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A Review of International Trade Law

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Abstract

International trade law refers to the import and export of goods and other things between the two countries. For international trade, it is a very important matter in the business sector to know and observe international trade law in details. In this article we will discuss international trade and international trade law. Which is a very important issue in international trade. The aim of this article was to try to discuss all of the international trade issues. This is just a general review of the different aspects of international trade. There can be different laws or customs for a country or a government about international trade that are not discussed here.

Keywords: International Trade; Law; WTO; GATT; Public Trade; Private Trade.

1. Introduction

International trade is a complicated area of law to analyze because there are numerous levels of trade organizations and friendships. International Trade Law includes suitable rules and methods for handling trade between countries. Generally, international trade law includes the rules and customs governing trade between countries. International trade lawyers may focus on applying domestic laws to international trade and applying treaty-based international law governing trade. The massive growth in international trade and the explosion of information technology are leading towards a world trading market and economic interdependence of the various nations. Perhaps this will eventually lead to a world government of sorts, with international trade being an arm of government. In the meantime, there is a complex myriad of treaties, laws, rules, and guidelines for those involved in international trade to decipher.

Breaking down the phrase into parts, 'inter' is Latin for between, 'national' is nations, 'trade' is the exchange of goods, services, and technology for profit, and 'law' is the regulation of conduct. International trade law can, therefore, be defined as the regulation of the conduct of parties involved in the exchange of goods, services, and technology between nations.[1]

2. International Trade

It may International Trade, there is two kinds of trades. Those are followed-

2.1. Public Trade

This seemingly clear solution, however, presents challenges. With regard to the source requirement, it was considered relevant that the provincial milk marketing boards "operate within a framework set up by federal and provincial legislation."[18]Under English law, however, contracting private parties operate within a legal framework determined by Parliament and the common law. We would not consider contracting private parties to exercise any form of governmental authority, however.[19] The Appellate Body's definition of a government agency when examining the functional requirement is similarly problematic[2].

Public international trade law is the regulation of conduct in commerce between nations. 'States' is used to refer to national governments rather than the word 'governments' because some governments may change and the new government may not be recognised internationally.

[1] Essential International Trade Law [Michele Sasnon]2002

[2] Save limited circumstances. *See, e.g.*, R v. Panel on Take-overs and Mergers, ex p. Datafin plc. [1987] Q.B. 815

2.2. Private Trade

Private international trade law is the regulation of conduct between private traders in different States. It generally does not encompass the trading activities of individual consumers, for example purchasing items whilst on holidays, but there has been a shift in perception[3]. Which are based on domestic legal systems and rest on conceptions of community or social groups, have a potentially distinct meaning or application when applied to groups of states or international organizations. Further, international law has, in its modern form, traditionally been the law *of* states made *by* states. In this sense, public international law has been just that—public. Nonetheless, there are increasing challenges to this account of the international system.

3. World Trade Origination

3.1. GATT

Between 1929 and the end of the Second World War, international trading activities ground to a halt. The incredible increase in international trade since then is a result of political change due to the war, where the United States of America took over from Britain as the new leader in world trade. The US sought to reorganise the world, so as to avoid a new polarisation of uneven economic development such as was seen in the economic devastation of 1929. The institutions to facilitate this reorganisation was to be: (1) International Monetary Fund (IMF) to address the balance of payments problems; (2) World Bank to regulate international investment; and (3) International Trade Organisation (ITO), to regulate international trade and dissolve trade barriers. It is the third that is of relevance to the present study. The first step towards establishing the ITO was the completion of its charter in 1948, known as the Havana Charter. Meanwhile, negotiations were held between governments aimed at lowering customs tariffs and reducing discriminatory trade restrictions amongst themselves. The result of these negotiations was the signing by 25 governments in 1947 of a provisional international agreement to make binding commitments[4]. The purpose of GATT was to eliminate harmful trade protectionism. That had sent global trade down 65 percent during the Great Depression. GATT restored economic health to the world after the devastation of the depression and World War II. The Uruguay Round also changed GATT's status. Before the round, it was the only multilateral trade agreement; and it only covered trade in goods. The Uruguay Round expanded the coverage of the multilateral rules to include services and intellectual property. GATT now stands alongside the General Agreement on Trade in Services (GATS) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) as one of the agreements of the World Trade Organization (WTO) which was established on 1 January 1995. From 1947 to 1994, GATT also served

[3] Essential International Trade Law [Michele Sasnon]2002
[4] Essential International Trade Law [Michele Sasnon]2002

another role — it was a de facto international organization for negotiating and administering the multilateral trade rules. That role has now formally been taken over by the WTO. The WTO Secretariat has prepared this book to assist public understanding of GATT. The first section is an explanatory introduction. The second section contains the legal text of the agreement and related documents. The book is not intended to provide a legal interpretation of the agreement[5]. Although the WTO agreement came into effect on 1 January 1995, the GATT 1947 also continued to apply during 1995, to ensure that contractual trade relations remained in effect between the GATT contracting parties during a transitional twelve months in which many countries had not yet completed the process of becoming members of the WTO. The "GATT 1994" is the basic set of trade rules, largely taken over from the GATT 1947, that in conjunction with the other agreements in Annex 1A to the WTO agreement now represents the goods related obligations of WTO members. The GATT 1947 is no longer in effect. However, it is still necessary to read it. Its successor, the GATT 1994, is defined only by a brief agreement1 that, although entitled "General Agreement on Tariffs and Trade 1994", is little more than a series of references to other texts. Most of the provisions of the GATT 1947 are included by reference, along with many other legal instruments adopted by the GATT Contracting Parties and some new understandings and explanatory notes. The following pages attempt to make the GATT 1994 comprehensible by considering both the elements that it shares with the GATT 1947 and also the ways in which the two agreements differ. For this purpose, they look, first, at the core principles carried over into GATT 1994 from the GATT 1947, and then at changes introduced by the agreement that defines the GATT 1994, as well as at the Uruguay Round understandings which interpret specific points in certain GATT Articles. Over the years the Contracting Parties participated in a series of multi trade negotiations (MTNs) to update the GATT, and these are commonly referred to as 'rounds'. The negotiation rounds are based on the most favoured nation (that every tariff concession by one State to another must similarly apply to the other Contracting States) and reciprocity (that concessions made by the Contracting States should be reciprocated by others). The rounds steadily became more complex and involved, and their duration expanded over time. The first rounds were completed each within a single year. The first round was held in Geneva, Switzerland in 1947, the second in Annecy, France in 1949, the third in Torque, the United Kingdom in 1951, and the fourth in Geneva in 1956. The fifth and sixth rounds were held in Geneva in 1960–62 (the 'Dillon' round) and 1962–67 (the 'Kennedy' round). The seventh round was held in Tokyo from 1973–79 and the most recent round, the Uruguay round, took place over 8 years from 1986–94. The reason the Uruguay round took 8 years is that it focused on several highly complex and controversial areas, including agricultural subsidies, services, and intellectual property. As developing countries became involved with GATT, the United Nations Conference on Trade and Development

[5] The General Agreement on Tariffs and Trade 1994 & 1947

(UNCTAD) was established in 1964 to consider the special needs of developing countries. It developed a Generalized System of Preferences, where good imported to developed countries from developing countries were given preferential duty treatment. It continues to operate, providing a vehicle for publicizing trade issues of developing countries.

National Treatment

The rule of national treatment, in Article III of the GATT, is also of fundamental importance. It complements the MFN rule. Whereas Article I, by requiring MFN treatment, puts the products of all of a country's trading partners on equal terms with one another, the national treatment principle puts those products on equal terms also with the products of the importing country itself. It says that, once imports have passed the national frontier (and in so doing have paid whatever import duty is imposed) they must be treated no worse than domestic products. Internal taxes or other charges on the imports must be no higher than on domestic products, and laws and regulations affecting their sale, purchase, transportation, distribution or use must be no less favorable than for goods of national origin. Contracting Parties agreed that imported goods from the other Member States would be accorded no less favor able treatment with regards their sale and distribution than similar products produced domestically

Restoration of Most-Favoured Nation Treatment

Each country agreed to grant one another treatment at least as favourable as they would grant any other country. That is, countries were to apply general treatment to the imports and exports of all other Contracting Parties. The MFN rule is basic to the whole edifice of the GATT. Stated in Article I of the GATT2, it requires that if one GATT (now WTO) signatory grants to another country "more favorable treatment" (such as a reduction in the customs duty payable on imports of a particular product), it must immediately and unconditionally give the same treatment to imports from all signatories.

Elimination of Preferential Trading Arrangements

some countries, or groups of countries, had previously accorded to each other reciprocal preferential tariffs. Examples include the territories of the French Union, and Britain and the Commonwealth countries. These preferential tariffs were seen as a barrier to trade. Despite the aim of the GATT to abolish trade preferences, the US favoured the creation of the European Community (EC) in 1957 by sponsoring the Treaty of Rome, to facilitate a greater economic harmonisation of Western Europe, which was seen as the bulwark against the eastern bloc during the Cold War. The eastern bloc responded with the creation of Come-on, which remained in place until 1989. Since then a number of the eastern bloc countries have become members of the EC. The national treatment principle means that protection of the domestic supplier of a product should be given only through action at the frontier[6]. A further set of GATT rules has the shared aim of restricting even frontier protection, as far as possible, to the single instrument of import duties. Quantitative restrictions on imports, and on exports, are in general

Domestic Protection

industries against export dumping a trader may introduce products into a foreign country at a price well below the usual price charged for that product in the overseas market, so as to obtain market share and force the domestic competitors out of the market. For 'dumping' to occur, the price charged must be less than the price charged in the trader's own country, or less than the price charged by the trader in other countries, or less than the cost of production in the country of origin. Because of the severe damage, this can do to the domestic industry, anti-dumping duties were allowed under the GATT to protect the domestic industry from this unfair competition, provided they were not applied merely to protect the domestic industry from competition. The amount of the anti-dumping duties imposed could be no more than the difference between the selling price and the price in the trader's domestic market.

State Trading

State purchases and sales can act to protect the domestic industry, and the GATT aimed to prevent discrimination by State trading. This posed problems for centrally planned economies, where most if not all purchases are made by State owned entities rather than private businesses, as is the case in market-based economies. Over the last 50 years the communist/socialist countries, such as China and the Soviet Union, have moved towards market economies. The remaining centrally planned economies were included in the GATT through agreements to purchase stated amounts of goods from market economies so that a certain level of their trade became market-based. A further principle carried over to GATT 1994 is that of transparency. Multilateral review and transparency is a major element in the WTO itself (i.e. in the Agreement Establishing the WTO). It is retained also in general requirements imposed by GATT Article X for trade policies and regulations affecting trade in goods, and in more specific requirements built into many other Uruguay Round agreements.[7] These key elements which shaped the functioning of the old GATT system, and which are still present under the GATT 1994, will not be discussed further here. Numerous studies of these principles pitched at every level of detail and sophistication, have been published over the years since the GATT came into force, and have passed judgement on their economic and political effect. The purpose of recalling them here is only to underline that they will continue to operate, and presumably to have similar effects, under the WTO. The

[6] Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries adopted by the Contracting Parties on 28 November 1979, GATT document l/4903, in BISD 26S, pages 203-205

[7] General Agreement on Tariffs and Trade 1994.

discussion which follows will turn instead to changes introduced into the GATT rules by the Uruguay Round agreements.

Rules of Origin, Actions by Lower-Level Governments

Nothing is said in Article XXIV understanding about the question of rules of origin. Although a separate Uruguay Round agreement, 10 (discussed in a separate book in this series), deals with origin rules, it applies only peripherally to origin rules used in preferential arrangements such as regional trading agreements. The Article XXIV understanding also includes a provision which deals with a paragraph of the article that has nothing to do with regional agreements. Article XXIV: 12 concerns the responsibility of WTO member governments to take "reasonable measures" to ensure that lower-level regional or local governments observe the GATT rules. The problem of such governments or authorities not acting in accordance with commitments made by the central government is primarily one that arises in federal states[8]. The understanding states clearly that WTO members are fully responsible for breaches of the GATT by subordinate levels of government, and may ultimately have to provide compensation if they cannot make the subordinate level meet GATT obligations. When it became evident that the ITO would never come into operation, which was in large part due to difficulties in ratification in the US Congress, the GATT became the central mechanism for regulating the conduct of international trade. The GATT did not pose as great a difficulty in the US Congress as the ITO did, because it was a trade agreement rather than a trade organization, and its legal obligations were described as 'provisional', viewed as impermanent, and to be applied only where they were consistent with US domestic legislation. The reason the US difficulties resulted in stifling the development of the ITO was their overarching dominant position in world trade at the time. To an extent, this remains the case today, with initiatives not having US support being unlikely to succeed[9]. The GATT had no formal institutional arrangements, for that was to be the role of the ITO. This is why we speak of GATT countries as 'Contracting Parties' and not 'members'. Perhaps the political flexibility of a 'non-institutional institution' is what made the GATT so effective. Decision-making was delegated to the Contracting Parties acting collectively and stated in capital letters 'CONTRACTING PARTIES' to distinguish between references to the various Contracting Parties acting individually. Despite the lack of an institution, the GATT had detailed rules in legal language, with rules for their application, interpretation, and enforcement. These rules were effective in the 1950s, mainly due to the normative pressure Contracting Parties placed on each other to comply with them. For a discussion on dispute settlement, refer to Chapter 7. The GATT involved an annual meeting of the Contracting Parties and an executive committee, the Council of Representatives (which met during interim periods to act with limited

[8] Agreement on Rules of Origin
[9] Essential International Trade Law [Michele Sasnon]2002

authority), and a Secretariat (which advised and assisted the Contracting Parties, undertook research and prepared reports.

GATT Negotiations 1947–94

Over the years the Contracting Parties participated in a series of multithread negotiations (MTNs) to update the GATT, and these are commonly referred to as 'rounds'. The negotiation rounds are based on the most favored nation (that every tariff concession by one State to another must similarly apply to the other Contracting States) and reciprocity (that concessions made by the Contracting States should be reciprocated by others). The rounds steadily became more complex and involved, and their duration expanded over time. The first rounds were completed each within a single year. The first round was held in Geneva, Switzerland in 1947, the second in Annecy, France in 1949, the third in Torque, the United Kingdom in 1951, and the fourth in Geneva in 1956. The fifth and sixth rounds were held in Geneva in 1960–62 (the 'Dillon' round) and 1962–67 (the 'Kennedy' round). The seventh round was held in Tokyo from 1973–79 and the most recent round, the Uruguay round, took place over 8 years from 1986–94. The reason the Uruguay round took 8 years is that it focused on several highly complex and controversial areas, including agricultural subsidies, services, and intellectual property. As developing countries became involved with GATT, the United Nations Conference on Trade and Development (UNCTAD) was established in 1964 to consider the special needs of developing countries. It developed a Generalized System of Preferences, where good imported to developed countries from developing countries were given preferential duty treatment. It continues to operate, providing a vehicle for publicizing trade issues of developing countries.

The second collection of materials, **GATT Publications**, includes a small number of publications series that were not broadly disseminated during the organization's lifespan[10].

- **Journal of the Preparatory Committee of the International Conference on Trade and Employment** issued on daily basis during October-November 1946 included information useful to participants and historians of the Committee's work. Each issue included a list of meetings, summary records of proceedings, lists of documents distributed to participants and names of participants.
- **The Legal Instruments series** includes the GATT treaties and schedules related to the trade rounds. In addition, they include protocols of modification and rectification to the schedules, along with protocols modifying treaty texts, accession instruments, and supplementary protocols. They are

[10] ATT Digital Library 1947 – 1994 General Agreement on Tariffs and Trade

indexed and assigned volume numbers in the "GATT: Status of Legal Instruments" publication of the Legal Affairs Division.

- **Press Releases (UN Conference on Trade and Employment / Interim Commission of the International Trade Organization).** This series was initiated and produced by the Department of Public Information for the Conference on Trade and Employment (Havana Conference). It was continued by the Information Centre of the United Nations Office at Geneva on behalf of the Interim Commission of the International Trade Organization (ICITO). The press releases contain statements and speeches by representatives to the conference, brief meeting summaries, biographies and other information vital to understanding the activities of the Conference and Interim Commission. A total of 628 releases were published between November 21, 1947, and September 30, 1948. The GATT Digital Library collection is incomplete, but a full set is found in the archives section of the United Nations Library in Geneva. Journal of the Preparatory Committee of the International Conference on Trade and Employment Legal Instruments

The GATT 1994 is defined by a very short agreement which lists the provisions that it covers, and also offers a number of explanatory notes[11]. Although it would undoubtedly have been preferable if a single, fully revised GATT text had emerged from the Uruguay Round, this proved impracticable. Even a simple rewriting of the GATT 1947 to make such changes as the replacement of references to “contracting parties” by “WTO members” raised surprisingly difficult questions. A fully satisfactory revision would have required wide-ranging changes to the substance of many GATT Articles, in order to reflect past decisions made by the GATT contracting parties as well as the agreements and understandings reached in the Uruguay Round. While some of these changes could probably have been made without difficulty, others might well have raised issues that would have demanded the reopening of painfully negotiated agreements.

The Relationship between GATT and WTO

The Uruguay Round of Multilateral Trade Negotiations from 1986–94 created the World Trade Organization (WTO). Remembering the difficulties regarding the US Congress and the ITO, the US was here given assurance that it could review its membership if the dispute settlement procedures under the WTO were repeatedly unfavorable to the US. The WTO is the realization of the ITO planned after the Second World War, discussed at the beginning of this chapter. The distinction between the GATT 1947 and the WTO is that the GATT was a network of international trade agreements and working bodies, whereas the WTO is an

[11] General Agreement on Tariffs and Trade 1994.

organization to administer international trade agreements using GATT 1994 as its code of conduct. The latter is institutional while the former is not.

It is probably best to be clear from the start that the General Agreement on Tariffs and Trade (GATT) was two things: (1) an international agreement, i.e. a document setting out the rules for conducting international trade, and (2) an international organization created later to support the agreement[12]. The text of the agreement could be compared to law, the organization was like parliament and the courts combined in a single body. As its history shows, the attempt to create a fully-fledged international trade agency in the 1940s failed. But GATT's drafters agreed that they wanted to use the new rules and disciplines, if only provisionally. Then government officials needed to meet to discuss issues related to the agreement and to hold trade negotiations. These needed secretarial support, leading to the creation of an ad hoc organization — that continued to exist for almost half a century.

Current WTO Membership

164 members since 29 July 2016, with dates of WTO membership. Including Australia, Austria, Belgium, Brazil, Canada, Chile, Czech Republic, Denmark, Egypt, European Community, France, Germany, Greece, Hong Kong, Hungary, India, Ireland, Italy, Japan, Korea, Malaysia, Mexico, Netherlands, New Zealand, Norway, Pakistan, Papua New Guinea, Peru, Philippines, Poland, Portugal, Singapore, South Africa, Spain, Sri Lanka, Sweden, Switzerland, Thailand, Turkey, United Kingdom, and the United States.

The WTO Agreement

Known as the Marrakesh Agreement, but officially titled 'The Final Act Embodying the Results of the Uruguay Round of Multilateral[13].

Trade Negotiations', the WTO Agreement contains a number of agreements reached during the course of the Uruguay Round.

- Agreement Establishing the World Trade Organization
- General Agreement on Tariffs and Trade 1994
- Uruguay Round Protocol GATT 1994
- Agreement on Agriculture
- Agreement on Sanitary and Phytosanitary Measures
- Agreement on Textiles and Clothing

[12] World trade origination
[13] Essential International Trade Law [Michele Sasnon]2002

- Agreement on Technical Barriers to Trade
- Agreement on Trade Related Aspects of Investment Measures (TRIMs)
- Agreement on Subsidies and Countervailing Measures
- Agreement on Safeguards
- General Agreement on Trade in Services (GATS)
- Domestic application

International Trade Contracts

Agency Arrangements

An agent acts on behalf of a principal to establish trade contacts for the principal's goods and services in different markets. Both parties in an agency relationship have certain rights and obligations. The agent is obliged to look after the interests of the principal, to communicate necessary information, to comply with reasonable requests of the principal, to keep confidential information confidential, and to act in good faith. The principal is obliged to indemnify the agent for expenses incurred on the principal's behalf, and to pay the agent a commission. If the parties cannot agree as to remuneration the amount customarily earned by agents in that place is applied. This is difficult to pinpoint as there are large differences in remuneration of agents in different States and in markets for different goods, and it is all the more difficult if the product being marketed by the agent is innovative. A key problem in agency agreements is the scope of the authority an agent has, and most often problems arise with regard to undertakings made by agents in the course of negotiations with third parties. The third party position is difficult where such undertakings are not performed by the principal, especially where the identity of the principal is not disclosed. Difficulties as to the correct forum in which to sue arise where the principal, agent and third party reside in different countries, for agency law differs across different legal systems. Formally, the extent to which the agent can bind the principal depends on the terms of the contract between them. This will determine the scope of the agent's actual authority. However, the principal may also be legally bound by an agent's representations where although the agent did not have actual authority to make them, the agent had ostensible, or apparent, authority to do so. Ostensible authority is determined from the viewpoint of third parties and may be inferred from the position the agent holds. For example, it is reasonable for a third party dealing with a person with a business title of 'Australasian Sales Manager' to conclude that person has authority to enter sales contracts for and on behalf of the company[14]. Generally, for an agent to ensure exclusion of personal liability the agent should sign a contract with a third party followed by the words 'as agent for' and state the principal's name. An agent who signs a contract without qualification

[14] Essential International Trade Law [Michele Sasnon]2002

may still be excluded from personal liability where it is clear from the contractual provisions that he or she is acting as an agent in the transaction. If the agent acts for a disclosed but unidentified principal the agent may be sued as a co-principal. Commonly large traders use agents to test a new market, and disputes arise where an agent builds a substantial market for a product over a two to three-year period and then the principal decides to conduct trade in that market directly rather than through the agent. There is a vast difference in bargaining power between the parties and the agent requires some form of protection. For example, in this situation, the principal is required to pay the agent a pension. There is some conflict between the principle of freedom of contract and the protection of the weaker party, which to a large extent is the impetus behind domestic consumer legislation. The Convention on Agency in the International Sale of Goods, produced by UNIDROIT in 1983, was drafted to complement the Vienna Convention (see p 74, below, for more on the Vienna Convention and p 70, below, for more on UNIDROIT). It is stated to apply where a principal and third party for whom the agent contracts have their place of business in different States and the agent's place of business is in a Contracting State to the Convention. It does not apply to agency agreements for stocks and commodity contracts. It contains similar provisions to the Vienna Convention with respect to interpretation and non-coverage. In relation to the issue of ostensible authority, the Agency Convention provides under Art 14 that, where the conduct of a principal causes a third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and is acting within the scope of its authority, the principal may not argue lack of authority on the part of the agent in defense to a claim by that third party against the principal. However, the principal may agree with a third party to exclude part or all of the Convention from applying to the relevant agency agreement. Under Art 33(1), the Convention enters into force when it is ratified, approved, accepted or acceded to by 10 Member States. At the time of writing, the Convention had been acceded to by three Member States and ratified by a further two Member States. It, therefore, has not yet entered into force.

Distribution Agreements

A distributor buys products and then resells them. A distribution agreement is a contract for the supply of goods over a certain period of time. The agreement defines the terms on which the goods are sold for resale by the distributor in the foreign market. Often a distributor will want exclusive rights to distribute the specific goods into their market, that is, a clause that the manufacturer will only supply the product to it and not to any other distributor in that market, nor to an agent or otherwise selling into that market[15]. If the agreement merely prevents the manufacturer from entering other distribution agreements in that market, it is known as a sole distribution agreement. If the agreement also prevents the manufacturer itself selling into that market, it is

[15] Essential International Trade Law [Michele Sasnon]2002

known as an exclusive distribution agreement. Distribution agreements typically include the following clauses: (1) Goods – specifying the model or type of goods to be distributed by the distributor. Where there are a number of goods or models within a product range, it is useful for the agreement to incorporate a separate document such as a product list or sales catalogue. (2) Price – it is unusual for a distribution agreement to include actual prices for the goods unless such a clause is coupled with another clause providing for periodic review of the prices. Even this may be unrealistic, especially where the prices of finished goods fluctuate depending on the cost of raw materials from which they are made. It is more common for distribution agreements to refer to prices in comparison to some other market driven factor. For example, prices can be agreed at 10% below standard published wholesale prices for the seller, or, where the goods being distributed are commodities, at 5% less than the world spot price for the particular commodity at the time each order is placed. (3) Territory – the geographical area in which the distributor may distribute the goods. (4) Exclusivity – agreement by the seller not to sell directly to customers within the stated territory. (5) Reciprocity – an agreement that any indirect inquiries by consumers in the stated territory will be referred by the seller to the distributor, and agreement by the distributor to refer any indirect inquiries from consumers outside the stated territory to the company. (6) Marketing – agreement as to minimum obligations of the distributor with respect to advertising the goods in the foreign market. This may includes minimum advertising spends, or a stated number of advertisements per annum in stated newspapers or magazines. There may also be an agreement as to maximum intervals between which the distributor must visit nominated major buyers or the number of prospective buyers the distributor must approach each month. (7) Database management – an agreement that the distributor will maintain a record of customers and will provide access to such record to the seller upon request. It is quite legal to enter exclusive distribution agreements. It is only where the agreement has an anti-competitive effect that there is a problem. Care should be taken with the following clauses, as they may breach competition law provisions in certain countries: (a) agreement by the distributor not to buy from other sellers of similar products to those covered by the distribution agreement; and (b) agreement as to the price at which the distributor will resell the goods within the foreign market. If a seller is unsure, the best approach in Australia is to contact the Trade Practices Commission and notify it of the arrangement. If it makes no decision on point, then the arrangement is acceptable. The best approach internationally is to seek legal advice in the overseas jurisdiction. For further information regarding anti-competitive agreements refer to Chapter 5 on the competition. Branch offices and subsidiaries A branch office is an arm of the exporting company which is physically located in a foreign country, and a subsidiary is a separate and independent legal entity incorporated in the foreign country. Determining which is more appropriate for an exporting company will depend on the employment, taxation, investment and company laws in the foreign country. A subsidiary may be partly or wholly owned by the exporting company, who is referred to as the 'parent' company. Where a number of subsidiaries are established in various countries, the exporting company becomes a multinational, or transnational, corporation. Although there are no international laws applicable to multinational companies, the OECD Guidelines for Multinational Enterprises express the collective expectations of OECD member governments as to the behavior and activities of multinational enterprises. Although in principle a subsidiary is legally a separate entity to the parent company, there are circumstances in which the ‘corporate veil’ is pierced, so that the subsidiary is treated as part of the parent company. The relevant circumstances include where the subsidiary is completely controlled by the parent company. For example, in James Hardie & Coy Pty Ltd v Desmond Putt (1998) the plaintiff who suffered asbestos related injuries as a result of working at James Hardie & Co Pty Ltd, New Zealand, succeeded in an action of negligence against two New South Wales companies, James Hardie & Coy Pty Ltd and James Hardie Industries Ltd (the Holding Company). Usually the acts of the New Zealand Company would be legally separate from the acts of the New South Wales companies, but in this case, the Court held that in this instance the corporate veil should be lifted. With subsidiaries being 95% owned by the parent company, and control is maintained by the parent company, the James Hardie group of companies was held to be conducted as one enterprise.

Joint Ventures

an international joint venture is an undertaking by two or more companies with registered business addresses in different countries. The joint venture may be in relation to a specific project or may be of an ongoing nature. In some countries where there are restrictions in the right of foreign enterprises to do business, a foreign enterprise may have no choice but to enter a joint venture with a domestic enterprise in a foreign country. The joint venture may be merely contractual or may involve the formation of a company in which the joint venture partners have equity shareholdings.

Licensing

Where the product is a method of manufacturing in which there is some intellectual property right, such as a new technology, licensees provides a means for the owner of the process to grant a foreign business the right to use that process for a period of time. The licensee typically pays royalties based on sales arising from the use of that process. Typical licensed intellectual property rights include patents (ideas), copyright (art works), trademarks (names/logos), circuit layouts and designs.

Patents

A patent gives the patentee the exclusive right to market the invention for a set period of time. In Australia, s 67 of the Patents Act 1990 (Cth)provides for a 20-year period. Where a patentee licenses use of the patent, the licensed right must be registered with the Register of Patents. The patentee can proceed against anyone who exploits the invention without permission.

Copyright

The copyright in a book, painting, and film, a piece of music or computer software is owned by the creator of the piece of work, except if the creator acted under commission or under a contract of employment, in which case the person commissioning the work or the employer owns the copyright. The copyright lasts for 50 years from the year in which the owner of the work dies. The owner of copyright grants a license for the licensee to copy the work. Typically, the owner will enter a series of exclusive licenses around the world for reproduction of their copyright work. Difficulties are created where the cost of reproduction in one licensed country is substantially lower than the cost of reproduction in another licensed country, such that it is economically feasible for the one country to transport the items for sale in the other country. This is known as parallel importing, and this practice has deemed an infringement of copyright under the Copyright Act 1968 (Cth).

Trademarks

A trademark is a distinctive sign used to distinguish a product from other products in the market. It can be a letter, word, name, number, signature, brand, heading, shape, color or sound. Under the Trade Marks Act 1995 (Cth), a trademark must be registered to be protected. Registration lasts for 10 years but can be renewed every 10 years indefinitely. The registered owner of a trademark may license its use. The owner may proceed against any unauthorized use of the trademark, that is, where a substantially or deceptively similar sign is used. There is nothing to prevent parallel importation of legitimately marked goods under a license from the owner of the trademark, except if there is a provision in the license agreement providing that the licensee may not export trademarked goods into the owner's country[16]. But even this will only bind the licensee – it will not bind third parties who buy the trademarked products from the licensee and choose to export them to the owner of the trademark's country. This may occur where the retail price of the trademarked good in the foreign market plus the cost of carriage from the foreign market to the market of the trademark owner is less than the cost of production of the trademarked good in the place of business of the trademark owner.

Circuit Layouts

A circuit layout is a blueprint for the production of an integrated circuit. The Circuit Layouts Act 1989 (Cth) provides the circuit layout creator the exclusive right for 10 years to exploit the layout by producing an integrated circuit from it. The right may be licensed, giving the license holder the right to proceed against

[16] Essential International Trade Law [Michele Sasnon] 2002

persons who copy the layout or produce integrated circuits from it. Parallel importation of circuit layouts is permitted (unlike computer software generally, which comes within the Copyright Act 1986 (Cth) discussed above). Software incorporated into an integrated circuit which is parallel imported is not protected.

Designs

A design is a pattern, shape, or ornamentation which gives a distinctive appearance to a product. The Designs Act 1906 (Cth) provides that new designs may be registered. The owner of a design is the person who created it unless they were employed or commissioned to do so, in which case the employer or person who commissioned the design is the owner of it. Although each of the above measures has anti-competitive effects, the Trade Practices Act 1974 (Cth) exempts them from the competition provisions in that Act (readers refer to Chapter 5) on the basis that the public benefits from new and innovative products. They take time and cost money to research, develop, produce and market, so an initial period of protection is considered an incentive for the creator to develop an invention beyond the concept stage. In each case, the usual remedy for a breach of a license is in restraining further breach, and either damages or an account of profits made from the unlawful use of the intellectual property right concerned.

Franchising

Where the product is a system of doing business, rather than a good or service for sale, the developer of the system may enter a franchise agreement. A franchise agreement is a type of licensing agreement, under which the franchisor allows the franchisee to use the franchisor’s business name, trademark, advertising slogan, shop layout, the design of packaging, etc. The franchisor also provides assistance with marketing, business, and technical aspects of working the business system. Examples of franchises include McDonald's and Jim’s Mowing. Given that a large number of new businesses fail to getoff the ground before the financial investment begins to show a return, entering a franchise arrangement can enable the new business to benefit from the goodwill created by other franchises in the chain. In return for these benefits, the franchisee agrees to conduct the business in accordance with the marketing plan and business system of the franchisor. The franchisee typically pays an initial fee and ongoing royalty payments based on sales. The difference between a franchise and a subsidiary is that the franchisee owns the franchised outlet, whereas a subsidiary is owned by the head company. Although the franchisee has ownership, the franchisor retains control. This is essential from a franchisor’s viewpoint because consumers perceive each outlet of a franchise to be part of the one business, and a failure to adhere to the corporate image by one outlet can affect the reputation of other outlets in the chain. In 2000, UNIDROIT published a Guide to International Master Franchise Arrangements. The Guide details international franchising through the use of a master franchise agreement between an oversees franchisor and a party in a country where the franchise is to be established. The domestic party effectively becomes a sub-franchisor, selling and operating franchises in that country. The sub-franchisor will be particularly concerned with the rights it is granted, how they can be exercised and how exclusive they are. The franchisor will be concerned with ensuring the integrity of the system, which can be done by training and assisting the sub-franchisor, and with removing any sub-franchisees who may bring the consumer perception of the franchise into disrepute. The only regulation in Australia is for petrol station franchises, which are regulated by the Petroleum Retail Marketing Franchise Act 1980 (Cth). It deals with the formation and termination of franchise agreements relating to petrol stations. There is also a Franchising Code of Practice, which was produced by the Franchising Code Administration Council in 1993. It provides for a code of conduct and for dispute resolution by mutual negotiation, or if that fails, conciliation by a conciliator nominated by the Franchising Code Administration Council. Injunctive relief may be obtained from a court if irreparable damage would be suffered by a party without it.

How to use the Incoterms® 2010 Rules?

1. Incorporate The Incoterms® 2010 Rules into Your Contract of Sale

If you want the Incoterms® 2010 rules to apply to your contract, you should make this clear in the contract, through such words as, "[the chosen Incoterms rule including the named place, followed by] Incoterms® 2010".

2. Choose The Appropriate Incoterms Rule

The chosen Incoterms rule needs to be appropriate to the goods, to the means of their transport, and above all to whether the parties intend to put additional obligations, for example, such as the obligation to organize carriage or insurance, on the seller or on the buyer[17]. The Guidance Note to each Incoterms rule contains information that is particularly helpful when making this choice. Whichever Incoterms rule is chosen; the parties should be aware that the interpretation of their contract may well be influenced by customs particular to the port or place being used.

3. Specify Your Place or Port as Precisely as Possible

The chosen Incoterms rule can work only if the parties name a place or port, and will work best if the parties specify the place or port as precisely as possible. A good example of such precision would be:

[17] FCA 38 Cours Albert 1er, Paris, France Incoterms® 2010.

Under the Incoterms Rules Ex Works (EXW), Free Carrier (FCA), Delivered at Terminal (DAT), Delivered at Place (DAP), Delivered Duty Paid (DDP), Free Alongside Ship (FAS), and Free on Board (FOB), the named place is the place where delivery takes place and where risk passes from the seller to the buyer. Under the Incoterms Rules Carriage Paid to (CPT), Carriage and Insurance Paid to (CIP), Cost and Freight (CFR) and Cost, Insurance and Freight (CIF), the named place differs from the place of delivery. Under these four Incoterms rules, the named

1.“Incoterms” is a registered trademark of the International Chamber of Commerce.

the place is the place of destination to which carriage is paid. Indications as to place or destination can helpfully be further specified by stating a precise point in that place or destination in order to avoid doubt or argument.

4. Remember That Incoterms Rules Do Not Give You a Complete Contract of Sale

Incoterms rules do say which party to the sale contract has the obligation to make carriage or insurance arrangements when the seller delivers the goods to the buyer, and which costs each party is responsible for. Incoterms rules, however, say nothing about the price to be paid or the method of its payment. Neither do they deal with the transfer of ownership of the goods, or the consequences of a breach of contract? These matters are normally dealt with through express terms in the contract of sale or in the law governing that contract. The parties should be aware that mandatory local law may override any aspect of the sale contract, including the chosen Incoterms rule.

Main Features of the Incoterms® 2010 Rules

1. Two new Incoterms rules – DAT and DAP – have replaced the Incoterms 2000 rules DAF, DES, DEQ, and DDU

The number of Incoterms rules has been reduced from 13 to 11. This has been achieved by substituting two new rules that may be used irrespective of the agreed mode of transport – DAT, delivered at Terminal, and DAP, Delivered at Place – for the Incoterms 2000 rules DAF, DES, DEQ, and DDU. Under both new rules, delivery occurs at a named destination: in DAT, at the buyer’s disposal unloaded from the arriving vehicle (as under the former DEQ rule); in DAP, likewise at the buyer’s disposal, but ready for unloading (as under the former DAF, DES and DDU rules).

The new rules make the Incoterms 2000 rules DES and DEQ superfluous. The named terminal in DAT may well be in a port, and DAT can therefore safely be used in cases where the Incoterms 2000 rule DEQ once was. Likewise, the arriving “vehicle” under DAP may well be a ship and the named place of destination may well be a port: consequently, DAP can safely be used in cases where the Incoterms 2000 rule DES once was.

These new rules, like their predecessors, are “delivered”, with the seller bearing all the costs (other than those related to import clearance, where applicable) and risks involved in bringing the goods to the named place of destination.

2. Classification of the 11 Incoterms® 2010 rules

The 11 Incoterms® 2010 rules are presented in two distinct classes:

RULES FOR ANY MODE OR MODES OF TRANSPORT EXW EX WORKS

FCA FREE CARRIER

CPT CARRIAGE PAID TO CIP CARRIAGE AND INSURANCE PAID TO

DAT DELIVERED AT TERMINAL DAP DELIVERED AT PLACE DDP DELIVERED DUTY PAID

RULES FOR SEA AND INLAND WATERWAY TRANSPORT FAS FREE ALONGSIDE SHIP FOB FREE ON BOARD

CFR COST AND FREIGHT CIF COST INSURANCE AND FREIGHT

The first class includes the seven Incoterms® 2010 rules that can be used irrespective of the mode of transport selected and irrespective of whether one or more than one mode of transport is employed. EXW, FCA, CPT, CIP, DAT, DAP and DDP belong to this class. They can be used even when there is no maritime transport at all. It is important to remember, however, that these rules can be used in cases where a ship is used for part of the carriage.

In the second class of Incoterms® 2010 rules, the point of delivery and the place to which the goods are carried to the buyer are both ports, hence the label “sea and inland waterway” rules. FAS, FOB, CFR, and CIF belong to this class. Under the last three Incoterms rules, all mention of the ship’s rail as the point of delivery has been omitted in preference for the goods being delivered when they are “on board” the vessel. This more closely reflects modern commercial reality and avoids the rather dated image of the risk swinging to and fro across an imaginary perpendicular line.

3. Rules for Domestic and International Trade

Incoterms rules have traditionally been used in international sale contracts where goods pass across national borders. In various areas of the world, however, trade blocs, like the European Union, have made border formalities between different countries less significant. Consequently, the subtitle of the Incoterms® 2010 rules formally recognizes that they are available for application to both international and domestic sale contracts. As a result, the Incoterms® 2010 rules clearly state in a number of places that the obligation to comply with export/import formalities exists only where applicable.

Two developments have persuaded ICC that a movement in this direction is timely. Firstly, traders commonly use Incoterms rules for purely domestic sale contracts. The second reason is the greater willingness in the United States to use Incoterms rules in domestic trade rather than the former Uniform Commercial Code shipment and delivery terms.

4. Guidance Notes

Before each Incoterms® 2010 rule, you will find a Guidance Note. The Guidance Notes explain the fundamentals of each Incoterms rule, such as when it should be used, when risk passes, and how costs are allocated between seller and buyer. The Guidance Notes are not part of the actual Incoterms® 2010 rules but are intended to help the user accurately and efficiently steer towards the appropriate Incoterms rule for a particular transaction.

5. Electronic Communication

Previous versions of Incoterms rules have specified those documents that could be replaced by EDI messages. Articles A1/B1 of the Incoterms® 2010 rules, however, now give electronic means of communication the same effect as paper communication, as long as the parties so agree or where customary. This formulation facilitates the evolution of new electronic procedures throughout the lifetime of the Incoterms® 2010 rules.

6. Insurance Cover

The Incoterms® 2010 rules are the first version of the Incoterms rules since the revision of the Institute Cargo Clauses and take account of alterations made to those clauses. The Incoterms® 2010 rules place information duties relating to insurance in articles A3/B3, which deal with contracts of carriage and insurance. These provisions have been moved from the more generic articles found in articles A10/B10 of the Incoterms 2000 rules. The language in articles A3/B3 relating to insurance has also been altered with a view to clarifying the parties' obligations in this regard.

7. Security-Related Clearances and Information Required for Such Clearances

There is heightened concern nowadays about security in the movement of goods, requiring verification that the goods do not pose a threat to life or property for reasons other than their inherent nature. Therefore, the Incoterms® 2010 rules have allocated obligations between the buyer and seller to obtain or to render assistance in obtaining security-related clearances, such as chain-of-custody information, in articles A2/B2 and A10/B10 of various Incoterms rules.

8. Terminal Handling Charges

[18]Under Incoterms rules CPT, CIP, CFR, CIF, DAT, DAP, and DDP, the seller must make arrangements for the carriage of the goods to the agreed destination. While the freight is paid by the seller, it is actually paid for by the buyer as freight costs are normally included by the seller in the total selling price. The carriage costs will sometimes include the costs of handling and moving the goods within port or container terminal facilities and the carrier or terminal operator may well charge these costs to the buyer who receives the goods. In these circumstances, the buyer will want to avoid paying for the same service twice: once to the seller as part of the total selling price and once independently to the carrier or the terminal operator. The Incoterms® 2010 rules seek to avoid this happening by clearly allocating such costs in articles A6/B6 of the relevant Incoterms rules.

9. String Sales

In the sale of commodities, as opposed to the sale of manufactured goods, cargo is frequently sold several times during transit "down a string". When this happens, a seller in the middle of the string does not "ship" the goods because these have already been shipped by the first seller in the string. The seller in the middle of the string, therefore, performs its obligations towards its buyer not by shipping the goods, but by "procuring" goods that have been shipped. For clarification purposes, Incoterms® 2010 rules include the obligation to "procure goods shipped" as an alternative to the obligation to ship goods in the relevant Incoterms rules.

Variants of Incoterms Rules

Sometimes the parties want to alter an Incoterms rule. The Incoterms® 2010 rules do not prohibit such alteration, but there are dangers in so doing. In order to avoid any unwelcome surprises, the parties would need to make the intended effect of such alterations extremely clear in their contract. Thus, for example, if the allocation of costs in the Incoterms® 2010 rules are altered in the contract, the parties should also clearly state whether they intend to vary the point at which the risk passes from seller to buyer.

Explanation of Terms Used in the Incoterms® 2010 Rules

As in the Incoterms 2000 rules, the seller's and buyer's obligations are presented in mirror fashion, reflecting under column The seller's obligations and under column B the buyer's obligations. These obligations can be carried out personally by the seller or the buyer or sometimes, subject to terms in the contract or the applicable

[18] ICC rules for the use of domestic and international trade terms

law, through intermediaries such as carriers, freight forwarders or other persons nominated by the seller or the buyer for a specific purpose.

The text of the Incoterms® 2010 rules are meant to be self-explanatory. However, in order to assist users, the following text sets out guidance as to the sense in which selected terms are used throughout the document. Carrier: For the purposes of the Incoterms® 2010 rules, the carrier is the party with whom carriage is contracted.

Customs Formalities

These are requirements to be met in order to comply with any applicable customs regulations and may include documentary, security, information or physical inspection obligations.

Delivery

This concept has multiple meanings in trade law and practice, but in the Incoterms® 2010 rules, it is used to indicate where the risk of loss of or damage to the goods passes from the seller to the buyer.

Delivery Document

This phrase is now used as the heading to article A8. It means a document used to prove that delivery has occurred. For many of the Incoterms® 2010 rules, the delivery document is a transport document or corresponding electronic record. However, with EXW, FCA, FAS, and FOB, the delivery document may simply be a receipt. A delivery document may also have other functions, for example as part of the mechanism for payment.

Electronic Record or Procedure

A set of information constituted of one or more electronic messages and, where applicable, being functionally equivalent with the corresponding paper document.

Packaging

This word is used for different purposes:

1. The packaging of the goods to comply with any requirements under the contract of sale.

2. The packaging of the goods so that they are fit for transportation.

3. The stowage of the packaged goods within a container or other means of transport.

In the Incoterms® 2010 rules, packaging means both the first and second of the above. The Incoterms® 2010 rules do not deal with the parties' obligations for stowage within a container and therefore, where relevant, the parties should deal with this in the sale contract.

Dispute Settlement

This chapter explains all the various stages through which a dispute can pass in the (WTO) dispute settlement system. There are two main ways to settle a dispute once a complaint has been filed in the WTO: (i) the parties find a mutually agreed solution, particularly during the phase of bilateral consultations; and (ii) through adjudication, including the subsequent implementation of the panel and Appellate Body reports, which are binding upon the parties once adopted by the DSB. There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling[19]. The Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) provided for the establishment of an integrated dispute settlement system, largely based on the 1992 Understanding in the GATT discussed above[20]. It extended the scope of dispute settlement to allow WTO members to make claims based on breach of any of the multilateral trade agreements annexed to the Agreement establishing the WTO. A Dispute Settlement Body (DSB) was established to exercise the authority of the General Council and the Councils and committees of the covered agreements. WTO settlement rules stipulate that commercial conflicts are represented by governments. Private industry must persuade its government to represent its complaint as a possible infringement of any one of the GATT/WTO articles, and that the complaint has significant trade ramifications so as to justify seeking consent from the WTO Dispute Settlement Panel to set up hearings between the parties, to investigate the complaint and to formulate a decision. The overall aim of the settlement of contractual disputes is the maintenance of good relations between countries. Therefore, there remains a preference for resolution of disputes by negotiation between the parties, assisted where necessary by a neutral third party. This is reflected in the procedure by which a dispute proceeds through a number of stages.

Conclusion

This report has addressed four fundamental issues relating to natural resources trade. The first is how key economic features of natural resources and the manner of their exchange influence patterns of trade for this

[19] Dispute Settlement System Training Module: Chapter 6
[20] Essential International Trade Law [Michele Sasnon] 2002

class of goods. Second, we have examined how far the absence of trade barriers provides an efficient mechanism for ensuring access to natural resources and their long-run sustainability. The third issue concerns the incentives that governments face in setting trade policy in natural resource sectors and the consequences of this incentive structure. Finally, the report has considered how international cooperation affects the management of trade in natural resources, with particular emphasis on the role of the WTO. One of the main objectives of the Brussels I Regulation is legal certainty as the ECJ has stressed, this objective requires "that the jurisdictional rules which derogate from the basic principle of the Brussels Convention, such as Article 5(1) should be interpreted in such a way as to enable a normally well-informed defendant reasonably to foresee before which courts, other than those of the State in which he is domiciled, he may be sued. As seen in the analysis of the post-Brussels I Regulation case laws of ECJ and the aforementioned illustrations, it can be inferred that Article 5(1) of the Brussels I Regulation, which was created on the rationale of "a close link between the court and the action" confers alternative grounds of jurisdiction in disputes concerning international sale contracts based on C-terms, F-terms and D-terms within the EU, giving to the plaintiff the possibility to choose where to start court proceedings. The absence of express definitions of key concepts of the Regulation leads to different interpretations by the various courts of the Member States, causing uncertainty and allowing a certain amount of forum shopping within the jurisdictional parameters imposed by the Regulation.

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