also, under Articles IX(3) and X(1) of the WTO Agreement, play a role in the procedure for the adoption of waivers and the amendment procedure. The GATS and the TRIPS Agreement also empower their respective overseeing councils specific functions.

However, it is submitted that few specific powers have been entrusted to the three specialized councils and it is unsafe to infer from their general oversight function the power to take any decision, be it political or legal. In addition to the specialized councils, there are a number of committees and working parties established to assist the Ministerial Conference and the General Council.

In November 2001, the Ministerial Conference at its Doha Session established the Trade Negotiations Committee ('TNC') which, together with its subordinate negotiating bodies, organizes the Doha Development Round negotiations. The TNC reports on the progress of the negotiations to each regular meeting of the General Council.

Finally, it is typical that an international organization has a secretariat and the WTO is no exception. Article IV of the WTO Agreement provides that the WTO has a Secretariat, which is headed by a Director-General who is, in turn, appointed by the Ministerial Conference. The WTO Secretariat is based in Geneva with more than 600 regular staffs.

As in other international organizations, the WTO Secretariat, as an administrative organ, and its Director-General have no autonomous decision-making powers. Rather, they act as a 'facilitator' of the decision-making processes within the WTO. The WTO Secretariat has conceived its own duties as follows:

- to supply technical and professional support for the various councils and committees;
- to provide technical assistance for developing countries;
- to monitor and analyse developments in world trade;
- to provide information to the public and the media and to organize the ministerial conferences;
- to provide some forms of legal assistance in the dispute settlement process; and
- to advise governments wishing to become members of the WTO.

E. Decision Making in the WTO

The normal decision-making procedure for WTO bodies is provided in Article IX(1) of the WTO Agreement in the following terms:

The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting. At meetings of the Ministerial Conference and the General Council, each member of the WTO shall have one vote...

[D]ecisions of the Ministerial Conference and the General Council shall be taken by a majority of the votes cast, unless otherwise provided in this Agreement or in the relevant Multilateral Trade Agreement. (Emphasis added)

Thus, there is a two-step approach to decision making in the WTO. Firstly, members must try to take decisions by consensus, which is defined by Footnote 1 to Article IX as follows: 'The body concerned shall be deemed to have decided by consensus on a matter submitted for its consideration, if no member, present at the meeting when the decision is taken, formally objects to the proposed decision'.

In other words, under consensus procedure, no voting takes place and a decision is taken unless explicitly objected by a member. Secondly, when consensus cannot be reached, a voting on a one country/one-vote basis is needed. In this case, a decision is taken by a majority of votes cast.

However, the WTO Agreement provides for a number of exceptions, which constitute 'lex specialis' to the general rule (normal procedure) on decision-making. Notable exceptions include decision-making by the DSB, authoritative interpretations, accessions, waivers, amendments and the annual budget and financial regulations. For these questions, the special decision-making procedures vary from consensus only (DSB's decisionmaking, waivers); three-fourths majority (authoritative interpretations); consensus/two-thirds majority (accessions, amendments); to two-thirds majority comprising more than half of the WTO members (the annual budget and financial regulations).

That said, it should be highlighted that although the WTO Agreement provides for the possibility of adopting a decision by voting, it is exceptional for WTO bodies to do so. The reason for the preference of consensus over voting is not difficult to understand. It is generally believed that decisions taken by the former, i.e., taken collectively, have 'more democratic legitimacy' than those taken by the latter.

Of course, sticking to the consensus principle runs the risk of paralyzing the decision-making in the WTO.

SOME BASIC PRINCIPLES OF THE WTO AND EXCEPTIONS

The present WTO, as did the GATT in the past, does not prescribe free trade as such. Rather the GATT and the agreements in the annexes of the WTO Agreement set out a number of principles and rules which encourage and ensure trade liberalization. In this section are discussed some basic principles and rules of the WTO and their qualifications (by way of exceptions).

1. Some Basic Principles of the WTO

The three major basic agreements contained in Annex 1 of the WTO Agreement, which are the subject of discussion in the sections that follow, contain a complex set of rules dealing with trade in goods and services as well as with the protection of IPRs. These rules cover a broad spectrum of issues, ranging from tariffs, import quotas and customs formalities to national security measures. There are, however, common themes recurrent in these agreements.

Five principles constituting the foundation of the world trading system have been identified, that is:
(A) trade without discrimination;

(B) freer trade (gradually, through negotiation);
(C) predictability (through binding and transparency);
(D) promoting fair competition; and
(E) encouraging development and economic reform.

Principle (A) is embodied in two fundamental non-discrimination principles or obligations, namely the most-favoured-nation treatment ('MFN') and the national treatment ('NT'), while principles (B) and (C) in fact contains a number of rules on market access ('MA') and can be grouped as such. This Section first focuses on the non-discrimination principles and the rules on MA, which are identified in the WTO Agreement's Preamble as the two main means to attain the WTO's objectives.

Besides the non-discrimination obligations, which operate to secure fair conditions of trade, WTO law also contains many other rules that realize principle (D), i.e. promotion of fair competition. These rules are enshrined not only in the GATT 1994 (hereinafter the 'GATT'), but also in a number of agreements covering specific fields, such as agriculture, IPRs and services.

All these agreements will be discussed in other sections; this Section thus only focuses on the two common practices of unfair trade in goods, that is dumping and subsidies. Principle (E), that is to encourage development and economic reform, takes into account the fact that DC members need more time to implement the WTO agreements than do better-off members. WTO law provides for a number of rules, in the form of exceptions in favour of DC members, to operationalize principle (E). These rules will be briefly touched upon when discussing exceptions to WTO law.

A. Trade without Discrimination or Principles of Non-discrimination

Non-discrimination is central to WTO law and is reflected in all of the key treaties of the WTO (for example, the GATT, GATS, and the TRIPS Agreement). In fact, as highlighted in the third Preambular paragraph of the WTO Agreement, 'the elimination of discriminatory treatment in international trade relations' is one of the means to attain the objectives of the WTO. The WTO law boasts two principles of non-discrimination, namely MFN obligation and NT obligation. Broadly, these two principles apply on the basis of the 'national origin or destination' of a good or service, or on the basis of the 'nationality' of the service supplier.

The MFN treatment obligation, or the MFN principle, is the single most important rule in WTO law without which the multilateral trading system could not exist.

The fact that the MFN principle is provided in the first article of the GATT, and the second article (yet still the first among the general obligation provisions) of the GATS testifies to its significance. In essence, the MFN treatment obligation prohibits discrimination by a WTO member among different foreign exporters and service suppliers, while the NT obligation constrains a WTO Member from discriminating against foreign products in favour of 'like' domestic products, services and service suppliers. However, since these non-discrimination principles have different connotations and vary in shade and tone in their application to trades both in goods and in services, it is necessary to consider them separately.

1. MFN Treatment under the GATT

The MFN principle for trade in goods is enshrined in Article 1(1) of the GATT in the following terms:

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

The principal purpose of the MFN treatment obligation, as are non-discrimination obligations in general, is to ensure equality of opportunity to import from or to export to all WTO members.

Despite the absence of the words 'de jure' and 'de facto' in its language, Article I(1) of the GATT is construed to cover both discrimination 'in law' and 'in fact'. In other words, the clause prohibits not only a measure that is, from a reading of the law, regulation or policy (in law), discriminatory, but is also a measure that is, on the face of it, 'origin-neutral' but whose application is still discriminatory in practice (in fact).

To determine whether a particular measure is discriminatory or not, Article I(1) of the GATT sets out a three-tier test of consistency, that is:

(i) whether the measure in question confers a trade 'advantage, favour, privilege or immunity'?

(ii) whether the products concerned are 'like products'? and

(iii) whether the advantage at issue is granted 'immediately and unconditionally to all like products' concerned?

As to the first question, it is generally agreed that Article I(1) covers a wide range of measures. In fact, many measures which have not been referred expressly to in Article I(1) may be classified as one measure or the other already covered by this Article.

On the other hand, while Article I(1) casts a wide net as to the measures covered, its scope of application is not unlimited.

For example, the Panel in EC-Commercial Vessels noted that since measures by Article III (8) (b) (on subsidies to domestic products) fall outside the scope of the application of Article III(2) and (4), which occur in the expression 'matters referred to in paragraphs 2 and 4 of Article III in Article I(1), these measures also fall outside the scope of application of Article I(1).

The term of 'like product' featured prominently in a number of provisions of the GATT, including Article I(1). The question of 'whether two products are like' is essential to the determination of whether discrimination occurs under Article I(1). Nevertheless, nowhere in the GATT can one find a definition of 'like product'. The case law on 'like product' within the meaning of Article I(1), as opposed to Article 3 (considered bellow), of the GATT is limited.

Recourse to dictionary to define the adjective 'like' seems of no avail as 'dictionary meanings leave many interpretive questions open.' It is generally agreed that the concept of 'like product' has a different meaning in the different contexts in which it is used. In Japan Alcoholic Beverages II, the Appellate Body illuminatingly commented on this very concept as follows:

The accordion of 'likeness' stretches and squeezes in different places as different provisions of the WTO Agreement are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term 'like' is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.

It follows that two products may be 'like' under one provision but 'unlike' under another provision of the GATT. As a rule of thumb, when a WTO Panel examines whether products are 'like', it may look at:

(i) the characteristics of the products;

(ii) their end-users, and

(iii) tariff regimes of other members.

Bossche suggests that a WTO Panel may also consider consumers' tastes and habits in its determination.

Finally, Article I(1) of the GATT requires that any advantage granted by a WTO member to imports from any country must be granted 'immediately and unconditionally' to imports from all other WTO members. That is to say, once a WTO member has granted an advantage to imports from a country, it cannot make the granting of that advantage to imports of other WTO members conditional upon the return of other advantage or payment for the advantage by those other WTO members.

The leading case in this regard is Belgium-Family Allowances where the Panel held that the Belgian law providing for a tax exemption for products purchased from countries which had a system of family allowances similar to that of Belgium '…*[i]ntroduced a discrimination between countries having a given system of family allowances and those* *which had a different system or no system at all, and made the granting of the exemption dependant on certain conditions'.*

On the other hand, whether the term 'unconditionality' allows discrimination between products not on the basis of their origin is an issue to be settled by the Appellate Body. While the Panel in Canada-Autos in 2000 opined that the term 'unconditionality' does rule out the imposition of conditions which do not discriminate between products on the basis of their origin, the Panel in EC-Tariff Preferences in 2003 favoured a stricter meaning of the term 'unconditionally', stating that it 'sees no reason not to give that term its ordinary meaning under Article I(1), that is, 'not limited by or subject to any conditions'.

2. MFN Treatment under the GATS

Article II(1) of the GATS prohibits discrimination between like services and service suppliers from different countries in the following terms: '[W]ith respect to any measure covered by this Agreement, each member shall accord immediately and unconditionally to services and service suppliers of any other member treatment no less favourable than that it accords to like services and service suppliers of any other country'.

Just as in Article I(1) of the GATT , the principal purpose of Article II(1) of the GATS is also to ensure equality of opportunity for services and service suppliers from all WTO members. Article II(1) of the GATS is supplemented by a number of other MFN or MFN-like provisions in the GATS, including Articles
VII (on recognition),
VIII (on monopolies and exclusive service suppliers),
X (on future rules relating to emergency safeguard measures),
XII (on balance of payments measures);
XVI (on market access); and
XXI (on schedule modification).

Again, as in Article I(1) of the GATT, Article II(1) of the GATS applies to both 'de jure' and 'de facto' discrimination as confirmed by the Appellate Body in EC-Bananas III. The MFN treatment test of Article II(1) of the GATS, as that of Article I(1) of the GATT, is a three-tier one. That is to say, it is necessary to answer the three questions:

(i) whether the measure is covered by the GATS;

(ii) whether the services or service suppliers are 'like'; and

(iii) whether less favourable treatment occurs with regard to the services or service suppliers of a member.

As to the first question, the answer, dictated by Article I(1) of the GATS, needs to establish whether the measure is

(i) a measure by a member and

(ii) a measure affecting trade in services.

A 'measure by a member' is a broad concept and covers, as defined by Article I(3) of the GATS, measures taken by

(i) central, regional or local governments and authorities; and

(ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities.

To determine whether a measure is one 'affecting trade in services', the Appellate Body in Canada-Autos stated that two issues must be examined, that is:

(i) whether there is 'trade in services' in the sense of Article I(2); and

(ii) whether the measure in issue 'affects' such trade in services within the meaning of Article I(1).

Article I(2) of the GATS will be discussed in greater detail in Section Fourth of this Chapter. Suffice it here to say that the concept of 'trade in services' is very broad. That leaves the question of what measure affects trade in services. The Appellate Body in EC-Bananas III clarified the term 'affecting' as follows: '*…[T]he use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application'.*

This interpretation is further reinforced by the conclusions of previous panels that the term 'affecting' in the context of Article III of the GATT is wider in scope than such terms as 'regulating' or 'governing'.

For a measure to affect trade in services, it is not necessary that the measure is to regulate or govern the supply of services. As pointed out by the Panel in EC-Bananas III, a measure regulating a different matter may still affects trade in services and hence is governed by the GATS.

As to the question of 'like services or service suppliers', it is noted that only a definition of 'service suppliers' is found in Article XXVIII(g), which provides that a 'service supplier' is 'any person who supplies a service', including natural and legal persons as well as service suppliers providing their services through forms of commercial presence. While no definition of 'services' is provided in the GATS, Article I(3)(c) states that 'services' includes 'any service in any sector except services supplied in the exercise of governmental authority.' The GATS, as the GATT, does not define concept of 'likeness' in the case of 'services' and 'service suppliers'.

However, dissimilar to the GATT, there has as yet been no case in the GATS jurisprudence that may shed light on this nebulous concept. Bossche, however, suggests three following reasonable criteria to determine the 'likeness' of 'services' and 'service suppliers':

- The characteristics of the service or the service supplier;
- the classification and description of the service in the United Nations Central Product Classification (CPC) system; and
- consumer habits and preferences regarding the service or the service supplier.

He also rightly observes that two service suppliers that supply a like service are not necessarily 'like service suppliers' as factors such as their size, assets, use of technology, expertise, etc must be taken into account. The final question in the MFN treatment test of Article II(1) of the GATS is whether 'treatment no less favourable' than that accorded to 'like services' or 'like service suppliers' of one member is accorded to services or service suppliers of all other members. The GATS defines 'treatment no less favourable' not in the context of MFN, but in the context of NT (Article XVII - discussed below). However, the Appellate Body in EC-Bananas III warned that in interpreting Article II(1), particularly the concept of 'treatment no less favourable', one should not assume that the guidance of Article XVII equally applies to Article II.

On the other hand, despite the absence of comparable language in Article II(1), the same Appellate Body also stated that the concept of 'treatment no less favourable' in Article II(1) and Article XVII of the GATS should be interpreted to include both 'de facto' and 'de jure' discrimination.

3. NT in the GATT

NT is provided in Article III of the GATT, which is of general scope. In other words, the NT obligation applies to imported products regardless of whether members have made tariff concessions them or not. In broad terms, the NT obligation prohibits a WTO member from discriminating against foreign products in favour of domestic products. Two other characters of general nature of the NT clause should be mentioned.

Firstly, just as in the case of Article I, Article III also applies to both 'in law' and 'in fact' discrimination.

Secondly, Article III applies only to internal measures, not to border measures.

Paragraph 1 of Article III sets outs the purpose of the NT clause as follows:

The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.

The above clause points out the first and important goal of the NT obligation, which are also explicitly acknowledged in various Panel and Appellate Body reports, that is, to avoid protectionism. Besides Paragraph 1, paragraphs 2 and 4, which provide further general obligations, as opposed to particular measures in other paragraphs, are of interest and should also be discussed. Paragraph 2 on NT with regard to 'internal taxation' covers two types of products, namely 'like products' and 'directly competitive or substitutable products'. It is convenient to deal first with the former, which is provided in the first sentence. Paragraph 2, first sentence of Article III of the GATT reads:

'… [T]he products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products'.

The above provision sets out a two-tier NT test for internal taxation on 'like' products. As the Appellate Body in Canada-Periodicals pointed out:

… [T]here are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994:

(a) whether imported and domestic products are like products? and

(b) whether the imported products are taxed in excess of the domestic products.

If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence.

As in the case of the concept of 'like product' in MFN treatment, the concept of 'like product' in NT is not defined in the GATT . Nevertheless, case law regarding the latter is much richer than that regarding the former. A considerable number of reports of Panel (since era of the GATT 1947) and Appellate Body are in place, thus shedding light on the meaning of the concept of 'like product' in Article III(2), first sentence.

The first case where Article III(2) was found violated is JapanAlcoholic Beverages [1987], i.e., in the era of the GATT 1947. The issue in this case was an internal tax measure that classified alcoholic beverages according to alcohol content and other qualities. In examining the 'likeness' of products, the Panel in the case cited, 'inter alia', the Working Party Report on 'Border Tax Adjustments', which concluded that problems arising from the interpretation of the terms 'like' or 'similar' products should be examined on a case-by-case basis using three criteria, namely, the product's end-users in a given market; consumers' tastes and habits, which change from country to country; and the product's properties, nature and qualities. Interestingly, almost ten years later, in Japan-Alcoholic Beverages II, the Appellate Body reaffirmed the correctness of the approach for determining 'likeness' set out in the 1970 Report on 'Border Tax Adjustment'.

This approach, which has been followed in almost all post-1970 GATT panel reports involving the concept of 'like product' in GATT, remains the dominant one for determining 'likeness' in Article III(2), first sentence.

Two further points are, however, worth highlighting. Firstly, the Appellate Body in Japan-Alcoholic Beverages II in upholding the approach in the 1970 Report reminded that the range of 'like products' in Article III(2), first sentence of the GATT 1947 should be kept narrow. Secondly, the three criteria listed in the Report of the Working Party on 'Border Tax Adjustments' do not include the tariff classification of the products concerned. Yet, as acknowledged by the Appellate Body in Japan-Alcoholic Beverages II, the uniform classification in tariff nomenclatures based on the Harmonized System, but not tariff bindings, may be of help in determining the 'likeness'.

With regard to the second tier in the NT test for internal taxation, i.e., 'taxes in excess of' the internal taxes applied to 'like' domestic products, the Appellate Body in Japan-Alcoholic Beverages II established a strict benchmark. In the Appellate Body's view, '… *[e]ven the smallest amount of "excess" is too much and the prohibition of discriminatory taxes in Article III(2), first sentence of the GATT 1994 "is not conditional on a "trade effects test" nor is it qualified by a de minimis standard'.*

The second sentence of Article III(2) of the GATT addresses, as mentioned above, NT in the case of internal taxation on 'directly competitive or substitutable products'.

This sentence reads: *'… [M]oreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set orth in Paragraph 1'.*

It is recalled that the principle mentioned in Paragraph 1 of Article III of the GATT is to avoid protectionism. The second sentence of Article III(2) of the GATT is interpreted to contemplate a 'broader category of products' than the first sentence. Furthermore, the former sets out a different test of consistency. In JapanAlcoholic Beverages II, the Appellate Body stated:

… [U]nlike that of Article III(2), first sentence, the language of Article III(2), second sentence, specifically invokes Article III(1). The significance of this distinction lies in the fact that whereas Article III(1) acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second sentence.

Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III(2), second sentence.

These three issues are whether:

1. The imported products and the domestic products are 'directly competitive or substitutable products' which are in competition with each other?
2. the directly competitive or substitutable imported and domestic products are 'not similarly taxed'? and
3. the dissimilar taxation of the directly competitive or substitutable imported and domestic products is 'applied… [s]o as to afford protection to domestic production'?

Again, these are three separate issues. Each must be established separately by the complainant for a panel to find that a tax measure imposed by a member of the WTO is inconsistent with Article III(2), second sentence.

Thus, the NT test for internal taxation under Article III(2), second sentence of the GATT contains three steps. Firstly, it is necessary to determine whether the imported and domestic products are 'directly competitive or substitutable products'. As with 'like products' which are themselves a subset of 'directly competitive or substitutable products', the determination of the appropriate range of the latter under Article III(2), second sentence, must be made on 'a case-by-case basis, taking into account all the relevant facts'.

Secondly, it is not inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as 'directly competitive or substitutable products'.

It has been interpreted by the Appellate Body that products are 'directly competitive or substitutable' when they are interchangeable or when they offer alternative ways of satisfying a particular need or taste.

Thirdly, in the JapanAlcoholic Beverage II, the Appellate Body also agreed with the panel's view that '*… [t]he decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, 'inter alia', as shown by elasticity of substitution'.*

After the determination of directly competitive or substitutable products, the next step is whether these products are 'similarly taxed'. In Japan-Alcoholic Beverages II, the Appellate Body opined that this phrase does not mean the same thing as the phrase 'in excess of', otherwise 'like products' and 'directly competitive or substitutable products' would mean one and the same thing.

The Appellate Body also agreed with the Panel that must the amount of differential taxation must be more than 'de minimis' to be deemed 'not similarly taxed' and whether any particular differential amount of taxation is 'de minimis' or not must be determined on a case-by-case basis.

The final step in the NT test under Article III(2) is taken only when it is established that 'directly competitive or substitutable products' are not 'similarly taxed'.

In the case of 'dissimilar taxation', it is necessary to determine whether the tax has been applied 'so as to afford protection.' This is a question, in view of the Appellate Body in Japan-Alcoholic Beverages II, that requires a comprehensive and objective analysis of the structure and application of the measure in question as related to domestic as compared to imported products.

The Appellate Body opined further that '*… [i]t is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic courts'.*

In Chile-Alcohol, it became clear that such an examination amounts to asking whether, looking objectively at the scheme, its classification may be understood in terms of non-protectionist aims. Thus, while rejecting an enquiry into subjective legislative intent, the Appellate Body in this case was endorsing a conception of protectionism that went to regulatory purpose, albeit as discernible from the objective features of the regulatory scheme.

The three tests outlined by the Appellate Body in Japan-Alcoholic Beverages II have been followed by the panels and refined or altered by the Appellate Body in other cases involving internal tax as well as other regulatory measures. These are not easy tests, however. For example, in the Canada-Periodicals, the Panel found that imported split-run periodicals and domestic non-split-run periodicals were 'like' products whereas the Appellate Body found they were not 'like' products but 'directly competitive or substitutable products'.

In addition to the NT obligation with regard to fiscal measures in Paragraph 2 of Article III discussed above, the GATT also provides for NT obligation with regard to non-fiscal measures in Paragraph 4 of the same article. Article III(4) of the GATT reads:

The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

According to the Appellate Body in Korea-Various Measures, in order to establish a violation of the above clause, it is necessary to show the three elements:
(i) the complained-of measure is a 'law, regulation or requirement' affecting the internal sale, offer for sale, purchase, transportation, distribution, or use of domestic and imported products; (ii) the imported product is 'like' a domestic product sold in the domestic marketplace; and (iii) less favourable treatment has been afforded in the imported product than to the like domestic product.

The first element is the scope of the obligation. In those earlier cases, the panels had interpreted the scope of this obligation broadly, opining that a government action need not take the form of a mandatory regulations in order to fall within the scope of Article III(4) provided that the action has an effect on the behaviour of the regulated private entity. Similarly, the term 'affecting' has also been interpreted widely.

The second element is again the concept of 'likeness'. The first case when the Appellate Body dealt with a dispute concerning Article III(4) of the GATT is the Asbestos case. By that time, the Appellate Body had already developed its approach to 'likeness' in Article III(2), first sentence.

However, in its report, the Appellate Body first noted that the concept of 'like products' in Article III(2), first sentence, had been interpreted narrowly. This narrow interpretation, the Appellate Body explained, was dictated by the existence of a second sentence in Article III(2) for which Article III(4) had no comparable sentence. Given the textual difference between Articles III(2) and III(4), the Appellate Body concluded '"the accordion" of "likeness" stretches in different ways in' the latter.

The Appellate Body further noted that the meaning of 'like product' in Article III(4) must be informed by the principle of antiprotectionism in Article III(1). Since protectionism exists only in a competitive relationship, the Appellate Body came to the conclusion that the determination of whether imported and domestic products are 'like products' under Article III(4) is, in essence, a determination about the nature and extent of the competitive relationship between these products.

The conjunction 'and' signifies that a mere economic analysis of the crossprice elasticity of demand for the products at issue will not suffice to determine 'likeness'.

Instead, 'likeness' is a matter of judgment - qualitatively as well as quantitatively. While it is difficult to indicate in the abstract what the nature and extents of the competitive relationship needs to constitute for the products to be 'like', it may be said that the concept of 'like products' in Article III(4) is fairly broad and is certainly broader than the narrowly construed concept of 'like product' in Article III(2).

However, the Appellate Body also concluded that although the scope of the concept 'like products' in Article III(4) is broad, it is not broader than the combined product scope of the concepts of 'like products' and 'directly competitive or substitutable products' in the first and second sentences of Article III(2), respectively.

At the end of the day, a determination of 'likeness' in Article III(4) has to be made on a case-by-case basis. The Appellate Body in the EC-Asbestos continued to refer to criteria outlined in the Report of the Working Party on 'Border Tax Adjustments' but also added that they are 'simply tools to assist in the task of sorting and examining the relevant evidence'. The Appellate Body also stressed that these criteria are 'neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products'.

Once a competitive relationship has been established of the nature and extent relevant to Article III(4), then the final element of analysis comes into the picture. Only where the differential treatment of the 'like' products amounts to 'less favourable treatment' of the group of imported products in relation to the group of like domestic products will there be a violation of Article III(4). In EC-Asbestos, the Appellate Body did no make any finding regarding 'less favourable treatment' as it had already reversed the panel's ruling that product were 'like'. However, in an important passage, the Appellate Body stated the approach to 'less favourable treatment'. The Appellate Body noted:

[T]he term 'less favourable treatment' expresses the general principle, in Article III(1), that internal regulation 'should not be applied… [s]o as to afford protection to domestic production'. If there is 'less favourable treatment' of the group of 'like' imported products, there is, conversely, 'protection' of the group of 'like' domestic products.

In effect, the Appellate Body stated that even where products are in a close enough competitive relationship to be considered 'like', members of that class or group of 'like' products may still be distinguished in regulation provided that the result is not that of less favourable treatment, understood as protection of domestic production.

The WTO Secretariat has identified the following five typical NT limitations:

1. Nationality or resident requirements for executives of companies supplying services;
2. Requirements to invest a certain amount of assets in local currency;
3. Restrictions on the purchase of land by foreign service suppliers;
4. Special subsidy or tax privileges granted only to domestic suppliers, and
5. Differential capital requirements and special operational limits applying only to operations of foreign suppliers.

Once a WTO member has committed itself to grant NT, it must accord to services and service suppliers of any other member treatment no less favourable than it accords to its own like services and service suppliers.

The Panel in EC-Banana III identified three elements that need to be demonstrated to establish a breach of the NT obligation under Article XVII of the GATS. These elements are:

- measures by members affecting trade in services;
- like services' or 'like service suppliers'; and
- treatment no less favourable.

Since the first two elements, 'measures affecting trade in services' and 'like services and service suppliers' have been discussed in the context of the MFN treatment obligation under Article II of the GATS, this section only considers the third and final element, i.e. 'treatment no less favourable'. Paragraphs 2 and 3 of Article XVII of the GATS clarify the requirement of 'treatment no less favourable' in the following terms:

…

2. [A] member may meet the requirement of Paragraph 1 by according to services and service suppliers of any other member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.

3. formally identical or formally different treatment shall be considered to be less favourable if it modifies the conditions of competition in favour of services or service suppliers of the member compared to like services or service suppliers of any other member.

Paragraph 3 clearly shows that on the one hand, even a member that gives formally identical treatment to foreign and domestic services or service suppliers may still be in breach of the NT obligation if the conditions of competition are modified in favour of the latter. On the other hand, a member that gives formally different treatment to foreign and domestic services or service suppliers does not act in breach of its NT obligation if that member does not modify the conditions of competition in favour of the domestic services or domestic service suppliers. In the EC-Bananas III(Article 21.5-Ecuador), the Panel found that certain EC measures accorded to Ecuadorian service suppliers 'de facto' less favourable conditions of competition than to like EC service suppliers.

In this connection, it should be noted that Footnote 10 to Article XVII states that

'… [S]pecific commitments assumed under this article shall not be construed to require any member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers'.

The Panel in Canada-Autos, however, stressed the limited scope of the above clause as follows:

… [F]ootnote 10 to Article XVII only exempts members from having to compensate for disadvantages due to the foreign character in the application of the national treatment

provision; it does not provide cover for actions which might modify the conditions of competition against services or service suppliers which are already disadvantages due to their foreign character.

B. The Rules on Market Access

The rules on market access ('MA') are at the core of WTO law. Indeed, as set out in the third Preambular Paragraph 3 of the WTO Agreement, 'the substantial reduction of tariffs and other barriers to trade' is one of the two means to attain the WTO's objects of higher standards of living, full employment, growth and sustainable economic development.

That Preambular paragraph also identifies two types of barriers to international trade, namely 'tariff' and 'NTBs'. The former is particularly relevant for trade in goods but of marginal importance for trade in services, while the latter relates to both trades in goods and in services. This Section briefly discusses the negotiations to reduce tariff barriers to trade in goods, and highlight some rules relating to NTBs elimination.

1. Negotiations to Reduce Tariff Barriers to Trade in Goods

Customs duties, or tariffs, are the most common and widely used barrier to MA for goods. As a matter of principle, WTO members are free to impose customs duties on imported products; the GATT does not prohibit the imposition of customs duties as such. However, the GATT recognizes customs duties as an obstacle to international trade and the importance of negotiations on tariff reductions. Article XXVIIbis of the GATT states:

The contracting parties recognize that customs duties often constitute serious obstacles to trade; thus negotiations on a reciprocal and mutually advantageous basis, directed to the substantial reduction of the general level of tariffs and other charges on imports and exports and in particular to the reduction of such high tariffs as discourage the importation even of minimum quantities, and conducted with due regard to the objectives of this Agreement and the varying needs of individual contracting parties, are of great importance to the expansion of international trade. The [members] may therefore sponsor such negotiations from time to time.

Indeed, as seen from the history of the GATT 1947, the first negotiation on tariff reductions was conducted and concluded along with negotiations of the text of the GATT 1947 itself.

In the GATT 1947 era, tariff reductions had always remained an important, if not the sole, substantive item on the agenda of the eight Rounds of trade negotiations. Despite the successful results of the eight GATT 1947 Rounds of trade negotiations, customs duties remain an important barrier in international trade in the WTO era and negotiations on their reductions have always been necessary.

Both the third Preambular paragraph of the WTO Agreement on reduction of trade barriers in general and Article XXVIIIbis of the GATT on tariff negotiations mention 'reciprocal and mutually advantageous'. Thus, the principle of reciprocity and mutual advantage constitutes the first basic principle governing negotiations on tariff reductions. According to this principle, when a member requests a second member to reduce its customs duties on certain products, it must be ready also to reduce its own customs duties on products at the request of that second member. There is no agreed method to establish reciprocity. Rather, each member determines for itself whether the economic values of the tariff reductions received and of the tariff reductions granted are equal.

The reciprocity principle is supplemented by the MFN principle enshrined in Article I(1) of the GATT which applies, 'inter alia', 'to customs duties and charges of any kind imposed on or in connection with importation or exportation'. The effect of the MFN treatment obligation is that once a tariff reduction is granted by a member to another member as a result of their tariff negotiations, that tariff reduction will also be granted to all other members, immediately and unconditionally.

The results of tariff negotiations are referred to as 'tariff concessions' or 'tariff bindings', which constitute a commitment not to raise the customs duty on a particular product above an agreed level. The tariff concessions of one member are set out in that member's Schedule of Concessions. The Schedules resulting from the Uruguay Round negotiations were all annexed to the Marrakesh Protocol to the GATT and, pursuant to Article II(7), form an integral part of the GATT.

As discussed above, reciprocity and mutual advantage constitute the first and basic principle of tariff negotiations. There is, however, an exception to this principle. This occurs in tariff negotiations between developed and developing- country members. Article XXXVI:8 of Part IV (Trade and Development) of the GATT reads:

'[Developed-country members] do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of [developing-country members]'.

This is further elaborated by Paragraph 5 of the so-called of the 'Enabling Clause' adopted at the 1979 Tokyo Round, which provides:

'[Developed-country members] shall… [n]ot seek, neither shall [DC members] be required to make, concessions that are inconsistent with the latter's development, financial and trade needs'.

The 'Enabling Clause', in Paragraph 6, also instructs developed-country members to exercise the 'utmost restraint' in seeking any concessions for commitments from the LDC members . However, the 'Enabling Clause' also provides in relevant part of Paragraph 7 that:

[Developing-country members] expect that their capacity to make contributions or ne-

gotiated concessions… [w]ould improve with the progressive development of their economies and improvement in their trade situation and they would accordingly expect to participate more fully in the framework of rights and obligations under the General Agreement.

2. Non-Tariff Barriers ('NTBs')

(a) To trade in goods

The category of NTBs includes quantitative restrictions (such as quotas) and 'NTBs'. Differently from the case of customs duties, the GATT sets out a general prohibition on quantitative restrictions, be them on import or export, in Article XI(1) which is entitled 'General Elimination of Quantitative Restrictions'. Article XI(1) provides in relevant part: *No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any [member] on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other [member].*

The Panel in Japan-Semi-Conductors noted the wording of Article XI(1) is 'comprehensive' and applies to all measures instituted or maintained by a [member] prohibiting or restricting the importation, exportation or sale for export of products other than measures that take the form of duties, taxes, or other charges.

Nevertheless, the general prohibition on quantitative restrictions set out in Article XI(1) of the GATT is not without exceptions. Besides the general and security exceptions in Articles XX and XXI of the GATT (discussed below), the Article XI itself contains a list of exceptions in Paragraph 2. To mitigate the effects of these exceptions, Article XIII of the GATT sets out rules on the administration of quantitative restrictions. In essence, Article XIII provides for three rules, namely: (i) the rule of nondiscrimination; (ii) rules on the distribution of trade; and (iii) rules on import licensing procedures.

As to the rule of non-discrimination, Article XIII(1) of the GATT provides: *No prohibition or restriction shall be applied by any [member] on the importation of any product of the territory of any other [member] or on the exportation of any product destined for the territory of any other [member], unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.*

Article XIII(1) thus provides for a MFN-like obligation in the application of quantitative restrictions to the effect that if a member imposes a quantitative restriction on products to or from another member, the same quantitative restriction will be imposed on products to or from all other members.

Once quantitative restrictions, other than moratoria, are applied on the importation of a product, an important question arises as to how to distribute the trade that is allowed among the different members exporting the product in question. This triggers the rules on the distribution of trade.

The chapeau of Article XIII(2) of the GATT provides in relevant part: *'… [I]n applying import restrictions to any product, [members] shall aim at a distribution of trade in such product approaching as closely as possible the shares which the various [members] might be expected to obtain in the absence of such restrictions…'.*

Finally, when quantitative restrictions are applied in the form of quotas or tariff quotas, they are often administered through important licensing procedures. A trader who wishes to import a product that is subject to a quota or tariff quota will therefore need to apply for an import licence, the granting of which in turn depends, 'inter alia', upon whether quota is filled or not.

Article 1 of the Agreement on Import Licensing Procedures in Annex 1A of the WTO Agreement sets out rules on the application and administration of import-licensing rules, the most important of which is that 'the rules for import licensing procedures shall be neutral in application and administered in a fair and equitable manner'.

Besides the fairly obvious barriers of customs duties and quantitative restrictions, trade in goods is impeded also by 'other NTBs'. This, unsurprisingly, is the largest and most diverse sub-category of NTBs. WTO law (GATT and other rule) does have some provisions to address these NTBs of this kind, particularly the lack of transparency of trade regulation, unfair and arbitrary application of trade regulation, customs formalities, technical barriers to trade, and government procurement practices.

To eliminate the lack of transparency of trade regulations, Article X(1) of the GATT entitled 'Publication and Administration of Trade Regulations', requires members to publish 'promptly' their laws, regulations, judicial decisions, administrative rules of general application and international agreements relating to trade matters. Article X(1) does not, however, prescribe in detail how this can be done; generally, it provides that these documents must be published 'in such a manner as to enable governments and traders to become acquainted with them'.

As to 'unfair and arbitrary application of trade measures', this is the contrary of fair and proper application of trade measures. Article X(3)(a) of the GATT provides that 'each [member] shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in Paragraph 1 of this Article.' It is worth emphasizing that the requirement of uniformity, impartiality and reasonableness apply only to the administration of the laws, regulations, decisions and rulings, but not to these documents themselves.

With regard to customs formalities and procedures, Article VIII(1)(c) of the GATT provides in general terms that *'the [members]… [r]ecognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements'.*

The dearth of rules in WTO law regarding customs formalities and procedures precipitated the Ministerial Conference to direct the Council for Trade in Goods at Singapore Session in 1996, 'to undertake exploratory and analytical work … [o]n the simplification of trade procedures in order to assess the scope for WTO rules in this era.'

At the Doha Ministerial Conference in 2001, it was agreed to open negotiations on 'trade facilitation' after the fifth session of the Ministerial Conference in 2003. However, at the latter session, members failed to agree on the modalities of negotiation on any of the Singapore issues. It was agreed in 2004 that trade facilitation would be included on the agenda of the Doha Development Round.

Finally, with regard to technical barriers, WTO law sets out specific rules in a separate agreement, that is, the Agreement on Technical Barriers to Trade (hereinafter the 'TBT Agreement') and the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter the 'SPS Agreement'). The former deals with general category of technical barriers to trade while the latter to special category, that is, sanitary and phytosanitary measures. These two agreements do not as such prohibit the application of technical barriers to trade. Rather it sets out the conditions for such an application. Article 2(2) of the TBT Agreement provides that: *'Members shall ensure technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.'*

Similarly, Article 2 of the SPS Agreement, after recognizing a right to take the SPS measure in Paragraph 1, provides in Paragraph 2 that: *'Any sanitary or phytosanitary measure is applied only to the extent necessary to protect human, animal or plant life and health.'*

Significantly, the TBT and SPS Agreements go beyond the GATT obligation not to discriminate among or against imported products. These two agreements even impose certain international disciplines on national regulation regarding products, their characteristics or production. In other words, they promote the harmonization of national regulation on the basis of international standards.

(b) To trade in services

Trade in services, dissimilarly to trade in goods, does not face border measures. Instead, the production and consumption of services are subject to a large number of domestic regulations. As such, barriers to trade in services are primarily the result of these domestic regulations. These barriers may be classified as 'MA barriers' and 'other barriers to trade in services'. The GATS does not explicitly define the concept of 'MA barriers'. However, in Article XV:2(a) to (f) of the GATS, one find an exhaustive list of those measures, which are

- [L]imitations on the number of service suppliers whether in the form of numerical quotas, monopolies, exclusive service suppliers or the requirements of an economic needs test;
- limitations on the total value of service transactions or assets in the form of numerical quotas or the requirement of an economic needs test;
- limitations on the total number of service operations or on the total quantity of service output expressed in terms of designated numerical units in the form of

quotas or the requirement of an economic needs test;

- limitations on the total number of natural persons that may be employed in a particular service sector or that a service supplier may employ and who are necessary for, and directly related to, the supply of a specific service in the form of numerical quotas or the requirement of an economic needs test;
- measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and
- limitations on the participation of foreign capital in terms of maximum percentage limit on foreign shareholding or the total value of individual or aggregate foreign investment.

The GATS does not provide for a general prohibition on the MA barriers listed above. Differently from the GATT, the GATS applies the socalled 'positive list' or 'bottom-up' approach to the liberalization of trade in services whereby a member is bound only with respect to the specific commitments it has undertaken in its Services Schedule.

When a member makes a MA commitment, it binds the level of MA specified in the Schedule and agrees not to impose any MA barrier that would restrict access to the market beyond the level specified. In addition to the MA barriers, trade in services may also be impeded by a wide array of other barriers. Some of these barriers are similar to those other NTBs to trade in goods, such as a lack of transparency, or unfair or arbitrary application of measures affecting trade in services. The GATS addresses these barriers in a similar fashion to the GATT.

Besides, there are barriers peculiar only to the GATS, two of which are (i) domestic regulation; and (ii) lack of recognition of diplomas and professional certificates.

Domestic regulation, as mentioned above, is the primary restriction on trade in services. The GATS does not provide for rules on domestic regulation as such. However, for those regulations on licensing and technical standards, Article VI(5)(a) of the GATS is relevant: In sectors in which a member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to Paragraph 4, the member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which: (i) Does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and

(ii) could not reasonably have been expected of that member at the time the specific commitments in those sectors were made.

The GATS in particular and WTO law in general do not require that members recognize foreign diplomas or professional certificates. However, the GATS encourages states to do so. Article VII(1) of the GATS provides in relevant part: 'A member may recognize the education or experience obtained, requirements met, or licences or certificates granted in a particular country'.

C. Anti-dumping, Subsidies and Countervailing Duties

As mentioned above, dumping and subsidies are two common forms of unfair trade. WTO law provides relatively detailed rules for the former and for certain types of the latter. In addition to specific provisions in the GATT, both practices are subject to separate agreements, namely, the Agreement on Implementation of Article VI of the GATT (or Anti-Dumping Agreement - hereinafter the 'ADA'), and the Agreement on Subsidies and Countervailing Measures (hereinafter the 'SCM').

1. Dumping and Anti-Dumping Measures

Article VI of the GATT and Article 2(1) of the ADA define dumping as the bringing of a product onto the market of another country at a price less than its 'normal value' (hereinafter the 'NV'). WTO law does not prohibit dumping as such, but this imposes obligations on and regulates the actions of WTO members. As dumping may cause injury to the domestic industry of the importing country, it is 'to be condemned'.

As a result, Article VI of the GATT and the ADA provide both substantive and procedural rules on how a member may counteract or 'remedy' dumping through the imposition of AD measures. It is worth emphasizing that AD measures are not mandatory, but a policy of choice of WTO members, the imposition of which must follow certain procedures as stipulated by the GATT and ADA.

Under Article VI of the GATT and the ADA, WTO members are entitled to impose AD measures if, after an investigation initiated and conducted in accordance with the ADA, on the basis of pre-existing legislation that has been properly notified to the WTO, a determination is made that: (i) there is dumping; (ii) there is injury to the domestic industry producing the like product; and (iii) there is a causal link between the dumping and the injury. Thus, central to WTO law on AD are the determination of dumping, the determination of injury and the demonstration of a causal link.

(a) Determination of dumping

Since 'dumping', as mentioned above, is the introduction of a product into the commerce of another country at less than its 'NV', a determination of dumping starts first with the determination of the 'NV'. Article 2(1) of the ADA defines the 'NV' of a product as 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.'

The Appellate Body in the US-Hot-Rolled Steel interpreted Article 2(1) as imposing four conditions on domestic sales transactions which that may be used to determine 'normal value'.

These conditions are:

(i) The sale must be 'in the ordinary course of trade';

(ii) the sale must be of the 'like product';

(iii) the product must be 'destined for consumption in the exporting country'; and

(iv) the price must be 'comparable'.

However, there may be situations where there are no sales of the 'like product' in 'the ordinary course of trade' in 'the domestic market of the exporting country', or when because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison. In this case, Article 2(2) of the ADA offers two alternative methods whereby the margin of dumping may be determined, that is, by comparing with a comparable price of the like product when exported to an appropriate third country, or by constructing the normal value. According to Article 2(2) of the ADA, the 'construction of normal value' is made on the basis of the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

After establishing the 'NV', the export price (hereinafter the 'EP') is compared with the 'NV' to determine if dumping exists. This comparison should be 'fair', as stipulated under Article 2(4) of the ADA. In order to ensure a fair comparison between the EP and NV, Article 2(4) provides further that adjustments should be made to the NV, EP or both. Article 2(4) states in pertinent part that:

… [D]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

In Argentina-Tiles, the Panel found a violation of Article 2(4) because the Argentina, though while having made adjustments for certain physical differences, failed to do so for other differences and hence was held not to have made a 'fair comparison'.

(b) Determination of injury

The second determination to be made after a finding of dumping concerns 'injury'. This is provided in Article 3 of the ADA entitled 'Determination of injury'. Indeed, the Appellate Body in Thai Steel identified Article 3 as focusing on the obligation on a member when it makes an injury determination.

The Appellate Body also opined that Article 3(1) is 'an overarching provision that sets forth a member's fundamental, substantive obligation' with respect to determining injury and 'informs the more detailed obligations in the succeeding paragraphs'.

Article 3(1) reads: A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products; and (b) the consequent impact of these imports on domestic producers of such products.

Article 3(1) are is expanded by the succeeding paragraphs, which concern:

- [T]the determination of the volume of imports, and their effect on prices (Article 3(2));
- the impact of dumped imports on the domestic industry (Article 3(4));

- causality between dumped imports and injury (Article 3(5));
- the assessment of the domestic production of the liked product (Article 3(6)); and
- the determination of the threat of material injury (Articles 3(7) and 3(8)).

In Thailand Steel, the Appellate Body indicated that Article 3(1) allows an investing authority to determine an injury based on all relevant reasoning and facts before it, not just on disclosed or discernible reasoning or facts.

In US-Hot-Rolled Steel, the Appellate Body expanded the discussion by providing definition to the terms 'positive obligation' and 'objective examination'. According to the Appellate Body, the former indicates that the evidence must *'be of an affirmative, objective and verifiable character, and that it must be credible' while the latter 'requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested party, in the investigation'.*

As noted above, Article 3(1) requires the a determination of injury to the domestic market must involves an examination of (i) the volume of dumped imports and their effect on prices (Article 3(2)), and (ii) the impact of dumped imports on the domestic industry (Article 3(4)). With regard to the requirement of Article 3(2), the Appellate Body in EC-Bed Linen (Article 21.5-India) held that imports from those exporters who were not found to be dumping may not be included in the volume of dumped imports from a country.

With regard to the requirement of Article 3(4), the said Article states: *'The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors'.*

Fifteen relevant economic factors then are identified by Article 3(4), which include: factors and indices having a bearing on the state of the industry (such as an actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity); factors affecting domestic prices; the magnitude of the margin of dumping; and actual and potential negative effects on cash flow, inventories, employment, wages, growth, and the ability to raise capital or investments.

Article 3(4) explicitly states that the list is not exhaustive and stresses that one or several of these factors will not necessarily give decisive guidance.
The Panel in Thailand-H-Beams opined that the list of factors in Article 3(4) is a mandatory minimum.

The term 'injury' in the ADA refers not only to material injury but also to the threat of material injury. Article 3(7) of the ADA lists requirements for finding a 'threat of material injury'. In Mexico-Corn Syrup, the Appellate Body stated that for the purposes of Article 3(7), investigating authorities may make assumptions, because future events 'can never be definitely proven by facts.' Nevertheless, Article 3(7) does indicate that 'the situation in which the dumping would cause injury must be clearly foreseen and imminent.'

In this connection, it is noted that Article 3(8) of the ADA requires that the application of AD measures shall be considered and decided with 'special care' where a determination of treat of material injury is involved.

(c) Demonstration of a causal link between the dumped imports and the injury to the domestic industry

Once a determination of injury is made, there is a final step to take, that is, the demonstration of a causal link. Article 3(5) of the ADA provides that demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence. Article 3(5) also contains a 'non-attribution' requirement, according to which it is also necessary to examine any known factors other than the dumped imports, which are at the same time injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. In US-Hot-Rolled Steel, the Appellate Body stated that if the effects of other factors cannot be separated from those of the dumped imports then investigating authorities cannot attribute the injury to the dumped imports.

2. Subsidies and Countervailing Duties

As mentioned above, in addition to rules on dumping, WTO law also includes rules on subsidization as another unfair trade practice. Subsidies are, however, a very sensitive matters in international trade relations since internally they help to pursue and promote important and fully legitimate objectives of economic and social policy; but externally, they may have adverse effects on the interests of trading partners whose industries may suffer, in its their domestic or export markets, from unfair competition with subsidised products. The rules on subsidies are found in Articles VI and XVI of the GATT and also in, arguably more importantly, the Agreement on Subsidies and Countervailing Measures (hereinafter the 'SCM'). The latter contains, for the first time in the history of the WTO, a detailed and comprehensive definition of the concept of 'subsidy'.

Article 1(1) of the SCM defines a 'subsidy' as a financial contribution by a government or public body, which confers a benefit. It should be noted in WTO law, subsidies were classified into three types, namely, actionable, non-actionable, and prohibited subsidies. The difference between among these types hinges upon the action that a member may take to respond. In particular, for actionable and prohibited subsidies, a member may follow one of the two methods to respond to subsidised trade, that is, to bring the issue to a dispute resolution forum or to impose a countervailing duty to offset the subsidization. For non-actionable subsidies, these two tracks to respond are not available to WTO members.

This type of subsidy, however, expired in 2000, pursuant to Article 31 of the SCM. As such there are now only two types of subsidies, prohibited and actionable subsidies.

Prohibited subsidies are specified in Article 3(1) of the SCM, which is entitled 'Prohibition'. Article 3 provides:

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) Subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

In short, two types of prohibited subsidies are: (i) export subsidies; and (ii) import substitution subsidies. These subsidies, often referred to as 'red light' subsidies, are prohibited because they aim to affect trade and are most likely to cause adverse effects to other members.

Article 3(1)(a) prohibits subsidies contingent, both 'de facto' and 'de jure', upon export performance. It refers to Annex I, which contains a nonexhaustive list of eleven types of export subsidy. The Appellate Body in Canada-Aircraft recognized that 'contingent' imports holds the same legal standard for both 'de jure' and 'de facto' contingency, i.e., 'conditional' or 'dependent for its existence on something else'.

The difference between 'de jure' and 'de facto' contingency lies in what evidence may be employed to demonstrate that a subsidy is export contingent. In the case of 'de jure' contingency, such demonstration necessarily involves the use of words in the relevant legislation, while in 'de facto' export contingency, to the SCM states that the standard is met if the facts demonstrate that the subsidy is 'in fact tied to actual or anticipated exportation or export earnings.' It is evident that 'de facto' export contingency is more difficult to demonstrate than 'de jure' export contingency. The Appellate Body in Canada-Aircraft stated that the standard for determining 'de facto' export contingency set out in Footnote 4 requires proof of three different substantive elements, namely, (i) 'the granting of a subsidy'; (ii) 'is … tied to…'; and (iii) 'actual or anticipated exportation or export earnings'.

In addition to export subsidies, Article 3(1) also prohibits import substitution subsidies. As defined in Article 3(1)(b), import substitution subsidies are subsidies contingent upon the use of domestic over imported goods. While the words 'de jure' and 'de facto' are absent in Article 3(1)(b), the Appellate Body in Canada-Autos stated that Article 3(1)(b) still covers both 'de jure' and 'de facto' contingency upon the use of domestic cover imported goods.

Subsidies that are neither prohibited nor non-actionable are placed in the actionable category. Article 5 of the SCM defines actionable subsidies as specific forms of government assistance to farms or industries. Actionable subsidy may be objectionable on three grounds, which are that is - They cause injury to the domestic industry of another member (Article 5(a)); - they entail nullification or impairment of benefits accruing to another country (Article 5(b)); or - they cause serious prejudice to the interests of another country (Article 5(c)).

The concept of 'serious prejudice' in Article 5(c) is explained by Article 6(3). Under Article 6(3), such a prejudice may occur if it produces one of the following effects:

a) Displacing or impeding the imports of a like product of another member into the market of the subsidizing member;
b) displacing or impeding the exports of a like product of another member from a third country market;
c) resulting in a significant price undercutting by the subsidized product as compared with the price of a like product of another member in the same market; or significant price suppression, price depression or lost sales in the same market;
d) leading to an increase in the world market share of the subsidizing member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years, and this increase follows a consistent trend over a period when subsidies have been granted.

Articles 5 and 7 of the SCM respectively provides for multilateral remedies for, respectively, prohibited and actionable subsidies. The procedure is that a member will request consultations with the other member over the latter's prohibited or actionable subsidy. If consultations fail, the issue will be referred to the Dispute Settlement Body for adjudication.

Besides multilateral remedies, a member challenging a prohibited or actionable subsidy which that causes injury to its domestic industry may be offset by the application of a countervailing measure. Part V of the SCM sets out detailed rules governing countervailing actions.

2. General and Security Exceptions

While the basic principles of the WTO discussed above provide the backbone of the WTO system, the picture emerging from their survey would be incomplete, if not severely distorted, without an understanding that each principle is subject to qualification. The GATT and GATS, in addition to providing for the basic principles and rules of WTO law, also set out a number of exceptions. The institution of exceptions is to allow members to justify on a limited number of policy grounds trade-restrictive measures that would otherwise be inconsistent with the WTO. Insofar as the WTO was established not only to raise standards of living (by the way of trade liberalization) but also to pursue broader objective, namely, sustainable development, the exceptions are necessary to enable balancing trade liberalization with other important policy objectives pursued by WTO members. In this sense, the exceptions may also be conceived as WTO's non-trade policy principles whose function is to reconcile conflicts between trade liberalization and other societal values and interests.

WTO agreements provide for wide-ranging exceptions which can broadly grouped into six categories, namely: the 'general exceptions', the 'security exceptions', the 'economic emergency exceptions', the 'regional integration exceptions', the 'balance of payments exceptions', and the 'economic development exceptions'. This Section focuses on the first exception, which is the single most important one of all the exceptions, and then cursorily discusses the second one, which functions similarly to the first. But before doing so, some brief remarks about the other exceptions are in order. The 'economic emergency exceptions', which are set out primarily in Article XIX of the GATT and further elaborated in the Agreement on Safeguards, basically allow a member to adopt measures, which is otherwise inconsistent with the GATT, to a product which has been 'imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.'

In a similar vein, the 'regional integration exceptions', which are enshrined in Article XXIV of the GATT and Article V of the GATS, enable members to adopt measures, otherwise WTO-inconsistent, in order to pursue regional economic integration. A member may have recourse to the 'balance-of-payments exceptions', which are provided in Articles XII and XVIII:B of the GATT and Article XII of the GATS in order to protect its external financial position and its balance-of-payments.

Finally, WTO law contains a number of rules which constitute 'economic development exceptions' in favour of DCs. These rules, as explained above, are developed to take into account the need of these members for greater flexibility in the time necessary for the implementation of WTO agreements. In other words, DCs enjoy 'special and differential treatments' (hereinafter the 'S&D') in the implementation of the WTO commitments in the interest of their economic development. These S&D provisions exist in almost all WTO agreements and have been classified by the WTO Secretariat into the following six-fold typology:

(i) Provisions aimed at increasing the trade opportunities of DCs;
(ii) provisions under which WTO members should safeguard the interests of DC members;
(iii) flexibility of commitments, of action, and use of policy instruments;
(iv) transitional time periods;
(v) technical assistance;
(vi) provisions relating to LDCs.

Among the six types of S&D treatment provisions, of particular importance is the General System Preferences (hereinafter the 'GSP') exception enshrined in the 'Enabling Clause'.

The 'Enabling Clause', in addition to providing for exception to the reciprocal principle in tariff negotiation as discussed above, also allows developed-country members to grant preferential tariff treatment to imports from DCs, subject to certain substantive and procedural conditions.

The practical effect of this provision is that the fundamental MFN treatment obligation is neutralized in favour of DCs. Furthermore, it is arguable that the 'Enabling Clause' even allows a developed-country member to grant preferential tariff treatment to some, and not to other, DCs, provided that specific requirements are met.

That said, it is now appropriate to turn to the general exceptions and security exceptions, which are stipulated in two separate articles in the GATT and the GATS respectively.

A. General Exceptions

General exceptions are key provisions of the GATT and GATS. These exceptions are stipulated in Article XX of the GATT (hereinafter the 'Article XX') and Article XIV of the GATS (hereinafter the 'Article XIV'). Article XX reads in the relevant part as follows:
Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(a) Necessary to protect public morals;

(b) necessary to protect human, animal or plant life or health;

…

d) [n]ecessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under Paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

…

(g) [r]elating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;

Article XIV begins with a chapeau identical to that of Article XX quoted above. In its operative part, Article XIV provides for measures that are:

(a) Necessary to protect public morals or to maintain public order;

(b) necessary to protect human, animal or plant life or health;

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) The prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective imposition or collection of direct taxes in respect of services or service suppliers of other members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the member is bound.

Despite the textual differences between Article XX and Article XIV, as the Appellate Body in the US-Gambling observed, these two articles boast similar structured, language and functions and thus can be cross-referenced in their analyses.

B. Security Exceptions

Besides the general *exceptions*, Article XXI of the GATT and Article XIVbis of the GATS provide exceptions that members may invoke to justify actions relating to their essential security interests. Article XXI of the GATT provides as follows: Nothing in this Agreement shall be construed (a) To require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) Relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) taken in time of war or other emergency in international relations; or

(c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

Article XIVbis of the GATS, the Paragraph 1 of which is modelled upon Article XXI of the GATT. The security exceptions functions similarly to the general exceptions in that they allow members to justify trade-restrictive measures on non-trade grounds. However, textually speaking, there are between the respective clauses relating to these two types of exceptions differences that may have some significance. Firstly, the security exceptions do not have a chapeau, which suggests that they might not be subject to a prohibition on arbitrary or unjustifiable discrimination. Secondly, the members need only to consider that their essential security interests are engaged in order to invoke security exceptions.

It is therefore argued that Article XXI of the GATT, particularly paragraph (b), gives a member a broad discretion to take national security measures. This being so, a certain degree of 'judicial review' should be maintained; otherwise the provision would be prone to abuse without redress. In the era of the GATT 1947, there were several cases where Article XXI could be invoked. US-Export Restrictions (Czechoslovakia)

[1949] was, however, the first and the only case where the security exceptions were successfully invoked. The US invoked Article XXI to justify its export licence regime which Czechoslovakia considered discriminatorily administered in violation of Article I of the GATT 1947. The UK representative, at the meeting of the Contracting Parties, which voted that the US was in conformity with its obligations, stated: '… *[T]he United States action would seem to be justified because every country must have the last resort on questions relating to its own security'*. However, in the controversial USTrade Measures Affecting Nicaragua, the Panel, having found that it could not determine the validity of the US invocation of Article XXI of the GATT due to its terms of reference, raised a pertinent question: If it were accepted that the interpretation of Article XXI was reserved entirely to the contracting party invoking it, how could the Contracting Parties ensure that this general exception to all obligations under the General Agreement is not invoked excessively or for purposes other than those set out in this provision? Neither Article XXI of the GATT nor Article XIV of the GATS has been invoked in a case in the WTO era and the above question remains open.

IV. INTERNATIONAL BUSINESS LAW

1. What Is the International Sales of Goods?

In business operations in general and international business in particular, the sales of goods are key transactions. On the domestic scale, it is the exchange of goods within a country, while on the international scale, it is the exchange of goods among different countries through the import and export transactions. Despite the increasing emergence of new international business transactions, such as international service provision and international investment, the international sales of goods, as traditional transactions, still have its important position in international business.

The international sales of goods are business transactions that usually take place beyond the territory of a country. It is performed in different countries with different elements of geography, history, climate, economy, policy, law, culture and religion. Therefore, it is much more complicated and more risky than the sales of goods within a country.

Culture barriers may cause disagreement or conflicts between points of view, working styles, business practices, or consumer tastes. The geography and climate of a country are sometimes important issues that are paid attention by international businessmen, because they may have a direct effect on the acceptance of a new product in the market.

International factors in sales of goods may also cause specific legal issues, compared with the domestic sales of goods, such as risks in transportation of goods from one country to another, risks in international payment or money transfer, etc. These are issues that must be resolved by the law on the international sales of goods.

2. Regulations on International Sales of Goods

There are many different sources of law that govern the international sales of goods, of which the three main sources are domestic law, international treaties, and international mercantile customs and usages.

A. Domestic Law

The sales of goods have been always basic business transactions, therefore each country has created its own rules governing the sales contracts. In several countries, there have been particular regulations on the sales contracts, e.g., The British Sales of Goods Act 1979. In certain other countries, for example, Vietnamese law on sales of goods now is a part of Commercial Law. In China, the law on sales contracts has been a chapter within Contract Law 1999. However, a sales contract may be governed simultaneously by the laws of many countries. In the case where the laws of these countries comprise different rules on the same issue under dispute, it may cause a conflict of laws, for example on the contract forms, or the content of contract.

Conflict of laws on contract forms: It is the case where the laws of different countries comprise different rules on the form of the sales contracts. According to the law of several countries, including the UK, France, the US and Germany, the sales contracts may be made in written form, or verbal form or a specific deed, except for sales of real estate.

Meanwhile, according to the law of other countries such as Vietnam and China, the sales contracts must be concluded in written form. Thus, verbal contracts or contracts based on deeds would be valid under the law of some countries, but not under that of others.

Conflict of laws on the content of contracts: It is the case where the laws of different countries comprise different rules on the various and complex issues, such as the rights and obligations of parties, principal contract terms, or the application of remedies in the case of breach of contract. For example, according to the laws of France, Germany and Japan, the principal contract terms include both the contract's objects and price, while the laws of the UK, US and Australia rule that it would be enough for parties to define only the contract's objects.

Regarding the rights and obligations of the seller and buyer within a sales contract, French law gives greater protection in favour of the buyer (consumer), while German law gives greater protection to the seller. Regarding the force majeure event, strikes are considered as a force majeure according to the law of some countries, yet not of others. In order to resolve the conflict of laws, it is the best way for parties to agree to choose a national law applied to their contract. Domestic law, as far as it relates to international treaties, states the freedom of the choice of law applied to parties involved in a international business transaction.

However, it is necessary to note that this freedom is always limited within such general rules as 'international public order', or 'general principles of law' or 'imperative norms' as these apply to some specific situations regardless of the applicable law.

If parties to an international sales contract did not choose the applicable law, then according to the general principles of private international law, the law applying to that contract will be identified via the rules of conflict. The rules of conflict are those that point out the legal system to be applied to the international business transactions in question.

Rules of conflict do not directly define the rights and obligations of parties involved in a transaction, but 'refer' to an applicable law which is most directly related and effective for a certain transaction. In the case where the rules of conflict are applied, the applicable law may be 'lex fori', or the law of another country.

Most countries provide their own rules of conflict in order to support their courts to choose the law applied to the international business disputes in general, and disputes on the international sales contracts in particular.

As a result, the national law applicable to an international sales contract may be the substantive legal provisions (those directly govern rights and obligations of parties to the contract), or the rules of conflict (those refer to a specific national law to be applicable to the contract).

B. International Treaties

Conflicts of laws may cause disputes in international sales of goods. To prevent these, countries often negotiate the adoption of related international treaties in order to unify certain rules aiming at governing these transactions. There are two types of such international treaties - one to unify the substantive rules, and the other to unify the rules of conflict. These treaties may be either bilateral or multilateral.

1. Treaties to Unify the Substantive Rules

The unification of the substantive rules occurs when countries agree to create the substantive rules, in order to govern international sales of goods transactions. Since 1920s, many international commercial treaties containing substantive rules were adopted and performed, showing an indispensable trend in the economic development of the world.

There were several important international treaties in the field of the international sales of goods. These were:

1. the Convention on Uniform Law on the Formation of Contracts for the International Sales (hereinafter the 'ULF')
2. the Convention on Uniform Law on the International Sales of Goods (hereinafter the 'ULIS').

In fact, these two conventions are rarely applied. Nowadays, countries that joined the Vienna Convention 1980 have already declared their abandonment of these two conventions. The Vienna Convention 1980 - the United Nations Convention on Contracts for International Sales of Goods (hereinafter the 'CISG') The CISG was adopted in Vienna on 11 April 1980 and officially came into effect on 1 January 1988. The CISG was drafted by the United Nations Commission on International Trade Law (UNCITRAL) in an effort to create an uniform legal document for substantive rules on the international sales contracts. It is nowadays the most widely applied the CISG and has the strongest influence on the international sales of goods. As of 1 August 2011, UNCITRAL reported that 77 states have adopted the CISG.

The CISG is estimated to govern three quarters of their international commercial transactions of goods. It plays an important role in removing the conflicts of laws among member countries. Contracts concluded between parties of which the commercial headquarters are located in member countries shall be governed uniformly by the CISG, thus there will be no more disputes on the applicable law. The CISG contains specific provisions on the rights and obligations of the seller and buyer, the responsibilities of each party in cases of breach of contract or others. The provisions of the CISG usually help the parties to foresee the potential legal problems concerning the sales of goods transactions, and these provisions do not depend on any national legal system. Therefore, the Convention provides secure and fair solutions for parties to the contract .

2. Treaties to Unify the Rules of Conflict

For a certain transactions, the national rules of conflict may differ among countries. If there exist different national rules of conflict to resolve the same issue, there might occur 'the conflict of rules of conflict'. Applying rules of conflict therefore causes considerable difficulties and risks in resolving the conflicts of laws. For example, if a certain dispute over an international business contract is brought to the national court of the state A with A's rules of conflict, the law applicable to the contract may be different from the law that national court of the state B might choose according to B's rules of conflict. It will cause difficulties for parties in predicting the applicable law, since their disputes may be resolved in many different national courts. This is a great obstacle in applying the rules of conflict to resolving disputes over international sales of goods. Therefore, nowadays, countries tend to negotiate and adopt international treaties to unify the rules of conflict. The uniform rules of conflict may be specified in bilateral or multilateral treaties. The bilateral treaties related to this issue are mutual legal assistance agreements. Before 1990s, when the Soviet Union and the former East European socialist countries still existed, Vietnam adopted six mutual legal assistance agreements with the countries, such as the German Democratic Republic, the Soviet Union, Czechoslovakia, Cuba, Hungary and Bulgaria.

Later, in 1992, after the new Vietnamese Constitution took effect, Vietnam adopted nine more mutual legal assistance agreements with the Poland, Laos, China, Russia, France, Ukraine, Mongolia, Belarus and the People's Democratic Republic of Korea. According to these agreements (except those with France and China), the rules of conflict were uniformly applied to the member countries, for example, the rules to identify the law applicable to foreign-related relations relating to civil matters, and the rules to identify the competent jurisdiction.

However, these rules usually related to marriage, family and heritage relations, but not international commercial transactions. The multilateral international agreements to unify the rules of conflict were usually adopted within the framework of an international organization, the most important of which was The Hague Conference on Private International Law. The Hague Conference is a permanent institution responsible for the unification of private international law on a global scale.

The Conference has compiled and adopted many international treaties, among which some international agreements have been widely applied and had considerable importance in resolving conflicts over the international sales of goods.

Among the multilateral international treaties to unify the rules of conflict, the following were quite widely applied:

- The Hague Convention 1955 on the Law Applicable to International Sales of Goods

According to this Convention, a sales contract must be in compliance with the law chosen by the involved parties. If there is no agreement on the applicable law, the law of the country where the seller has his/her office upon received orders shall apply, with the following exceptions:

(i) if an order is assigned to be performed by a branch of the seller, the law where the branch locates shall apply;

(ii) if an order is received by the seller or his/her agent in the buyer's country, the law of the country where the buyer has his/her permanent residence shall apply (Article 3).

The Hague Convention took effect in 1964 and currently has eight member countries (such as Denmark, Finland, France, Italy, Norway, Sweden, Switzerland and Niger).

- The Rome Convention 1980 on the Law Applicable to Contractual Obligations

There are nine European member countries participating in this Convention, including Belgium, Denmark, France, Germany, Ireland, Italy, Luxembourg, the Netherlands and the UK. Later, seven more countries joined, such as Greece, Spain, Portugal, Austria, Finland, Slovakia and Sweden. The Rome Convention has been widely applied in European countries. The Convention provisions shall apply to contractual obligations. Under the Convention, a contract will be governed under the law chosen by the parties involved. This choice must be made clear in the terms of the contract or the circumstances of the case. The parties may choose the law applicable to the whole or only a part of the contract.

In the case where no applicable law was choosen, the contract would be governed by the law of the country which has the closest connection with the disputed contract. 'The country which has the closest connection with the disputed contract' is determined by Article 4(2) of the Convention.

According to this, the country that has the closest connection with the contract is that where the party fulfiling the main obligation locates his/her major place of business.

C. International Mercantile Customs and Usages

International mercantile customs and usages are an important source of law governing sales contracts. They have been recognized and widely applied to business activities on a regional or a global scales. Some international mercantile customs and usages applied to the international sales of goods include International Commercial Terms (hereinafter the 'INCOTERMS') codified and issued by the International Chamber of Commerce (hereinafter the 'ICC') in 1936 (and amended in 1953, 1968, 1976, 1980, 1990, 2000 and 2010) (see, the Section Two of this Chapter); and Uniform Custom and Practice for Documentary Credits (hereinafter the 'UCP').

The international mercantile customs and usages usually govern specific issues, such as the transfer of risk from the seller to the buyer, the obligations of each party related to the transport and insurance of goods, etc.

D. Other Legal Sources

The 'Model Contracts' and 'General Principles of Contract Law' are other sources of law, which are also becoming increasingly important in governing international commercial contracts in general and sales contracts in particular, having a legal effect similar to international mercantile customs and usages. Firstly, regarding the Model Contracts, it is necessary to distinguish a model contract drafted by a professional association, from one provided to the parties by an independent organization.

In international commercial practices, the first type of Model Contracts is very common. Professional associations of many sectors have developed Model Contracts, such as the Model Contract on the sale of grains (GAFTA contracts), the sale of oil (FOSFA contracts), and the sale of coffee, cocoa or cotton. The above contracts were drafted respectively with content relevant to each business sector. However, the terms of these contracts have been criticized for giving greater legal protection to the interests for the members of the association.

The Model Contracts drafted by independent organizations, however, do not often encounter similar criticism. The goal of these organizations is to provide contracts with full and equal benefits for the parties involved. The most common are the Model Contracts and Model Terms of Contracts drafted by the ICC. In 1985, the ICC issued the Model Clause of Force Majeure. Since 1991, the ICC has published a series of Model Contracts in many sectors, including the sales contracts. These model contracts have been consistently and legally reliable, since they were created by experts in the relevant sectors. Moreover, the provisions of the Model Contract do not depend on the legal system of any particular country.

The Model Contracts would be applied as the source of law for an international sales contract in the case where parties refer to the Model Contracts or one or several clauses of the Model Contracts.

Secondly, regarding the 'general principles of contract law', they have been usually principles extracted from international business practices recognized and applied by traders in their international contracts transactions, and have considered popular. They have included the principles of free contract, cooperation, good faith and precaution. Most of these principles have been also inserted uniformly into national laws. Therefore, they have been easily recognized and considered popular in international commerce.

Nowadays, the application of the general principles of law becomes an increasing trend in international business, because these principles exist independently of the national legal systems, thus may more easily gain the acceptance of parties to a contract. Moreover, being created in the practices of international business, these principles contain norms relevant to the practices of international business, which are always changing. This trend may be seen in the fact that these principles have been codified and issued as Principles, such as the Principles of International Commercial Contracts (hereinafter the 'PICC'), compiled by the International Institute for Unification of Private Law (hereinafter the 'UNIDROIT'); or the Principles of European Contract Law (hereinafter the 'PECL'), drafted and issued by the Commission on European Contract Law (known as 'Lando Commission').

Regarding their legal effect, the Principles are for reference only and have no legal binding force over parties to contracts. In other words, these Principles do not be automatically or mandatorily applied. They may apply only in the case where they have been chosen by the parties involved. These Principles have the same legal effect as international mercantile customs and usages. The following sections will discuss more details about the important sources of law that govern international sales contracts.

INTERNATIONAL COMMERCIAL TERMS - INCOTERMS

1. INCOTERMS - Overview

Sales contracts involving transportation customarily contain abbreviated terms describing the time and place where the buyer is to take delivery, the place of payment, the price, the time when the risk of loss shifts from the seller to the buyer, and the costs of freight and insurance. These terms are widely used in international business and each has a different meaning, depending on the governing law. The most widely used commercial terms are those published by the ICC. Known as 'INCOTERMS', they are applied throughout the world. Their use in international sales is encouraged by trade councils, courts and international lawyers. First published in 1936, the current version is INCOTERMS 2010. The 2000 revision makes few changes from the previous revision, INCOTERMS 1990. The 1990 revision made several significant modifications to the earlier terms, reflecting changes both in technology and in shipping practices that occurred during the 1980s. According to the ICC, 'The main reason for the 1990 revision of INCOTERMS was the desire to adapt terms to the increasing use of electronic data interchange (EDI).' The terms, accordingly, allow parties to transmit documents electronically, including negotiable bills of lading, as long as their contract specifically allows them to do so. The second main reason for the revision stemmed 'from transportation techniques, particularly the unitization of cargo in containers, multimodal transport, and roll-on roll-off traffic with road vehicles and railway wagons in "short sea" maritime transport.' Older terms that applied to peculiar modes of land and air transport, such as Free on Rail (FOR), Free on Truck (FOT), and FOB Airport, were eliminated and the Free Carrier term was expanded

INCOTERMS 2010 eliminated four terms (DAF, DES, DEQ and DDU) and added two (DAP- Delivered at Place and DAT - Delivered at Terminal), reducing the total number of terms to eleven. INCOTERMS 2010 officially admits the use of the terms in domestic and international trade. EXW - Ex Work clearly indicates for domestic business only. The new version shall not terminate the validity of the previous versions. Therefore, parties who adopt the INCOTERMS, or any other commercial terms, should make sure they express their desires clearly: they should state clearly in the contract which commercial terms they prefer to use. For example, if parties choose FOB for their sales contract, they should indicate FOB INCOTERMS 2000 or FOB US Uniform Commercial Code (UCC); while it contains the same term 'FOB', the meaning differs to some extent.

The UCC states in §2-319 FOB and FAS Terms that 'when the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery of them in the manner provided in this Article'. However, FOB INCOTERMS 2000 transfers the risk from the seller to the buyer at the loading port. If parties fail to show their choice of governing law, courts or arbitrators will apply the definitions used in their own jurisdictions.

Parties should also refrain from casually adopting any particular set of terms. The ICC's INCOTERMS, possibly the most complete of all such rules, are lengthy and deserve careful study. Parties are free to make additions to or to vary the meaning of any particular term, provided that such additions or variations do not conflict with the nature of the terms, i.e., FOB transfers the risk from the seller to the buyer when the goods pass the ship's rail at the port of departure, thus parties may not modify this feature such that the risk is transferred at the port of destination. Courts or arbitrators are as apt to ignore a variation, or to hold that the entire term is ineffective, as they are to apply it.

2. Terms - Overview

The terms in INCOTERMS 2010, as it is the most recent version up to now (2012), shall be focused.

The INCOTERMS 2010 are classified into four groups, according to the parties' obligations. The 'E' Group (i.e., Ex Works [EXW]) requires the buyer to take delivery of the goods at the buyer's premises. The 'F' Group (i.e., Free Carrier [FCA], Free Alongside Ship [FAS] and Free on Board[FOB]) requires the seller to deliver goods to a carrier. The 'C' Group (i.e., Cost and Freight [CFR]; Cost, Insurance and Freight [CIF]; Carriage Paid to [CPT] and Carriage and Insurance Paid to [CIP]) requires the seller to arrange and pay for carriage, but the seller does not assume the risk for loss or damage once the goods are delivered to the carrier. The 'D' Group (i.e., Delivered at Terminal [DAT], Delivered at Place [DEP] and Delivered Duty Paid [DDP]) requires the seller to bear all costs and risks of bringing the goods to the buyer's country.

Certain INCOTERMS apply only to particular forms of transport. FAS, FOB, CFR, CIF apply only to sea and inland waterway transport. The other terms - EXW, FCA, CPT, CIP, DAT, DAP, and DDP - apply to any form of transport.

Several of the common commercial terms begin with the word 'Free' (e.g., Free Alongside the Ship, Free on Board, Free Carrier). 'Free' means that the seller has an obligation to deliver the goods to a named place for transfer to a carrier. The terms 'Free Alongside' or 'Free Alongside Ship' require the seller to deliver goods to a named port alongside a vessel to be designated by the buyer and in a manner customary to the particular port. 'Alongside' has traditionally meant that the goods must be within reach of a ship's lifting tackle. This may, as a consequence, require that the seller hire lighters to take the goods out to a ship in ports where this is the practice. In other respects, the requirements of a FAS term are the same as those of a FOB contract.

The seller's responsibilities end upon delivery of the goods alongside. Some terms start with 'C' (i.e., 'Cost'). 'C' may go with or without 'I' (i.e., 'Insurance') and 'F' (i.e., 'Freight') or 'P' (i.e., 'Paid to'). The 'C' term is preferred by many buyers because it means that they have little to do with the goods until the goods arrive at a port or destination in their country.

A 'C' terms contract requires the seller to arrange for the carriage of goods by sea to a port of destination and to turn over to the buyer the documents necessary to obtain the goods from the carrier or to assert a claim against an insurer if the goods are lost or damaged. However, both 'C' and 'F' terms transfer the risk from the seller to the buyer at the departure point.

Particularly, the risk passes from the seller to the buyer when the goods are on board under CIF or FOB INCOTERMS 2010. It may be considered an advantage of INCOTERMS 2010 compared with INCOTERMS 2000, as INCOTERMS 2000 creates an imaginary 'line' where the risk transfers, which is the ship's rail.

Terms starting with 'D' require the seller to deliver goods to a buyer at an agreed-upon destination. This is different from 'C' terms, although 'D' terms put the seller under similar obligations to those in 'C' terms. The seller in 'D' terms remains responsible for the goods until they are delivered.

Section Three. RULES ON INTERNATIONAL SALES OF GOODS CONTRACTS

1. The Vienna Convention 1980 - The United Nations Conventions on Contracts for International Sales of Goods (CISG)

The CISG was drafted by the United Nations Commission on International Trade Law (hereinafter the 'UNCITRAL') and adopted in Vienna in 1980. The CISG was based on two previous attempts to achieve an uniform law on international sales, such as the Conventions relating respectively to the Uniform Law on the Formation of Contracts for the International Sales ('ULF'), and to the Uniform Law on the International Sales of Goods ('ULIS'), and both adopted in The Hague in 1964. These two predecessors of the CISG, however, did not gain widespread success. The CISG has now gained worldwide acceptance and is considered to be the most successful convention promoting international commerce. Since its entry into force on 1 January 1988, as of 1 August 2011, UNCITRAL reported that 77 states have adopted the CISG.

The CISG includes 101 articles and is divided into four parts:

- Part I (from Article 1 to Article 13) lays down rules on its application and general provisions;
- Part II (from Article 14 to Article 24) governs the formation of the contract;
- Part III (from Article 25 to Article 88) contains the substantive rules for the sales contract, i.e., the obligations and rights, in particular the remedies, of the parties;
- Part IV (from Article 89 to Article 101) contains rules on ratification and entry into force, including the reservations.

The reservations are significant for a number of reasons - when noting whether a state has ratified the CISG, always check for reservations. There are options that may be taken by ratifying states. They fall into three main categories. Firstly, the reservations which may prohibit the application of the CISG such as the CISG may not extend to all of the territories of a federal state (Article 93); the CISG may not apply between states who reciprocally agree this; the CISG cannot apply through Article 1(1)(b), only through Article 1(1)(a). Secondly, the reservations that limit the application of the CISG as laid down in Article 92, where either Part II or Part III is excluded.

This reflects the fact that the CISG is a 'double-convention', embodying both the ULF (formation) and ULIS (substantive rules). Thirdly, there are reservations that alter the content of the CISG where Article 11 on verbal contracts may be made inapplicable, requiring written confirmation.

The CISG reflects main following contents: (A) the criterion for identifying an international sales contract according to the CISG; (B) scope of the CISG's applications; (C) formation of international sales contract; (D) the buyer's and seller's obligations; and (E) remedies for breach of international sales contract.

A. The Criterion for Identifying an International Sales Contract According to the CISG

Article 1 of the CISG laid down 'place of business of parties to contract' as an only criterion for identifying an international sales contract. A contract is considered as an international sales contract if the parties to the contract have their respective places of business in different countries which are contracting states; or the rules of private international law lead to the application of the law of a contracting state. Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the 'international nature' of the sale of goods contracts under the CISG.

B. Sphere of the CISG's Application

1. The Two Cases of Application

Firstly, it is the case where there is a choice of law referring to apply the CISG. In this case, the CISG will be applied. In a jurisdiction where the autonomy of party is respected, parties to contract may freely identify the CISG to be the governing rules on their contract.

Secondly, it is the case where parties to the contract do not expressly or impliedly identify the applicable law as the CISG in the contract. The CISG, at this event, will be applied under Article 1(1).

Under Article 1(1)(a), if no private international law rules apply, the CISG would be the governing law. Under Article 1(1)(b), where private international law rules refer to the law of a contracting state, the applicable law would be the CISG.

2. The Three Cases of Non-application

Firstly, non-application of the CISG to certain types of transaction, such as consumer sales, auctions or executions or other sales by authority of law, sales of securities (Article 2(a)-(d));

Secondly, non-application of the CISG to certain specific goods, such as ships, aircraft, electricity, property; and non-application of the CISG to contracts for which most seller's obligations are supplying labour or other services (Article 2(e)-(f) and Article 3); and

Thirdly, non-application of the CISG to some subject matter, such as validity of the contract, the effect which the contract may have on the property in the goods sold, and the liability of the seller for the injuries caused by the goods to any person (Articles 4-5).

C. Formation of International Sales Contract

Under the CISG, an international sales contract comes into effect 'when the acceptance of an offer becomes effective in accordance with the provisions of the Convention'.

This means the CISG adopts the classical model of the exchange of offer and acceptance and does not require further elements such as form , or 'consideration'.

1. Offer

An offer is a definite expression of the offeror's will (intention to be bound), addressed to one or more specific persons. A proposal that is not addressed to one or more identified persons would be considered as an offer only if this is clearly indicated by the person making the offer.

The CISG does not require the price to be fixed for a contract to be valid. Implied or explicit provisions for determining the price must be contained in an offer for it to be definite. The sending of price lists, catalogues and the placing of advertisements and the like are in principle not offers. The offer is effective as soon as it has reached the offeree. It is terminated when rejected - even if irrevocable.

Under Article 15(2) of the CISG, the offeror may still withdraw his offer if the withdrawal reaches the offeree before or at the same time as the offer. This is true even if the offer is irrevocable. Furthermore, the offeror may still revoke his offer after the offer has reached the offeree, but before the acceptance has been dispatched. The regulation of the revocation of an offer came about as a compromise after long discussions between the civil and common law systems. The revocation as it is found in common law systems remains basically intact. Revocation is not possible where an offer is irrevocable (either impliedly or expressly) or if the offeree has acted in reliance upon the offer.

2. Acceptance

By accepting, the offeree indicates his assent to the offer. As soon as an indication of assent reaches the offeror, the acceptance becomes effective and a contract is formed. Actions of the acceptor, such as the dispatch of goods or payment of the price, may indicate an implied acceptance. This may be when the offer expressly allows for this possibility, when the implied acceptance by parties has become customary or when it is in conformity with commercial usages.

The contract then becomes effective at the moment of the implied acceptance. On the other hand, silence or inactivity in itself does not amount to acceptance. An acceptance normally has no effect if it does not reach the offeror within a reasonable time or a fixed time. The acceptance may be withdrawn if the withdrawal reaches the offeror at the same time as or before the acceptance would have had effect.

If an acceptance is late, the offeror may accept it, but must notify the offeree of this as soon as possible. Conversely, if an acceptance is late (typically for problems of delivery, postal strike, etc.), but would have been timely under normal circumstances, the offeror must immediately inform the offeree, if s/he does not accept the acceptance as timely.

An acceptance with modifications to the offer is, in general, a counter-offer if the modifications are material.

This counter-offer must then, in turn, be accepted by the original offeror.

D. The Buyer's and Seller's Obligations

The buyer's and seller's obligations, in principle, are identified under the contract and the CISG as an applicable law. As stated in Article 9, however, the parties are bound by any usages to which they have agreed and by any practices which they have established between themselves. The buyer and seller, thus, have to perform the obligations under the contract, the CISG, the usages and practices. According to the CISG, the buyer and the seller are under the following main obligations:

1. Obligations of the Seller

(a) The seller must deliver goods that conform and are free of third party rights. Delivery is the physical hand-over of goods to the buyer. If nothing has been negotiated about the place of delivery, the seller must in principle make the goods available at the place of where he has the place of business at the time of concluding the contract. The seller shall deliver on the date agreed in the contract or implied by the contract. If nothing is fixed for the delivery date, then the principle of reasonableness applies. The delivered goods must be conformable. The conformity of the goods means that the goods must be of the quality, quantity and description required by the contract and are packaged in a manner required by the contract or as sale by sample.

In addition, the seller must deliver the goods free from any right or claim of a third party, unless the buyer agreed to take the goods subject to that right or claim.

The seller must protect not only against well-founded claims, but also against ill-founded claims. The buyer has to inform the seller within a reasonable period about the existence of any rights or claims, unless the seller is already aware of these. There is a special regulation for goods subject to IP claims.

(b) The seller must hand over any documents relating to the delivered goods.

2. Obligations of the Buyer

(a) The buyer must take delivery of the goods. Taking delivery is indelibly linked to the passing of the risk. The buyer must do all that can reasonably be expected of him/her in order to make delivery possible. Thus, s/he must, if necessary, inform the seller of the exact place of delivery. The buyer must actually take possession of the goods.

In principle, the risk passes at the taking delivery of the goods. If the buyer does not take delivery, s/he would breach the contract, which may make him/her liable for any damage to the goods. The passing of risk is governed by Articles 66-70, if contract involves carriage, in Article 67; if goods in transit, Article 68.

(b) The buyer must pay for the goods. Payment is the buyer's main obligation. The obligation to pay covers four elements, such as the determination of the price, the place of payment, the moment of payment, as well as the method of payment. These elements are usually agreed in the contract. However, the contract may remain obscure in respect of some of these elements. In that a case, the supplementary rules of the CISG apply. So, unless the contract states otherwise, the buyer must pay at the seller's place of business or place of handing over, without notice when goods or documents come under the buyer's control.

E. Remedies for Breach of International Sales Contract

In the process of implementing the international sales contracts, if the breach of contract is committed by a breaching party, the other party can apply the agreed remedies in the contract or as laid down in the CISG. It is important to note that the applying the remedies provided for by the CISG depends on whether there is a breach of contract or not. Unfortunately, the CISG did not define what constitutes a breach of contract. However, one can conclude from the CISG's remedial regime and Article 79(1) that 'breach of contract' includes all forms of defective performance, as well as a complete failure to perform. It also includes both excusable and inexcusable non-performance. The contractual obligation may either be one expressly defined in the CISG (e.g., delivery at the right time, at the right place and of the correct goods) or one created and defined by the parties. In addition, for the choice of remedy, it is important to know whether is a so-called 'fundamental breach of contract.'

A fundamental breach of contract has two elements: (i) there has to be a substantial detriment which deprived the aggrieved party of what s/he is entitled to expect under the contract; (ii) the result of the breach must be foreseeable. It is for the party in breach to prove that neither s/he nor any reasonable person of the same kind and in the same circumstances could have foreseen the result.

1. Remedies of the Buyer

If the seller fails to perform any of his obligations, the buyer may, depending on the circumstances, resort to a number of remedies such as:

- Specific performance;

- additional period for performance;
- avoidance (rescission),
- requiring notice under Article 26;
- reduction of price;
- remedies for partial delivery/conformity of goods;
- damages.

Before invoking general remedies such as those mentioned above, the buyer may also grant the seller extra time to perform his obligations. When it becomes clear that the seller is not going to fulfill his obligations, the buyer may then suspend or rescind the contract; qualifying the breach for avoidance regardless of the initial fundamentality of the breach. The amount of damages is determined by the size of loss, including lost profits.

It should note that if the case concerns non-conforming goods, the buyer must examine the goods and give notice of any non-conformity within reasonable time. The consequence of not doing this is a complete loss of remedy.

2. Remedies of the Seller

The remedies available to the seller are the same as those available to the buyer.

S/he may also require the performance of an obligation, declare the contract avoided, and claim damages. The seller may fix an additional period of time for the performance of the buyer's obligations. As may the buyer, the seller may suspend the performance of his/her obligation or declared the contract avoided, if it is clear in advance that the buyer will not perform his/her obligations. Furthermore, the seller may make the necessary specifications when the buyer failed to supply missing specifications.

The CISG provides equal remedies for both the buyer and seller. Moreover, the exemptions also have been available for them. This means the buyer or the seller is not liable for failure to perform, if this is due to an impediment beyond his control, rendering the performance impossible. This impediment is what we understand under force majeure and failure to perform induced by other party's act omission.

Additionally, both the buyer and seller must minimize a loss to their business partner.

Generally speaking, through the CISG's provisions, the CISG seems to be one of the most successful examples of the unification of rules governing international sales contracts.

UNIDROIT Principles of International Commercial Contracts 2010 - PICC

The UNIDROIT Principles of International Commercial Contracts (hereinafter the 'PICC') are another major instrument of international business law, which can have relevance for international sales of goods. Part (A) of this contribution will describe these PICC and the growing impact they have on the law of international contracts in general. Part (B) will examine their possible application to international sales contracts.

A. The PICC - Overview

UNIDROIT is an intergovernmental institution located in Rome (Italy), active, as its name indicates, at the harmonization of laws. Among other initiatives, UNIDROIT has played a prominent part in the initial efforts to harmonize the laws of sales contracts. In more recent times, the PICC are one of the most outstanding accomplishments of UNIDROIT. The project originated in 1971. The first texts were elaborated by a prestigious triumvirate of comparative lawyers, Professors R. David (civil law), C. Schmithoff (common law), and T. Popescu (socialist law). In 1980, a Working Group took over, very competently and efficiently chaired by Professor J. Bonell of Italy. The composition of the Group has evolved over the years, but the prime concern has always been to try to ensure the representation of the main legal systems worldwide.

From the second phase of the project onwards, observers were invited to attend the meetings, in order for the Group directly to benefit from the reactions of institutions such as The Hague Conference, UNCTAD, the International Bar Association, the ICC, and other arbitral institutions. The PICC consist of a codification of the general law of contracts, where the provisions themselves (the so-called 'black letters rules') are followed by comments and illustrations. The main characteristic is that the texts have not been drafted in the perspective of a future international convention, such as the CISG (see above). They have been conceived as a 'soft law' instrument, with no own normative value - similar in that respect, for instance, to the INCOTERMS prepared by the ICC. The PICC are simply published as a book, and their contents are at the disposal of anyone interested in using them.

The nature and possible uses of the PICC are stated in their Preamble: These Principles set forth general rules for international commercial contracts. they shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators.

After the publication of the first edition in 1994, the PICC very rapidly became a major source of reference. Without neglecting the wide interest also raised in academic circles, it may be said that most of the aims announced in the Preamble have been reached, admittedly to various degrees. While it is difficult to gather precise data on the subject, it does happen that parties in an international contract choose the PICC as the rules governing their relationship. However, it is debated whether such 'soft law' rules - as opposed to a national legal system - may be chosen by parties as the rules applicable to their contract. In any event, the PICC play an important part where the parties have decided to submit their contract to the lex mercatoria or to the usages of international commerce: many decisions, mainly from arbitral tribunals but also from national courts, have then made reference to the PICC to substantiate the contents of such general formulas. Experience also reveals the frequency to references to the PICC to support a decision already based on a national or international norm.

On the other hand, the PICC now occupy a prominent place among the sources of inspiration of legislative reforms planned or accomplished in several countries, such as France, Germany, Russia, Lithuania, Estonia, Hungary, Turkey and China. In the 16 African countries of OHADA, upon the request of the Council of Ministers, a draft Uniform Act on the law of contracts has been drafted taking the PICC as a model.

Recently, some model contracts elaborated by the ICC as well as the International Trade Centre of the WTO have chosen to advise the parties to refer to the PICC to govern matters not already covered by the model contracts.

The first edition of the PICC came out in 1994. The second edition, published in 2004, added new chapters on authority of agents, third party rights, set-off, assignment of rights, transfer of obligations, assignment of contracts and limitation periods. The third edition, issued in 2010, brought innovations mainly on the subjects of validity, restitutions, conditions and plurality of obligors and of obligees.

The PICC 2010 now consist in 211 articles (there were only 120 in the 1994 edition and 185 in the edition of 2004). After the already mentioned Preamble, eleven chapters successively deal with (i) General provisions; (ii) Formation and authority of agents; (iii) Validity; (iv) Interpretation; (v) Content, third party rights and conditions; (vi) Performance; (vii) Nonperformance; (viii) Set-off; (ix) Assignment of rights, transfer of obligations, assignment of contracts; (x) Limitation periods; and (xi) Plurality of Obligors and of Obligees.

The respective merits of the common and civil law systems for promoting development and economic efficacy have recently been the subject of lively debates, fuelled by the Doing Business reports of the World Bank.

In this respect, the PICC are an original 'product', born of the confluence of various sources of inspiration - reflecting the universal composition of the Working Group. The CISG, itself the product of debates between representatives of the different legal systems, has also been the model of several provisions of the PICC.

One last point should be made in this short presentation of the PICC. The Working Group has constantly been concerned with meeting the needs and expectations of practitioners of international contracts. Special attention was devoted to clauses which are generally ignored by national codifications, but which are extremely frequent in actual contracts.

This is for instance apparent in the provisions of Articles 2.1.2 to 2.1.22 of the section related to contract formation, as well as in the provisions on hardship (Articles 6.2.1. to 6.2.3) and force majeure (Article 7.1.7). Such marked concern contributes to making the PICC an attractive reference for participants in international business.

B. The PICC and International Sales Contracts

Which role could the PICC play in connection with an international sales contract? In particular, how do they relate to more specific instruments such as the INCOTERMS and the CISG, both concerning sales contracts? Dissimilarly to these last two instruments, the PICC are not especially designed to regulate sales contracts. The PICC are rules applicable to commercial contracts in general; they have been devised to govern any type of contract, not only sales, but also contracts as diverse as, for instance, lease, construction, distribution, transfer of technology or outsourcing. They state common rules concerning, mainly, the formation, performance and nonperformance of contracts in general.

Globally, the PICC appear as a civil law instrument, since they take the form of a structured codification. But inputs from the common law are apparent, for instance with anticipatory breach (Article 7.3.3). The American Restatement Second on Contracts and Uniform Commercial Code were always on the working table; a provision such as Article 6.1.4, concerning order of performance in bilateral contracts, is directly inspired by the corresponding rule of the Restatement (§234). On the other hand, civilian lawyers will feel at home with other provisions directly inspired by some of their systems, such as German law (e.g., the Nachfrist in Article 7.1.5), Italian law (e.g., the advance consent given by the other party in Articles 9.2.4 and 9.3.4) or French law (see the recognition of the distinction between 'obligations de moyens' and 'obligations de résultat' in Articles 5.1.4 and 5.1.5). Most important is that such imports are always the results of consensus reached among Working Group members after thorough comparative discussions.

This major difference leads to the answers to the questions just raised. The PICC on one side, the INCOTERMS and the CISG, on the other side, are complementary. Actually, all three instruments are complementary with each other, each at a different level of generality or specificity. The CISG sets rules applicable to many of the most important aspects of a sales contract: the formation, the obligations of the seller (the delivery of the goods, the conformity, the third party claims) and the corresponding remedies available to the buyer, the obligations of the buyer (the payment, and taking delivery) and the corresponding remedies available to the seller and passing of risk, as well as some provisions common to both parties' obligations.

The INCOTERMS are also specific to the sales contract. They are, however, limited to a few particular issues, mainly to the delivery of the goods and the passing of risk, each of the terms offering a choice between different arrangements to suit the needs of the parties depending on the circumstances of the operation. It immediately appears that the subject matter of the INCOTERMS overlaps with some provisions of the CISG, which also deals with the delivery of the goods and the passing of risk. However, these rules of the CISG are general provisions applicable to any contract for an international sale of goods, for which the parties to a particular sale will often prefer the much more detailed and finely-tuned rules provided by one of the INCOTERMS. In such a context, the choice of an INCOTERMS is perfectly compatible with the application of the CISG; simply, between the parties, the INCOTERMS will replace the corresponding provisions of the CISG (this is allowed by Article 6 of the CISG). On the other hand, one sees that the CISG still has a wide field of application on the contractual relationship, with all its other provisions dealing with issues not governed by the chosen INCOTERMS (such as the formation, payment and remedies of the contract).

Similarly, although at a higher level of generality, the PICC can also apply to a sales contract in combination with the CISG (as well as with an INCOTERMS). The CISG covers many aspects of the contractual relationship between the seller and buyer, but not all. For instance, it expressly states that it is not concerned with the validity of the contract (Article 4), a matter where the PICC provide a detailed set of rules (Articles 3.1.1 to 3.3.2).

However, there are many other aspects with which the CISG does not deal, because they are not specific to the sales contract, such as the authority of agents, interpretation of the contract, numerous general rules on content and performance, set-off, assignment of rights, obligations and contracts, limitation periods, and plurality of obligors and of obligees. If parties want the benefit of a complete set of rules to govern their sales contract, they can choose to agree that in addition to the CISG and the possible choice of an INCOTERMS, their agreement will be subject to the PICC.

According to the principle that a 'lex specialis' normally prevails over a more general set of rules, the INCOTERMS will overrule the specific conflicting provisions of the CISG on delivery and passing of risk, and the CISG itself will overrule the PICC whenever the CISG has its own rules on a certain issue (e.g., on the obligations of the parties and the corresponding remedies). Of course, nothing prevents the parties from derogating from certain provisions of the CISG in favour of the UNIDROIT rules (e.g., on contract formation, or on certain remedies).

Such a combination of the respective sets of rules can work smoothly, since the PICC themselves often took inspiration from the CISG, mainly as regards several of their provisions dealing with formation of the contract (compare Articles 14 to 24 of the CISG and Articles 2.1.1 to 2.1.11 of the PICC) and remedies for non-performance (compare Articles 45 to 52 and 61 to 65 of the CISG with Articles 7.1.1 to 7.4.13 of the PICC). The two instruments offer a relatively high degree of compatibility, and their articulation raises few problems of coherence.

Conclusion

As a set of rules designed to govern the general law of contracts, the PICC offer a commendable complement to the specific rules of the CISG to regulate an international sales contract. As in the CISG, the PICC have been elaborated with the view to meet the needs of parties involved in international business, and they have attempted to retain solutions acceptable to both civil and common law systems. Since they constitute a 'soft law' instrument, their application is normally subject to the parties' choice. However, arbitral (and sometimes also domestic) tribunals more and more often tend to refer to them when the parties have chosen to submit their contractual relationship to the general principles of international business.

Principles of European Contract Law (PECL)

The Principles of European Contract Law (hereinafter the 'PECL') are the product of work carried out by the Commission on European Contract Law, a body of lawyers drawn from all of the member states of the European Community, under the chairmanship of Professor Ole Lando. They are a response to a need for a Community-wide infrastructure of contract law to consolidate the rapidly expanding volume of Community law regulating specific types of contract.

The PECL include Parts I, II and III, which cover the core rules of contract, formation, authority of agents, validity, interpretation, contents, performance, non-performance (breach) and remedies. The PECL Parts I and II (from chapters 1 to 9) was adopted in 1999; Part III (from chapters 10 to 17) were revised in 2002 and covers the plurality of parties, assignment of claims, substitution of new debt, transfer of contract, set-off, prescription, illegality, conditions, and capitalization of interest.

It may be said that, nowadays, the PECL are considered as useful rules governing international sales contracts, but in connection with European countries. The application of the PECL principles, freedom of contract, formation of contract and remedies for non-performance under the PECL will be addressed below.

A. Application of the PECL

As does the CISG, the PECL provides a solution to the issue raised where the system or rules of law applicable do not do so. The PECL, however, may be applied only to international sales contracts that are connected to Europe.

As stated in Article 1:101 of the PECL, the PECL will apply to the following situations:

- The parties have agreed to incorporate them into their contract or that their contract is to be governed by them;
- the parties have agreed that their contract is to be governed by 'general principles of law', the lex mercatoria or the like;
- the parties have not chosen any system or rules of law to govern their contract. At that time, there was no choice of law applicable to the contract, but it must be connected to Europe.

B. Freedom of Contract

The principle of freedom of contract is a fundamental one. A large number of the rules contained within the PECL are specific applications of the principle of freedom of contract.

Direct application of freedom of contract principle is laid down in Article 1:102 of the PECL. The parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by the PECL. The parties, however, may exclude the application of any of the PECL or derogate from or vary their effects, except as otherwise provided by the PECL.

Regarding the good faith requirement, the PECL provides that before reserving the liability of the party who negotiates in bad faith, the provision starts by affirming the freedom of the parties to negotiate, which is nothing other than an expression of freedom of contract at a pre-contractual stage.

Article 1:103 of the PECL details the limiting of freedom of contract by mandatory rules. This provision allows parties, when the applicable law determined by the choice of law rules of the forum before which the dispute is brought, so allows, to 'choose to have their contract governed by the PECL, with the effect that national mandatory rules are not applicable', with the exception of those rules which apply regardless of the governing law.

The freedom of the parties to submit their contract to the PECL can thus allow them to elude the application of certain national mandatory rules, which the commentary has christened 'ordinary' mandatory laws in contrast to the so-called 'directly applicable laws' which are applicable irrespective of which law governs the contract.

According to the commentary, these directly applicable rules are rules that 'are expressive of a fundamental public policy of the enacting country and to which effect should be given when the contract has a close connection to this country'.

Therefore, the freedom of contract of the parties to submit their contract to the PECL does not, in any case, allow them to elude the application of national, supranational or international mandatory rules which always apply to the contract regardless of the governing law. The freedom of the parties to contract is therefore systematically limited by fundamental mandatory rules.

The freedom to determine the content of the contract implies, e.g., the freedom to determine the obligations' place of execution, the contract's date of executio or the currency of payment.

The PECL retain a wide conception of the fundamental principles and avoid heterogeneous national concepts of 'immorality', 'illegality', 'public policy' and 'morals'. The commentary on Article 15:102 states that, although the PECL constitute a self-contained system of rules applicable to the contracts governed by them, it is still not possible to ignore altogether the provisions of national law or other rules of positive law applying to such contracts, in particular those rules or prohibitions expressly or impliedly making contracts null, void, voidable, annullable or unenforceable in certain circumstances. It is therefore necessary to return to the distinction between mandatory rules laid down in Article 1:103 of the PECL.

C. Formation of the Contract

It should note that the conditions for the conclusion of a contract also were stated under the PECL. The PECL establishes, without giving it a name, the principle of concensualism as it states first of all that the contract is concluded by the agreement of the parties, i.e., intend to be legally bound and reach a sufficient agreement 'without any further requirement'.

Additionally, it is expressly foreseen that 'a contract need not be concluded or evidenced in writing nor is it subject to any other requirement as to form'. As mentioned above, under the PECL, a contract is concluded on the basis of the agreement of the parties, the formation of contract is constituted mainly through exchange of offer and acceptance. An offer is revocable until accepted, unless it is to be deemed firm.

The acceptance that does not conform to the offer is deemed to be a 'counter-offer', unless the modifications were not material. Negotiations have to be entered into and continued in good faith. The PECL specify also that their rules on the formation of contract, although expressly meant to regulate the eventuality of exchange of offer and acceptance, shall be deemed applicable, even if the contract is entered into in a different way, thus indirectly recognizing that contracts may be concluded also in other ways.

D. Remedies for Non-performance

The PECL contain a series of remedies for breach of contract, such as:

- Specific performance;
- reduction of the price;
- termination of contract.

The remedy of specific performance is restricted by some provisions.

Under the PECL, the specific performance is not admitted where the performance would be unlawful or impossible, it would be unreasonably burdensome, or performance could be reasonably obtained from other sources. Furthermore, the PECL extend these restrictions also to the remedying a defective performance. The PECL provide also for the right to reduce the price. The right to termination is subject to the breach of contract being fundamental, or to the non-defaulting party having given notice to the non-performing party with an additional period to perform. In addition to all these remedies, reimbursement of damages is also available.

The PECL assume that damages are payable on the basis of strict liability, and do not therefore require proof of the negligence of the non-performing party; also the PECL, however, make an exception for the eventuality that the performance is prevented by an event beyond the control of the non-performing party.

In respect of the calculation of the reimbursable damages, the PECL specify that the sum should be such as to place the non-defaulting party in the position as if the contract has been properly performed, and it shall contain both incurred expenses and loss of profit.

In respect of the remoteness of the loss, the PECL applies the 'foreseeability of the losses' standard as a likely result of the breach. However, it should note that in connection with the remoteness of the losses, the PECL introduces the criterion of 'gross negligence' or 'intentional misconduct'. If the defaulting party's conduct has been grossly negligent or intentional, the losses to be compensated will not be limited to the foreseeable losses.

In respect of excuse due to an impediment beyond the control of the non-performing party, the remedies of reimbursement of damages and of specific performance are not admitted. This excuse lasts as long as the effects of the impediment persist. The effects of hardship are to entitle the affected party to renegotiations or to request that the court terminates the contract.

Although there are some restricted provisions of the PECL as limits on the scope of its application only in Europe, the PECL nevertheless play certain crucial role in the uniformity of rules governing international sales contracts in the world.

V. METHODS OF FINANCING OF INTERNATIONAL SALES OF GOODS

1. Introduction

This is a section addressing mainly financing in international trade, especially in international sales of goods. Following Article 1 of the CISG, an ‘international’ sales as contracts must be signed by parties whose places of business are in different states. Because the seller and the buyer are in different countries, how to arrange payment between them is a very important question. The seller ships the goods, obtains the shipping documents and wishes to receive payment immediately; the buyer, who has not yet received the goods, does not yet wish to pay for them. The buyer may want to make payment only after s/he has checked the shipped goods on its arrival and is sure that they are of good quality and in the required quantity. The payment mechanism in this case needs the involvement of third parties, usually a bank, to act as intermediaries to ensure that the seller shall get the contract price at the right time. Usually, the seller, after the goods have been shipped, draws up a bill of exchange for the value of the shipment, attaches the bill of lading and any other specified documents required, and presents the bill of exchange to a bank, usually in his/her country of residence, for negotiation or payment.

The buyer shall pay when s/he receives the required documents at his/her bank in his/her country. This Section will deal with two types of financing arrangements under international trade. Firstly, it mentions documentary bills and documentary credits, which have the key functions of providing payment security for goods and services against specified documents tendered.

Secondly, standby credits, performance bonds and guarantees with the key function of providing security against default in performance of the principal in the underlying contract.

2. Documentary Bills

In international sales of goods, the term ‘documentary bills’ denotes a bill of exchange accompanied by shipping documents and is intended to be accepted or paid in exchange for those documents. Compare this with a 'clean' bill, that is, a bill of exchange. An approximate definition is that a documentary bill is a bill of exchange to which the bill of lading (or other documents of title) is attached.

Therefore, documentary bills may technically be construed as a set of (A) a bill of exchange, and (B) a shipping document, which should be a document of title. Here, the most frequently used form in the international sales of goods is the bill of lading itself. In order to understand what constitutes documentary bills, the definitions of a bill of exchange and a shipping document with the function of a document of title need to be explained. This subsection begins with the definition and function of a bill of exchange, then gives a short introduction to the function of documents of title; finally, it analyses the operation of documentary bills.

A. Bill of Exchange

Internationally, the United Nations Convention on International Bills of Exchange and International Promissory Notes was adopted in 1988 with the intention, as of any international convention, of harmonizing the law relating to bills of exchange. This Convention is primarily aimed at international bills of exchange as defined in Article 2(1).

Under English law, Section 3(1) of the Bills of Exchange Act 1882 defines a bill of exchange as 'An unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or bearer.'

A bill of exchange (also known as a 'draft'), along with others (for example, cheques) belongs to the class of document known as 'negotiable instruments'. A negotiable instrument, which evidences the obligation to pay money by one party to another, has two outstanding characteristics. Firstly, it is transferable by delivery, and with the transfer, rights embodied in it are transferred, such that the transferee can enforce them in his/her own name; and it is not necessary to notify the obligor or assignee. Secondly, where the transferee takes it in good faith and for value, s/he takes it free of any defects of title of the transferor. The bill of exchange is an autonomous contract and is not affected by breach in the underlying contract that resulted in the creation of a bill of exchange. Because of these characteristics, bills of exchange are treated as cash.

Where the bill of exchange is negotiated with recourse, the endorser may be liable to the subsequent holder if the bill is dishonoured by the drawee, upon notice of such failure to honour it by the subsequent holder. Where the bill of exchange is negotiated without recourse, the endorser negates this liability and therefore, the subsequent holder bears the loss. Another matter is that a bill of exchange may be a sight bill or a time bill. A sight bill must be paid on presentation. A time bill must be paid upon presentment for acceptance, when the bill matures a fixed time (e.g., 90 days) after sight. A time bill may be sold for cash, although of course their value (sight rate) will be lower than the face value of the bill (because of a commission or interest).

B. Function of Shipping Documents

After shipping the goods being sold, the seller obtains shipping documents, usually including a bill of lading or other documents of title. A document of title transfers constructive possession of the goods. For example, the shipped bill of lading is recognized, by the custom of merchants, as document of title. Only the holder of a document of title may demand the goods from the ship at the destination. The bill of lading may therefore be negotiated, to enable the holder either to resell the goods or pledge them with a bank to raise money on the security.

In brief, the shipping documents entitle the buyer to receive the goods at the port of destination.

C. Operation of Documentary Bills

The parties to international sales contract may agree to effect payment through documentary bills. The seller will send a documentary bill to the buyer to ensure that the buyer does not take up the bill of lading, which gives him/her a right of disposal of the goods, without first accepting or paying the bill of exchange as previously agreed between the parties. If the buyer fails to accept or to pay the bill of exchange (depending on whether it is a time or a sight bill), s/he is bound to return the bill of exchange to the seller, and if s/he wrongfully retains the bill of lading, the ownership of the goods does not pass to him/her.

The advantage for the seller is that, on the acceptance of the bill of exchange by the buyer, money may be obtained by the seller, before the maturity date of the bill of exchange, by selling it at a discount to a bank. As for the buyer, s/he obtains credit until the bill of exchange's maturity date. However, a major disadvantage for the seller, with the documentary bill, is that the buyer may not honour the bill of exchange. In this case, the party to whom the seller discounted the bill of exchange would have recourse to him/her.

In the event that the bill of exchange is not honoured by the buyer, one more problem that may occur is that the buyer may then proceed to sell the goods as s/he holds the bill of lading, a document of title. It is an illegal or fraudulent act by the buyer, as the ownership of the goods has not yet passed to him/her, because s/he has not accepted or paid against the bill of exchange. To prevent the risk of loss of title through the buyer's fraud in disposing of the goods without honouring the bill of exchange, the seller will arrange for collection through a bank. The seller's own bank (the remittance bank) may despatch the bill of exchange and shipping documents to its correspondent (the collecting bank) in the buyer's country with the instruction not to part with the documents, except against payment or acceptance of the bill of exchange. The collecting bank will then present the documents to the buyer, procuring his/her payment or acceptance of the bill of exchange.

The relations between the seller and the remittance bank, between remitting and collecting banks; are usually governed by the ICC's Uniform Rules for Collection (the latest version is URC 522 published in 1995), commonly known as 'Uniform Rules for Collection' or 'URC'. In fact, in this circumstance, it is combination of two methods in the financing of international trade, which is documentary bills and collection; in other words, the method of collection with supported documents (documentary collection).

D. Documentary Collection

These rules set out the procedures to be followed by all parties concerned, including the liabilities and responsibilities of banks and customers involved with collection transactions. They endeavour to eliminate difficulties (created by differences in banking phraseology and procedures) in various countries by setting out standard practices that banks may apply. Sellers may, by specific written instructions to their bank, for individual bills and subject to the agreement of the bank, vary any standard procedure to suit their own requirements. The URC rules recognize local conditions by stating that the rules are binding on all parties *'...[u]nless contrary to the provisions of a national, state or local law and/or regulation which cannot be departed from'*.

For example, in some countries, payment is made in local currency regardless of the currency stated on the draft. Funds are held, in trust, at the exchange risk to the seller pending the availability of foreign currency reserves.

1. Parties in Documentary Collections

When payment is to be made by documentary collection, the parties to the operation are:

- ***the principal (usually the drawer)*** - the seller who prepares the collection documents and delivers them to his/her bank with collection instructions.
- ***the remitting bank*** - normally the seller's bank which forwards the documents together with the seller's instructions to the collecting bank.
- ***the collecting bank*** - is any bank (other than the remitting bank) involved in the processing of the collection and would normally be the remitting bank's correspondent in the buyer's country.
- ***the presenting bank*** - normally the buyer's bank, which presents the collection to the drawee (buyer) and collects the payment, or obtains the acceptance, from the drawee. The collecting and presenting banks are often one and the

same bank.

- ***the drawee*** - the buyer to whom the documents are presented for payment or acceptance.

Banks usually require sellers to complete an instruction form for each documentary bill lodged for collection or purchase. These must be complete and precise, as instructions will be passed on to the overseas collecting bank to enable the collection to be processed to the satisfaction of the seller.

2. Method of Collecting Bills

As soon as shipment is made, the seller draws a sight or term bill on the overseas buyer, attaches the shipping documents (usually in duplicate), and hands these to his/her bank (remitting bank) together with instructions as to the manner in which the collection is to be handled. The seller's bank forwards the bill and documents to the collecting bank according to the instructions passed to it by the seller. If the seller draws a 'sight' or an 'on demand' bill, the instructions would be for documents to be released only against payment (D/P). In the case of a term bill, the instructions would usually be for documents to be released against acceptance of the bill (D/A) with subsequent presentment for payment on the due date.

The collecting bank should keep the remitting bank regularly informed of the status of the bill. However, collecting banks in some countries may be quite lax in their status advices; the remitting bank is often required to initiate these enquiries.

When the buyer has paid, the collecting bank would advise the remitting bank, who would apply the proceeds as instructed by the seller.

3. Presentation on Arrival of Goods (PAG)

A seller may find that the buyer is not, until the relevant goods arrive, prepared to pay, or to accept, a documentary bill drawn on him/her. In some countries, it is common practice for the payment or acceptance of bills to be deferred until the arrival of the goods. The term used in the heading, 'PAG', is applied to this practice. It is also described as 'payment on arrival of carrying vessel'. Banks despatch export documentary bills by airmail or courier, as previously described, yet pass on the seller's instructions to the correspondent bank in the importing country that presentation of the bill to the drawee is to be delayed until the arrival of the relevant goods, or that there is the option of requesting such delayed presentation if the drawee so wishes.

In most cases, the remitting bank will discount the bill of exchange before its acceptance or payment by the buyer. A bill of exchange is discounted when the bank credits the seller's account with the full amount of the bill (less any banking charges), or when the bank agrees to advance to the seller a percentage of the face value of the bill but withholds the balance until the bill is paid by the buyer. This has the advantage of releasing funds to the seller at an earlier date than if s/he waited for the bill of exchange to mature.

However, the remitting bank will usually retain a right of recourse against the seller. If the buyer fails to honour the bill of exchange by non-acceptance or non-payment, the bank may sue the seller over the bill. This highlights the real disadvantage, from the seller's point of view, of payment under a documentary bill collected by or discounted to a bank. The buyer may accept the bill of exchange so that the bill of lading will be released to him/her. However, the seller has no assurance that the buyer will pay when the bill matures.

This problem is well resolved by documentary credits, as will be mentioned below. That is why the documentary credits or letters of credit are preferred to the method of documentary bills.

3. Documentary Credits

Documentary credits (also known as 'commercial credits' or 'letters of credit') are preferred alternatives to a documentary bill. Documentary credits are widely used across the world. Their popularity in international commerce has led judges to describe them as 'the life blood of international commerce' and it is said that merchants across the world embraced and continue to embrace them whole-heartedly; much of the law governing letters of credit is grounded in the mercantile customs and practices.

For example, the UCP, e-UCP and ISBP. Despite the wide use of documentary credits, the attempt to harmonize the law governing the documentary credits through the negotiation and conclusion of international treaties has been largely unsuccessful. A near global unification, however, has been achieved through the great efforts of the ICC, which creates and is responsible for the UCP. An eminent academic on commercial law in the UK, Professor R. M. Goode, described it as the 'most successful harmonizing measure in the history of international commerce'. The unification is, as Professor E. P. Ellinger, a leading expert on letters of credit, observes, a consequence of necessity and use of banks as agents in international trade.

The UCP is seen as a code to standardize (i) conditions under which bankers are prepared to issue documentary credits at the request of the trader willing to arrange the payment for their traded goods via the means of documentary credits; and (ii) the interpretation of documentary credit practice.

It may also be seen as a set of rules governing the use of documentary credits. The majority of banks and traders in most countries of the world have welcomed and adopted the UCP for supporting payments for goods. The UCP was first published by the ICC in 1933 and has been revised six times since then. The latest version is UCP 600, which came into effect on 1 July 2007. UCP 600 replaces the 1993 version (UCP 500).

Unless stated otherwise, all references in this section are to UCP 600. In addition to UCP, a supplement to UCP 600, the 'e-UCP', was also enacted to deal with the electronic presentation of documents.

A. Application of the UCP

Article 1 of the UCP provides: The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 ('UCP') are rules that apply to any documentary credit ('credit') (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject to these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit.

From the scope of application above, three legal matters should be taken into consideration.

1. UCP Rules Apply to Documentary Credit

The application of the UCP is widely discussed and focuses on what a 'documentary credit' actually means. The definitions and types of documentary credits will be discussed later. The UCP also applies to a standby letter of credit; the practice of international commerce has indicated, however, that it is ill-suited to that type of letter of credit and the traders are unwilling to apply the UCP to standby letters of credit. That is why Article 1 of the UCP provides that it apply to standby letters of credit only 'to the extent to which they may be applicable'.

2. Applied in the Case where the Text of the Credit Expressly Indicates that It Is Subject to These Rules

However, as a model law, the UCP does not automatically have the force of law. The traders, or more precisely, the parties to commercial contracts, are free to incorporate all or any of the UCP rules into their contracts; if incorporated, the UCP will govern all aspects of documentary credit arrangements except the relationship between the applicant and the beneficiary under the underlying contract, e.g. between the seller and the buyer under sales contracts, as this contract does not usually incorporate the UCP.

3. The UCP Is Binding on All Parties thereto unless Expressly Modified or Excluded by the Credit

When incorporated in the underlying contract, e.g., an international sales contract, the UCP will automatically become an integral part of the contract made by reference; and all terms and conditions of the use of a documentary credit as well as other provisions of the UCP will become part of the agreement made between the parties. Such agreement 'is binding on all parties' as they are, in essence, a part of contract and agreement between the seller and the buyer. However, as these are agreements, the parties are free to amend, modify, supplement or even exclude the use of the UCP in their credit arrangement. The practice has shown that, except the exceptional cases, the traders do not need to modify or amend much of the UCP, which in its turn assists the sustainable and predictable development and strong flow of goods and services in international business.

B. Definition of the Documentary Credit

Research scholars all over the world have outlined some definitions of a documentary credit. For example, one of the most brief and correct definitions is that a documentary credit is, in essence, a banker's assurance of payment against presentment of specified documents.

A documentary credit may also be described as an advice issued by a bank authorizing the payment of money to a named party, the beneficiary, against delivery by the beneficiary of specified documents (usually accompanied by a bill of exchange for the amount to be paid) evidencing the shipment of described goods. The advice sets out the strict terms and conditions that must be fulfilled.

Under the UCP, its Article 2 reads: *'Credit means any arrangement, however named or described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation.'* Therefore, documentary credits means credits (within the meaning in this Article 2) that arrange payment by the buyer ('the applicant') to the seller ('the beneficiary') against the presentation of specified documents (that is why this type of credit is known as 'documentary'). In order to ascertain the definition of a documentary credit under Article 2 above, relevant terms in this Article as defined in the UCP should be taken into consideration, as follows:

- ***'Issuing bank'*** means the bank that issues a credit at the request of an applicant or on its own behalf;
- ***'Honour'*** means:
    - To pay at sight if the credit is available by sight payment;
    - to incur a deferred payment undertaking and pay at maturity if the credit is available by deferred payment;
    - to accept a bill of exchange ('draft') drawn by the beneficiary and pay at maturity if the credit is available by acceptance.

- ***'Complying presentation'*** means a presentation that is in accordance with the terms and conditions of the credit, the applicable provisions of these rules and international standard banking practice.

In brief, a documentary credit is an arrangement that is irrevocable and constitutes a definite undertaking of the 'issuing bank' to 'honour', more straightforwardly, to pay the price of the goods when the documents considered a 'complying presentation' presented to it.

C. Types of Documentary Credits

1. Irrevocable and Revocable Credits

(a) Irrevocable credit Article 3 of the UCP provides that a credit is irrevocable even if there is no indication to that effect. An irrevocable credit constitutes a definite undertaking by the issuing bank that it will honour the credit, provided that there is a complying presentation of the documents specified in the credit (UCP 600 Articles 2 and 7(a)). Except as otherwise provided by Article 38 of the UCP (transferable credits), an irrevocable credit may not be modified or cancelled after it has been communicated to the seller as the beneficiary, without the consent of the seller, issuing bank and confirming bank if any (UCP 600 Article 10(a)).

Once an irrevocable credit has been advised, the beneficiary is assured that such credits contain an express undertaking by the issuing bank, or one implied by the use of the word 'irrevocable', that all drawings will be duly honoured provided that there has been full compliance with all of the terms of the credit. That is why these credits have a high standing in the commercial world when issued by reputable banks, and are the type usually required in commercial transactions.

(b) Revocable credit

Revocable credit is a credit that may be cancelled or the terms altered at any time without the consent of the beneficiary. Revocable credits therefore afford the beneficiary either no or the lowest level of security protection. Revocable credits are rare and tend to be used only where the parties are not interested in security (e.g., they have a very high level of trust in each other). However, it is noticeable that the UCP 600 applies only to irrevocable credits; it does not apply to revocable credit. Therefore, if the parties to the underlying contract wish to use a revocable credit, they should make the credit subject to the UCP 500, an earlier version of the UCP 600 and one that does extend to revocable credits.

2. Unconfirmed and Confirmed Credits

The meaning of the 'confirmation' of an irrevocable credit is set out 'inter alia' in Article 2 of the UCP as follows: 'Confirmation means a definite undertaking of the confirming bank, in addition to that of the issuing bank, to honour or negotiate a complying presentation.' Therefore, in unconfirmed credit, only the issuing bank provides an undertaking to pay the beneficiary; although the credit will be advised to the seller by the advising bank, the advising bank has no undertaking to pay. However, in confirmed credit, there is an additional undertaking in the credit given by a bank other than the issuing bank (usually by the advising bank), and the beneficiary has assurance that s/he will have one more definite undertaking to pay in addition to that of the issuing bank. Moreover, it is convenient to the beneficiary that the confirming bank is normally located in his own country, which offers greater comfort and reassurance. The 'confirmed' undertaking may be detailed in the credit advice by the confirming bank; otherwise, the use of the words 'This credit is confirmed by us' or similar is sufficient to imply the undertaking specified by the confirming bank.

(a) Confirmed plus irrevocable credits

It is ideal for the seller to obtain an irrevocable credit plus confirmation by a reputable bank in his/her own country, which almost serves to provide the assurance that s/he will get paid. This type of credit constitutes an undertaking of payment by two banks. It has a higher standing than an irrevocable credit, although it is more costly since the confirming bank makes a charge for adding its confirmation and, in essence, for taking a risk in return for such charge by giving an undertaking to pay.

(b) When a credit should be 'confirmed'?

When the issuing bank is a well-known, first-class bank of high standing, located in a country with a stable political and economic climate, confirmation has little practical value. However, if the issuing bank is little known and has low resources, or if the country of issue has political or economic problems, the beneficiary may - understandably - seek to have the credit confirmed by a bank in his/her own country, the reputation and standing of which s/he is better able to assess.

(c) Operation of a credit confirmed

The instruction to an advising bank to confirm a credit must be given by the issuing bank, which will be responsible for the confirmation fee unless it instructs that the fee is to be charged to the beneficiary. If a beneficiary, on receipt of the credit bearing no provision for confirmation, wishes to have it confirmed, the advising bank should be requested to refer back to the issuing bank for their permission to do so. Although advising banks requested by issuing banks to add their confirmation to a credit seldom refuse, they may do so in circumstances where satisfactory arrangements cannot be made with the issuing bank to cover the liability which the confirming bank will incur by confirming the credit.

(d) Silent confirmation

Silent confirmations fall outside the current provisions of the UCP. A silent confirmation is an undertaking given by a bank (at the request of the beneficiary, without the request or authorization of the issuing bank) to add its undertaking to a letter of credit to pay according to the terms of the credit, providing all documents are presented in order. Accordingly, these transactions are available only for specific customers that meet the bank's stringent criteria. Silent confirmations are assessed at the sole discretion of the bank requested to add its silent confirmation.

3. Sight Payment, Acceptance and Deferred Payment Credits

Classified by the time at which the seller is entitled to payment, documentary credits may be divided into the following categories:

- ***'Payment at sight'***: the bank undertakes to pay the seller (the beneficiary under the credit) upon presentation of the specified documents. It usually calls on the seller to draw a sight bill of exchange and to present this with supporting documents in order to obtain payment;
- ***'deferred payment'***: the bank undertakes to pay the seller at some future date determined in accordance with the terms of the credit, e.g. 90 days from the shipment. Where a future payment by the bank is to be made other than against an accepted bill of exchange (acceptance credit), the credit is known as a 'deferred payment' credit. Such credit may be discounted before its maturity date by the discounting bank, which takes on the assignment of the beneficiary's rights under the credit;
- ***'acceptance credit'***: the bank undertakes to accept bills of exchange drawn on it by the seller. The bill will usually be a time bill payable at a future date. Thus, by accepting the bill, the bank agrees to pay the face value of the bill on maturity to the party presenting it. Between acceptance and maturity, the seller may discount the bill to her/his own bank for cash.

4. Straight (or Special Advised) Credits and Negotiation Credits

In some credits, known as 'straight credits', the issuing bank's *payment* undertaking is directed solely towards the seller. In other credits, known as 'negotiation credits', the issuing bank's payment undertaking is not confined to the seller; it extends to the 'nominated bank' authorized to negotiate to purchase the bill of exchange drawn by the seller.

The following criteria may be a critical factor in assessing a silent confirmation request from the beneficiary: (i) experienced traders; (ii) credit assessment of the Issuing Bank; (iii) customer relationship with the Bank; (iv) control of goods through Bills of Lading; (v) possible contract repudiation due to the type of commodity being exported; and (vi) export insurance cover is a pre-requisite for some countries.

Article 2 of the UCP reads: *'Negotiation' means the purchase by the nominated bank* *of drafts (drawn on a bank other than the nominated bank) and/or documents under a complying presentation, by advancing or agreeing to advance funds to the beneficiary on or before the banking day on which reimbursement is due to the nominated bank*.

Under an open negotiation credit, the undertaking extends to any bank. The bank that has negotiated the draft and/or documents from the beneficiary may then present these under the credit and receive payment in due course (UCP 600, Articles 7(c) and 8(c)).

5. 'Red Clause' and 'Green Clause' Credits

'Red clause' credits are those allowing the seller to draw on the documentary credit in advance of shipment. The advances are made against the warehouseman's receipt, even though the beneficiary is able to deal with the goods. This type of credit came to be known as the 'red clause' credit, since the clause is printed in red ink. Although its origins are in the wool trade, its use is not restricted to it. Since the seller under this credit may deal with the goods, it is used when there is a high degree of trust between the parties to the contract. 'Green clause' credits came to be used in the coffee trade in Zaire and operate similarly to 'red clause' credits. The only difference is that in this type of credit, the goods are stored in the name of the bank.

6. Revolving Credits

Instead of a credit being for a fixed amount or for a fixed time, it may revolve around value or time. A credit revolving around value enables the beneficiary to present the documents as often as s/he wishes during the credit period so long as the overall limit specified in the credit is not exceeded. A credit revolving around time allows the beneficiary to draw up to, a certain amount of money a month for the period of the credit and may or may not permit the beneficiary to carry forward under-drawings from one month to the next.

7. Transferable and Non-Transferable Credits

Documentary credits are either transferable or are non-transferable. A transferable credit allows the seller (the original beneficiary of the credit) to transfer the rights embodied in the credit to a third party, e.g., his/her own suppliers. Article 38 of the UCP sets out a number of conditions that must be met for the transfer of the credit to be conducted. Chief among these are the requirements that the transferring bank must expressly consent to the extent and manner of the transfer (Article 38(a)) and that credit must be expressly designated as 'transferable' by the issuing bank (Article 38(b)).

However, the term 'transfer' is somewhat misleading. 'Transferable' does not mean 'negotiable'. A documentary credit is not a negotiable instrument that may be transferred from one person to another through endorsement and delivery. In practice, what happens when the first beneficiary (the seller) wishes to transfer the credit to the second beneficiary (usually the seller's own supplier) is that s/he returns the credit to the transferring bank, which at the first beneficiary's request, issues a new credit to the second beneficiary for the whole or part of the amount of the original credit. Where the first beneficiary transfers only a part of the credit, the balance remains payable to him/her. Unless otherwise stated in the credit, a transferable credit may be transferred only once (UCP 600, Article 38(d)). This means that the second beneficiary is not able to transfer part of the credit in favour of his/her supplier, while it does not prevent the first beneficiary from transferring part of the credit to several different people, so long as the aggregate of the sums transferred does not exceed the amount of the credit; also, partial shipments and partial drawings are not prohibited under the credit (UCP 600, Articles 38(d) and (g))

8. Demand Guarantees and Standby Credits

These types of credit are within the UCP; they are, however, of different character from the ordinary documentary credits and are discussed in the next subsection.

D. Operation of Documentary Credits

Assuming that the underlying transaction is an international sales contract, a documentary credit transaction usually operates as follows:

- The seller and the buyer agree in the sales contract that payment shall be made under a documentary credit;
- the buyer (acting as the 'applicant' for the credit) requests a bank in his/her own country (the 'issuing bank') to open a documentary credit in favour of the seller (the 'beneficiary') on the terms specified by the buyer in his/her instruction (usually made through a request to open a documentary credit);
- the issuing bank opens an irrevocable credit and by its terms, undertakes (i) to pay the contract price; or (ii) to incur a deferred payment undertaking and pay at maturity; or (iii) to accept a bill of exchange drawn by the beneficiary and pay at maturity; provided that specified documents are duly tendered and any other terms and conditions of the credit are complied with;
- the issuing bank may open the credit by sending it directly to the seller; alternatively, as happens in most cases, the issuing bank may arrange for a bank in the seller's country (the 'advising' or 'correspondent' bank) to advise the seller that the credit has been opened;
- the issuing bank may also ask the advising bank to add its 'confirmation' to the credit. If the bank agrees to do so, the advising bank (now called the 'confirm-

ing' bank) gives the seller a separate payment undertaking in terms similar to those given by the issuing bank, and the seller benefits from having the payment obligation localized in his/her own country;

- the seller ships the goods and tenders the required documents (often through his/her own bank, which acts as his/her agent) to the advising bank (acting as the nominated bank) or confirming bank. If the documents conform to the terms of the credit, the advising bank (as a nominated bank or confirming bank will (i) pay the contract price; or (ii) incur a deferred payment undertaking and pay at maturity; or (iii) accept a bill of exchange and pay at maturity; or (iv) negotiate a bill of exchange drawn for the price, and seek reimbursement from the issuing bank;
- before releasing the documents to the buyer, the issuing bank will in turn seek payment from him/her. If the buyer is not in a position to pay without first reselling the goods, the issuing bank may provide the documents to him/her under a trust receipt, thereby giving the buyer access to the goods on arrival without destroying the bank's security interests in the goods and in the proceeds of sale.

E. The Contracts Arising out of a Documentary Credit Transaction

A documentary credit transaction is held together by a series of interconnected contractual relationships. Firstly, there is the underlying sales contract between the seller and buyer. Secondly, when the issuing bank agrees to act upon the instructions of the buyer, a contract comes into existence between them. Thirdly, when a correspondent bank agrees to act upon the instructions of the issuing bank, and advises or confirms the credit, there is contractual relationship between the issuing bank and the correspondent bank. Finally, the payment undertakings given to the seller by the issuing and confirming banks in a documentary credit transaction are contractual in nature.

F. Undertakings by Issuing Bank and Confirming Bank

Usually, when a credit is confirmed, the beneficiary will be paid by the confirming bank. If the credit is unconfirmed, the beneficiary will be paid by the issuing bank. If a nominated bank is involved, s/he will be paid by such bank. If the nominated bank does not pay, the beneficiary will come back to the confirming bank or issuing bank. Therefore, legally speaking, the undertakings by the issuing bank and the confirming bank to the related parties, e.g., the undertakings to pay are very important for the beneficiary of the credit (e.g., the seller). With respect to the undertaking of the issuing bank, Article 7 of the UCP provides as follows:

a) Provided that the stipulated documents are presented to the nominated bank or to the issuing bank and that they constitute a complying presentation, the issuing bank must honour if the credit is available by:

(i) Sight payment, deferred payment or acceptance with the issuing bank;

(ii) sight payment with a nominated bank and that nominated bank does not pay;

(iii) deferred payment with a nominated bank and that nominated bank does not incur its deferred payment undertaking or, having incurred its deferred payment undertaking, does not pay at maturity;

(iv) acceptance with a nominated bank and that nominated bank does not accept a draft drawn on it or, having accepted a draft drawn on it, does not pay at maturity;

(v) negotiation with a nominated bank and that nominated bank does not negotiate.

b) an issuing bank is irrevocably bound to honour as of the time it issues the credit.

c) an issuing bank undertakes to reimburse a nominated bank that has honoured or negotiated a complying presentation and forwarded the documents to the issuing bank. Reimbursement for the amount of a complying presentation under a credit available by acceptance or deferred payment is due at maturity, whether or not the nominated bank prepaid or purchased before maturity. An issuing bank's undertaking to reimburse a nominated bank is independent of the issuing bank's undertaking to the beneficiary. With respect to the undertaking of the confirming bank, Article 8 of 'Nominated bank' means the bank through which the credit is available or any bank in the case of a credit available with any bank (Article 2 of the UCP).

2. Standard for Examination of Documents

Article 14 of the UCP provides that:

a) A nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank must examine a presentation to determine, on the basis of the documents alone, whether or not the documents appear on their face to constitute a complying presentation.

b) a nominated bank acting on its nomination, a confirming bank, if any, and the issuing bank shall each have a maximum of five banking days following the day of presentation to determine if a presentation is complying. This period is not curtailed or otherwise affected by the occurrence on or after the date of presentation of any expiry date or last day for presentation. In practice, as allowed by this Article of the UCP, the nominated bank, the confirming bank if any, and the issuing bank are usually concerned only with ensuring that the documents presented appear on their face to constitute a complying presentation, not to check with the veracity of the statements contained in the documents, and still less to examine the goods, the subject of the contract of sale. In addition,

> Article 5 of the UCP also emphasizes that: 'Banks deal with documents and not with goods, services or performance to which the documents may relate'. Therefore, if the documents appear in be in order, then, in general, the bank is both entitled and obliged to pay. Conversely, if the documents deviate from the language of the documentary credit, the bank is entitled to withhold the payment even if the deviation has no materiality in fact.

H. The Governing Law of Documentary Credits

As outlined above, there are several different contractual relationships under a documentary credit arrangement. Leaving aside the underlying sales contract, there are contracts between: (i) the buyer and the issuing bank; (ii) the issuing and the confirming bank; (iii) the confirming bank and the seller; and (iv) the issuing bank and the seller. If a dispute arises out of or relating to such contractual relationship, an important legal question that may arise concerns which state's law governs the documentary credits. Because such a relationship is complicated and involves more than one country, the answer may not be easy to determine. However, in principle, the Rome Convention on the Law Applicable to Contractual Obligations ('the Rome Convention') may well assist in resolving the issue.

Article 3.1 of the Rome Convention provides that the proper law of the present contract, however it was made, must be determined in accordance with the Rome Convention. Article 4 of the Rome Convention is the most useful provision in identifying the governing law of documentary credits, which reads as follows:

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely related. Nevertheless, a several part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
2. subject to the provisions of Paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered in the course of that party's trade or profession, that country shall be the country in which the principle place of business is situated or, where under the terms of the contract, the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

4. Standby Credits, Performance Bonds and Guarantees

Standby credits, performance bonds and guarantees have a different function to that of documentary credits. Whereas the function of documentary credits is to provide payment for goods and services against documents, the function of the above instruments is to provide security against default in the performance of the underlying contract. Although standby credits, performance bonds and guarantees may be used to secure the performance of the buyer and (more usually) the seller under an international sales contract, they are more often found in international construction contracts where the overseas employer requires financial security from a reputable third party (usually a bank) against the contractor defaulting in his performance of the contract.

A. Standby Credit

A standby letter of credit is similar to an ordinary documentary credit in that it is issued by a bank and embodies an undertaking to make payment to a third party (the beneficiary) or to accept bills of exchange drawn on his/her, provided that the beneficiary tenders conforming documents. However, whereas a documentary credit is a primary payment mechanism for discharge of payment obligation contained in the underlying contract (i.e., the issuing or confirming bank is the first port of call for payment), the standby credit is given by way of security with the intention that it should only be drawn on if the party by whom the work should be done, or the goods or services provided, (the principle) defaults in the performance of his/her contractual obligation to the beneficiary.

The liability of a bank under a standby credit is intended to be secondary to that of the principle (although, technically, the form of the credit makes the bank's liability primary) and the credit performs the same security function as would be provided by a bank guarantee. However, unlike a guarantee, a standby credit may be called upon by tendering any specified documents without the beneficiary having to prove actual default by the principal, e.g. the specified documents may simply be a demand from the beneficiary or a statement from him/her that the principal is in default. Standby credits are covered by the UCP (subject to its incorporation by the parties) and therefore, the principle of autonomy of the credit applies to the standby credit in general. However, the UCP is generally regarded as being ill-suited to the security nature of standby credits, so the ICC, in collaboration with the Institute of International Banking Law and Practice, has produced separate Rules on International Standby Credit Practices (ICC Publication No 590) ('ISP 98') which came into effect on 1 January 1999. Standby credits may be issued subject to the UCP or the above Rules, depending on the will of the parties. The ISP 98 reflects 'accepted practices, custom and usage' relating to standby letters of credit. The ISP 98 deals with various obligations, such as the undertaking to honour by the issuer the presentation of documents as required, examination of the documents for compliance and various standby document types, and the transfer and assignment of drawing rights. The ISP 98 has a number of similarities with the UCP yet it caters specifically for standby letters of credit, for instance, it allows for more than one transfer (Rule 6.02), and partial drawing (Rule 3.08).

Alongside the UCP and ISP 98, there is another instrument that could well apply to a standby letter of credit. It is the United Nations Convention on Independent Guarantees and Standby Letters of Credit 1995. The Convention's aim is to provide a harmonized set of rules for the use of standby letters of credit and independent guarantees (performance/demand guarantees) and to ensure the independence of independent undertakings through the principles it sets out. The scope of application of the Convention is set out in Article 1. It applies to an international undertaking, where the place of the guarantor/issuer is in a contracting state, or the private international law leads to the application of the law of a contracting state. It is open for the parties to exclude the application of the Convention.

B. Performance Bonds and Guarantees

The terms 'performance bond' and 'performance guarantee' are sometimes called 'on demand' performance bond or demand guarantee) (hereinafter the 'demand guarantee'). The bank issuing a demand guarantee agrees to make payment on production of a written demand by the beneficiary, or his/her declaration that the principal has defaulted. The beneficiary needs only demand payment; s/he does not have to prove that the principal has defaulted in performance of the underlying contract (although sometimes the demand may have to be supported by specific documents such as a certificate from an independent third party indicating that the principal has defaulted or that payment is otherwise due). The demand guarantee may be issued by a bank in the beneficiary's country against the counter-guarantee of the principal's bank (a four-party demand guarantee). In either case, the principal's bank will require a counter-indemnity from its customer.

With respect to a demand guarantee, the recent major development was the worldwide adoption at a large voting majority of the 'Uniform Rules for Demand Guarantees (URDG), brochure No 758' at the ICC Commission on Banking Technique and Practice meeting on 24 November 2009. This set of rules (comprising 35 articles) will in most cases bring a reply and a solution for a fair balance of parties' interests. The rules will help to avoid hesitation, misunderstanding and confusion leading to unnecessary and lengthy litigation. The common reference and application of the rules in today's world is intended to fill many gaps of the practice, should it be based solely on the consideration of merely agreed terms and formats. In many cases, the practice has shown that a guarantee is an instrument for remedying difficult and controversial situations. The acceptance of the rules by the parties, unless modified or excluded, will assist them in their work and will facilitate and simplify the way of doing international business.

Summary of the Chapter Five

The Chapter Five introduces the legal framework, which governs the rights and obligations of the subjects/actors entering into international sales of goods - the most important international business transactions. Five sections of this Chapter aim at introducing the comprehensibility and complexity of an international sale transaction and the law governing this. Besides examining the obligations of the buyer and seller under standard international commercial terms ('INCOTERMS') used in international sales contracts, the Chapter focuses on the UN Convention on the International Sales of Goods 1980 (popularly known as the 'Vienna Convention') due to its worldwide impact in determining the obligations of the seller and the buyer and remedies available to them in the case of breach the contractual terms by either of them. Recent international initiatives of the law governing international contracts are mentioned in this Chapter, such as UNIDROIT Principles of International Commercial Contracts ('PICC') and Principles of European Contract Law ('PECL'). Since payment for the goods is a major feature of the sales contracts, this Chapter considers the various payment mechanisms, such as bill of exchange, documentary bill, letter of credit (or documentary credit), standby credit, etc. Which method of payment is used depends on various factors such as the bargaining capacities of the parties to the international sales of contract, the economic environment in the importing and exporting countries, the political stability of the countries affecting the international sales transaction, and the degree of trust and confidence of each party in the other.

Questions/Exercises

1. Why does INCOTERMS 2010 eliminate DES, DEQ and DDU?
2. What is the similarity between CIF and FOB?
3. What is the difference between CIF and DAT?
4. What is the advantage of the CISG? Real or perceived?
5. Comparing a remedy under the CISG with a similar remedy under the Commercial Law of Slovakia.
6. Comparing 'force majeure' under the CISG with that following Slovak law.
7. Explain the principle of freedom of contract under the PECL. What are advantages of this principle?
8. Comparing the formation of contracts under the PECL with that under the CISG.
9. Comparing a remedy under the PECL with a similar remedy under the Commercial Law of Slovakia.
10. There is a statement 'In fact, the application of the PECL is so limited. Thus, the PECL seems to be not real'. Discuss.
11. What are the differences between documentary bills and documentary credits? What are the advantages and disadvantages of each?
12. What is the principle of autonomy of the credits? What is the reasoning behind it?

13. What are the differences between documentary credits and standby letters of credit?
14. How many types of documentary credits are there? Which is the best for the seller?
15. What is the governing law of documentary credits?
16. Nieuwenhuis Vo.f, a Dutch company from Alkmaar, supplies 1,500 kilos of Leerdammer cheese to Brown Ltd., a company established in the UK. The English buyer pays only half of the price, claiming that he received only half of the amount of kilos he ordered. Since this is utterly untrue, the Dutch seller wants to claim the remaining half of the price from the English buyer.

Question: Could be the CISG applied in this case?

17. Anders, a company established in Germany, offers Egberts, a company established in the Netherlands, a consignment of coffee. Anders informs Egberts in writing that the time limit for Egberts to accept the offer is three months. One month after his offer to Egberts, Anders sees an opportunity to sell these goods to Christensen, a company from Denmark, at a much higher price. Anders revokes the offer made to Egberts. Nevertheless, Egberts accepts the offer after Anders has revoked it.

Question: Whether an agreement has been reached in this case?

18. Abels, a company established in the Netherlands, sells to Bartels, a company established in Germany, a number of radios at a price of 150,000 Euros. The moment they are delivered to Bartels it becomes clear that these radios suffer from an electronic defect.

Question: Has the seller fulfilled his legal obligations?

19. A seller agreed to ship 10,000 tons of potatoes FOB Tacoma, Washington, to a buyer in Japan. The buyer designated the SS Russet to take delivery at Pier 7 in Tacoma. On the agreed-upon date for delivery, the seller delivered the potatoes to Pier 7, but the ship was not at the pier. Because another ship using the pier was slow in loading, the SS Russet had to anchor at a mooring buoy in the harbour and the seller had to arrange for a lighter to transport the potatoes in containers to the ship. The lighter tied up alongside the SS Russet, and a cable from the ship's boom was attached to the first container. As the container began to cross the ship's rail, the cable snapped. The container then fell on the rail, teetered, and finally crashed down the side of the ship, causing the lighter to capsize. All of the potatoes were dumped into the sea. The buyer now sues the seller for failure to make delivery.

Questions: Is the seller liable?

20. You are negotiating a sales contract with a foreign buyer, and the CISG is applicable. You have heard of the PICC, and you suggest using them as rules of law to govern the contract. The other party objects that this would be pointless, since the CISG already provides for the necessary legal rules; besides, the buyer argues, 'soft law' rules such as the PICC may not be chosen as the law applicable to the contract.

Question: What would you answer?