KLE LAW ACADEMY BELAGAVI

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STUDY MATERIAL

for

LAW RELATING TO INTERNATIONAL TRADE

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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SYLLABUS

LAW RELATING TO INTERNATIONAL TRADE ECONOMICS

Objectives:

International trade has assumed great importance in 21st century and its regulation under law has become a necessity to prevent exploitation of the weaker people. A new legal regime to regulate international trade is emerging. Students of law should have understanding of these developments. This course is worked out to provide the future lawyers basic inputs in the area of international trade law.

Course contents:

UNIT-I

Historical perspectives of International Trade, Institutions – UNCTAD, UNCITRAL, GATT (1947-1994); World Trade Organization-Objectives, Structure, Power; Most Favored Nation Treatment and National Treatment; Tariffs and Safeguard measures.

UNIT-II

Technical Barriers to Trade; Sanitary and Phyto- sanitary measures; Trade Related Investment Measures(TRIMs); Anti- Dumping, Subsidies and Countervailing Measures; Dispute Settlement Process.

UNIT-III

International Sales of Goods Formation and Performance of International Contracts, Various Forms and Standardization of Terms; Acceptance and Rejection of Goods, Frustration of Contract, Invoices and packing, Product liability.

UNIT-IV

Exports – Insurance of Goods in Transit; Marine Insurance and kinds; Law on Carriage of goods by sea, land and air, Container transport, Pre-Shipment Inspection; Licensing of Export and Imports.

UNIT-V

Laws Governing Finance and Investments; Foreign Collaboration and Investment Policy; Foreign Direct Investment in Industries and Governing Policies; Foreign Institutional Investors (FIIs): Investment by Non-resident Indians (NRIs) and Overseas Corporate Bodies (OCBs); Foreign Collaboration Agreement- Foreign Technology Agreement; Foreign Companies and Foreign Nationals in India.

UNIT - I

Synopsis

- Historical perspectives of International Trade
- Institutions – UNCTAD, UNCITRAL, GATT (1947-1994)
- World Trade Organization-Objectives, Structure, Power
- Most Favored Nation Treatment and National Treatment
- Tariffs and Safeguard measures.

HISTORICAL PERSPECTIVES OF INTERNATIONAL TRADE

A. Mercantilism
B. Absolute Advantage
C. Comparative Advantage

The theory of international trade and commercial policy is one of the oldest branches ofeconomic thought. From the ancient Greeks to the present, government officials, intellectuals, and economists have pondered the determinants of trade between countries, have asked whether trade bring benefits or harms the nation, and, more importantly, have tried to determine what trade policy is best for any particular country.

Since the time of the ancient Greek philosophers, there has been a dual view of trade: a recognition of the benefits of international exchange combined with a concern that certain domestic industries (or laborers, or culture) would be harmed by foreign competition. Depending upon the weights put on the overall gains from trade or on the losses of those harmed by imports, different analysts have arrived at different conclusions about the desirability of having free trade. But economists have likened free trade to technological progress: although some narrow interests may be harmed, the overall benefits to society are substantial. Still, as evidenced by the intense debates over trade today, the tensions inherent in this dual view of trade have never been overcome.

Mercantilism

The theory of mercantilism attributes and measures the wealth of a nation by the size of its accumulated treasures. Accumulated wealth is traditionally measured in terms of gold, as earlier gold and silver were considered the currency of international trade. Nations should accumulate financial wealth in the form of gold by encouraging exports and discouraging imports.

The theory of mercantilism aims at creating trade surplus, which in turn contributes to the accumulation of a nation’s wealth. Between the sixteenth and nineteenth centuries, European colonial powers actively pursued international trade to increase their treasury of goods, which were in turn invested to build a powerful army and infrastructure.

The colonial powers primarily engaged in international trade for the benefit of their respective mother countries, which treated their colonies as exploitable resources. The first ship of the East India Company arrived at the port of Surat in 1608 to carry out trade with India and take advantage of its rich resources of spices, cotton, finest muslin cloth, etc.

Other European nations—such as Germany, France, Portugal, Spain, Italy—and the East Asian nation of Japan also actively set up colonies to exploit the natural and human resources.

Mercantilism was implemented by active government interventions, which focused on maintaining trade surplus and expansion of colonization. National governments imposed restrictions on imports through tariffs and quotas and promoted exports by subsidizing production.

The colonies served as cheap sources for primary commodities, such as raw cotton, grains, spices, herbs and medicinal plants, tea, coffee, and fruits, both for consumption and also as raw material for industries. Thus, the policy of mercantilism greatly assisted and benefited the colonial powers in accumulating wealth.

The limitations of the theory of mercantilism are as follows:

i. Under this theory, accumulation of wealth takes place at the cost of another trading partner. Therefore, international trade is treated as a win-lose game resulting virtually in no contribution to the global wealth. Thus, international trade becomes a zero-sum game.

ii. A favourable balance of trade is possible only in the short run and would automatically be eliminated in the long run, according to David Hume's Price-Specie- Flow doctrine. An influx of gold by way of more exports than imports by a country raises the domestic prices, leading to increase in export prices.

In turn, the county would lose its competitive edge in terms of price. On the other hand, the loss of gold by the importing countries would lead to a decrease in their domestic price levels, which would boost their exports.

iii. Presently, gold represents only a minor proportion of national foreign exchange reserves. Governments use these reserves to intervene in foreign exchange markets and to influence exchange rates.

iv. The mercantilist theory overlooks other factors in a country's wealth, such as its natural resources, manpower and its skill levels, capital, etc.

v. If all countries follow restrictive policies that promote exports and restrict imports and create several trade barriers in the process, it would ultimately result in a highly restrictive environment for international trade.

vi. Mercantilist policies were used by colonial powers as a means of exploitation, whereby they charged higher prices from their colonial markets for their finished industrial goods and bought raw materials at much lower costs from their colonies. Colonial powers restricted developmental activities in their colonies to a minimum infrastructure base that would support international trade for their own interests. Thus, the colonies remained poor.

A number of national governments still seem to cling to the mercantilist theory, and exports rather than imports are actively promoted. This also explains the raison d'etre behind the 'import substitution strategy' adopted by a large number of countries prior to economic liberalization.

This strategy was guided by their keenness to contain imports and promote domestic production even at the cost of efficiency and higher production costs. It has resulted in the creation of a large number of export promotion organizations that look after the promotion of exports from the country. However, import promotion agencies are not common in most nations.

Presently, the terminology used under this trade theory is neo-mercantilism, which aims at creating favourable trade balance and has been employed by a number of countries to create trade surplus. Japan is a fine example of a country that tried to equate political power with economic power and economic power with trade surplus.

Absolute Advantage

Economist Adam Smith critically evaluated mercantilist trade policies in his seminal book An Inquiry into the Nature and Causes of the Wealth of Nations, first published in 1776. Smith posited that the wealth of a nation does not lie in building huge stockpiles of gold and silver in its treasury, but the real wealth of a nation is measured by the level of improvement in the quality of living of its citizens, as reflected by the per capita income.

Smith emphasized productivity and advocated free trade as a means of increasing global efficiency. As per his formulation, a country's standards of living can be enhanced by international trade with other countries either by importing goods not produced by it or by producing large quantities of goods through specialization and exporting the surplus.An absolute advantage refers to the ability of a country to produce a good more efficiently and cost-effectively than any other country.Smith elucidated the concept of 'absolute advantage' leading to gains from specialization with the help of day-today illustrations as follows:

It is the maxim of every prudent master of a family, never to make at home what it will cost him more to make than to buy. The tailor does not attempt to make his own shoes but buys them of the shoemaker. The shoemaker does not attempt to make his own clothes but employs a tailor. The farmer attempts to make neither one nor the other, but employs those different artificers. All of them find it for their interest to employ their whole industry in a way which they have some advantage over their neighbours.

What is prudence in the conduct of every private family can scarce be folly in that of great kingdom. If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry. Thus, instead of producing all products, each country should specialize in producing those goods that it can produce more efficiently.

Such efficiency is gained through:

i. Repetitive production of a product, which increases the skills of the labour force.

ii. Switching production from one produce to another to save labour time.

iii. Long product runs to provide incentives to develop more effective work methods over a period of time.

Therefore, a country should use increased production to export and acquire more goods by way of imports, which would in turn improve the living standards of its people. A country's advantage may be either natural or acquired.

Natural:

Natural factors, such as a country's geographical and agro-climatic conditions, mineral or other natural resources, or specialized manpower contribute to a country's natural advantage in certain products. For instance, the agro-climatic condition in India is an important factor for sizeable export of agro-produce, such as spices, cotton, tea, and mangoes.

The availability of relatively cheap labour contributes to India's edge in export of labour-intensive products. The production of wheat and maize in the US, petroleum in Saudi Arabia, citrus fruits in Israel, lumber in Canada, and aluminium ore in Jamaica are all illustrations of natural advantages.

Acquired Advantage:

Today, international trade is shifting from traditional agro-products to industrial products and services, especially in developing countries like India. The acquired advantage in either a product or its process technology plays an important role in creating such a shift.

The ability to differentiate or produce a different product is termed as an advantage in product technology, while the ability to produce a homogeneous product more efficiently is termed as an advantage in process technology.

Production of consumer electronics and automobiles in Japan, software in India, watches in Switzerland, and shipbuilding in South Korea may be attributed to acquired advantage. Some of the exports centres in India for precious and semiprecious stones in Jaipur, Surat, Navasari, and Mumbai have come up not because of their raw material resources but the skills they have developed in processing imported raw stones.

Comparative Advantage

In Principles of Political Economy and Taxation, David Ricardo (1817) promulgated the theory of comparative advantage, wherein a country benefits from international trade even if it is less efficient than other nations in the production of two commodities.Comparative advantage may be defined as the inability of a nation to produce a good more efficiently than other nations, but its ability to produce that good more efficiently compared to the other good.Thus, the country may be at an absolute disadvantage with respect to both the commodities but the absolute disadvantage is lower in one commodity than another.

Therefore, a country should specialize in the production and export of a commodity in which the absolute disadvantage is less than that of another commodity or in other words, the country has got a comparative advantage in terms of more production efficiency.The case for free trade was reinforced by the classical economists writing in the first quarter of the nineteenth century. The theory of comparative advantage emerged during this period and strengthened our understanding of the nature of trade and its benefits. David Ricardo has received most of the credit for developing this important theory, although James Mill and Robert Torrens had similar ideas around the same time.

The theory of Comparative Advantage suggests that a country export goods in which its relative cost advantage, and not their absolute cost advantage, is greatest in comparison to other countries. Suppose that the United States can produce both shirts and automobiles more efficiently than Mexico. But if it can produce shirts twice as efficiently as Mexico and can produce automobiles three times more efficiently than Mexico, the United States has an *absolute* productive advantage over Mexico in both goods but a *relative* advantage in producing automobiles. In this case, the United States might export automobiles in exchange for imports of shirts—even though it can produce shirts more efficiently than Mexico.

The practical import of the doctrine is that a country may export a good even if a foreign country could produce it more efficiently if that is where its relative advantage lies; similarly, a country may import a good even if it could produce that good more efficiently than the country from which it is importing the good. From Mexico's standpoint, it lacks an absolute productive advantage in either commodity, but has a relative advantage in producing shirts (where its relative disadvantage is least). This trade is beneficial for both the United States and Mexico.

The comparative advantage proposition is incredibly counterintuitive: it states that a less developed country that lacks an absolute advantage in any good can still engage in mutually beneficial trade, and that an advanced country whose domestic industries are more efficient than those in any other country can still benefit from trade even as some of its industries facing intense import competition.

As developed by Adam Smith and the classical economists, the theory of international trade is an enormously powerful one due to its generality. Just like trade between citizens within a nation's borders, international trade was an efficient mechanism for allocating resources and for increasing national welfare, regardless of the level of a country's economic development. Any impediments to trade would detract from the gains from trade and therefore harm the economy. Smith and the classical economists made a powerful case for liberalizing trade from government restrictions (such as import tariffs and quotas) and moving toward free trade.

At the same time, these economists recognized that there may be situations in which a government might wish to sacrifice economic gains for some other political objective. There might be non-economic objectives that are so desirable that they are worth incurring economic losses.

INTERNATIONAL TRADE INSTITUTIONS

UNCTAD - The United Nations Conference on Trade and Development

The United Nations Conference on Trade and Development (UNCTAD) was established in 1964 as a permanent intergovernmental body.

UNCTAD is the part of the United Nations Secretariat dealing with trade, investment, and development issues. The organisation's goals are to: "maximise the trade, investment and development opportunities of developing countries and assist them in their efforts to integrate into the world economy on an equitable basis". UNCTAD was established by the United Nations General Assembly in 1964 and it reports to the UN General Assembly and United Nations Economic and Social Council.

The primary objective of UNCTAD is to formulate policies relating to all aspects of development including trade, aid, transport, finance and technology. The conference ordinarily meets once in four years; the permanent secretariat is in Geneva.

Globalisation, including a phenomenal expansion of trade, has helped lift millions out of poverty. But not nearly enough people have benefited. And tremendous challenges remain.

We support developing countries to access the benefits of a globalised economy more fairly and effectively. And we help equip them to deal with the potential drawbacks of greater economic integration. To do this, we provide analysis, facilitate consensus-building, and offer technical assistance. This helps them to use trade, investment, finance, and technology as vehicles for inclusive and sustainable development.

Working at the national, regional, and global level, our efforts help countries to:

- Comprehend options to address macro-level development challenges
- Achieve beneficial integration into the international trading system
- Diversify economies to make them less dependent on commodities
- Limit their exposure to financial volatility and debt
- Attract investment and make it more development friendly
- Increase access to digital technologies

- Promote entrepreneurship and innovation
- Help local firms move up value chains
- Speed up the flow of goods across borders
- Protect consumers from abuse
- Curb regulations that stifle competition
- Adapt to climate change and use natural resources more effectively

Together with other UN departments and agencies, we measure progress by the Sustainable Development Goals, as set out in Agenda 2030.

The first UNCTAD conference took place in Geneva in 1964, the second in New Delhi in 1968, the third in Santiago in 1972, fourth in Nairobi in 1976, the fifth in Manila in 1979, the sixth in Belgrade in 1983, the seventh in Geneva in 1987, the eighth in Cartagena in 1992, the ninth at Johannesburg (South Africa) in 1996, the tenth in Bangkok (Thailand) in 2000, the eleventh in São Paulo (Brazil) in 2004, the twelfth in Accra in 2008, the thirteenth in Doha (Qatar) in 2012 and the fourteenth in Nairobi (Kenya) in 2016.

Currently, UNCTAD has 195 member states and is headquartered in Geneva, Switzerland.

UNCITRAL has adopted the following legislative guides:

- UNCITRAL Legislative Guide on Privately Financed Infrastructure Projects (2000)
- UNCITRAL Legislative Guide on Insolvency Law (2004)
- UNCITRAL Legislative Guide on Secured Transactions (2007)
- UNCITRAL Legislative Guide on Secured Transactions: Supplement on Security Rights in Intellectual Property (2010)

Purpose of UNCITRAL

From the premise that international trade has global benefits to its participants, and acknowledging increasing economic interdependence globally, UNCITRAL seeks to help expand and facilitate global trade through the progressive harmonisation and modernisation of the law of international trade. The salient areas of commercial law its mandate covers include dispute resolution, international contract practices, transport, insolvency, electronic commerce, international payments, secured transactions, procurement and sale of goods. UNCITRAL aims to formulate modern, fair, and harmonised rules on such commercial transactions. Its work includes conventions, model laws, and rules which are acceptable worldwide; legal and legislative guides, and practical recommendations; updated information on case law and enactments of uniform commercial law; technical assistance in law reform projects; and regional and national seminars on uniform commercial law.

UNCITRAL Members

UNCITRAL's original membership comprised 29 states, and was expanded to 36 in 1973, and again to 60 in 2004. Member states of UNCITRAL are representing different legal traditions and levels of economic development, as well as different geographic regions. States includes 12 African states, 15 Asian states, 18 European states, 6 Latin American and Caribbean states, and 1 oceanian state. The Commission member States are elected by the General Assembly. Membership is structured so as to be representative of the world's various geographic regions and its principal economic and legal systems. Members of the commission are elected for terms of six years, the terms of half the members expiring every three years.

UNCITRAL -The United Nations Commission on International Trade Law

- The United Nations Commission on International Trade Law (UNCITRAL) is a subsidiary body of the U.N. General Assembly (UNGA) responsible for helping to facilitate international trade and investment.
- Established by the UNGA in 1966, UNCITRAL's official mandate is "to promote the progressive harmonisation and unification of international trade law" through conventions, model laws, and other instruments that address key areas of commerce, from dispute resolution to the procurement and sale of goods.
- UNCITRAL carries out its work at annual sessions held alternately in New York City and Vienna, where it is headquartered.
- The United Nations Commission on International Trade Law is the core legal body of the United Nations system in the field of international trade law. A legal body with universal membership specialising in commercial law reform worldwide for over 50 years, UNCITRAL's business is the modernisation and harmonisation of rules on international business.

UNCITRAL Activities

- Coordinating the work of active organizations and encouraging cooperation among them.
- Promoting wider participation in existing international conventions and wider acceptance of existing model and uniform laws.
- Preparing or promoting the adoption of new international conventions, model laws and uniform laws and promoting the codification and wider acceptance of international trade terms, provisions, customs and practice, in collaboration, where appropriate, with the organizations operating in this field.
- Promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.
- Collecting and disseminating information on national legislation and modern legal developments, including case law, in the field of the law of international trade.
- Establishing and maintaining a close collaboration with the UN Conference on Trade and development.
- Maintaining liaison with other UN organs and specialized agencies concerned with international trade.

GATT - The General Agreement on Tariffs and Trade

The General Agreement on Tariffs and Trade (GATT) was a free trade agreement between 23 countries that eliminated tariffs and increased international trade. As the first worldwide multilateral free trade agreement, GATT governed a significant portion of international trade between January 1, 1948 and January 1, 1995. The agreement ended when it was replaced by the more robust World Trade Organization (WTO).

<u>Purpose</u>

The purpose of GATT was to eliminate harmful trade protectionism. That had sent global trade down 66% during the Great Depression. GATT restored economic health to the world after the devastation of the Depression and World War II.

History

GATT grew out of the Bretton Woods Agreement. The summit at Bretton Woods also created the World Bank and the International Monetary Fund to coordinate global growth.

The 50 countries that started negotiations wanted it to be an agency within the United Nations that would create rules, not just on trade, but also employment, commodity agreements, business practices, foreign direct investment, and services. The ITO charter was agreed to in March 1948, but the U.S. Congress and some other countries' legislatures refused to ratify it. In 1950, the Truman Administration declared defeat, ending the ITO.

At the same time, 15 countries focused on negotiating a simple trade agreement. They agreed on eliminating trade restrictions affecting $10 billion of trade or a fifth of the world’s total. A total of 23 countries signed the GATT deal on October 30, 1947, clearing the way for it to take effect on June 30, 1948.

GATT didn’t require the approval of Congress. That's because, technically, GATT was an agreement under the provisions of the U.S. Reciprocal Trade Act of 1934.It was only supposed to be temporary until the ITO replaced it.

Throughout the years, rounds of further negotiations on GATT continued. The main goal was to further reduce tariffs. In the mid-1960s, the Kennedy round added an Anti-Dumping Agreement.8The Tokyo round in the seventies improved other aspects of trade. The Uruguay round lasted from 1986 to 1994 and created the World Trade Organisation.

Member Countries

The original 23 GATT members were Australia; Belgium; Brazil; Burma, (now called Myanmar); Canada; Ceylon, now Sri Lanka; Chile; China; Cuba; Czechoslovakia, now Czech Republic and Slovakia; France; India; Lebanon; Luxembourg; Netherlands; New Zealand; Norway; Pakistan; Southern Rhodesia, now Zimbabwe; Syria; South Africa; the United Kingdom and the United States. The membership increased to more than 128 countries by 1994.10

GATT and WTO trade rounds

NAME	START	DURATION	COUNTRIES	SUBJECT	ACHIEVEMENTS
Geneva Switzerland CH	April 1947	7 Months	23	Tariffs	Signing of GATT, 45,000 tariff concessions affecting $10 billion of trade
AnnencyFR	April 1949	5 months	34	Tariffs	Countries exchanged some 5,000 tariff concessions
Torquay GB	Sept 1950	8 Months	34	Tariffs	Countries exchanged some 8,700 tariff concessions, cutting the 1948 tariff levels by 25%
Geneva II CH	January 1956	5 Months	22	Tariffs, admission of Japan	$2.5 billion in tariff reductions
Dillon CH	Sept 1960	11 Months	45	Tariffs	Tariff concessions worth $4.9 billion of world trade
Kennedy CH	May 1964	37 Months	48	Tariffs, anti-dumping	Tariff concessions worth $40 billion of world trade
Tokyo	Sept 1973	74 Months	102	Tariffs, non-tariff	Tariff reductions worth more than

JP				measures, "framework" agreements	$300 billion achieved
Uruguay UY	Sept 1986	87 Months	123	Tariffs, non-tariff measures, rules, services, intellectual property, dispute settlement, textiles, agriculture, creation of WTO, etc.	The round led to the creation of WTO, and extended the range of trade negotiations, leading to major reductions in tariffs (about 40%) and agricultural subsidies, an agreement to allow full access for textiles and clothing from developing countries, and an extension of intellectual property rights.
Doha QA	November 2001	?	159	Tariffs, non-tariff measures, agriculture, labor standards, environment,	The round has not yet concluded. The last agreement to date, the Bali Package, was signed on 7 December 2013.

				competition, investment, transparency, patents etc.	

Initial Round

Preparatory sessions were held simultaneously at the UNCTE regarding the GATT. After several of these sessions, 23 nations signed the GATT on 30 October 1947 in Geneva, Switzerland. It came into force on 1 January 1948.

Annecy Round: 1949

The second round took place in 1949 in Annecy, France. 13 countries took part in the round. The main focus of the talks was more tariff reductions, around 5,000 in total.

Torquay Round: 1951

The third round occurred in Torquay, England in 1951. Thirty-eight countries took part in the round. 8,700 tariff concessions were made totalling the remaining amount of tariffs to ¾ of the tariffs which were in effect in 1948. The contemporaneous rejection by the U.S. of the Havana Charter signified the establishment of the GATT as a governing world body.

Geneva Round: 1955–56

The fourth round returned to Geneva in 1955 and lasted until May 1956. Twenty-six countries took part in the round. $2.5 billion in tariffs were eliminated or reduced.

Dillon Round: 1960–62

The fifth round occurred once more in Geneva and lasted from 1960–1962. The talks were named after U.S. Treasury Secretary and former Under Secretary of State, Douglas Dillon, who first proposed the talks. Twenty-six countries took part in the round. Along with reducing over $4.9 billion in tariffs, it also yielded discussion relating to the creation of the European Economic Community (EEC).

Kennedy Round: 1964–67

The sixth round of GATT multilateral trade negotiations, held from 1964 to 1967. It was named after U.S. President John F. Kennedy in recognition of his support for the reformulation of the United States trade agenda, which resulted in the Trade Expansion Act of 1962. This Act gave the President the widest-ever negotiating authority.

As the Dillon Round went through the laborious process of item-by-item tariff negotiations, it became clear, long before the Round ended, that a more comprehensive approach was needed to deal with the emerging challenges resulting from the formation of the European Economic Community (EEC) and EFTA, as well as Europe's re-emergence as a significant international trader more generally.

Tokyo Round: 1973–79

Reduced tariffs and established new regulations aimed at controlling the proliferation of non-tariff barriers and voluntary export restrictions. 102 countries took part in the round. Concessions were made on $19 billion worth of trade.

Formation of Quadrilateral Group: 1981

The Quadrilateral Group was formed in 1982 by the European Union, the United States, Japan and Canada, in order to influence the GATT.

Uruguay Round: 1986–94

The Uruguay Round began in 1986. It was the most ambitious round to date, as of 1986, hoping to expand the competence of the GATT to important new areas such as services, capital, intellectual property, textiles, and agriculture. 123 countries took part in the round. The Uruguay Round was also the first set of multilateral trade negotiations in which developing countries had played an active role.

Agriculture was essentially exempted from previous agreements as it was given special status in the areas of import quotas and export subsidies, with only mild caveats. However, by the time of the Uruguay round, many countries considered the exception of agriculture to be sufficiently glaring that they refused to sign a new deal without some movement on agricultural products. These fourteen countries came to be known as the "Cairns Group", and included mostly small and medium-sized agricultural exporters such as Australia, Brazil, Canada, Indonesia, and New Zealand.

The Agreement on Agriculture of the Uruguay Round continues to be the most substantial trade liberalisation agreement in agricultural products in the history of trade negotiations. The goals of the agreement were to improve market access for agricultural products, reduce domestic support of agriculture in the form of price-distorting subsidies and quotas, eliminate over time export subsidies on agricultural products and to harmonise to the extent possible sanitary and phytosanitary measures between member countries.

Doha Round: 2001

The Doha Development Round began in 2001. The Doha Round began with a ministerial-level meeting in Doha, Qatar in 2001. The aim was to focus on the needs of developing countries. The major factors discussed include trade facilitation, services, rules of origin and dispute settlement. Special and differential treatment for the developing countries were also discussed as a major concern. Subsequent ministerial meetings took place in Cancún, Mexico (2003), and Hong Kong (2005). Related negotiations took place in Paris, France (2005), Potsdam, Germany (2007), and Geneva, Switzerland (2004, 2006, 2008). Progress in negotiations stalled after the breakdown of the July 2008 negotiations

WORLD TRADE ORGANISATION

Introduction

The practice of multilateral trading system

The thought is the father to the deed, and the multilateral trading system could never have been built if it had not first been imagined. The World Trade Organization (WTO) is not the product of just one idea, however, or even one school of thought. It instead represents the confluence of, and sometimes the conflict between, three distinct areas of theory and practice. Law, economics and politics have each inspired and constrained the capacity of countries to work together for the creation and maintenance of a rules-based regime in which members with widely different levels of economic development and asymmetrical political power work together to reduce barriers to trade. It is therefore fitting to begin this history with a review of the intellectual prehistory of the WTO, as well as the contemporary debates surrounding each of these fields.

Three major developments were required before a multilateral trading order could be created, including the emergence of two ideas and the resolution of a paradox. The first idea is that countries are sovereign, and hence have control of their own destinies, but also that the best exercise of sovereignty is to enter into binding agreements with other states by which they place voluntary and mutual limits on their exercise of that sovereignty. International law thus needed to be devised and respected, including the forms and norms of diplomacy, protocol, treaties, conferences and eventually the establishment of international organizations.

The first steps towards the creation of the modern legal system date from the seventeenth and eighteenth centuries, based on speculations about natural law, but a true regime of international law was not under way until states developed a comprehensive body of positive law based on actual treaties. The WTO is an expression of that idea, but must also contend with the fact that states have created other international organizations (thus posing problems of coherence) while also jealously guarding their own sovereignty (thus setting limits on how far they are willing to go in negotiating and enforcing commitments).

The second idea, and the one that is most important for this specific aspect of international order, was the notion that countries may extract mutual gains from freer trade. Policymakers will not liberalize markets unless they believe it is in the individual and collective interests of their countries to take advantage of an international division of labour based on comparative advantage and economies of scale. In contrast to political science and law, the systematic study of economics is quite a recent development. Given that this field emerged more than two millennia after the Greeks pioneered the scientific study of history and politics, it is remarkable how quickly trade economists devised the core ideas of their Discipline. The principal intellectual arguments in favour of open markets were developed in the late eighteenth and early nineteenth centuries and overwhelmed the prevailing mercantilist doctrines that saw wealth as interchangeable with power, treating trade as the conduct of international competition through means other than outright war.

The chief objective of mercantilism had been to manage trade so as to maximize exports, minimize imports, and thus build up trade surpluses in order to accumulate specie (i.e. gold and silver). Those precious metals could then be converted, when needed, into armies, navies and other instruments of power. The emergence of more cooperative economic ideas, when coupled with the establishment of a rules-based state system, gave countries both the motive and the means to negotiate treaties for closer economic relations. While the intellectual rationale behind free trade is impressive, it does not persuade all critics. Proponents of open markets have had to deal with perennial challenges to the foundations and implications of their ideas.

The third development concerned power and its paradox. The legal and economic ideas that underlie the trading system each aim to create a world order in which power would play a lesser role and in which more powerful countries would be constrained either by law or by their recognition of mutual self-interest. Power nonetheless remained indispensable to the establishment of international order. But for the actions of two successive hegemons, each of which employed their power to create and maintain a regime of market-opening trade agreements, it is doubtful that the legal and economic ideas on which the multilateral trading system is based would ever have moved beyond speculation and into practice. Great Britain played this part from the mid-nineteenth until the early twentieth century, followed by the United States after an unfortunately leaderless and turbulent period between the world wars. The system of linked, bilateral trade agreements that countries negotiated during the period of British hegemony was replaced under US leadership by the General Agreement on Tariffs and Trade

(GATT), the precursor to the WTO. These two powerful states helped to establish and enforce rules that granted judicial equality and economic opportunity to other states that would, in earlier periods of history, have been subject to much more naked and one-sided exercises of power. Each of these centuries-long developments in theory and practice converged with the creation of GATT in 1947, and remains critical to the development of the WTO.

History of the World Trade Organisation

The World Trade Organization (WTO) is an intergovernmental organization which regulates international trade. The WTO officially commenced on 1 January 1995 under the Marrakesh Agreement, signed by 123 nations on 15 April 1994, replacing the General Agreement on Tariffs and Trade (GATT), which commenced in 1948. The WTO deals with regulation of trade between participating countries by providing a framework for negotiating trade agreements and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which is signed by representatives of member governments and ratified by their parliaments. Most of the issues that the WTO focuses on derive from previous trade negotiations, especially from the Uruguay Round (1986–1994).

The WTO's predecessor, the General Agreement on Tariffs and Trade (GATT), was established by a multilateral treaty of 23 countries in 1947 after World War II in the wake of other new multilateral institutions dedicated to international economic cooperation—such as the World Bank (founded 1944) and the International Monetary Fund (founded 1944 or 1945). A comparable international institution for trade, named the International Trade Organization never started as the U.S. and other signatories did not ratify the establishment treaty, and so GATT slowly became a de facto international organization.

GATT

The General Agreement on Tariffs and Trade (GATT), signed on Oct. 30, 1947, by 23 countries, was a legal agreement minimizing barriers to international trade by eliminating or reducing quotas, tariffs, and subsidies while preserving significant regulations. The GATT was intended to boost economic recovery after World War II through reconstructing and liberalizing global trade. The GATT went into effect on Jan. 1, 1948. Since that beginning it has been refined, eventually leading to the creation of the World Trade Organization (WTO) on January 1, 1995, which absorbed and extended it. By this time 125 nations were signatories to its agreements, which covered about 90% of global trade. The Council for Trade in Goods (Goods Council) is responsible for the GATT and consists of representatives from all WTO member countries. As of September 2019, the council chair is Uruguyan Ambassador José Luís Cancela Gómez. The council has 10 committees that address subjects including market access, agriculture, subsidies, and anti-dumping measures.

GATT Negotiations before Uruguay

Seven rounds of negotiations occurred under GATT (1949 to 1979). The first real GATT trade rounds (1947 to 1960) concentrated on further reducing tariffs. Then the Kennedy Round in the mid-sixties brought about a GATT anti-dumping agreement and a section on development. The Tokyo Round during the seventies represented the first major attempt to tackle trade barriers that do not take the form of tariffs, and to improve the system, adopting a series of agreements on non-tariff barriers, which in some cases interpreted existing GATT rules, and in others broke entirely new ground. Because not all GATT members accepted these plurilateral agreements, they were often informally called "codes". (The Uruguay Round amended several of these codes and turned them into multilateral commitments accepted by all WTO members. Only four remained plurilateral (those on government procurement, bovine meat, civil aircraft and dairy products), but in 1997 WTO members agreed to terminate the bovine meat and dairy agreements, leaving only two.) Despite attempts in the mid-1950s and 1960s to establish some form of institutional mechanism for international trade, the GATT continued to operate for almost half a century as a semi-institutionalized multilateral treaty regime on a provisional basis.

From Geneva to Tokyo

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Uruguay Round

Well before GATT's 40th anniversary, its members concluded that the GATT system was straining to adapt to a new globalizing world economy. In response to the problems identified in the 1982 Ministerial Declaration (structural deficiencies, spill-over impacts of certain countries' policies on world trade GATT could not manage, etc.), the eighth GATT round known as the Uruguay Round was launched in September 1986, in Punta del Este, Uruguay.

It was the biggest negotiating mandate on trade ever agreed: the talks aimed to extend the trading system into several new areas, notably trade in services and intellectual property, and to reform trade in the sensitive sectors of agriculture and textiles; all the original GATT articles were up for review. The Final Act concluding the Uruguay Round and officially establishing the WTO regime was signed 15 April 1994, during the ministerial meeting at Marrakesh, Morocco, and hence is known as the Marrakesh Agreement.

The GATT still exists as the WTO's umbrella treaty for trade in goods, updated as a result of the Uruguay Round negotiations (a distinction is made between GATT 1994, the updated parts of

GATT, and GATT 1947, the original agreement which is still the heart of GATT 1994). GATT 1994 is not, however, the only legally binding agreement included via the Final Act at Marrakesh; a long list of about 60 agreements, annexes, decisions and understandings was adopted. The agreements fall into six main parts:

1. The Agreement Establishing the WTO
2. The Multilateral Agreements on Trade in Goods
3. The General Agreement on Trade in Services
4. The Agreement on Trade-Related Aspects of Intellectual Property Right
5. dispute settlement
6. reviews of governments' trade policies

In terms of the WTO's principle relating to tariff "ceiling-binding" (No. 3), the Uruguay Round has been successful in increasing binding commitments by both developed and developing countries, as may be seen in the percentages of tariffs bound before and after the 1986–1994 talks.

Ministerial Conferences

The highest decision-making body of the WTO is the Ministerial Conference, which usually meets every two years. It brings together all members of the WTO, all of which are countries or customs unions. The Ministerial Conference can take decisions on all matters under any of the multilateral trade agreements.

The inaugural ministerial conference (1996) was held in Singapore. Disagreements between largely developed and developing economies emerged during this conference over four issues initiated by this conference, which led to them being collectively referred to as the "Singapore issues". The second ministerial conference (1998) was held in Geneva in Switzerland.

The third conference (1999) in Seattle, Washington ended in failure, with massive demonstrations and police and National Guard crowd-control efforts drawing worldwide attention. The fourth ministerial conference (2001) was held in Doha in the Persian Gulf nation of Qatar. The Doha Development Round was launched at the conference. The conference also approved the joining of China, which became the 143rd member to join.

The fifth ministerial conference (2003) was held in Cancún, Mexico, aiming at forging agreement on the Doha round. An alliance of 22 southern states, the G20 developing nations (led by India, China, Brazil, ASEAN led by the Philippines), resisted demands from the North for agreements on the so-called "Singapore issues" and called for an end to agricultural subsidies within the EU and the US. The talks broke down without progress.

The sixth WTO ministerial conference (2005) was held in 13–18 December 2005 in Hong Kong. It was considered vital if the four-year-old Doha Development Round negotiations were to move forward sufficiently to conclude the round in 2006. In this meeting, countries agreed to phase out all their agricultural export subsidies by the end of 2013 and terminate any cotton export subsidies by the end of 2006. Further concessions to developing countries included an agreement to introduce duty-free, tariff-free access for goods from the Least Developed Countries, following the everything but Arms initiative of the European Union but with up to 3% of tariff lines exempted. Other major issues were left for further negotiation to be completed by the end of 2010.

The WTO General Council, on 26 May 2009, agreed to hold a seventh WTO ministerial conference session in Geneva from 30 November-3 December 2009. A statement by chairman Amb. Mario Matus acknowledged that the prime purpose was to remedy a breach of protocol requiring two-yearly "regular" meetings, which had lapsed with the Doha Round failure in 2005, and that the "scaled-down" meeting would not be a negotiating session, but "emphasis will be on transparency and open discussion rather than on small group processes and informal negotiating structures". The general theme for discussion was "The WTO, the Multilateral Trading System and the Current Global Economic Environment"

Doha Round

The WTO launched the current round of negotiations, the Doha Development Round, at the fourth ministerial conference in Doha, Qatar in November 2001. This was to be an ambitious effort to make globalization more inclusive and help the world's poor, particularly by slashing barriers and subsidies in farming. The initial agenda comprised both further trade liberalization and new rule-making, underpinned by commitments to strengthen substantial assistance to developing countries.

Progress stalled over differences between developed nations and the major developing countries on issues such as industrial tariffs and non-tariff barriers to trade particularly against and between the EU and the US over their maintenance of agricultural subsidies seen to operate effectively as trade barriers. Repeated attempts to revive the talks proved unsuccessful, though the adoption of the Bali Ministerial Declaration in 2013 addressed bureaucratic barriers to commerce.

As of June 2012, the future of the Doha Round remained uncertain: the work programme lists 21 subjects in which the original deadline of 1 January 2005 was missed, and the round remains incomplete. The conflict between free trade on industrial goods and services but retention of protectionism on farm subsidies to domestic agricultural sectors (requested by developed countries) and the substantiation[jargon] of fair trade on agricultural products (requested by developing countries) remain the major obstacles. This impasse has made it impossible to launch new WTO negotiations beyond the Doha Development Round. As a result, there have been an increasing number of bilateral free trade agreements between governments. As of July 2012 there were various negotiation groups in the WTO system for the current stalemated agricultural trade negotiation.

Objectives of WTO

The WTO has six key objectives:

- to set and enforce rules for international trade,
- to provide a forum for negotiating and monitoring further trade liberalization,
- to resolve trade disputes,
- to increase the transparency of decision-making processes,
- to cooperate with other major international economic institutions involved in global economic management, and

- to help developing countries benefit fully from the global trading system. Although shared by the GATT, in practice these goals have been pursued more comprehensively by the WTO.

For example, whereas the GATT focused almost exclusively on goods, though much of agriculture and textiles were excluded. the WTO encompasses all goods, services, and intellectual property, as well as some investment policies. In addition, the permanent WTO Secretariat, which replaced the interim GATT Secretariat, has strengthened and formalized mechanisms for reviewing trade policies and settling disputes. Because many more products are covered under the WTO than under the GATT and because the number of member countries and the extent of their participation has grown steadily the combined share of international trade of WTO members now exceeds 90 percent of the global total. open access to markets has increased substantially. The rules embodied in both the GATT and the WTO serve at least three purposes.

- First, they attempt to protect the interests of small and weak countries against discriminatory trade practices of large and powerful countries. The WTO's most-favoured-nation and national-treatment articles stipulate that each WTO member must grant equal market access to all other members and those both domestic and foreign suppliers must be treated equally.
- Second, the rules require members to limit trade only through tariffs and to provide market access not less favourable than that specified in their schedules (i.e., the commitments that they agreed to when they were granted WTO membership or subsequently).
- Third, the rules are designed to help governments resist lobbying efforts by domestic interest groups seeking special favours. Although some exceptions to the rules have been made, their presence and replication in the core WTO agreements were intended to ensure that the worst excesses would be avoided. By thus bringing greater certainty and predictability to international markets, it was thought that the WTO would enhance economic welfare and reduce political tensions.

The other objectives include:

- To improve the standard of living of people in the member countries.

- To ensure full employment and broad increase in effective demand.
- To enlarge production and trade of goods.
- To increase the trade of services
- To ensure optimum utilisation of world resources
- To protect the environment
- To accept the concept of sustainable development

Structure of WTO

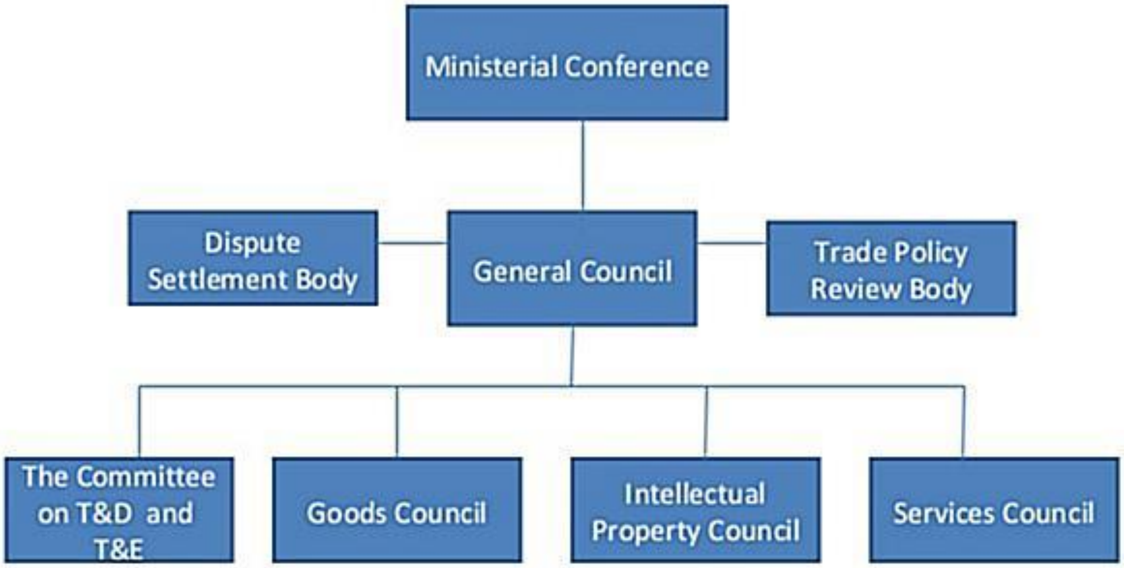
The WTO has 164 members, accounting for 98% of world trade. A total of 22 countries are negotiating membership.

Decisions are made by the entire membership. This is typically by consensus. A majority vote is also possible but it has never been used in the WTO, and was extremely rare under the WTO's predecessor, the GATT. The WTO's agreements have been ratified in all members' parliaments.

The WTO's top level decision- making body is the Ministerial Conference, which meets usually every two years. Below this is the General Council (normally ambassadors and heads of delegation based in Geneva but sometimes officials sent from members' capitals) which meets several times a year in the Geneva headquarters. The General Council also meets as the Trade Policy Review Body and the Dispute Settlement Body.

At the next level, the Goods Council, Services Council and Intellectual Property (TRIPS) Council report to the General Council. Numerous specialized committees, working groups and working parties deal with the individual agreements and other areas, such as the environment, development, membership applications and regional trade agreements.

STRUCTURES OF WTO



Powers and Functions of WTO

- Administering WTO trade agreements
- Forum for trade negotiations
- Handling trade disputes
- Monitoring trade policies
- Technical assistance and training for developing economies
- Cooperation with other international organizations

Among the various functions of the WTO, these are regarded by analysts as the most important:

- It oversees the implementation, administration and operation of the covered agreements (with the exception is that it does not enforce any agreements when China came into the WTO in Dec 2001)

- It provides a forum for negotiations and for settling disputes.

Additionally, it is WTO's duty to review and propagate the national trade policies, and to ensure the coherence and transparency of trade policies through surveillance in global economic policy-making. Another priority of the WTO is the assistance of developing, least-developed and low-income countries in transition to adjust to WTO rules and disciplines through technical cooperation and training.

- 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 multilateral Trade Agreements.
- The WTO shall provide the forum for negotiations among its members concerning their multilateral trade relations in matters dealt with under the Agreement in the Annexes to this Agreement.
- The WTO shall administer the Understanding on Rules and Procedures Governing the Settlement of Disputes.
- The WTO shall administer Trade Policy Review Mechanism.
- With a view to achieving greater coherence in global economic policy making, the WTO shall cooperate, as appropriate, with the international Monetary Fund (IMF) and with the International Bank for Reconstruction and Development (IBRD) and its affiliated agencies.

The above five listings are the additional functions of the World Trade Organization. As globalization proceeds in today's society, the necessity of an International Organization to manage the trading systems has been of vital importance. As the trade volume increases, issues such as protectionism, trade barriers, subsidies, violation of intellectual property arise due to the differences in the trading rules of every nation. The World Trade Organization serves as the mediator between the nations when such problems arise. WTO could be referred to as the product of globalization and also as one of the most important organizations in today's globalized society.

The WTO is also a centre of economic research and analysis: regular assessments of the global trade picture in its annual publications and research reports on specific topics are produced by the organization. Finally, the WTO cooperates closely with the two other components of the Bretton Woods system, the IMF and the World Bank.

WTO Agreements

The WTO's rule and the agreements are the result of negotiations between the members. The current sets were the outcome to the 1986-93 Uruguay Round negotiations which included a major revision of the original General Agreement on Tariffs and Trade (GATI).

GATT is now the WTO's principal rule-book for trade in goods. The Uruguay Round also created new rules for dealing with trade in services, relevant aspects of intellectual property, dispute settlement and trade policy reviews.

The complete set runs to some 30,000 pages consisting of about 30 agreements and separate commitments (called schedules) made by individual members in specific areas such as, lower customs duty rates and services market-opening.

Through these agreements, WTO members operate a non-discriminatory trading system that spells out their rights and their obligations. Each country receives guarantees that its exports will be treated fairly and consistently in other countries' markets. Each country promises to do the same for imports into its own market. The system also gives developing countries some flexibility in implementing their commitments.

(a) Goods:

It all began with trade in goods. From 1947 to 1994, GATT was the forum for negotiating lower customs duty rates and other trade barriers; the text of the General Agreement spelt out important, rules, particularly non-discriminations since 1995, the updated GATT has become the WTO s umbrella agreement for trade in goods.

It has annexes dealing with specific sectors such as, agriculture and textiles and with specific issues such as, state trading, product standards, subsidies and action taken against dumping.

(b) Services:

Banks, insurance firms, telecommunication companies, tour operators, hotel chains and transport companies looking to do business abroad can now enjoy the same principles of free and fair that originally only applied to trade in goods.

These principles appear in the new General Agreement on Trade in Services (GATS). WTO members have also made individual commitments under GATS stating which of their services sectors, they are willing to open for foreign competition and how open those markets are.

(c) Intellectual Property:

The WTO's intellectual property agreement amounts to rules for trade and investment in ideas and creativity. The rules state how copyrights, patents, trademarks, geographical names used to identify products, industrial designs, integrated circuit layout designs and undisclosed information such as trade secrets "intellectual property" should be protected when trade is involved.

(d) Dispute Settlement:

The WTO's procedure for resolving trade quarrels under the Dispute Settlement Understanding is vital for enforcing the rules and therefore, for ensuring that trade flows smoothly.

Countries bring disputes to the WTO if they think their rights under the agreements are being infringed. Judgments by specially appointed independent experts are based on interpretations of the agreements and individual countries' commitments.

The system encourages countries to settle their differences through consultation. Failing that, they can follow a carefully mapped out, stage-by-stage procedure that includes the possibility of the ruling by a panel of experts and the chance to appeal the ruling on legal grounds.

Confidence in the system is bourne out by the number of cases brought to the WTO, around 300 cases in eight years compared to the 300 disputes dealt with during the entire life of GATT (1947-94).

(e) Policy Review:

The Trade Policy Review Mechanism's purpose is to improve transparency, to create a greater understanding of the policies that countries are adopting and to assess their impact. Many members also see the reviews as constructive feedback on their policies.

All WTO members must undergo periodic scrutiny, each review containing reports by the country concerned and the WTO Secretariat.

TARIFFS AND TYPES OF TARIFFS

Introduction

Types of Tariffs

Introduction

A tariff is a duty or tax imposed by the government of a country upon the traded commodity as it crosses the national boundaries. Tariff can be levied both upon exports and imports. The tariff or duties imposed upon the goods originating in the home country and scheduled for abroad are called as the export duties. Countries interested in maximising their exports generally avoid the use of export duties. Tariffs have, therefore, become synonymous with import duties.

The import duties or import tariffs are levied upon the goods originating from abroad and scheduled for the home country. Sometimes a country may also resort to what is called as a transit duty. It is imposed upon the goods originating in the foreign country and scheduled for a third country crossing the borders of the home country. For instance, if India imposes tariffs on goods that Bangladesh exports to Nepal through the Indian Territory, these will be called as transit duties. Such duties are usually a matter of much concern for the land-locked countries. The imposition of import tariff results in the relative changes in prices of products and factors. That brings about a significant change in the structure of international trade. High tariffs certainly have the effect of restricting the volume of international trade. A negative tariff or subsidy is often supposed to expand foreign trade over and above its volume in the absence of subsidy.

Types of Tariffs

Tariffs are of several types and these can be classified into different groups or sub-groups as below:

(1) Classification on the Basis of Criterion for Imposition:

On the basis of the criterion for imposition of tariffs.

These can be of such types as:

(a) Specific tariff,

(b) Ad Valorem tariff,

(c) Compound tariff and

(d) Sliding scale tariff.

(a) Specific Tariff:

Specific tariff is the fixed amount of money per physical unit or according to the weight or measurement of the commodity imported or exported. Such duties can be levied on goods like wheat, rice, fertilisers, cement, sugar, cloth etc. Specific duties are quite easy to administer, as they do not involve the evaluation of the goods.

The determination of the value of the traded goods may be difficult as there are several variants of price such as demand price, supply price, market price, contract price, invoice price, f.o.b, (free on board) price, c.i.f (cost, insurance, freight) price etc. The resort to specific duties enables the government to keep out of complexities of prices.

However, the specific duties cannot be levied on high valued goods such as diamonds, jewellery, watches, T.V. sets, motor cars, works of arts like paintings etc. These articles can be taxed either on the basis of weight, surface area covered or the number of articles.

(b) Ad Valorem Tariff:

'Ad Valorem' is the Latin word that means 'on the value.' When the duty is levied as a fixed percentage of the value of the traded commodity, it is called as valorem tariff. Such duties are levied on the products the value of which is disproportionately higher compared to their physical characteristics such as weight or measurement.

These duties are more equitable as the costly goods, generally consumed by the rich, bear greater burden of duty, while the cheaper goods bought by the poor, bear lesser burden of tariff. For instance, if the import of watches is subject to 70 percent ad valorem tariff, a watch valued at Rs. 1000 will be subject to a duty of Rs. 700 and a watch valued at Rs. 1200 will be subject to a tariff amounting to Rs. 840. The ad valorem duties have an additional advantage that the international comparison of tariffs, in their case, can be easily made.

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(2) Classification on the Basis of Purpose for Which Tariff is Imposed:

On the basis of purpose of levying the tariff.

These can be of two types:

(a) Revenue Tariff and

(b) Protective Tariff.

(a) Revenue Tariff:

The tariff, which is imposed primarily for generating more revenues for the government is called as the revenue tariff. In advanced countries, the introduction and diversification of direct taxes has reduced the importance of tariff as a source of government revenues. But in the less developed countries, there is still much reliance of the governments on this source of revenue.

Generally pure revenue tariff is not possible. The imposition of tariff, even for the purpose of securing revenues, does have protective effect when it leads to switch of demand by the domestic consumers from the imported to home- produced goods.

(b) Protective Tariff:

The tariff may be imposed by the government to protect the home industries from the cut-throat competition from the foreign produced goods. The higher the tariff, greater may be the protective effect of tariff. A perfect protective tariff is likely to prohibit completely the import from abroad.

In practice, the perfect protective tariff may not exist. If the domestic demand for import remains strong, there can be the possibility of smuggling imported goods. In addition, such a tariff will not yield any revenue to the government. A high rate of protective tariff can make the domestic producers more lethargic and inefficient and unable to face foreign competition even in the long run.

(3) Classification on the Basis of Discrimination:

If the tariff is influenced by the consideration of discrimination.

There can be two types of tariffs-

(a) Non-discriminatory and

(b) Discriminatory.

(a) Non-Discriminatory Tariff:

If the uniform tariff rates are applicable to all the commodities irrespective of the country of origin, these are known as non-discriminatory tariffs. It is possible that low rates of tariffs on certain commodities exist because of commercial agreements with some countries but the tariff-imposing home country extends the same low tariff rates to the commodities of all the countries.

Such a system of nondiscriminatory tariff is called as single column tariff. This system of tariff is easy and simple to administer. There is, however, one deficiency that it is not elastic enough to adjust according to the changing needs of the industries of the home country. From the viewpoint of revenues too, it may not be satisfactory for the tariff-imposing country.

(b) Discriminatory Tariff:

In case of discriminatory tariff, the varying tariff rates exist for different commodities. The products originating from favoured countries are subject to a lower tariff rate than those of other countries. The discriminatory tariffs can be double or multiple column tariffs.

In case of the double column tariff, two different rates of duty exist for all or some commodities. Both the rates are either announced by the government right from the beginning and the two rates come into existence after the country enters into favoured-nation commercial agreement with some foreign countries. The favoured rates of tariff may either be on a unilateral basis or on a reciprocal basis.

The double column tariff can be further classified as:

(i) General and conventional tariff

(ii) Maximum and minimum tariff

(iii) Multiple Column Tariff.

(iv) General and Conventional Tariff:

The general tariff schedule is determined by the state legislature. It also makes provision for the adjustment in tariff rates as and when required to fulfill the obligations of international commercial agreements. The conventional tariff schedule is evolved through the commercial agreements of the home country with other countries. It does not permit changes in tariff rates according to the changes in domestic conditions or requirements.

The changes can be possible only after negotiations and agreements are reached between the concerned countries or after the expiry of the existing agreement. It is clear that there is some rigidity in the conventional tariff schedule. In contrast, the general tariff schedule is more flexible

(ii) Maximum and Minimum Tariff:

Under this system, a country has maximum and minimum tariff rates for every commodity. These tariff rates are fixed by the legislature and the government is authorised to apply specific rates of tariff to the goods imported from the different countries. The minimum tariff rates are applied to the products originating from the countries treated as 'The Most Favoured Nations'. The maximum tariff rates are applied for the purpose of improving the bargaining position of the home country vis-a-vis the foreign countries.

(iii) Multiple Column Tariff:

The multiple column tariff consists of three different rates of tariff – a general rate, an international rate and a preferential rate. The general and international tariff rates can be considered equivalent to the maximum and minimum tariff rates discussed above. The preferential tariff is generally applied by a subject country to the products originating from the colonial countries.

The preferential tariff rate is kept lower than the general rate of tariff. For instance, the goods imported by India from Britain before independence were subjected to a lower tariff or duty free on account of Imperial Preferences. On the other hand, the goods imported from other countries such as Japan, Germany and others were subject to higher rates of tariff.

(4) Classification on the Basis of Products:

Whether a product is imported or exported can be the basis of tariff.

On this basis, the tariffs can be of the types of:

(a) Import duties and

(b) Exports duties.

(a) Import Duties:

If the home country imposes tariff upon the products of the foreign countries as they enter its territory, the tariff is known as import tariff or import duty.

(b) Export Duties:

If the products of the home country become subject to tax as they leave its territory to be sold in the foreign market, the tax or duty is called as export tariff or export duty.

The import tariffs have remained the matter of deep interest both for analytical and policy reasons. These are far more wide-spread, and almost every country takes resort to them. In contrast, the export duties are applied to a very limited extent. Some countries like the USA have prohibited export duties by law. Even in those countries, where these are in vogue, the basic purpose is to secure larger revenues.

(5) Classification on the Basis of Retaliation:

On this basis, the tariffs can be of the types of

(a) Retaliatory tariffs and

(b) Countervailing tariffs.

(a) Retaliatory Tariffs:

If a foreign country has imposed tariffs upon the exports from the home country and the latter imposes tariffs against the products of the former, the tariffs resorted to by the home country will be regarded as the retaliatory tariffs. The home country, while adopting this measure does not either has the object of raising revenues or protecting home industries but of acting in retaliation.

(b) Countervailing Tariffs:

If the foreign country has been exporting large quantities of its products in the market of the home country on the strength of export subsidies, the home country can neutralise the 'unfair advantage' enjoyed by foreign products through imposing duties upon them as they enter the territory of the home country. The latter has full justification for resorting to these countervailing duties in order that the unfair advantage given by exports subsidies to the foreign products is offset and the competition takes place on equal footing between the foreign and home produced goods.

THE MOST FAVORED NATIONS PRINCIPLE

Introduction

The principle of Most Favored Nation (popularly known as the MFN treatment) by name implies especially favourable treatment. The MFN principle is a fundamental principle of trade ensuring non-discrimination between 'like' goods and services. It is a legal obligation to accord equal treatment to all nations accorded the benefits.

The clause relates to providing the same benefit and concession to one Member, in case benefits and concessions are provided to another Member. MFN hence calls for nondiscrimination amongst Members inter-se; so for example, in case a country 'A' provides a tariff concession to a country 'B' by imposing a 10% duty on import of cars, 'A' is obligated to charge the same rate of 10% to the imports of cars by Country 'C'. In this sense, a nation is bound to treat every other nation as its favorite or most favored nation. Thus, with respect to the GATT, a Contracting Party is expected to treat every other Contracting Party as its favorite nation.

Modes of discrimination

In order to obtain a thorough understanding of the principle of most-favored nation, it is vital to understand the forms of discrimination. Discrimination may either be de jure or de facto.

<u>De jure discrimination</u>

By de jure discrimination, we mean that discrimination that is spelt out by law. Hence, when foreign goods and services are not given the same treatment as domestic goods or services or that which is given to other Members; despite of being similar or like, it is a case of de jure discrimination. For example, there may be laws or regulations that have the impact of discriminating between goods and services that are like. Also, there may be an application of taxes in a different manner to domestic and imported goods, when in reality there is no real difference between the two.

De facto discrimination

De facto discrimination is discrimination that is not as explicit as de jure discrimination and is implicit in the type of measures used. For example, there may be a variable tax rate on beverages with high alcohol content than those with low alcohol content. There being no real discrimination apparent in such a measure, it will be regarded as de facto discrimination if, based on the market scenario, domestic beverages have a low alcohol content and imported beverages have a higher content. Discrimination must hence operate so as to distort the „conditions of competition‟ between goods and services that are like. Mere existence of different rule, does not lead us to the conclusion that like goods and services have been discriminated unless the "conditions of competition" have been adversely impacted.

Most Favored Nation Obligations under the GATT, 1947

Article I of the GATT, 1947 that invokes the principle of most-favored nation treatment prohibits discrimination that may be in eh form of de facto and de jure discrimination, against the Contracting Parties inter se. It provides for non-discrimination amongst trading partners; and applies to every governmental measure in the form of customs duties and charges, the method of levying the same and the rules and formalities applicable in the importation and exportation of goods.

Article 1 of the GATT additionally calls for non-discrimination amongst Members inter-se in the importation of products that are „like‟. Article 1: 1 hence states that

"any advantage, favor, privilege or immunity granted by any Member to any product originated in or destined for any other country shall be accorded immediately and unconditionally to the like product originated in or destined for the territories of other Members"

The MFN principle under the GATT prohibits discrimination that is either de jure or de facto. Hence, discrimination that is either is the form of explicit provisions of laws or regulations, or by means of a conduct is prohibited. The Belgian Family Allowances dispute comprehensively elucidates the scope of discrimination, and the phrase “any advantage, favor, privilege or immunity” for the purpose of understanding the nature and scope of discrimination prohibited by the MFN principle.

In this dispute, the measure at issue was whether Belgium had violated the MFN principle because of levying a charge on exports only due to the fact that such countries did not have a similar family allowance policy in place. As a result, countries like Denmark and Norway had to pay a charge on exports only by reason of not having a similar family allowance policy as that of Belgium. The question was whether Belgium was justified in imposing a special charge on the condition that exporting nations should also have a policy similar to that of Belgium. In this context, the Panel held that Belgium had Article I:1 of the GATT as a result of this measure. It elaborated that any advantage, etc. which was granted by one Contracting Party with respect to products originating or destined for any country must also be granted to all other countries. Hence, the Panel stated that such classifications made for certain products must exclusively be based on the characteristics of the products themselves; as against being based on the characteristics of the country where they originate from.

Types of measures covered under Article I: 1

The principle of most-favored nation under Article I: 1 of the GATT covers the following types of governmental measures:

With respect to customs duties and charges of any kind (for example, transport or warehouse charges) which are requisite for free and fair trade; and such type of customs duty or charge must be imposed on or in applied in connection with the importation and exportation of products;

The charge imposed on the internal transfer of payments for imports or exports. Hence, suppose a Member charges a different exchange rate or service charge on the importation or exportation of goods only for a particular WTO Member in a discriminatory manner, the measure is in violation of Article I: 1.

The method of levying such duties and charges. This measure refers to the method used to calculate the duties and charges; and in turn refers to the application of ad voleram versus specific duties. Accordingly, if a WTO Member applies ad voleram duties on the (like) products imported or exported to some Members, while imposing specific duties on similar products; the same would be considered as a different method of levying duties and charges.

Other rules and formalities in connection with importation and exportation: this means that rules and formalities with respect to importation and exportation of like products must be uniform for all Members so as to maintain a level playing field.

Measures referred to in Article III: 4 of the GATT, 1947; with respect to all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use must also be uniform for like products from goods destined to or coming from another Member"s territory.

Product must be a "like" product

In order to prove that the principle of MFN has been violated, the aggrieved party must first prove that the products are "like". The jurisprudence of the concept of "likeness" evolved in the case of Border Tax Adjustment wherein the Panel laid down the guidelines to determine "like" goods by following four general criteria: a) the property, nature and quality of the products; b) the end uses of the product; c) consumer tastes and habits and d) tariff classification of the products. Hence, the physical properties, the extent to which the product may be perceived as serving the same end use, the extent to which consumers perceive and treat the products as an alternative and the international classification of the products for tariff purposes is what ought to be taken into account.

The Japan-Alcoholic Beverages Case is also known for its jurisprudence on the concept of "like products". The question before the Panel in this case was whether "vodka" and the Japanese drink "sochu" were alike. While Japan argued that the two shared no similarities, the Panel in its report (which was later upheld by the Appellate Body) stated that the two should be regarded as alike due to the fact that the two shared the same physical characteristics and even the same end-use. The differences in the same simply lie in the fact that the process of filtration is not the same.

In elaboration, the Panel gave a comparison of other alcoholic beverages like rum to sochu, stating that the two cannot be considered as "like" products because of the difference in the ingredients, while "whiskey" and "brandy" had different appearances to that of "sochu". At the same time, "gin" "genever" and "liqueurs" contained certain addictives. To this extent, vodka and sochu must be considered as like products given the fact that they are similar in appearances and even have identical end-uses. There were however, no clear guidelines as to the circumstances in which goods may be considered as "like". Hence, products that are "like" must be treated equally, irrespective of their origin. Considerations in determining "like" products are essentially the same in case of the MFN clause as well. Discrimination among "like" goods arises when goods that are otherwise similar are discriminated by governmental measures.

Exceptions to the MFN Principle

The MFN obligation is not sans exceptions. In addition to the general exceptions and the security exceptions to the obligations of GATT, the existence of customs union and free trade areas (FTA‟s) are also justification to measures that are otherwise GATT inconsistent.

1. Customs Union: A Customs Union is defined in Article XXIV: 8(a) of the GATT, 1994 as "a substitution of a single customs territory for two or more customs territory so that duties and other restrictive regulations of commerce are eliminated w.r.t.substantially all trade between the constituent territories of the union or at least w.r.t. substantially all trade in products originating in such territories." Furthermore, the existence of customs union justifies a measure that is otherwise GATT inconsistent if the formation of that customs union were made to be impossible if the introduction of that measure was not permitted. At the same time, the existence of a customs union makes it obligatory for the members of the customs union to apply substantially the same duties and other regulations of commerce to each of the trade territories not included in the union. In the application of substantially the same duties and other regulations of commerce, Article XXIV: 8(5) (a) (of the GATT) also imposes the obligation that such duty and other

regulations are not higher or more trade restrictive than they were before the constitution of the customs union.

2. Free Trade Area: Measures inconsistent with the MFN obligation under the Article 1: 1 of the GATT is also permitted with the formation of a free trade area. A free trade area is defined under Article XXIV: 8 (b) as “a group of two or more customs territories in which duties and other regulative restrictions are eliminated on substantially all trade between the constituent territories in products originating in such territories.” Hence, the measure is justified on the ground that the formation of the free trade area would be unattainable but for the existence of such a measure.

While the existence of a customs union makes it obligatory vide Article XXIV: 8(a) (ii) to apply substantially the same duties and regulations of commerce to territories not a part of the customs union (commonly known as “third party rights”); the same is not the case with free trade areas. Free trade areas, hence only establish a standard for internal trade between members of the free trade area. Trade territories not a part of the FTA are merely assured that the duties and other regulations of commerce are not higher or more restrictive than they were prior to the formation of the free trade area.

3. Preferential Treatment to Developing Countries: Next, countries may also be exempted from the MFN obligation with the aim to provide preferential treatment to developing countries. The UNCTAD Special Committee on Preferences recognized as long as in the year 1970 that preferential treatment granted under the generalized scheme of preferences was a motivating factor for developing countries to increase their exports so as to promote industrialization and accelerate economic growth. Thereafter, the Waiver Decision on the Generalized System of Preferences was passed in the year 1971 to give effect to the Agreed Conclusions; which was eventually replaced as a result of the Tokyo Round Negotiations by the 1979 GATT Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries; commonly known as the “Enabling Clause”.

The Enabling Clause authorizes Members to deviate from MFN obligations under Article 1: 1 of the GATT and accord differential and more favorable treatment to developing countries, without according the same to other Members. Preferential treatment may therefore be accorded in accordance with the Generalized System of Preferences by Members of developed countries to products originated in developing countries. The Appellate Body in EC- Tariff Preferences ruled that the Enabling Clause is enacted with a view to enhance the market access to products originating from developing countries beyond the access granted to like products originating from products of developed countries. The Enabling Clause, thereby persuades developing countries to accord „differential and more favorable treatment" to developing countries; keeping in mind that the same is designed to facilitate and promote the trade for developing countries and not raise barriers or create undue difficulties for the trade of other Members; and that it does not constitute an impediment to the reduction or elimination of tariff and other restrictions to trade on an MFN basis. Lastly, the differential and more favorable treatment provided to developing countries under the Enabling Clause shall also be designed or modified as the case may be to respond positively to the development, financial and trade needs of the developing country.

THE NATIONAL TREATMENT PRINCIPLE

Introduction

Significance of the National Treatment Provision

Introduction

National treatment is one of the fundamental market access principles of the GATT / WTO system. It imposes an obligation of like treatment and non discrimination between domestic and imported goods. With respect to goods, national treatment means that, once imported products have cleared customs and applicable tariff or duty has been collected, they must be treated the same as domestic products. Otherwise discriminatory treatment could defeat the tariff concessions granted under Article II of the GATT. The objective of National treatment is "to protect expectations of the contract in parties as to the competitive relationship between their products and those of other contracting parties to protect current trade and to create the predictability needed to plan future trade".

National treatment applies to products even whose tariffs are not bound. National treatment is also a feature of the General Agreement on Trade in Services (GATS) and many other trade agreements. National treatment obligation is set forth in Article III of the GATT. The basic rule is that no law, regulation or taxation pattern adversely modifies the conditions of competition between like imported and domestic products in the domestic market.

Article III:1 contains general principles and informs and provides the context for the rest of Article III. In addition, Article III:1 defines the scope of application of Article III to include:

Internal taxes and charges laws regulations and requirements affecting the same come of transportation, distribution for use of products and internal quantitative regulation requiring the mixture, processing or use of products in specified prepositions.

The purpose of Article III is to assure that national domestic measures do not subvert the Article II tariff bindings and limit national protective measures to border controls. Accordingly, Article III secures "effective equality of opportunity for imported products" to compete with domestic products. The National treatment obligation is, therefore, a constraint that operates upon virtually any measure favouring domestic products or disfavouring imported products. For Example: In *Korea-Beef case*, the appellate body considered whether Korea was infringing the national treatment of obligation by maintaining a dual retail system for marketing beef that can find sales of imported beef to specialized stores. Korean law created two distinct retail distribution system for beef. One for domestic true beef and another for imported beef. A large retailer could sell both domestic and imported beef as long as it maintained separate sale areas. Retailers selling imported beef were required to display a sign reading "Specialised Imported Beef Store".

The Appellate Body, in analysing whether maintenance of the dual retail system violated Article III, concluded that formal separation does not, itself necessarily violate the national treatment obligation. The key inquiry is whether the maintenance of separate retail distribution system for domestic and imported products "modify the conditions of competition in the Korean beef market to the disadvantage of the imported product". This, in turn, depends upon the effect of the dual retail system. The Appellate Body noted that effect had been the reduction of retail outlets for imported beef, both in absolute terms and in comparison with the number of retail outlets for domestic beef. This "reduction of competitive opportunity" was not consistent with the requirements of Article 3 of the GATT.

Significance of the National Treatment Provision

The principle of National Treatment endeavors to prohibit discrimination between domestic and imported goods and services that are like. In essence, the principle of national treatment seeks to promote trade liberalization. With this, the principle of national treatment sought to provide tariff concessions to countries in general as against limiting them to countries that had negotiated for the same.

Article III of the GATT, 1947 aims and endeavors to achieve the following:

It seeks to promote the conditions of competition between countries. In the Japan – Alcoholic Beverages Case, the Appellate body held that "the fundamental purpose of the Principle of national treatment is to prevent protectionism in the application of internal tax and regulatory measures.” National treatment entails to improve the conditions of competition in the market, and any protectionism afforded to imported production shall directly hamper the conditions of competition. Prejudices against goods that are not locally made are considered to be unfair trade practices; with the principle of national treatment ensuring that free trade is fair and fair trade is free.

It seeks to ensure that imported goods are not subjected to any discrimination in the country of importation by way of measures either in the form of internal taxes or internal charges and laws, regulations and requirements…is not applied in such a manner so as to afford protection to domestic production. Hence, national treatment ensures that imported goods will be afforded the same treatment as domestic goods in matters that are under the control of the government.

“Like” products

Article III of the GATT prohibits discrimination between imported and domestic “like products”. Because discrimination between unlike products is permissible, the determination is one of the thorniest state that determination as to whether products are “like” is central to the administration of Article III.

The “like” product determination is one of the thorniest in GATT/WTO jurisprudence. The term “like product” does not mean, in any case, that products must be identical to be “like”. The term “like” includes “similar” products. It would be pertinent to note that where on the one hand, the principle of most favored nation endeavors to provide equal treatment to “like” products or goods belonging to Member nations inter se; the principle of national treatment delves to provide equal treatment to “like” goods of foreign nations *vis-à-vis* domestic goods.

In this respect, the principle of national treatment seems to have a larger bearing on international trade regulation simply due to the fact that nations are more likely to discriminate against foreign goods vis-à-vis their own goods; than discriminate between foreign goods inter se. in other words, the Article III of the GATT imposes an obligation on the Members to provide equal treatment to foreign Member nations, as far as “like” products are concerned; and thus not “afford protection to domestic production.”

SAFEGUARD MEASURES

Introduction

Unforeseen Developments and Correlation between Article XIX of GATT 1994 and the Safeguards Agreement.

Increase in Imports

Introduction

The term 'safeguard measures' is sometimes used in wide sense including all defense mechanisms given in the WTO to safeguard a member's economy and industry. As such it would include all trade remedy measures and also measures under articles XII and XVIII. However, for our purposes we use the term 'safeguard measures' in its specific sense which only includes product specific safeguard measures given under article XIX of GATT 1994 and the Safeguards Agreement. In this sense safeguards measures are one of the three trade remedy measures.

Other two are antidumping measures and countervailing measures. Safeguard measures are taken when domestic industry is seriously injured by increase in imports and seeks protection of the government to maintain its existence in the domestic market. Government then, if conditions given in the safeguards agreement are fulfilled, is authorized to restrict imports so that the domestic industry gets a breathing space and is able to again stabilize its situation in the market. However, the government in order to be justified in taking safeguardmeasures needs to fulfill certain conditions which are substantive and procedural.

Substantive conditions are three:

(a) There should be increase in imports

(b) There should be serious injury to the domestic industry producing like or directly competitive products; and

(c) There should be causal link between increase in imports and serious injury

Procedural conditions tell us about the procedure required to be observed before taking safeguard measures and period upto which safeguard measures can be taken.

Unforeseen Developments and Correlation between Article XIX of GATT 1994 and the Safeguards Agreement.

Article XIX:1(a) of GATT 1994 provides:

If as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury todomestic producers in that territory of like or directly competitiveproducts, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Article 2.1 of the Safeguards Agreement states:

A Member may apply safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being 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.

As it can be noted the first line of Article XIX:1(a) 'If as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions' is missing from article 2.1 ofthe Safeguards Agreement which otherwise repeats all the conditions given in article XIX:1(a). Can we say that the Safeguards Agreement has modified article XIX:1(a) of GATT 1994? It should be remembered that the Safeguards Agreement was finalized only in 1994 while Article XIX:1(a) was always part of GATT which was finalized in 1947. Can we say that later agreement has modified the earlier

What is an Unforeseen Development?

Definition of Unforeseen Developments was given by Czechoslovakia in the first safeguards case United States- Report on the Withdrawal by the United States of a Tariff Concession under

Article XIX6 known as the Fur Hat case. The definition given by the Czechoslovakia was accepted by the United States and by the contracting parties. The definition provided:

'Unforeseen Development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of country making the concession could and should have foreseen at the time when the concession was negotiated".

Increase in Imports

After being familiarized with a requirement which is not a condition but a circumstance, let us now examine the first substantive condition for imposition of safeguard measures that is, increase in imports. Now it has to remembered,safeguard measures are fair trade remedy measures and exporters have not indulged in any unfair trade practice as in case of antidumping measures and countervailing measures. Therefore conditions for imposition of safeguard measures are also more onerous and are also interpreted in strict manner.

Absolute and Relative Increase

Increase in imports can be absolute or relative to domestic production. Under article XIX there was some doubt earlier whether relative increase in imports were allowed to be considered for imposition of safeguard measures. The ambiguity has now been cleared. Article 2.1 of the Safeguards Agreement as it may be noted, provides for both absolute and relative increase in imports. Prof. Jackson criticizes inclusion of relative increase in imports as a protective device and states that it would not be fair to take safeguard measures where there has been no increase in imports but decline in domestic production and it would be unjustified to place the burden on foreign products. Prof. Lee accepts that relative increase in imports may qualify for being considered as increase in imports but thinks that it would be difficult to prove causal link requirement because if imports and domestic production both fall it means that injury has been caused by general decline in demand rather than by increased imports.

What is Serious Injury and threat of serious injury?

Article 4:1(a) defines serious injury as 'significant overall impairment in the position of the domestic industry'. Threat of serious injury is defined as 'serious injury that is clearly imminent, in accordance with provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility'. Paragraph 2 gives an inclusive list of factors which are to be examined in determining the existence of serious injury or threat of serious injury. It specifically states, ' In the investigation to determine whether increased imports have caused or are threatening to cause serious injury to domestic industry under the terms of this Agreement, the competent authorities shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of thatindustry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by the increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.' It has been decided by the Panel and the Appellate Body in Argentina-Safeguard Measures on Imports of Footwear that all relevant factors mentioned in Article 4.2(a) should be necessarily examined. These are the minimum factors which have to be examined and there can be other additional factors.

What amounts to 'serious' injury as distinguished from 'material' injury, it is difficult to state. It has been considered as subjective assessment. In Hatter's Fur case, Czechoslovakia had contended that injury to the US domestic industry was not enough to qualify as 'serious' injury. The working party in this case found that the record showed some injury to the US domestic industry but was not sure whether it would amount to serious injury or not. The burden of proof falls on the complainant to prove that injury caused to domestic industry was not serious enough to justify imposition of safeguard measures. The working party concluded:

Any view on [this] is essentially a matter of economic and social judgment involving a considerable subjective element. In this connection it may be observed that the Working Party naturally could not have the facilities available to the United States authorities for examining interested parties and independent witnesses from the United States hat-making areas, and for forming judgments on the basis of such examination. Further, it is perhaps inevitable that governments should on occasion lend greater weight to the difficulties or fears of there domestic *producers than would any international body, and that they may feel it necessary on social grounds, e.g. because of lack of alternative employment in the localities concerned, to afford a high degree of protection to individual industries which in terms of cost of production are not economic.*

Other Conditions

Other conditions for imposition of safeguard measures are procedural in nature. There has to be investigation done which has to result in positive finding of increase in imports, serious injury and causal link. Request for investigation should normally be made by the domestic industry which is defined as producers of major proportion of the production. Principles of natural justice should be followed that means all interested parties should be notified and hearing has to be given to all the parties. The committee on safeguard measures should also be notified about the initiation of the investigation and imposition of final measures. Safeguard measures once taken can be in existence for four years and they can be extended for next four years. They have to end after eight years.

Developing countries are allowed to take safeguard measures for ten years. Once safeguard measures is taken on any product and it has been ended, in cannot be applied by that country for the same product for a period equivalent of that for which the measure was in force. For example if a safeguard measure has been in force for six years and has been ended after that then it cannot be applied for the same product for next six years. For developing countries the period of non-application has to be half of the period of application. That means a developing country can take safeguard measures after three years. If the safeguard measures is imposed for 180 days or less it can be applied again if one year has passed since the introduction of safeguard measures on that product and it is not applied more than twice in the five years period in respect of same product.

Safeguard measures can be in the form of safeguards duty or quantitative restrictions. In this way safeguard measures are an exception to article II andarticle XI of GATT 1994. If safeguard measures are taken in the form of quantitative restrictions, then quota has to be allotted on the basis of agreement with the exporting countries. If this is not possible then quota has to be allotted on the basis of share of exporters in previous years.

Normally safeguard measures have to be applied on MFN basis, but if there is disproportionate increase in imports from a particular country and safeguard measures are taken in the form of quantitative restrictions, then it may be applied against that particular exporting member only. Provisional safeguard measures can also be taken pending final findings but these cannot be for more than 200 days and have to be in the form of safeguards duty only. This is because if final findings are negative then the safeguard duty which has been collected can be refunded but irreparable loss can be done by quantitative restrictions. There has to be midterm review of the measures once taken and they can be extended beyond four years only if before the end of this term a review is conducted which shows the necessity of continuing the measures beyond four years.

Since safeguard measures are fair trade remedy, article XIX of GATT 1994 and article 8 of the Safeguards Agreement provide that member taking safeguard measures should provide substantially equivalent level of concession to exporting members in other sectors/products. If the member fails to provide the same, affected exporting members are free to suspend equivalent concessions towards member taking safeguard measures.

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UNIT - II

Synopsis

- Technical Barriers to Trade
- Sanitary and Phyto- sanitary measures
- Trade Related Investment Measures (TRIMs)
- Anti-Dumping
- Subsidies and Countervailing Measures
- Dispute Settlement Process.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

Introduction

Basic Concepts

The Principles or Rules of TBT Agreement

Introduction

Since the signing of the General Agreement on Tariffs and Trade (GATT) in 1947, tariffs have been bound for a large number of industrial and agricultural goods, and have declined significantly. But on the other hand an increase in standards of living and greater awareness and sensitivity to environment fueling the demand for high – quality products by consumers worldwide has made it necessary to address the issue of product standards. TBT is an agreement under the aegis of World Trade Organization ("WTO") governing product standards which do not fall under the ambit of SPS agreement. Even though the TBT agreement concerns itself with health issues of human, animal and plant life and health but it does the same through technical regulations, standards and conformity assessment procedures.

During the Tokyo Round, a Standard Code was drafted to govern the preparation, adoption and application of technical regulations, standards and conformity assessment procedures. The new TBT Agreement which was earlier a Standards Code emerged during the Uruguay round of trade negotiations.

The TBT Agreement covers a broad set of the measures relating to technical regulations standard and conformity assessment procedures. The agreement is premised on an acknowledgement of the right of WTO members to develop technical requirements, and to ensure that they are complied with. However, the Agreement has its objectives and ensures that unnecessary obstacles to international trade are not created. These objectives are achieved through a delineation of a number of legitimate objectives for which mandatory technical requirements may be developed and through a number of principles which govern the preparation, adoption and application of mandatory and voluntary requirements and conformity assessment procedures. such as non-discrimination, avoidance of unnecessary obstacles to international trade, harmonization, the equivalence of Technical regulations and the results of conformity assessment procedures, mutual recognition of conformity assessment procedures and transparency.

Under the TBT Agreement technical regulations may only be developed for one or more of the objectives considered legitimate by the legitimate objectives include: "inter-alia national security requirements, the prevention of deceptive practices, protection of human health of safety, animal or plant life for health, or the environment". Further the WTO members may develop technical regulations to protect themselves against certain armaments (for national security), to protect endangered species (for the environment) and to warn consumer against the hazards of cigarette smoking (for human health).Deceptive practices for two measures which leadership consumers, such as false labels. Further WTO members are allowed to adopt technical regulations to guard against such practices.

Basic Concepts

The TBT agreement divides technical requirements into two categories:

- Technical regulations and
- Standards

According to the Agreement technical regulation is a, "document that lays down product characteristics for the related process and production methods, including the applicable administrative provisions with which compliance is mandatory. It may also include ordeal exclusively with terminology symbols packaging marking on labeling requirements as applied to a product process or production method.

Standard is a "document approved by a recognised body, that provides for common and repeated use, rules, guidelines on characteristics for product or related process and production methods, which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as applied to a product, process of production methods."

Technical regulations and Standards are product technical requirements. The difference between the two is that compliance with technical regulation is mandatory while a compliance standard is voluntary. Technical regulations are addressed in the main body of the agreement and provisions are laid out to ensure that did not cause unnecessary obstacles to trade. The provisions apply to technical regulations developed by central and local government as well as non governmental bodies. WTO members are fully responsible for ensuring the observance of all the provisions of the agreement relating to technical regulations.

Where are standards addressed separately and record of good practice which forms one of the Annexes to the agreement and (Annex 3). Most of the principles applied by the agreement to technical regulations apply to standards through the code. The code is open to acceptance by central, local and nongovernmental standardizing bodies as well as to regional governmental bodies.

The compliance of standardizing bodies with the provisions of the code of good practice shall apply irrespective of whether or not a standardizing body has accepted the code of good practice. That Agreement also addresses conformity assessment procedures and defines the

Conformity assessment procedure as "any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations of standards are fulfilled". Conformity assessment procedures are subject to the same principles which apply to technical regulations and standards, in order to ensure that they themselves do not constitute unnecessary obstacles to international trade. Members are fully responsible for ensuring the observance of all provisions relating to conformity assessment under the agreement and must formulate and implement positive measures and mechanisms in support of the observance to the provisions by local government bodies. They must also ensure the central government bodies rely on conformity assessment procedures operated by Non governmental bodies only if these bodies comply with the relevant provisions of the Agreement.

The Principles or Rules of TBT Agreement

The Most Favoured Nation ("MFN") principle and National Treatment ("NT") principle constitutes the backbone of the international trading system. The TBT agreement embraces the GATT principle of non – discrimination and applies it to technical regulations, standards and conformity assessment procedure (Art. 2.1 includes aspects of both MFN as well as NT in it.)

The Agreement stipulates that the non-discrimination principle be observed throughout the different stages of their preparation, adoption and application. For instance, a WTO member cannot adopt a technical regulation mandating that all imported vehicles meet certain air emission standards, if it does not enforce such standards on its own domestically produced vehicles. In addition, it cannot enforce such a technical regulation on one of its trading partners, but not on the others. Providing treatment that is no less favourable, therefore, is essential under the disciplines of the TBT Agreement and the WTO system as a whole.

WTO members must also ensure that conformity assessment procedure are not prepared, adopted or applied discriminatorily. Conformity assessment systems must not create undue distinction between the procedure to be followed by products originating from different sources. For instance, they cannot subject similar products to tests of varying degrees of stringency based on their sources of supply.

<u>Avoidance of Unnecessary Obstacles to International Trade</u>

The Avoidance of unnecessary obstacles to international trade is a principal objective of the TBT agreement. With respect to both technical regulations and Standards, the Agreement and states that members Hassan sure that night technical regulations not standards are prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade.

The agreement elaborates on the meaning of the phrase and stipulates that technical regulations should not be more restrictive than necessary to fulfill a legitimate objective, taking into account the risk that non fulfillment would create. The TBT rules provide for two steps while determining whether the technical regulation poses unnecessary obstacles to international trade. Firstly, the regulation must be designed to meet one of the legitimate objectives delineated in the agreement and second, it must be the least trade restrictive option available to a WTO member that achieves that legitimate objective, taking into account the risk that would be associated with its non fulfillment.

The Agreement encourages WTO members to develop technical regulations and Standards that are based on product performance rather than design requirements for stop search requirements create fewer obstacles to trade providing exporters with greater leeway in fulfilling the objectives of the technical requirements. Further the agreement required WTO members to this invoke technical regulations when the objectives that had given raise to the adoption no longer exist or exchange circumstances objectives can be address in less trade restrictive manner.

The Agreement states that conformity assessment procedures must not be applied more stringently than is necessary to ensure conformity. They must consider the risk of reduced stringently and decide on whether or not they outweigh the benefits of having fewer obstacles to International trade. The Agreement also urges members to ensure that conformity assessment procedures undertaken as expeditiously as possible, that information requirements are limited to whatever is necessary, that the confidentiality of information is respected for legitimate commercial interest, that the fees charged domestically are equitable to the fees charged for foreign products, and so on and so forth.

Harmonization

The TBT fertility agreement encourages WTO members to base their technical regulations, standards and conformity assessment procedures of international standards and guides and recommendations, when these exist or their completion is imminent except when they are deemed to be inappropriate or ineffective. The principle of harmonisation is designed to avoid the emergence of undue layers of technical requirements and assessment procedures, and to encourage the use of ones that have been developed with the approval of the international community.

Though the agreement mandates the members to follow technical regulations and Standards, but in the event of fundamental climatic or Geographic differences or due to fundamental technological problems the Agreement allows the members to derogate from the application of the international standards. But the exceptions allowed for conformity assessment procedures and broader. According to the Agreement, exceptions are as follows: national security requirements, the prevention of deceptive practices, protection of human health and safety, animal or plant life or health or the environment, fundamental climatic or other geographical factors, fundamental technological or infrastructural problems. Therefore while the Agreement calls upon members to use International standards, guides or recommendations, it creates sufficient scope for them to derogate from this obligation in order to tailor domestic requirements to the specifics of their situation.

Equivalence and Mutual Recognition

The TBT agreement stipulates that WTO members give positive consideration to recognising other members technical regulations as equivalent to theirs, provided they are satisfied that they adequately fulfill their objectives. The principle of equivalence is designed to complement that of harmonization. As International harmonisation is time consuming process and sometimes one which is difficult to achieve, the argument increases members to accept each other’s regulations as equivalent until full-fledged International harmonization becomes possible. Through equivalency arrangements, products that meet the regulations of an exporting country do not have to comply with the regulations of the importing country, provided that the same objectives ae fulfilled by the two sets of requirements. This significantly reduces barriers to trade.

The agreement intends to avoid multiple products testing in both exporting and importing country markets and its associated costs financial and otherwise. The Agreement recognizes and encourages parties to enter into negotiations to achieve equivalent and to ensure continued reliability of conformity assessment results. The Agreement encourages members to enter into a mutual recognition agreement for acceptance of each other assessment results. The mutual recognition agreements are usually negotiated on either a bilateral or unilateral bases to cover the defined product groups.

Transparency

Transparency is a central feature of the TBT agreement and is comprised of:

- Notification obligation
- The establishment of enquiry points and
- The creation of WTO TBT committee

Notification means the circulation of information by WTO members to other members on matters relating to the agreement. This obligation includes:

- notifying the measures taken to implement the provisions of TBT agreement nationally
- notify draft technical regulations, conformity assessment procedures and Standards and
- providing other members with sufficient time to comment on them with the abbreviation of taking these comments in account and
- notify entry into any bilateral or multilateral agreements regarding technical regulations and others for conformity assessment procedures.

Notification allows for dissemination of Information and for avoiding unnecessary obstacles to international trade at an early stage. They allow exporters to be informed of new requirements that are developed in their export markets prior to their entry into force, to comment on these requirements, to have their comments taken into account, and to prepare themselves for compliance.

The Agreement stipulates that each WTO member established an entry point that can respond to questions on technical regulations standards and conformity assessment procedures and supply required documents. Enquiry points are designed to increase transparency by contributing to the flow of information. The Agreement also established the TBT committee which is a standing body that acts as a form for consultation and negotiation or issues pertaining to the Agreement.

Developing Countries

The TBT Agreement authorizes special and differential treatment for developing countries. Like,

- Ensuring that the technical regulations, standards and conformity assessment procedures of developed countries do not create unnecessary obstacles to developing country exports.
- Not expecting developing countries to use International standards, since these, may be inappropriate for the level of technological development.
- Ensuring that developing countries participate representatively in International standardizing bodies and international systems for conformity assessment.
- Preparing International standards for the products that are of export interest to them and allowing them to obtain certain time limited exceptions from obligation.

In addition the agreement calls upon developed countries to provide developing countries for technical assistance. Assistant may be directed towards helping the developing countries to prepare their own technical regulations, meet the technical requirements of the export markets, established National standardizing bodies and participate in international ones, to establish bodies for conformity assessment with technical regulations and standards, access the conformity assessment systems of other countries and to become members of international bodies.

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AGREEMENT ON THE APPLICATION OF SANITARY AND PHYTOSANITARY MEASURES

Introduction

General Provisions of the SPS Agreement

Introduction

The Agreement on Application of Sanitary and Phytosanitary measures has been made desiring to improve the human health animal health and photo sanitary situations in all members and to establish multilateral framework of rules and disciplines to guide the development of adoption and enforcement of sanitary and phytosanitary measures in order to minimize negative effects on trade.

The SPS agreement essentially seeks to spell out in a limited area that principle of Article XX (b) of the GATT. On the one hand, members states should be free to make their own decisions about health and safety measures, on the other hand regulatory measures having the effect of excluding or limiting the imports should be permitted only if they are backed by scientific findings and should not become disguised efforts at protectionism or discrimination.

General Provisions of the SPS Agreement

A Sanitary and Phytosanitary measure applies:

To protect animal or plant life or health within the territory of the members from risk arising from the entry establishment or spread of pests, diseases, diseases carrying organisms or disease causing organisms.

To protect human or animal life or health within the territory of the member from risk arising from additives, contaminants, toxins or disease causing organisms in food, beverages or feedstuffs.

To prevent or limit other damages within the territory of the member from the entry, establishment of spread of pests.

The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) has dual objectives to achieve. The Agreement recognizes the member's right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health. However, these measures should not be employed in a way which would "constitute a means of arbitrary or unjustifiable discrimination between Members where the same conditions prevail or disguise restrictions on international trade."

Further the Agreement sets limitations on member states polices relating to food safety (bacterial contaminants, pesticides, inspection and labeling) as well as animal and plant health (phytosanitation), specifically with respect to imported pests and diseases.Thus the Agreement aims to provide the balance between the right of governments to protect food safety, plant and animal health, and prevent these sanitary and phytosanitary measures from being unjustified trade barriers. The member shall ensure that the measures be based on scientific principles and is not maintained without sufficient evidence. Further, it is the obligation of the member states to ensure that the sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between members where identical or similar conditions prevail.

Justification

SPS agreement has been built on previous GATT rules to restrict the use of unjustified sanitary and phytosanitary measures for the purpose of trade protection. The basic aim of the SPS Agreement is to maintain the sovereign right of any government to provide the level of health protection it deems appropriate, but to ensure that the sovereign rights are not misused for protectionist purposes and do not result in unnecessary barriers to international trade.

Sanitary and Phytosanitary measures, by their very nature, may result in restrictions on trade. All governments accept the fact that some trade restrictions may be necessary to ensure food safety and animal and plant health protection. However, governments are sometimes pressured to go beyond what is needed for health protection and to use sanitary and phytosanitary restrictions to shield domestic producers from economic competition. Such pressure is likely to increase as other trade barriers are reduced as a result of Uruguay Round Agreement.

International Standards

The SPS Agreement encourages governments to establish national SPS measures consistent with international standards, guidelines and recommendations. This process is often referred to as harmonization first whl does not and will not develop such standards. However, most of WTO members' governments participate in the development of the standards in the international bodies standard developed by leading scientists in the field and governmental experts on health protection and are subject to International Security and review.

International standards are often higher than the national requirements of many countries, including developed countries, but the SPS Agreement explicitly permits governments to choose not to use the international standards. However, if the national requirements results in greater restrictions of trade, a country may be asked to provide scientific justification demonstrating that the relevant International standards would not result in the level of health protection the country considers appropriate.

Adapting to Conditions

The Agreement takes into account the varying factors like climate, existing pests or diseases, or food safety conditions of a geographical area. It is not always appropriate to impose the same sanitary and phytosanitary requirements on food, animal or plant products coming from different countries. Therefore, the sanitary and phytosanitary measures sometimes vary, depending on the country of origin of the food, animal or plant product concerned. The Government should also recognise disease free areas which may not correspond to political boundaries and appropriately adapt their requirements to products from these areas. The Agreement however, checks unjustified discrimination in the use of sanitary and phytosanitary measures whether in favour of domestic producers or among foreign suppliers.

Risk Assessment

The SPS Agreement increases the transparency of sanitary and phytosanitary measures. Countries must establish SPS measures on the basis of an appropriate assessment of the actual risk involved and, if requested, make known what factors that took into consideration, the assessment procedures they used and the level of risk they determined to be acceptable. Although many governments already use risk assessment in the management of food safety and animal health, the SPS Agreement encourages the wider use of systematic risk assessment among all WTO member governments and for all relevant products.

Transparency

Governments are required to notify other countries of any new or change sanitary and phytosanitary requirements which affect trade and to set up offices to respond to requests for more information on your existing measures. The systematic communication of Information and exchange of experiences among the WTO member governments provide a better basis for national standards. Such increased transparency also protects the interest of consumers as well as of trading partners, from hidden protectionism through unnecessary technical requirements.

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THE WTO AGREEMENT ON TRADE RELATED INVESTMENT MEASURES

Introduction

In the 1980's a significant increase in foreign direct investment in developing countries posed a threat to the domestic industries of the invested country. A need to discipline the investment measures that distort trade was felt by many developed countries. Therefore, some countries started imposing numerous restrictions to protect and foster domestic industries and to prevent the outflow of foreign exchange reserves.

During the Uruguay Round of negotiation, the United States suggested that the negotiation should cover policy issues affecting the flow of foreign direct investment and it also would be necessary to consider the feasibility of applying to foreign direct investment the GATT principles of National Treatment (Give foreign companies the same right as domestic companies to invest in, and to establish, local operations) and MFN treatment (which would prevent countries from discriminating amongst sources of investment)

The proposals made and received during the GATT rounds of negotiation were supported by the developed countries while they were disfavoured by developing countries. Apart from holding the GATT's mandate, the developing countries did not permit any further negotiations on investment issues. The countries maintained to include negotiations relating to the problems posed to trade by transnational corporations resorting to transfer pricing, restrictive business methods and other practices. This reluctance of developing countries in allowing discussions on investment issues ultimately resulted in negotiations taking place on narrowly defined concepts of trade related investment measures.

What are TRIMs ?

TRIMs- Trade Related Investment Measures are those measures adopted by the government to attract and regulate foreign investment including physical investments tax rebate under provisions of land and other services and preferential terms. In addition, governments import conditions to increase or compare the use of investment according to certain national priorities.

For Example: Local content requirements which require the investor to undertake to utilise a certain amount of local inputs in production.

Export performance requirements- they compel the use of investors to undertake to export a certain proportion of its output. Therefore, it can be said that such conditions which can have adverse effects on trade,are known as trade related investment measures.

An Illustrative list of TRIMs

Local content requirements	Impose the use of a certain amount of local inputs in production.
Trade balancing requirements	Oblige imports to be equivalent to a certain proportion of Exports
Foreign exchange balancing requirements-	Stipulates that the foreign exchange made available for imports should be a certain proportion of the value of foreign exchange bought in the firm from exports and other sources
Vocal Content Requirements (LRCs)	Impose the use of a certain amount of local exports in production
Domestic sales requirements	Require a company to sell a certain proportion of its output locally, which amounts to restriction of exportation
Manufacturing requirements	Requires certain products to be manufactured locally

Export Performance Requirements (EPRs)	Stipulate that a certain proportion of production should be exported good
Product mandating requirements	Oblige an an investor to supply certain markets with designated product or products manufactured from a specified facility operation
Manufacturing Limitations	Prevent companies manufacturing certain products or product lines in the host country
Technology Transfer Requirements	Require specified technologies to be transferred or non commercial terms and specific levels and types of research and development to be conducted locally.
Licensing requirements	Oblige the investor to license technologies similar or unrelated to those it uses in the home country to the host countries firm.
Remittance restriction	Restrict the right of a foreign investor to repatriate returns from an investment
Local equity requirements	Specify that a certain percentage of a firm's equity should be held by local investors

Trade related investment measures have been used mainly if not exclusively by developing countries to promote development objectives. For instance, the growth of domestic ancillary industries has been sought through the imposition of local content requirements and export expansions through export performance requirements. In many cases TRIMs are designed to deal with destructive business practices of transnational corporations and anti competitivebehaviour.

The TRIMs agreement negotiated in Uruguay round prohibits countries from using 5 (Five) TRIMs from the list Inbox 31. These are considered inconsistent with GATT rules on natural treatment and rules against the use of quantitative restrictions. TRIMs prohibited on the ground that they extend more favourable treatment to domestic product in comparison to imports and do in French the national treatment principle including those that require:

Purchase order used by an enterprise of products of domestic origin or some any domestic source(local content requirements), or

That an enterprise purchase for use of imported products should be limited to the amount related to the volume or value of the local product it Exports (trade balancing requirements)

TRIMs considered inconsistent with the provisions of article XI of GATT against the use of quantitative restrictions on imports and exports include those that:

Restrict imports tournament related to the quantity or value of the product exported(trade balancing requirements constituted restrictions on imports)

Restrict access to foreign exchange tournament of foreign exchange attributable to the enterprise (exchange restrictions resulting in restrictions on imports)

Export in terms of the volume or value of local production (domestic sales requirements involving restrictions on exports).

The agreement provides a transition period for the elimination of prohibited TRIMs. Developed countries the period was 2 years from 1995 when the Agreement entered into force, for developing countries the transition period was up to 5 years until 1st January 2000 and least developed countries after seven years until 1st January 2002. It should be noted that these transition periods were available only for the prohibited TRIMs notified when the Agreement became operational.

AGREEMENT ON IMPLEMENTATION OF DUMPING AND ANTI DUMPING MEASURES

History of Article VI of GATT 1947
Article VI of GATT 1994
Basic Concepts

Article VI of GATT established the framework for the law of dumping and antidumping which has remained unchanged for decades. Article VI accepts a proposition that dumping is unfair trade. It defines the term, and it commits the determination of dumping to the authority of the important state. Further, Article VI states that the remedy against dumping is an anti dumping duty which is to be imposed only upon a finding of injury caused by the dumped imports

History of Article VI of GATT 1947

In 1967 the Kennedy round of negotiations drafted the first anti dumping policies negotiated at the auspices of GATT. The Code contained provisions concerning the determination of dumping determination of injury, definition of industry, initiation and conduct of Investigations, evidence, price undertakings, duration of anti-dumping duties and provisional measures, plus a general article of obligating each party to ensure the conformity of its law, regulations and administrative procedure with the provisions of the code. Further, the code provides for the establishment of a committee on anti dumping practices to which parties to the code could complain about implementation of anti-dumping laws by other parties.

During the period 1973-79 the Committee on Anti-Dumping Practices became a forum for amending the code, by modifying provisions that have proven unclear and by making provisions for issues not dealt with in the 1967 code. In addition during the Tokyo Round of trade negotiation anti dumping code was revised to make it parallel to the Subsidies Code. In particular the provisions in 1967 code that determination of injury shall be made only when the authorities concerned are satisfied that the dumped imports are demonstrably the principal cause of material injury.

The 1979 Anti-Dumping Code remained ,for the most part, an agreement among the industrial countries, but India and Brazil, the states that have been the leaders among developing states in the GATT/WTO system, both became original parties to the 1979 anti-dumping code, and Egypt, Korea, Mexico, Pakistan and Singapore signed on subsequently.

In 2001 Doha Round of trade negotiation, there was a substantial effort made to place revision of 1994 Anti Dumping Agreement, with a view to make it more difficult to establish dumping and to reduce the permissible levels of anti-dumping duties.

Article VI of GATT 1994

The contracting parties recognize and dumping by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established Industries in the territory of a contracting party or materially retards the establishment of a domestic industry.

According to this provision, there must be three requirements:

First the export price of a product must be lower than the price of the product in the domestic market of the exporting country.

Second exports of such products must (1) cause or threaten to cause material injury to a domestic industry or (2) materially retard the establishment of a domestic industry.

Third, there must be a casual relationship between dumping and the injury or retardation.

Article VI also addresses the injury determination. Under this Article, National anti dumping authorities may impose an anti dumping duty only after first determining that the dumping causes or threatens material injury to an established domestic industry or materially retards the establishment of a domestic industry.

The GATT Article VI sets for the basic principles to be followed by the WTO Members when dealing with dumping issues, its terms are general and the content is rather sketchy.

Institutions and Notifications

The Antidumping Agreement establishes a committee on Antidumping Practices composed of representatives of all WTO members. The function of the committee is to seek information and provide a forum for consultation among members. All preliminary and final anti-dumping actions taken by Members must be promptly notified to the committee.

Developing Countries

Article 15 of the Antidumping Agreement recognizes that special regard must be given by developed country members to the special situation of developing country members when considering the application of anti dumping measures under this agreement. Possibilities of constructive remedies provided for by this agreement shall be explored before applying anti-dumping duties where they would affect essential interest of developing country members.

For example: price undertaking, special rules for initiating an investigation, special import share and *de minimis* threshold for developing countries.

Basic Concepts

Initiating an investigation

Article 5.2 of the Antidumping Agreement requires the National anti dumping authorities may initiate an anti-dumping investigation when a domestic industry files a petition or on their own. The petition must include evidence of dumping, material injury and causation that is reasonably available t o the petitioner.

The application must contain sufficient evidence of the existence of dumping that causes or threatens to cause injury to a domestic industry. Further, the antidumping agreement sets a maximum period for an anti dumping investigation to be conducted within one (1) year and not exceed 18 months.

Determination of Dumping

To determine whether a product is dumped, the antidumping authority of the importing country must determine whether there is a difference between export price and normal value of the product. If the difference is slight (less than 2% of the export price), national antidumping authorities must also terminate the investigation. Anti dumping authorities must also terminate the investigation if the volume of imports of the dumped product is negligible (less than 3% of imports of the like products).

Since comparing the normal value and export price is complicated, the comparison between domestic price and export price of the product in question should in principle be made at the same level of transaction.

When the actual domestic prices are not available, or cannot be used, normal value can be based on the export price of a third country or cost of production in the country of origin. Export prices may be 'constructed' from the first independent price where the importer t is related to the exporter. A fair comparison must be made between export price and normal value. Allowances should be made for all differences that affect price comparability.

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In addition, various circumstances of sale affect the price level. For example, suppose a foreign purchaser pays for a product by letter of credit payable on site and domestic purchaser pays for the same product by promissory note payable after 6 months. The seller can get paid in cash from the foreign purchaser immediately after receiving the letter of credit, whereas he cannot get paid in cash until 6 months after receiving the promissory note. The seller is, therefore, justified in charging more to the domestic purchaser than the foreign purchaser, at least to the extent of interest that he would obtain if the domestic purchaser paid cash.

Like Product

The Like Product issue is typically quite important in anti-dumping cases. The issue arises principally in three contexts. First, dumping involves a comparison of the prices of life products in the domestic market of the exporting country and the export market. There may be some differences in the characteristics of the products sold in the two markets.

Second, the "like product" issue may come up in a context in which every manufacturer buys product components at below-cost prices from an unrelated supplier and assemble them into a product for resale in domestic and export markets.

Third the "like product" issue may arise in the context of defining the domestic industry. Article IV of the Antidumping Agreement states that domestic industry includes domestic producers of "like products". However, the term "like product" is defined in the Antidumping Agreement to mean, "a product which is identical" or "has characteristics closely resembling the product under consideration"

Comparison of third- country prices

In two situations determination of dumping can be made by comparing the export price with the price of the like product when exported to an "appropriate third country", provided that the third country price is "representative". These situations arise:

- When there are no sales of the like product in the ordinary course of trade in the home country; or
- Where there is no volume of such sales.

Determination of Injury

Material injury or threat of material injury

Determination of material injury to domestic industry must be based on evidence regarding:

- the quantity of dumped product and its effect on the price of like domestic products its effect on producers of such domestic products.
- With regard to the quantity of dumped imports, the national anti dumping authority must examine whether there is significant increase of the quantity of term product.
- An increase of import can be absolute or relative.
- With respect to price, the antidumping authority must investigate whether the dumped product undercuts the like domestic products, depresses the domestic price, or prevents the domestic price from rising.

Factors to be considered when determining injury

Article 3.4 requires National anti dumping authorities to consider for all relevant economic factors and indices having a bearing in the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity return on investment, or utilization of capacity, factors affecting domestic prices, the magnitude of the margin of dumping, actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment.

Further Article 3.7 requires National anti-dumping authorities to consider specific factors while determining whether a threat of material injury exists or not.

National anti-dumping authorities may cumulate injuries when (1) more than one exporting country is involved and (2) exporters from all of the exporting countries are engaged in dumping.

Under Article 3.5 Anti-dumping Agreement, national anti dumping authorities must take into consideration all of the relevant factors causing material injuries to domestic industry, including those other than dumping in assessing injury to domestic industry, and injury caused by those other factors must not be attributed to the dumped imports.

Domestic Industry

Anti Dumping Duty is imposed when there is a dumping that causes a material injury to a domestic industry and causation between the dumping and injury. The meaning of domestic industry is defined as:

"the domestic producer has a whole of the like products or those of them whose collective output of the products constitutes a major proportion of the total production of those products"

If a domestic producer is related to or affiliated with exporters or importers of the product in question or the domestic producer is an importer of the product, national antidumping authorities may decide that such a domestic producer should be excluded from the category of domestic industry.

The imposition of anti dumping measure

Professional measure

After an antidumping investigation is initiated, imports of the products under investigation may suddenly increase in anticipation of the imposition of an antidumping duty. Such a sudden increase in imports may cause damage to a domestic industry. When such an increase is likely to occur, national anti dumping authorities may impose a provisional measure.

Article 7 of the Antidumping Agreement regulates the imposition of professional measures by national antidumping authorities. National anti dumping authorities may apply provisional measures only after making a preliminary affirmative determination of dumping and determining that professional measures are necessary to prevent damage that may occur during the period of Investigation.

In general, provisional measures may be applied for no more than 4 months. Provisional measures may be applied for 6 (six) months, however, if requested by exporters that account for a substantial portion of the transactions in question.

Duration and review

An Antidumping duty shall remain in force only so long as and to the extent necessary to counteract the dumping that is causing injury. There is also an obligation to review the need for continued anti dumping duty after “a reasonable period of time”. Under a general “sunset clause”, in the Antidumping Agreement, antidumping duties must be terminated in any event on a date not later than unless it is determined that the expiry of the duty would be likely to lead to a continuation or recurrence of dumping and injury.

Price Undertakings (suspension of antidumping duty investigations)

Anti dumping investigations are costly and burdensome to exporters, importers, and national antidumping authorities. Settlements between exporters and national anti dumping authorities can save time and resources. Therefore, the Anti dumping Agreement permits a “price undertaking”, whereby an exporter subject to an antidumping investigation offers a price undertaking to the national anti dumping authority to the effect that there would be an increase of export price to eliminate the dumping margin or otherwise cease the alleged dumping.

If the anti dumping authority accepts this offer, the investigation is suspended. National anti dumping authorities may accept a price undertaking only after making an affirmative preliminary determination of dumping and injury caused by such dumping.

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THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES (SCM AGREEMENT)

Introduction

Basic Concepts

Types of Subsidy

Introduction

The Governments in order to achieve the object of export promotion, provides several export incentives to the exporters. However, the extent and the form of export incentives vary from country to country depending on the country's economic structure, its overall resource availability, its export potential, and the effectiveness of export incentives in realizing its export potential. Considering its fiscal structure, expenditure and budget constraint, each WTO Member country must decide how best to structure its export incentives that are consistent with the WTO rules.

The Agreement on Subsidies and Countervailing Measures (SCM Agreement), framed in the most recent round, namely Uruguay Round governs the conduct of Member countries with respect to all subsidies. The SCM Agreement is for all kinds of subsidies, domestic as well as export subsidies. It applies to all goods, agriculture as well as manufactured goods, but it does not apply to services. However, certain disciplines of the SCM Agreement do not apply to agriculture as disciplines elsewhere apply to subsidies to agriculture.

Not all export incentives are regarded as subsidies under the WTO Agreement. The SCM Agreement clearly specifies what export incentives constitute a subsidy and hence subjected to the disciplines of the SCM Agreement. The Agreement defines the term "subsidy" more clearly and has strengthened the disciplines over subsidies and countervailing duties.

Over the years as tariffs have been reduced and certain non-tariff barriers have been removed and as a competition has increased, there has been increasing tendency to use contingent measures such as Anti Dumping, Countervailing Duty and Safeguard Duty especially by the developed industrialized countries and also by developing countries.

These measures are supposed to advance “fairness “by checking against the unfairness in international trade. Countervailing Duty is imposed to neutralize adverse effects of export subsidies on the domestic industry of importing countries.

Export incentives play an important role in increasing exports from a country almost every country provides incentives to exporters. However, not all types of export incentives are actionable under SCM Agreement.

The agreement of subsidies and countervailing measures (SCM Agreement) under the Uruguay Round addresses two distinct but related issues. These issues related to:

The multilateral discipline (set of rules) the provisions of subsidies that a member nation must follow, and

Countervailing measures to neutralize the adverse effect of subsidised imports.

These sets of rules are enforced through invocation of WTO Dispute Settlement Mechanism (DSM). In precise subsidies are prohibited and certain other types of subsidies can be challenged if they cause adverse effects to the interest of other members.

Definition of Subsidy

A measure is defined to be a subsidy if it contains the following three elements:

financial contribution

The contribution is by a government or any public body within the territory of the member and

The contribution confers a benefit.

What constitutes financial contribution?

A Financial contribution could take the form of direct transfer or of income or price support. Direct transfers could take the form of grants, loans and equity infusion or could also be the potential sense when the government provides for loan guarantees. Government is deemed to have made financial contribution if revenue otherwise due to the government is not collected. For example, Fiscal incentives such as tax credit or where the government provides for goods and services other than general infrastructure, or purchase goods on favourable terms. A government may either itself carry out these functions or may entrust these to any Private agency.

Further, it is important to note that remission or drawbacks of duties on the inputs used in the production of exports is not considered a financial contribution on the inputs used in the production of exports is not considered a financial contribution, and so also government's financial contribution for general infrastructure such as rail, roads, ports etc.

A financial contribution by itself does not necessarily constitute a constitutive subsidy. The financial contribution must confer benefit to the recipient. Often, it is not easy to determine whether a financial contribution confers a benefit as the Agreement provides only a partial guide to whether a benefit is to be considered with reference to a commercial benchmark or with reference to the cost to the government. In the context of countervailing duties, the Agreement mentions that the benefit is to be assessed with reference to Commercial benchmarks.

What constitutes a benefit?

A government provision of equity capital is considered a benefit if an investment decision is considered inconsistent with the usual investment practice of private investors. Similarly, a government Loan or a loan guarantee is considered a benefit if the amount a firm actually pays is less than the amount that the firm would have paid if the same facility were to be availed on a commercial basis from the market. *Prime facie* all governments' financial contributions would seem to confirm some benefit to its recipient.

What does not constitute a benefit?

Government Provisions of equity capital, if a decision made is consistent with the usual investment practice of a private investor in the territory of that member.

Further, in order to constitute is subsidy and to be subjected to disciplines under SCM Agreement, a subsidy must be provided specifically to an enterprise or industry or group of enterprises or industries. Subsidies that are provided specifically to an enterprise distort the allocation of resources within an economy. On the contrary, subsidies that are widely available are presumed to be non- distortionary. Thus subsidies that are specific alone are subjected to SCM Agreement disciplines.

Specificity has been defined in terms of an industry, geographical region, prohibited subsidies (that favour exports over domestic sales), and where a subsidy is although not -specific but there are overriding reasons to believe the subsidy to be specific. However, schemes where objective criteria or conditions are laid down governing the eligibility for a subsidy, specificity is deemed not to exist.

Types of Subsidies

Prohibited Subsidies: Two types of subsidies are prohibited for most countries. These are subsidies that are contingent upon export performance (or export subsidies), or upon the use of domestic over imported goods (local content subsidy). Such subsidies are designed to affect trade, and are therefore likely to cause adverse effects to the interest of other members.

Subsidies contingent on export performances are prohibited. For example, export related exemptions, remission or deferral of direct taxes or excess exemption, remission or deferral of indirect taxes or import duties are contingent on export performance and hence prohibited. Similarly, currency retention schemes or practices which involve a bonus on exports. Internal transport and flight charges on export shipments provided for or mandated by the government on terms more favourable than for domestic shipments is yet another example of prohibited subsidies. The Agreement provides for an illustrative list of prohibited subsidies.

Import substitution which favours the use of domestic or imported goods. Under the Agreement, countries in general are prohibited from giving export subsidies and local content subsidy. If a member country provides prohibited subsidy then the issue can be taken to dispute settlement mechanism by any member country without any proof of its adverse effect.

Actionable Subsidies

Most domestic subsidies come under the category of actionable subsidy if they are specific to an enterprise or group of enterprises. These subsidies, although not prohibited, can be challenged, either through multilateral dispute settlement or through countervailing action, if such subsidies cause adverse effects to the interest of another Member.

Adverse effect can be caused in three possible ways: (i) injury (ii) nullification or impairment and (iii) serious prejudice.

Injury- If subsidized imports causes injury to domestic industry of the complaint Member, the Member can seek remedy against the subsidy. 'Injury' could be a current material injury in which case it must be based on evidence involving an objective examination of both volume of subsidized imports and its effect on the price. Injury could also be in terms of the threat of material injury in which case it must be based on facts and not merely on possibility. Finally, injury could also be in terms of material retardation of the establishment of a domestic industry.

Subsidy for cause injury can be challenged both at a unilateral and at a multilateral level. Countervailing action is a unilateral remedy whereas the dispute settlement mechanism provides for a multilateral remedy. In case of injury, both these remedies could be involved in parallel but only one form of relief is eventually available.

Nullification or impairment of benefits, that arises where improved access to market from a bound tariff reduction is undertaken by subsidization and that market.

Serious presidents arises where is subsidy leads to (a) displacement or impedance of the complaining member's export, either in the market of the subsidizing member or in a third country market (b) significant price undercutting or price suppression or (c) an increase in the subsidizing Member's world market share in a subsidized primary product of commodity.

Nullifications / impairment and serious prejudice can form the basis for a complaint related to harm to a Members exporting interest and can be challenged at the multilateral level Dispute Settlement Mechanism.

Non -actionable Subsidies

The SCM Agreement identifies three specific subsidies which are non actionable and therefore cannot be challenged multilaterally or be subject to countervailing action. These subsidies relate to research subsidies, assistance to disadvantages and environmental subsidies. These subsidies are either unlikely to cause adverse effects or are considered to be of some merit and thus not to be discouraged. However, the subsidies are no longer permitted as the time period for review is lapsed. Therefore, non specific subsidies are not actionable.

Non-specific and non-actionable subsidies

Subsidies that cannot be identified as being given specifically to any industry or an enterprise or a group of industries or enterprises or are defined geographically could be given by the government. The basic idea is that such subsidy should not be seen as being given to any particular product. For Example, investment subsidies and tax subsidies given to small-scale industries, defined in terms of its investment in plant and machinery, could be given without inviting any CVD action because the term small-scale industries is objectively defined.

Countervailing measures

Countervailing measures are unilateral remedy applied by a member only after investigating the case in accordance with the criteria laid down in the SCM agreement. To be able to impose countervailing duty the Member country must establish the following three substantive aspects (1) that the imports are subsidised (2) that an injury is caused to the domestic Industry (3) that there existed causal link between the subsidised imports and the injury. There is a well laid out procedure to be followed in the conduct of countervailing investigation and the imposition of countervailing measures. Failure to respect either the substantive and procedural requirement can be taken to dispute settlement and can form the basis for invalidation of the measure.

A certain administrative framework is called for under the SCM Agreement under the aegis of which the decision to impose countervailing duties will be carried out: a formal Investigation must be initiated during which rights of affected parties will be protected essentially through the transparency of the whole exercise.

Investigation

Initiating an investigation

An investigation can be initiated either by, or on behalf of, the domestic industry producing the like products or by domestic authorities of their own Accord. The petition must include sufficient evidence that a subsidy has been granted that resulted in injuring the domestic industry producing the like product. The Agreement does not provide for an exhaustive list of what must be included in the petition. It does, however, provide indications. All petitions must at least contain the following information:

- The identity of the applicant
- A description of the subsidized product
- A description of the nature and amount of the subsidy in question and
- Evidence of injury caused to domestic industry producing the like product.

Evidentiary Issues

The application must contain “sufficient evidence” of the existence of a subsidy that causes injury to domestic industry producing the like product. National authority investigating the matter determines whether the evidence submitted is sufficient to justify the initiation of an investigation.

The WTO imposes certain limits like, each member must ascertain the adequacy and accuracy of evidence presented "to determine whether the evidence is sufficient to justify the initiation of an investigation" There shall be immediate termination in case where the amount of a subsidy is *de minimis,* or where the volume of subsidized imports, actual or potential, or the injury , is negligible. The amount of the subsidy shall be considered to be *de minimis* if less than 1 per cent ad valorem. Sufficient evidence does not, however, amount to full proof, "sufficient" in this context means there is probable cause for an investigation.

The duties of investigating authority

Investigating authorities must review the accuracy of the submitted information and provide an assessment of whether such information constitutes sufficient evidence.

Investigating authority must complete the investigation within 18 months. During the investigation period, procedures of customs clearance may not be hindered. Investigating authorities are responsible for gathering and handling the evidence. They have a duty to invite all interested parties to participate in the hearings.

The authorities must respect certain confidentiality requirements. They may not disclose any confidential information without specific permission of the party submitting it, but they may ask the latter to provide non confidential summaries of confidential information that provides a reasonable understanding of the issue. In the absence of objections, investigating authorities may conduct investigations in the territory of other Members and even on the premises of the subsidized firm.

Provisional Application

WTO members can impose countervailing duties after first making a preliminary determination that is subsidy is causing or threatening to cause injury to domestic industry, provided that:

Such duties are not applied sooner than 60 days after the initiation of the investigation. Such duties are limited in time (not exceeding 4 months, roughly 120 days). The relevant provisions of

Article 19 of the SCM Agreement have been followed. This Article deals with the imposition of definitive countervailing measure.

Determination of Subsidy

The SCM Agreement does not dictate a particular method of calculating a subsidy in terms of the benefit that the recipient has received. Regulatory diversity is condoned, imposing, however, the obligation to adopt "transparent inadequately explained" methods.

Equity infusions by the government will not automatically be considered as a benefit to the recipient if they correspond to a private investor's criteria.

When it comes to government loans, only the difference between commercial and governmental paid loans, will qualify as benefit. The same is true for loan guarantees. With respect to provisions of goods and services or purchase of goods, benefit will be the difference between the prevailing market conditions and price paid by the government.

Determination of injury

Under the SCM Agreement, injury means "material injury to the domestic industry, threat of material injury to the domestic industry or material retardation of the establishment of such an industry". The term "material injury" to be distinguished from the term "serious injury". The term "material injury" appears in both the Antidumping Agreement and the SCM Agreement and the term "serious injury" appears in the Safeguard Agreement. The appellate Body has concluded that the standard of "serious injury" is higher than that of "material injury". As far as threat of injury is concerned, the SCM Agreement requests extra care by the authorities about to take corrective action through recourse to this ground.

The term "material retardation" is not interpreted in the SCM Agreement. It must be assumed that the analysis relevant for the determination of injury must also be relevant to show material retardation. Investigating authorities must demonstrate injury based on "positive evidence" about both (1) the volume of subsidized imports on prices of the domestic like product and (2) the impact of such imports on the domestic producers of such product.

Domestic Industry

Definition of “domestic industry” in the SCM Agreement is similar to the definition of the same term domestic industry in the Antidumping Agreement. As a general rule, domestic industry includes domestic producers of like products as a whole or a “major proportion” of such producers. Domestic producers that are related to exporters and importers may be excluded. In exceptional cases, domestic industry may be defined by regional market, provided that there is a concentration of imports into the market causing injury to “almost all” of the producers in that market.

Causation

Article 15.5 of SCM Agreement requires a showing of causation between the subsidized imports and the injury to domestic industry producing the like product. The WTO Members wishing to impose countervailing duties must:

Show that subsidized imports to the effect cause injury to the domestic industry.

Not attributed to factors other than the subsidized imports any injury caused to the domestic industry.

Causation in the SCM agreement is similar to that in the Antidumping and Safeguards Agreement and interpretation rendered by WTO adjudicating bodies under those agreements will be applied to the SCM Agreement.

The Imposition of Definitive countervailing duties

WTO members may impose definitive countervailing duties only after making a final determination that countervailable subsidy exists and that such subsidy causes injury to the domestic industry. The amount of countervailing duties may not exceed the amount of the subsidy found to exist. However, the countervailing duties be limited to the amount necessary to counteract the injury caused if such amount is less than the amount of the subsidy found to exist.

Duration and review

One of the novelties of the SCM Agreement is a "sunset clause" (Article 21), under which all countervailing duties will lapse at, the latest 5 years after the imposition, unless the investigating authorities determine "that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury.

The review of countervailing duties may take place before the 5 years period on the initiative of the investigating authority following a request by an interested party.

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DISPUTE SETTLEMENT PROCESS UNDER WTO

Dispute Settlement Understanding

Organization and Structure of the Dispute Settlement System

Implementation of the rulings

Applicable Law and Rules of Interpretation

Dispute Settlement Understanding

The Dispute Settlement Understanding (DSU) is one of the Core Agreements establishing the World Trade Organization. The purpose of dispute settlement, according to DSU, is to clarify the provisions of the WTO Agreements in accordance with the customary rules of interpretation of public law. It is modeled on the adversarial system of settlement which postulates equality of parties before the adjudicating body. It is a rule based system of dispute settlement rather than power oriented diplomatic solutions.

Organization and Structure of the Dispute Settlement System

There are five components of the dispute settlement mechanism–

- The Dispute Settlement Body (DSB);
- Good Offices of the Director General;
- Dispute Panel;
- The Expert Review Group; and
- The Appellate Body.

The Dispute Settlement Body (DSB)

Article 2 of the Dispute Settlement Understanding provides for establishment of a Dispute Settlement Body (DSB). The DSB has the authority to adopt panels and appellate body reports, maintain surveillance of implementation of rulings and recommendations and authorize suspension of concessions and other obligations under the covered agreement. DSB shall also inform the relevant WTO councils and committees and shall meet as often as is necessary. The recommendations or rulings made by DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations of the members. It will also be the aim of the DSB system to properly settle situation where a member considers that any benefit accruing to it directly or indirectly under various Agreements is being impaired by measures taken by another member and such impairment is in conflict with effective functioning of the WTO.

Good Offices of the Director General

The Director General can be asked to offer his good offices. Where consultations, which have to precede the reference of dispute to a panel fail and where both parties agree, the case can be brought before the Director General who acting in his *ex officio* capacity, will be ready to offer his good offices, conciliation or mediation to settle the dispute. Good offices, conciliation or mediation may be requested at any time by any party to a dispute. They may begin at any time and be terminated at any time. Once procedures for good offices, conciliation or mediation are initiated, a complaining party may then proceed with a request for the establishment of a panel.When good offices, conciliation or mediation are entered into within 60 days after the date of receipt of a request for consultations, the complaining party must allow a period of 60 days after the date of the request for consultations before requesting the establishment of a panel.

The complaining party may request the establishment of a panel during the 60 day period if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute Where a request is made by a least developed country, the Director General is bound to offer his good offices with a view to assisting members to settle disputes. In offering his good offices he is likely to offer his personal advice as well as the advice of key advisors from WTO Secretariat including the Head of the Legal Division. Such advice is not binding and cannot be cited in a later disputes panel repot.

Dispute Panel

Dispute Panel is the other important component body of the dispute settlement mechanism. It is established by the DSB under Art 6 of the DSU and consists of three to five independent panelists chosen from a list of potential panelists maintained by the WTO Secretariat. They should be men and women of sufficiently diverse background and the wide spectrum of experience. A Government and/or non-government individual who has served on some form of a panel in the past or presented a case to a panel, or acted as a government representative under GATT or on a WTO Council or Committee or has been employed as an expert by the WTO Secretariat is eligible to become a panelist. Those who have taught or published in the field of international trade law or policy, or have served as a senior trade policy official of a WTO member also qualify to become panelists if their names are included in the list prepared by the Secretariat. The Panel performs two functions:

1. Thorough investigation of the facts of the dispute taking into account the terms of the particular agreement alleged to be breached, andin the event of failure of the parties to a dispute to reach an acceptable agreement during the investigation, submission of a written report to the DSB.
2. The Panel's report should set out the panel's findings of facts, the applicability of relevant agreement provisions and the reasoning behind its recommendations.

The Expert Review Group

The Panel can seek information from any individual or group. It also has a discretionary authority to consider or reject *amicus curie* briefs. Where the Dispute Panel is considering a matter of a particularly technical nature, it may, with the consent of both the parties to disputes, set up an Expert Review Group (ERG). An ERG consists of experts in the particular field under investigation. The ERG takes its reference from the Panel and submits a written report to the latter.

The Appellate Body

The Appellate Body, a standing body established by the DSB consists of seven members who are appointed for a term of four years with one possible extension of four years. The Appellate Body members must be individuals of recognized standing in the field of law and international trade. They should not be affiliated to any government. They are appointed on the basis of a joint proposal forwarded by the Director General, the SDB Chairman and the Chairman of the General Council and the Trade Councils. Its proceedings are confidential and based on information already provided in the dispute panel report. It gives its considered opinion in the form of a written report on the issues of law covered in the Panel report and the legal interpretation developed by the Panel. It can uphold, modify or reverse the legal findings and conclusions of the Disputes Panel. Its recommendations are deemed to have been accepted unless they are rejected unanimously by the DSB. It is pertinent to note here that the DSB cannot refuse to adopt a report absent consensus and consensus requires at a minimum that the prevailing party does not object it.

Appellate Body reports, like panel reports, bind only the parties to a particular dispute and do not create binding precedent. The Appellate Body generally pays due regard to its previous decisions, although it is not obliged to follow them. Regarding the extent to which Panels will treat Appellate Body reports as authoritative. It is reasonable to presume that, absent unusual circumstances Panels will follow the decisions of the Appellate Body in much the same way that a lower court follows the decisions of a higher court.

Adjudication Process in the WTO dispute settlement mechanism

The dispute settlement procedure involves following stages:

1. mutual consultations;
2. proceedings before the Dispute Panel;
3. proceedings before the Appellate Body; and
4. Implementation of the rulings.

Mutual Consultations

Consultations are to precede the reference of the dispute to the Panel. Where a dispute arises the aggrieved member should make a request for consultations with the offending member. The request must be sent to the DSB in writing. Unless otherwise mutually agreed the offending member should send its reply within 10 days and consultations should commence within 30 days of the original request. Where a case involves perishable goods or is urgent, the reply and commencement of consultations should take place within 10 days of the original request. The Director General may be asked to provide his good offices to settle the dispute. Article 24 requires the complaining member to exercise the restraint when the targeted member happens to be a least developed country. Article 4.1 provides that during consultations special attention should be given to the particular problems and interest of developing country members. The good offices procedure may continue while the Dispute Panel process is in the progress, if both parties agree to it.

Proceedings before the Dispute Panel

The complaining member may request the DSB to establish a panel to examine the case if no solution is found within 60 days of consultations. After receiving the request the DSB will establish a panel not later at 2nd DSB meeting. The Dispute Panel is to be constituted within 20 days of the DSB's decision to establish it. Its terms of reference and mandate are determined by the DSB in accordance with Article 7 of the DSU, special terms may be employed if both parties to the dispute agree within 20 days of the establishment of the Dispute Panel. Composition of the Panel is decided by the Secretariat. If parties do not agree on the composition of the panel, the Director General in consultation with the Chairman of the DSB and the Chairman of the relevant WTO Councils will make the nominations. Where the dispute is between a developed and a developing country, a panelist from developing country shall be included, if developing country so requests.

The Panel is required to complete the examination of the case before it and produce a final report within six months and in the case of urgent within three months. It should never take more than nine months. It is required to hold meetings with both parties at least twice and also with third parties. It can seek information from any source.

It is the Panel’s duty to make an objective assessment, as required by Art 11 of the DSU, of the case before it and it should continue, throughout the course of its investigations, to encourage the parties to the dispute to settle the matter voluntarily. After the Panel has considered the written and oral evidence of both parties to dispute, it will distribute the factual and argument sections of its report to the parties for their perusal. The parties will then submit their written comments within a time period set by the Panel. Following receipt of both parties’ comments on the descriptive sections of the report the Panel will issue an interim report to the parties of its findings and findings and conclusions. It will set a period of time in which the parties can respond to the interim report and this may include a further meeting to discuss any written comments made. Where no comments are made on the interim report, it will be considered as the final report and submitted to the DSB which should adopt it within 60 days of issuance unless either one of the parties to the dispute indicates that it intends to appeal or a consensus emerges in the DSB against adoption.

A Panel enjoys a margin of discretion in assessing the value of the evidence and the weight to be ascribed to that evidence. It is entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements. In other words ‘a panel’s appreciation of the evidence falls in principle, “within the scope of the panel’s dispute as the trier of facts”. In assessing the Panel’s appreciation of the evidence, the Appellate Body cannot base a finding of inconsistency under Article 11 simply on the conclusion that it might have reached a different factual finding from the one the panel reached.

Before the DSB can consider adopting the report, it must first circulate it to the other Members. Members who object to the report then have the opportunity to write to the DSB outlining those objections at least 10 days before the meeting at which the Dispute Panel report is due to be discussed. For this reason, the DSB has to wait at least 20 days after circulating the report to Members before holding an adoption meeting. Provided that no appeal has been lodged against the Dispute Panel report and that there is no consensus against adoption, the DSB will automatically approve the Panel’s recommendations at the adoption meeting.

Proceedings before the Appellate Body

Either party to the dispute may appeal against the final report of Dispute Panel to the standing Appellate Body. Proceedings before the Appellate Body are now governed by the Working Procedure for Appellate Review 2000. The participants and the third party participants submit their submissions. It is followed by an oral hearing in which the participants and the third participants present oral arguments and respond to questions put to them by Members of the Division hearing the appeal. The Appellate Body may receive and consider *amicus curie* briefs but it may or may not address in its report, the legal arguments made in such a brief. It may allow a third party which did not file a third participant's submission in the appeal, to attend the oral hearing as a passive observer on the request of such party.

The Appellate Body will review the existing evidence and should aim to report to the DSB with its findings within 60 days and certainly never more than 90 days. The DSB must adopt the Appellate Body report within 30 days of issuance, unless there is consensus against adoption. Appellate Body Reports that are adopted by the DSB are, as Article 17.4 of the DSU provides, unconditionally accepted by the parties to the dispute and, therefore, must be treated by the parties to a particular dispute as a final resolution to that dispute.

When the Appellate Body reaches a different conclusion on a question of law than that of the Panel, it makes the legal analysis with a view to facilitating the prompt settlement of the dispute pursuant to Article 3.3 of the DSU. The only caveat is that it does so only when the factual findings of the panel and the undisputed facts in the panel report provide the Appellate Body with a sufficient basis for its own analysis. If the factual findings of the Panel are not there, the Appellate Body refrains from completing the analysis. Since there is no procedure under the WTO dispute system for remand of such an issue to the original panel, the Appellate Body is not in position to fully address it.

Implementation of the rulings

At a DSB meeting to be held within 30 days after the adoption of the Panel report or Appellate Body report, the party concerned must state its intentions in respect of the implementation of the DSB's recommendations. The DSB will allow the concerned party a reasonable period of time to implement the recommendations. In any event that reasonable period should not normally exceed 15 months from the report's original date of adoption. In the event of a party's failure to comply with the recommendations within the set time, it must enter into negotiations with the complainant in order to decide on a mutually acceptable level of compensation. If, after 20 days of the expiry of the reasonable time no acceptable level of compensation has been agreed, the complainant may request authorization from the DSB to suspend concessions or obligations due to the offending party under the particular agreement in question. The DSB should grant the request for suspension of concessions or obligations within 30 days of the expiry of the reasonable time unless there is a consensus against doing so. If the offending party objects to the level of suspension granted by the DSB, it can request that the matter be sent to arbitration. Arbitration should be completed within 60 days of the expiry of the reasonable time and its decision is final. On request from the complainant, the DSB will then authorize the suspension of concessions or obligations as recommended by the arbitration board unless there is consensus against doing so.

In principle, the DSB or arbitration body, should authorize or recommend the suspension of concessions in the same sector of an agreement. However, if this is not practicable or does not produce the desired effect, authorization may be granted to suspend concessions in a different sector of the same agreement. In general terms, withdrawal of concessions will take the form of increased import duties.

As can be seen from the above, the DSB monitors the implementation of adopted panel and Appellate Body reports and recommendations. In the DSB's meeting held within 30 days of the adoption of the panel report or Appellate Body report the member concerned is required to convey its intention in respect of the implementation of the rulings of the DSB. The DSU expects prompt compliance of the ruling. In any case it must be implemented within a reasonable period of time. While the full implementation of the ruling is mandatory, there are two interim measures that can be resorted to pending full implementation of the ruling:

- compensation and
- retaliation.

As for the reasonable period of time, Article 21.3 provides that it shall be period of time proposed by the Member concerned and approved by the DSB. In the absence of such approval it shall be a period mutually agreed upon by the parties within 45 days after the adoption of the report. If no such agreement materializes, a period of time determined by the arbitrator who is normally a member of the Appellate Body within 90 days after the adoption of the report. The reasonable period of time determined by the arbitrator has been between 6 to 15 months.

Applicable Law and Rules of Interpretation

The Panels and the Appellate Body decide the cases brought before them according to the relevant provisions of the WTO Agreements and covered Agreement cited by the parties to the dispute. Reported decisions of prior dispute settlement panels which include the report of GATT panels and WTO panels and report of the Appellate Body also provide necessary guidelines in the adjudication. Palmeter and Mavroidis argue that all the sources of law set out in Article 38(1) of the Statute of the International Court of Justice are the potential sources of law.

The purpose of dispute settlement is to clarify the provisions of the WTO agreements in accordance with customary rules of interpretation or public international law. WTO Dispute Panel and the Appellate Body may have a resource to the teachings of the most highly qualified publicists, but they have been reluctant to do so.

WTO panels and the Appellate Body have invoked general principles of law in support of their reasoning. For example they have applied the equitable principle of estoppel.

Another point which deserves some consideration is whether GATT and other treaties cited by the parties to the dispute could be considered successive treaties relating to the same subject matter within the meaning of Article 30 of the Vienna Convention on the Law of Treaties, 1969. It is submitted that the WTO panels and the Appellate Body should follow the rules of interpretation as provided for in Article 31 and 32 of the Vienna Convention.

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UNIT III

Synopsis

- International Sale of Goods
- Formation of International Contracts
- Performance of International Contracts
- Various Forms and Standardization of Terms
- Acceptance and Rejection of Goods
- Frustration of Contract
- Invoices and packing
- Product liability

INTERNATIONAL SALE OF GOODS

Never has the increase in international commerce been as significant as it has been during recent decades. Many difficulties occur in the context of an international sale of goods because of the considerable differences in the national rules governing the law of sales. Thus, the expanding volume of international sales requires a common understanding of the legal rights and duties among partners to an international transaction.

The CISG is understood as a modern uniform substitute for the wide array of foreign legal systems. It is based on the Uniform Law for the International Sale of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), drafted by the "Rome Institute." These two Conventions had a rather limited success; only nine countries have become members. The United Nations Commission on International Trade Law (UNCITRAL), therefore, in a further attempt to unify the law governing the international sale of goods, prepared the Draft Convention on Contract for the International Sale of Goods. This was finalised at a diplomatic conference in Vienna in 1980 and entered into force in 1988.

The CISG harmonised interests and ideas of different legal systems and of countries on different levels of economic development. Thus, a text that is suited for implementation in civil law countries and common law countries and for economies that are developed and those which are developing.

According to Article 1, the Convention applies to international contracts for the sale of goods (if the parties have not rejected its application in their contract - Article 6) when the States where the parties have their places of business, are in different contracting states, or the rules of private international law lead to the application of the law of a Contracting State.

The CISG is an international set of rules designed to provide clarity to most international sales transactions involving the sale of goods. The CISG went into effect on January 1, 1988. The CISG can be both a discretionary and mandatory set of rules. It is discretionary when both parties agree to be bound by its rules; it has mandatory application when the parties do not choose to use it but become bound to it by virtue of its automatic application. As a result of the mandatory application of the CISG, most international sale of goods contracts with parties in western countries will be subject to the CISG, unless specifically excluded in accordance with the CISG's terms.

The purpose of the CISG is to make it easier and more economical to buy and sell raw materials, commodities and manufactured goods in international commerce. Without the Convention, there is greater room for uncertainty and disputes. The trading law of one country often differs from that of another. In international transactions, there is often doubt about which nation's law is in control. Where there is doubt about the rules that apply, the parties cannot be sure of their rights and obligations. Such uncertainty breeds inefficiency and mistrust.The CISG does not deprive parties to the contract of the freedom to form their contracts to their specifications. Generally, the parties are free to modify the rules established by the Convention or to agree that the Convention is not to apply at all.

Domestic law also affects the International Sale of Goods provided that no inconsistency arises between the application of these domestic laws and the performance of the country's obligations under any international conventions.

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FORMATION OF CONTRACT

Introduction
Offer
Acceptance of Rejection
Standard Form Contracts

Introduction

The Vienna Convention adopts the traditional offer-acceptance framework for determining the existence of a contract. Consideration, a concept found in common law, plays no role. However, the common lawyer will find much that is familiar and unfamiliar in the formation of contract under the Vienna Convention. No specific formal requirements are imposed and a contract can be concluded in any form, oral exchange or otherwise. Article 11, however, was the subject of some debate since socialist countries such as Russia, used to strict formal requirements for international trade transactions, were unhappy with contracts coming into existence on the basis of oral communication; similarly, with modification and termination. It was therefore agreed that states requiring written communication could make a reservation under Art 96. Once a reservation is made under Art 96, it is mandatory and the contracting parties cannot agree to depart from the writing requirement. To illustrate, a contract of sale between two parties with places of business in contracting states, one of whom has an Art 96 reservation, will not be able to opt out of the formal requirement that the contract be in writing.

Offer

An offer, under the Vienna Convention (Art 14):

• must be addressed to a specific person;

• must be sufficiently definite (that is, the offer must indicate the goods and fix the quantity and price explicitly or implicitly); and

• must indicate the intention on the offeror's part to be bound in the event of acceptance.

While Art 14 states that the price must be fixed either explicitly or implicitly, Art 55 of the Vienna Convention goes on to state:

Where a contract has been validly concluded but does not expressly or implicitly fix or make provision for determining the price, the parties are considered in the absence of any indication to the contrary to have impliedly made reference to the price generally charged at the time of the conclusion of the contract or such goods sold under comparable circumstances in the trade concerned.

It seems there is a conflict between Art 14 and Art 55. Article 14 seems to suggest there is no offer if the price is not fixed, either implicitly or explicitly, whereas Art 55 suggests there is a contract even in the absence of explicit/implicit agreement o fprice. Unsurprisingly, there are disparate opinions among scholars in respect of the interplay between Arts 14 and 55. Honnold is of the opinion there is no contradiction –

Art 14 is concerned with offers and the emphasis of Art 55 is on contracts that are validly concluded but have not made express or implied provision for determining the price. There is support for this view from other scholars as well. The alternative view is that Art 55 is of relevance to those contracting states to the Vienna Convention who have made a reservation that they will not be bound by Part II. As for case law, Art 55 has been cited in a number of judgments. The earliest cases relating to undetermined price emanated from Hungary. In the first case, *Adamfi Video Production Gmbh v Alktok Studisa Kisszovetkezet*, the price, using Art 9(1), was determined on the basis of past course of dealings between the parties and no reference was made toArt 55. The next case, *United Technologies (Pratt and Whitney) v Malev Hungarian Airlines*, involved sale of engines by the plaintiffs for Boeings that Hungarian Airlines were planning to buy. The offer did not quote an exact price but the court at first instance held that a contract was concluded since the offer made provision for the quantity and price. On appeal, the Supreme Court overturned the decision holdingthat for the purposes of Art 14(1) a bid is properly defined if it indicates the products, the quantity and the price, or contains directions as to how these terms can be defined. Article 55 could not be used to determine the price for a product like a jet engine which has no market price. A rather surprising interpretation of Art 55, given that it does not differentiate between products for the purposes of determining price.

Flechtner is critical of the decision in this case and it is difficult not to agree with him. He says:

The decision is subject to several criticisms. First, it rewards Malev's bad faith in repudiating an agreement that, when made, the buyer almost certainly assumed was binding. Imagine if the tables were turned, and it was Pratt and Whitney who refused to sell the engines after Malev had committed to purchase the Boeing aircraft. Secondly, the decision ignores the international character of the convention by straining for an interpretation favourable to the party of the same nationality as the court.

However, not all decisions are as extreme nor preclude the view that there is a valid contract where no price has been fixed. In *Arbitration Case of Bulgarian Chamber of Commerce and Industry 14/98 Bulgaria, 30 November 1998*, the tribunal concluded that in situations where the price is only tentatively defined it does not follow that there is no valid contract for sale. The issue was to be determined as provided for by Art 55 –that is, in terms of the price generally charged at the time of the conclusion of the contract for such goods sold under comparable circumstances in the trade concerned. It is not absolutely clear from the case as translated whether the parties had indicated a price range. Cases from other jurisdictions also indicate that Art 55 is relevant where no price is agreed, lending support to the view taken by Honnold. An offer, not unlike the rule in common law, is effective upon receipt. Unlike common law, the Vienna Convention makes room for a firm offer.

Acceptance or Revocation

As for revocation of an offer, rules differ among civil law and common law traditions. At common law, an offer can be revoked any time before acceptance even where the offeror agrees to keep the offer open until a fixed date. One way for the offeree to protect himself against revocation is to provide consideration. In the civil law tradition on the other hand, where a period of time is fixed, the offeror cannot revoke the offer during that period. The issue of revocability of offer is addressed in Art 16. It is a peculiar provision proneto either a common law biased or a civil law biased interpretation. According toArt 16(1), 'until a contract is concluded, an offer may be revoked if the revocation reaches the offeree before he has dispatched the acceptance'. There is much that is familiar to the common law system in this provision. Article 16(2) then goes on to say that 'an offer cannot be revoked (a) if it indicates, whether by stating a fixed time for acceptance or otherwise, that it is irrevocable, or (b) if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer'. Equally, there is much that is familiar to the civil law system in para 2. Given that Art 16 reflects rules that are familiar to both sides, there is a real danger that in interpreting this provision emphasis will be put on the part that is most familiar. To illustrate: if an offer states 'Please reply by 29 January', it is likely to be interpreted as giving a fixed time for acceptance by the civil law tradition, whereas the common law tradition will see it as simply indicating when the offer is to lapse, not irrevocability. It has been suggested by various commentators that the provision should be interpreted independently of any legal doctrine the lawyers may bring with them.

To superimpose a received doctrine in its interpretation, as Sono states, would 'distort the convention's rules, which are in fact tailored to meet the reasonable expectations of the business community'. According to Schlectriem, the stating of a period of acceptance by the offer simply creates a rebuttable presumption of irrevocability and Art 8 should be used to establish the intention of the parties. In order to accept, the offeree needs to indicate his assent either with a statement or other conduct. Mere silence on his part will not constitute an acceptance (Art 18(1)). Acceptance of the offer becomes effective when it is received by the offeror (Art 18(2)), though it can be withdrawn before the acceptance reaches the offeror orat the same time as the acceptance would have become effective (Art 22). As indicated earlier, it is possible under the Vienna Convention to conclude a contract orally. If the offer is an oral offer, then acceptance to an oral offer must be immediate according toArt 18(2). Presumably, it will not be possible to withdraw an oral acceptance to anoral offer since Art 22 envisages that the acceptance is not immediate but will take time to reach the offeror.

Standard Form Contracts

In international trade, it is not uncommon for merchants to use their standard forms reflecting terms that are beneficial to the merchant who has drafted the form. Often the acceptance sent on a standard form is likely to be on terms different from those found in the offer. In these circumstances, the issue is to establish the terms on which the contract is concluded. Common law follows what is often called the mirror image rule – that is, the offer and acceptance must match. Where the terms of the purported acceptance are different from that of the offer, it is a counter-offer. So, even a slight variation would constitute a counter-offer. The Vienna

Convention, while adopting the mirror image rule, allows for some distortion. While Art 19(1) unambiguously states that ‘a reply to an offer that purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer’, Art 19(2) states that a reply which contains additional or different terms which do not materially alter the terms ofthe offer will constitute an acceptance, and the contract terms will consist of those in the offer along with the modifications in the acceptance unless the offeror objects.

However, where the acceptance contains terms that materially alter the terms of the offer, then the purported acceptance will be a counter-offer. The Vienna Convention provides an inexhaustive list of terms that are likely to be regarded as material alterations. These according to Art 19(3) are terms relating to price, payment, quantity, place and time of delivery, extent of one party’s liability to the other and settlement of disputes. It seems therefore that only minor changes are likely to be treated as immaterial – for instance, where an offer quotes the price FOB Singapore and the acceptance states Free on Board Singapore.

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PERFORMANCE OF CONTRACT

Obligations of the seller

Obligations of the buyer

Obligations of the seller

According to Art 30, the seller is under an obligation to:

• deliver goods;

• hand over the documents; and

• transfer property in the goods.

The Vienna Convention does not list the kind of documents the seller is required to hand over to the buyer. In international sales, it is usual for the seller to require certificates of origin, quality, transport documents and other documents required for customs clearance. The sale contract would stipulate the documents required. Use of trade terms would also indicate the minimum requirements in respect of documents to be tendered to the buyer. The obligation to deliver is dealt with in Art 31. The sale contract is likely to stipulate the particular place where delivery is to take place. In the absence of such a stipulation, according to Art 31, delivery is dependent on the circumstances. So,where the contract of sale involves carriage of goods, then delivery will take place when the goods are handed over to the first carrier for transmission to the buyer.If the contract of sale does not involve carriage of goods, and where the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and the parties knew that the goods were at a particular place or to be manufactured at a particular place, delivery takes place when the goods are placed at the buyer's disposal at that place according to Art 31(b). In all other cases, delivery takes place when the goods are placed at the buyer's disposal at the seller's place of business at the conclusion of the contract according to Art 31(c).The Vienna Convention is silent as to whether the seller needs to satisfy any formalities in placing the goods at the buyer's disposal. Presumably, he will have to notify the buyer that the goods are at his disposal so that he can take over the goods thus enabling the passing of risk from the seller to the buyer. It is more than likely that Art 31 will be of limited use since it is likely that parties have used trade terms in their contract of sale. However, use of trade terms may itself cause problems. If INCOTERMS are used, then no doubt it embodies a uniform approach to a number of obligations from delivery, passing of risk to obtaining of export and import licences. Where parties have not referred to INCOTERMS specifically, then it may cause problems since trade terms may be interpreted differently in different jurisdictions. The situation gets more complicated where the parties agree on terms not widely used such as 'CIF landed port of destination'. The matter will presumably be resolved by looking to Arts 8, 9 and choice of law. As for the date of delivery, the sale contract would normally stipulate this – it could be a fixed date or within a fixed period or on the happening of an event such as the buyer opening a letter of credit. According to Art 33, delivery should take place if the date is fixed on that date. Where the parties agree on a period of time, then within that period. The choice of when to deliver within that period will be the seller's unless circumstances indicate that the buyer is to choose the date. Resort to Art 8 may berequired to establish the parties' intention. Where the agreement does not indicate a fixed period or a fixed time, goods are to be delivered within a reasonable time after conclusion of the contract. What is reasonable will inevitably depend on the circumstances of each case. Equally, where the seller is required under the contract to handover documents, he is required to do so at the time and place agreed by them. As for goods that are delivered, Art 35(1) requires that they are of the quantity, quality and description required by the contract, and are contained or packaged in the manner required by the contract. Goods will not conform if they are not fit for the purpose for which goods of the same description would ordinarily be used (Art 35(2)(a)), are not fit for the particular purpose made known to the seller expressly or impliedly (Art 35(2)(b)), do not possess the qualities of goods which the seller has held out to the buyer as sample or model (Art 35(2)(c)), are not packaged in the usual manner, or adequately to preserve and protect the goods (Art 35(2)(d)).

Obligations of the buyer

The buyer is obliged to take delivery of the goods under Art 53, and Art 60 obliges the buyer to doing all acts which could reasonably be expected of him in order to enable the seller to make delivery and in taking over the goods. He is also placed under a duty to examine the goods once the goods have been delivered and give timely notice in the event of non-conformity of goods.

Unlike ULIS, which requires the buyer to examine the goods promptly, under Art 38(1) of the Vienna Convention the examinationof the goods must take place within as short a time as is practicable in the circumstances. Under Art 38(1), it is not a requirement that the buyer personally examines the goods. The goods may be examined by his employees or through others appointed by him for that task. It could also be a third party, such as the second buyer, who has bought the goods during transit from the first buyer. Most international sales are likely to involve the carriage of goods where the seller might be involved in arranging the shipment of goods as in CIF sales or loads the goods on the vessel nominated by the buyer as in FOB sales. It may not be practicable to inspect the goods at the point of departure. The same applies to the case where the goods are sold during transit. The buyer might not have the time to examine the goods or it may be difficult to remove all the packaging to examine the goods. Article 38 is sympathetic to the various practices found in international sales and the contingencies that may arise. Article 38(2) provides that, where the contract involves carriage of goods, examination may be deferred until the goods have arrived at the destination. Where the goods are redirected or redispatched by the buyer without a reasonable opportunity to examine them and where the seller knows orought to have known of the possibility that goods are likely to be redispatched or redirected at the conclusion of the contract, examination may be deferred until after the goods have arrived at the new destination. The seller is likely to know of such a possibility, for instance, where the buyer requests the seller to give him a transferable bill of lading. Of course, the extension allowed for the purposes of examination of goods places the seller in a difficult situation but, according to Art 38(3), it seems that the buyer has to establish that the seller knew or ought to have known of the redirection at the time of conclusion of the contract. It is often said that Art 38(3) is incomplete since it does not address resale by the buyer. As Bianca and Bonnell observe, however, resale in most cases is likely to involve redispatch or redirection in transit. Where the goods are packed in a manner for resale to consumers, then Art38(1) is relevant.

It is not clear from Art 38 whether the examination has to be thorough or whether examination of a random sample is sufficient. It seems from the Commentary, the method of examination is to be determined on the basis of what is acceptable ininternational usage. Past practices between the parties may also be a relevant factor. Of course, it is always open to the parties to specify the level and kind of examination in their agreement. Interestingly, ULIS in Art 38(4) in relation to examination states that ‘the methods of examination shall be governed by agreement of the parties or, in the absence of such agreement, by the law or usage of the place where the examinationis to be effected'. It is inevitable that reliance on the law or usage of the place will introduce a considerable degree of uncertainty and the drafters of the Vienna Convention decided not to include a similar provision but instead indicating in the *travaux preparatoire* that international usage would be relevant. In the absence of a widely adopted international usage, the best course would be to consider the issue on the basis of what would be reasonable in the circumstances.

In the event the buyer has discovered or ought to have discovered a lack of conformity, Art 39(1) places the buyer under an obligation to notify the seller of the defect within a reasonable time. If he fails to do so, he loses the right to rely on lack of conformity. In any event, the buyer loses the right to rely on a lack of conformity if he does not give the seller notice of non-conformity within two years from the date onwhich the goods were handed over (Art 39(2)). Reasonable time is a flexible notion to be construed according to surrounding circumstances. What is reasonable time for a piece of machinery will not be reasonable for perishable items. It also seems that timely notice is to be determined on thebasis of usage. Emerging case law from various jurisdictions also indicates that that is how the phrase 'reasonable time' is being construed. In *Al Palazzo Srl v Bernardauddi Limoges SA*, the buyer who ordered porcelain plates for use at his restaurant failed to pay the second instalment of the price, alleging that the goods were affected by defects such as chips and cracks. The seller argued that buyer had lost his right to rely on lack of conformity due to failure to give notice within a reasonable time as required under Art 39(1). While taking into account the construction of reasonable time in other jurisdictions, the court concluded that a six-month period was too extended due to the nature, use and purpose for which the goods were bought –namely, their use in the buyer's business. Past course of dealings may also be a relevant factor. The burden of proof is on the buyer to show that timely notice was given. As the Italian court said '. . . it must be reiterated that the principle "*onus pro bandi incumbit et qui dicit*" . . . is a general principle on which the CISG is based'. If reasonable time is construed on the basis of surrounding circumstances, nature of the goods and usage, then without doubt Art 39 can be said to affect certainty, uniformity and predictability – the aims the Vienna Convention promotes. Of course, if the parties so wish, they can set their own time limits in respect of notification. This is the step that parties to a contract for the sale of cold rolled metal incoils took in *Internationales*

Schiedsgericht der Bundeskammer der gewerblichen WirtschaftSCH 4318, 15 June 1994. They included the following clauses:

Seller's warranty against defects in the goods is subject to the condition that buyer examine the goods immediately after taking delivery and give without delay written notice of any defects discovered and substantiate its findings with an expert statement by an internationally recognised testing company. Complaints as to defects not recognizable immediately must be made no later than two months after the goods have been handed over.

Despite these clauses, the buyer took well over two months to give notice, but the buyer alleged that seller could not set up the defence of late notice since the parties had derogated from the time limit as established by the contract on the basis that the seller had recognised the complaints and they had talked about legal settlement.

Referring to the concept of reliance found in Arts 16(2)(b) and of 29(2) alongside citing Arts 7(1) and (2), the tribunal raised estoppel to find in favour of the buyer. In the words of the tribunal:

. . . at least the principle of estoppel or, to use another expression, the prohibition of venire contra factum proprium, which represents a special application of the general principle of good faith, may without doubt be seen as one of the 'general principles on which the convention is based', which according to Art 7(2) of the CISG may be settled in the convention . . .

In the case in point, the requirements for forfeiture are met. The [seller] may never havehad the intention of waiving the defence of late notice; however, objectively, its conduct after receiving the first complaint from the [buyer] was such as to give the latter the justifiable impression that it recognised the lawfulness of the complaint despite the lateness of the transmission . . . What is even more important is the fact that the [seller] repeatedly made statements . . . from which the latter could reasonably infer that the [seller] would not set up the defence of late notice.

The above decision reveals a mature approach by the arbitration tribunal which, instead of resorting to domestic law on the basis of silence on the part of the Vienna Convention, studied the convention closely to reveal the principle of estoppel. While Art 39 unambiguously states the right to claim non-conformity is lost if the notice requirements are not met, the harshness of the rule is somewhat tempered by Art 44 which states:

Notwithstanding the provisions of paragraph (1) of Art 39 and paragraph (1) ofArt 43, the buyer may reduce the price in accordance with Art 50 or claim damages, except for loss of profit, if he has reasonable excuse for his failure to give the required notice.

It is difficult to see how effective this position will be in practice since the onus will beon the buyer to show that he had a reasonable excuse for failure of notification, a point also made by Bianca and Bonnell. It is, however, possible that the buyer may have areasonable excuse for failure where the merchandise bought is equipment and faults become apparent over time with use.

The seller's right to rely on late notice as a defence is lost where the lack of conformity relates to facts which the seller knew or could not have been unaware of and which he did not disclose to the buyer according to Art 40. *Landsgericht Trier 7 HO78/95, 12 October* 1995 provides an interesting illustration. A consignment of wine was sold by the Italian seller to a German buyer. The German authorities seized the wine and destroyed it since it contained 9% water with which the wine had been mixed. The buyer refused payment. The seller said that the buyer could not rely on non-conformity since he had not examined the wine. The court held that he could since the seller could not have been unaware of the non-conformity. It also went on to add that the delivery of wine with water additions which is not fit for circulation constitutes wilful deceit.

The buyer is also obliged to pay the price for the goods on the date fixed and take the formalities required to effect payment. So if the sale agreement requires theopening of a letter of credit, then the buyer must take the necessary steps. In the absence of agreement, the place of payment according to Art 57 is the seller's place of business. If payment is against handing over of goods or documents, then at the place where the goods or documents are handed over.

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VARIOUS FORMS AND STANDARDIZATION OF TERMS

Introduction

Rules for Sea and Inland Waterway Transport

Rules for any Mode or Modes of Transport

Introduction

Export sales transactions usually embody trade terms which are not customary in domestic trade. To avoid any misunderstandings with a buyer abroad, the exporter should make clear the meaning of any trade term adopted in the transaction. This may be done by, for example, inserting a term into the contract to the effect that the contract will be governed by the law of his own country, the parties may state explicitly what is understood by the use of a particular term or the parties may opt to contract, where appropriate, on standard contract forms issued by trade associations. Alternatively, the exporter may choose to make referencein his own conditions of sale to sets of standard trade terms, for example, Incoterms or Intraterms. The former is sponsored by the International Chamber of Commerce under the title of Incoterms 2010 and the latter is a set of terms developed to eliminate, by the use of plain language in a "register easily understood by traders", any doubts as to the meaning of terms

Incoterms 2010

The International Chamber of Commerce (ICC) has now produced its ninth revision of the International Commercial Terms, Incoterms, 2020. The two new Incoterms – Delivered at Terminal (DAT) and Delivered at Place (DAP) – are available for use irrespective of the mode of transport. Incoterms 2010 have been divided into two groups:

Those for use for sea and inland waterway transport, where the point of delivery and the place to which the goods are carried to the buyer are both ports

Those which may be used in relation to any mode or modes of transport which can be used when there is no maritime transport involved or where maritime transport is used only for part of the carriage.

Rules for Sea and Inland Waterway Transport

<u>FAS – Free Alongside Ship</u>

"Free Alongside Ship" means that the seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards.

<u>FOB – Free On Board</u>

"Free On Board" means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

Duties of the exporter under FOB

(A) Supply the contracted goods in conformity with the contract of sale and deliver the goods on board the vessel named by the buyer at the named port of shipment;

(B) Bear all costs and risks of the goods until such time as they shall have effectively passed the ship's rail. In other words, once goods are placed on ship's rail, title to the property passes to the buyer and so risks too;

(C) Provide at his own expense the customary clean shipping documents as proof of delivery of goods;

(D)Provide export license and pay export duty, if any ; and

(E) Pay loading costs.

Duties of Importer under FOB terms of delivery.

(A) Reserve the necessary shipping space and give due notice of the same to the exporter;

(B) Bear all costs and risks of the goods from the time when they shall have effectively passed the ship's rail;

(C) Pay freight;

(D)Pay unloading costs and

(E) Pay the price as provided in the contract to exporter.

CFR – Cost and Freight

"Cost and Freight" means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination.

CIF – Cost, Insurance and Freight

"Cost, Insurance and Freight" means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

Seller's Duty Under CIF Contracts

(A) The seller is under obligation to procure and prepare documents

The seller must procure and prepare shipment documents. Such as, he should prepare an invoice and receive a bill of lading and also policy insurance.

(B)Invoice

In CIF contracts the seller is under a duty to tender an invoice to the buyer. 'The seller's invoice to the price'. Moreover, 'the seller must give credit to the buyer for the amount of the freight'.

(C) Insurance

The seller must obtain insurance policy cover the goods to protect marine cause and then tender the insurance to the buyer. Otherwise, he commits a breach of contract. If the seller could not cover the insurance policy or fails to obtain it, he will responsible for the risk.

(D) Bill of Lading

The seller is under obligation to insure bill of lading and also he must obtain shipped it. The face of bill should be clear because it shows that the goods have been obtained for shipped. Otherwise, the goods are not in good order. In CIF contracts the buyer pays for the goods against the documents and it is a 'reason or the insistence on a clear bill of lading'. Also bill of lading should be transferable, and during the transit the buyer can sell the goods. The seller in cif contract must procure and tender bill of lading. Furthermore, it should be issued at the time of shipment.

Buyer's Duty Under CIF Contracts

(A) Payment against Document

Tender of documents plays a significant role in a CIF contract. The buyer should confirm a good tender of documents, because it represents the goods. Against the document , the buyer has to pay for the goods. The buyer is under a duty to pay to the seller in the currency which correspond with the contract of sale. If any currency has fluctuations, the seller has right to protect himself against it. Today in the most CIF contracts will establish a letter of credit as a method of payment.

(B) Name of port of destination

There are a numerous number of destinations. The buyer is under a duty to name port of destination. Before the shipment, the buyer has to choose the name of the port and he must tell the seller.

(C) delivery is the buyer's obligation. He must take delivery when the goods arrive. Also he must bear all unloading costs.

(D) the buyer is under an obligation to obtain any import licence 'if required'. But the parties can agreed otherwise in the contract.

Rules for any Mode or Modes of Transport

<u>EXW – Ex Works</u>

"Ex Works" means that the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.

<u>FCA – Free Carrier</u>

"Free Carrier" means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place. The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point.

<u>CPT – Carriage Paid to</u>

"Carriage Paid To" means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.

<u>CIP – Carriage and Insurance Paid to</u>

"Carriage and Insurance Paid to" means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. The buyer should note that under CIP the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.

DAT – Delivered at Terminal

“Delivered at Terminal” means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. “Terminal” includes a place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination.

DAP – Delivered at Place

“Delivered at Place” means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place.

DDP – Delivered Duty Paid

“Delivered Duty Paid” means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

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ACCEPTANCE AND REJECTION OF GOODS

Introduction
Conditions and Warranties
Examination of Goods
Acceptance of Goods
Rejection of Goods

Introduction

In the performance of a contract of international sale the rules relating to the examination, acceptance and rejection of the goods are of great practical importance. If the contract is governed by English law, these rules are founded on the Sale of Goods Act 1979. If the parties to an international sale have adopted the Uniform Laws on International Sales, appended to the Uniform Laws on International Sales Act 1967 or the Vienna Convention on Contracts for the International Sale of Goods (1980), which eventually will take their place, the rules set out therein will govern the examination and acceptance of the goods.

The general principle on which the regulation of the Sale of Goods Act rests is that if the buyer is deemed to have accepted the goods, he loses his right to reject them. He does not, however, lose all rights with respect to them. Although he is now bound to retain them he can still claim damages if the value of the goods which were actually delivered is less than the value of the goods which the seller promised to supply. This claim for damages is not lost as the result of legal rules peculiar to the sale of goods. It is governed by general legal principles. It is not lost by lapse of time until it becomes barred under the Limitation Act 1980; as most mercantile contracts are in the nature of simple contracts, the seller is normally entitled to plead the defence of limitation after the lapse of six years from the breach of contract. The tendency of English sales law is to discourage the rejection of goods by the buyer but to allow, without serious restriction or qualification, his claim for damages if he has overpaid their value, as expressed in the contract price.

Conditions and Warranties

According to the Sale of Goods Act 1979, the terms of the contract of sale are either conditions or warranties. This simple classification has proved to be insufficient in commercial circumstances and the courts have supplemented it by recognising a third type of contractual term, the innominate term, also referred to as the intermediate term.

The buyer is entitled to reject the goods if a condition relating to them is broken. A condition is a term to which the parties, when making the contract, attribute such importance that it can truly be described as being of the essence of the contract. A condition has to be distinguished from a warranty, which is a contract term of less significance and which relates to matters collateral to the main purpose of the contract. In the case of breach of a warranty the buyer is not entitled to reject the goods. He has to retain them but may claim damages which, if the goods have an available market, are prima facie the difference between the value of the goods as delivered and the value they would have if they had complied with the warranty. As a condition is treated as being of higher legal quality than a warranty, every condition includes a warranty-statement which cannot be reversed. The buyer is, therefore, at liberty to treat a broken condition as a broken warranty and, instead of rejecting the goods, he may elect to keep them and claim the difference between those two values by way of damages. If the buyer is deemed by law to have accepted the goods and if, consequently, he has lost his right to reject them, he is bound henceforth to treat what, originally, was a condition as a warranty and his only claim is for damages for breach of warranty.

Examination of Goods

When the seller tenders delivery of the goods, the buyer, unless otherwise agreed, is entitled to request that he be given a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract. A buyer who has not previously examined the goods is not deemed to have accepted them and, consequently, has not lost his right to reject them unless and until he has had a reasonable opportunity of examining them. There exists a prima facie presumption, where goods are transported, that the place and time of examination are the place and time of delivery of the goods. This presumption is, however, displaced where the arrangements of the parties, the circumstancesof the sale or a trade custom point to a different intention of theparties.

An illustration of exceptional circumstances in which the place and time of examination were postponed occurred in *B &P Wholesale Distributors v Marko Ltd* in which the sellers, importers of meat, sold one tonne of fat salted backs with rind to the buyers who were wholesale dealers in meat. The buyers had an opportunity of inspecting the meat cursorily at the docks in London when it arrived, but failed to avail themselves of it and had it taken to their depot in Chester. In the depot the buyers noticed that the meat was not in accordance with the contract. They rejected it and stopped the cheque for the price which they had given the sellers. The latter sued the buyers on the cheque and the buyers counter claimed for damages for non-delivery of the goods. Pearson J. decided in favour of the buyers. The learned judge held that the place of delivery wasthe docks in London but that the place of examination was postponed to the buyers' depot in Chester. He observed that the true meaning of s.34 of the Sale of Goods Act (in the form in which it was then in force) was that it must be practicable to make a properexamination of the goods, and until such opportunity was afforded to the buyers they were not deemed to have accepted the goods within the meaning of s.35. In further support of his judgment, the learned judge could now refer to the additional words contained in s.35 of the Sale of Goods Act 1979. These words make it clear that the buyer's right to reject exists until he is given a genuine opportunity of examining the goods. In export sales the place and time of examination are frequently not those of delivery but are postponed. In a contract of export sale the place and time of delivery is usually defined by the special trade clause which the parties have adopted. Where the seller is not obliged to tender a bill of lading to the buyer, as in sales ex works, f.a.s., f.o.b. (buyer contracting with carrier), or in container delivery contracts, physical delivery of the goods takes place in the seller's country.Where bills of lading have to be tendered, as in f.o.b. contracts of the classic type or providing additional services, c.i.f. contracts, and c. and f. contracts, the delivery of the goods is constructive and completely divorced from the actual situation of the goods. Whether in an export sale the delivery is physical or constructive, the two conditions postulated in the case referred to for the postponement of the place of examination are normally satisfied. The goods are usually ordered and packed for export, and these facts alone indicate to the seller that they are going farther on. The locality at which the delivery takes place is usually unsuitable for the examination of the goods, so that it is unreasonable to expect the buyer to carry out the examination there. Consequently, in an export sale, unless the parties have otherwise agreed, for example by arranging pre-shipment inspection, or a trade custom provides a different practice, it has to be assumed that the parties intend that the examination of the goods shall be postponed until the goods have arrived at the place of their destination and that that place is the agreed place of examination.

Acceptance of Goods

The test adopted by s.35 is whether the buyer is "deemed to have accepted" the goods. The receipt of the goods is not acceptance and the section does not provide that the mere receipt of the goods shall be deemed to be acceptance. On the other hand, approval is not always required by the section: in two of the three circumstances set out by s.35 a buyer is deemed to have accepted the goods though he may not have approved them.

The buyer is deemed to have accepted the goods:

(a) when he intimates to the seller that he has accepted them(s.35(1)(a));

(b) when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller (s.35(1)(b)); or

(c) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them (s.35(4)).

The first of these three cases is obvious and does not need clarification. As regards the third, it should be noted that indecision on the part of the buyer may lead to the loss of his right to reject the goods, that is, if he retains them for an unreasonably long time without intimating that he has rejected them. The Act refrains from requiring a fixed period of time within which the buyer has to intimate his rejection. "Reasonable time" is a flexible requirement which varies according to the circumstances of the case; the question of what is a reasonable time is always a question of fact. The prudent buyer will, as observed earlier, examine the goods as soon as they arrive at the place of examination and will then decide whether to reject them or to keep them. Of particular importance is the second case. First, this circumstance arises only after the buyer has been afforded a reasonable opportunity of examining the goods. Secondly, "an act inconsistent with the ownership of the seller" is deemed to be an acceptance of the goods only after the goods have been delivered to the buyer, butthe delivery need not be physical. A delivery to a carrier for transmission to the buyer, e.g. under an f.o.b. or c.i.f. contract, would be sufficient. An act inconsistent with the ownership of the seller is any act by which the buyer behaves as if he were the owner of the goods. Whereas any disposal of the goods, e.g. a resale and dispatchor delivery of the goods to a sub-purchaser, or the pledging of them as a security, was deemed an act inconsistent with the ownership of the seller, because thereby the buyer accepts the title to the goods although he might not have accepted their quality, this no longer reflects the law. The Sale of Goods Act now provides that the buyer is not deemed to have accepted the goods merely because the goods have been delivered to another under a sub-sale or other disposition. The thrust of the subsection ensures that where a buyer passes on the contract goods without examination to a sub-buyer, he is not necessarily deemed to have accepted the goods although there has been a delivery from the prima facie place of inspection. This amendment is rather easier to understand in the context of international sales where often the buyer is merely the supplier of goods under a subsale and in situations where the delivery is effected by the presentation of documents. In the latter example it is clear that the acceptance of the documents amounts to only conditional acceptance of the goods themselves. The right to reject is not lost simply because the documents are "sold" on to a subpurchaser. If the contract is not severable, that is where goods are to be delivered in instalments which are to be completed before payment is to be made, and the buyer has accepted part of the goods, he can no longer reject the other part of the goods. This, however, is subject to s.35A which provides that if a buyer has a right to reject goods by reason of a breach that affects some or all of the goods he does not lose his right to reject the remainder of the goods by accepting some of them.

The position is different, however, if the seller tenders the wrong quantity of goods. The buyer is entitled to reject the whole consignment or to accept the contract quantity and to reject the others, but if he accepts a smaller or larger quantity than he bought he has to pay for what he accepted. The above is again subject to the proposition that the section will not apply generally in overseas sales, that a buyer, other than a consumer, may not reject an excess or shortfall in quantity of goods if that excess or shortfall is so slight that it would be unreasonable to do so. Where the buyer has bought "assorted" goods but is tendered only one type of goods he is entitled to accept a reasonable percentage of the tendered goods and to reject the remainder.

Rejection of Goods

A buyer who wishes to reject the goods has to intimate within a reasonable time to the seller that he refuses to accept them. This notice should be clear and definite and should not be contradicted by an act relating to the goods by which the buyer denies the title of the seller to them. No form is prescribed for the notice of rejection, which may be given verbally, by telex, fax or in writing, but the buyershould make certain that it reaches the seller, otherwise it is ineffective. The buyer who rejects the goods is not bound to return them to the seller unless this is agreed but, being a bailee, he has to exercise reasonable care with respect to them. Subject to this obligation, if the goods are rejected for good reason and in good time, the risk of loss of, or damage to, the goods is with the seller. Unless a different intention of the parties is expressed in the contract or can be gathered from its terms by necessary implication, the buyer's right to reject the goods is postponed until the goods arrive and he has a reasonable opportunity of examining them. Inappropriate cases the buyer may reject the goods even before having received them, that is, if he notices from a provisional invoice or advice note that the seller has dispatched goods which are not inaccordance with the contract. A seller, except in c.i.f. sales, who has tendered goods not in accordance with the contract may cancel the original tender and make another tender, but only if he can make the other tender within the time stipulated in the contract.

Right of Rejection in c.i.f contracts

Some observations have to be added on c.i.f. contracts. As has been explained earlier, the characteristic feature of these contracts is the importance attributed to the shipping documents. It has been held, *obiter,* in *Kwei Tek Chao v British Traders alld Shippers Ltd,* that a disposal of the bill of lading (which is part of the shipping documents)is not necessarily an act inconsistent with the seller's ownership of the goods and that, in principle, a c.i.f. buyer does not lose his right to reject the goods by dealings with forged documents, e.g.by pledging the bill of lading to a bank. In that case, the question whether by dealing with the documents the buyers had done an act inconsistent with the sellers' ownership in the goods did not arise, but in the interest of "those who may be concerned" Devlin J.observed that so long as a buyer was merely dealing with the documents, he did not commit an act inconsistent with the seller's ownership in the goods and retained the right of rejecting the goods if upon examination after their arrival they were found not to be inconformity with the contract. The argument that the buyer, when reselling the bill of lading or pledging it to a bank, intended to give the sub-purchaser or pledgee a proprietary interest in the goods andpassed onto to him, was rejected by Devlin J. on the grounds that the buyer himself had only conditional property, *viz.* property conditional on the goods being in accordance with the contract and that therefore he could not deal with more than conditional property.

Rejection and estoppel

If the buyer has a valid ground for rejection of the goods but so conducts himself as to lead the seller to believe that he is not relying on that ground, he is estopped-precluded-from setting up ground of rejection when it would be unfair or unjust to allow him so to do. On the other hand, if a buyer has rejected the goods on a ground which he has notified to the seller, he is not confined to that ground and can later rely on other grounds for the rejection. If owing to a frustrating event the rejection of the goods becomes impossible, it would appear that the buyer has lost the right to reject the goods.

The rights of the unpaid seller

In international sales transactions the seller normally parts with the possession of the goods before receiving the purchase price because he wants to dispatch the goods with due expedition. Even where the sale is on a cash basis, some time will elapse before the buyer's remittance reaches the seller. Where the sale is a credit transaction more time will pass before the bill of exchange drawn by the seller on the buyer is settled. Much may happen during that time. The buyer may become insolvent, he may issue debentures taking priority over ordinary trading debts, he may amalgamate with a firm that is heavily indebted, or the buyer's country may prohibit payment in the stipulated currency. It is imperative that the seller should be properly protected here.The law would fail in its task if it omitted to devise special rules for the protection of the seller during the vulnerable period which commences when he gives up possession of the goods and continues until he has received the price. However, here again, the best protection is the seller's foresight. The seller who parts with his goods before obtaining the price should insert into the contract ofsale a clause reserving the title in the goods until he receives the purchase price. Section 39(2) entitles the unpaid seller, who has reserved the property in the goods) to withhold their delivery until the price is paid, and provides that his rights against the goods shall be similar to and coextensive with the rights of lien and stoppage in transit which can be claimed by an unpaid seller who has not retained title in the goods.

Where the seller has failed to reserve the property in the goods, the rights of the unpaid seller are defined in ss.38-48 of the Sale of Goods Act 1979. These rights, which can be claimed by implication of the law, are (s.39):

(a) a lien on the goods for the price while he is in possession of them;

(b) in case of the insolvency of the buyer, a right of stopping the goods in transit after he has parted with the possession of them;

(c) a right of resale, as limited by the Act.

The Act also provides'" a definition of the unpaid seller, who becomes such when the whole of the price has not been paid or tendered; or

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

The rights of the unpaid seller may likewise be claimed by an agent of the seller to whom the bill of lading has been indorsed or by a consignor or confirming agent who has himself paid or is directly responsible for the price or who, for other reasons, is in the position of a seller.

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FRUSTRATION OF CONTRACT

Introduction

Article 79 of the CISG

Introduction

A basic and universally accepted principle of international contract law is "*pacta sunt servanda*." This principle means that each party to an agreement is responsible for its non-execution, even if the cause of the failure is beyond his power and was not or could not be foreseen at the time of signing the agreement. The principle reflects natural justice and economic requirements because it binds a person to their promises and protects the interests of the other party. Since effective economic activity is not possible without reliable promises, the importance of this principle must be emphasized.

On the other hand, practice has demonstrated that on many occasions application of this principle may lead to the opposite of its aim. That is to say, the situation existing at the conclusion of the contract may subsequently have changed so completely that the parties, acting as reasonable persons, would not have made the contract, or would have made it differently, had they known what was going to happen. This situation is unlikely to arise with short-term contracts, which often exhibit a simple structure where non-performances are exchanged for money. In international trade, however, many contracts are of a more complicated structure, and even if they are not long-term contracts, they frequently exist over a substantive period. International trade transactions generally imply a greater element of uncertainty because they are subject to political and economic influences in foreign countries.

Different legal concepts deal with this problem of changed circumstances and provide for the discharge of the duty to perform of one or both parties when a contract has become unexpectedly onerous or impossible to perform. The classic concept of force majeure is primarily directed at settling the problems resulting from non-performance, either by suspension or by termination.

Although all legal systems take notice of the situation of changed circumstances, the conditions under which they allow the defence of force majeure vary. Furthermore, the adaptation of the contract is not universally accepted. Attempts have been made to tackle these problems on an international level. In particular, the United Nations Convention on Contracts for the International Sale of Goods (CISG) addresses the issue of changed circumstances. It avoids reference to the existing concepts because it has developed a system of its own. This concept, however, is generally not regarded as being able to solve the problem entirely. Parties to international sales transactions, therefore, frequently include special clauses in their contracts dealing with matters of hardship and force majeure.

The concept of force majeure, providing for the discharge of one or both parties when a contract has become impossible to perform, "has evolved progressively in international trade practice by assuming many original and autonomous features distinct from similar legal concepts." The approach of municipal legal systems to situations of force majeure varies from country to country. Despite these circumstances, certain general characteristics of the conception of force majeure can be determined.

Force majeure occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible.

Article 79 of the CISG

1. The general rule - paragraph (1)

Paragraph (1) sets out the conditions under which a party is not liable for a failure to perform any of his obligations. The expression "failure to perform" does not specify the nature of the non-performance. Thus, the scope of this expression has to be analysed first.

a. Failure to perform contractual obligations

The term "failure to perform" must be considered here in the broadest sense of the word. Accordingly, the non-performance may be total or partial, delayed or defective. Article 79 refers to any obligation, no matter which party is concerned. Thus, the buyer and the seller are subject to the same conditions. The obligation to deliver conforming goods is also within the scope of Article 79.

The text is silent on the point of the time of the impediment's occurrence. Therefore, the question arises as to whether Article 79 applies in situations where the impediment existed at the time of the conclusion of the contract and was unknown to both parties. The Secretariat Commentary on the 1978 Draft affirms, without justifying its position, that Article 79 applies to this case. National laws often provide, . . . contracts regarding impossible performances are void, some authors believe that because of Article 4(a), domestic law has to be applied so that the Convention becomes irrelevant in this context. In this case, however, it can be said that domestic laws which accord legal recourse in situations where a party errs about the goods to be delivered would not apply under the Convention. This applies in instances in which these problems are specifically and conclusively regulated by the Convention, as is the case in Article 79.

Thus, Article 79, in its general wording, applies to non-performances that may have occurred at any time.

b. Conditions for exemption

Three elements must be proved by a non-performing party who seeks to establish that it is not liable for failure to perform:

The failure was due to an impediment beyond his control;

the impediment was reasonably unforeseeable at the time of the conclusion of the contract; and

the impediment was reasonably impossible to overcome.

These elements constitute the traditional components of force majeure.

(1) Impediment beyond control

For an exemption to be granted, the non-performance of the contract must be due to an "impediment." Article 74(1) ULIS used the word "circumstances." "By adopting the word "impediment" the Vienna Conference's aim was at emphasizing the objective nature of the hindrance rather than its personal aspect." This wording, however, is very general and the actual meaning of the term "impediment" is unclear. This causes problems in determining the scope of the exemption provided by Article 79. These problems, however, will be dealt with in a later chapter.

In requiring that the impediment must be beyond the control of the party concerned, the scope of the latter's risk is determined. The question of fault is not involved here since this concept has been set aside by the Convention. Within the control of the seller, for example, are all those factors which are connected with an orderly organisation of his manufacturing and/or procurement process, as are the personnel's qualifications, the technical equipment and the disposition of the required financial means to ensure manufacture and procurement. In the case of generic goods, the seller always bears the risk of procuring the goods. Other goods may be obtained to replace those that are lost.

(2) Unforeseeability of the impediment

The requirement that the impediment must be reasonably unforeseeable is consistent with the basic idea that if the event were foreseeable, the defaulting party should be considered as having assumed the risk of its realisation. "Foreseeability should not only relate to the impediment per se, but also to the time of its occurrence. The closure of the Suez Canal was, for example, foreseeable in the more or less distant future."

Everything regarding foreseeability, however, is a matter of measure, and it seems difficult to provide more details in a general text.

(3) Reasonably impossible to avoid or overcome

The parties are under an obligation to counteract the impediments. First, disturbances must be avoided. In order to achieve this, measures need to be taken against impediments which are generally looming. Second, if a disturbance has already revealed itself, it has to be overcome as quickly as possible; to overcome means to take the necessary steps to preclude the consequences of the impediment. The basis of reference is what can reasonably be expected from the party concerned, and that is what is customary, or what similar individuals would do in a similar situation. This criterion is, however, rather vague, and it will often be difficult to distinguish between what is possible and what is impossible to overcome. The issue raises the question of the distinction between impossibility and *imprévision* or hardship and whether cases of the latter fall within the scope of Article 79. This question is probably the most discussed problem in the context of Article 79 and is of major significance for this paper. Therefore, it will be considered separately in another chapter.

2. Non-performance by a third person - paragraph (2)

The third person must be someone who has been engaged to perform the whole or a part of the contract. It does not include suppliers of the goods or of raw materials to the seller. There must be an "organic link" between the main contract and the sub-contract.

3. Temporary impediment - paragraph (3)

Article 79(3) deals with an impediment for a limited time, but makes no provision as to an impediment affecting part of the contract. Unlike some legal systems, Article 79 does not speak of nullity of "the contract" but instead asserts that a party is not liable for failure to perform "any" of its "obligations," -- language that permits exemption to the extent that the impediment applies.

Article 51(1) reflects a policy that is consistent with this result: "(1) If the seller delivers only part of the goods . . . articles 46-50 (provisions on remedies for breach) apply in respect or the part that is missing. . . ."

4. Duty to notify - paragraph (4)

In the case of a failure of notification, it should be noted that the damages for which the non-performing party is liable are only those arising out of the failure of the other party to have received the notice, and not those arising out of the non-performance.

5. Legal effect of the exemption - paragraph (5)

Paragraph (5) restrains the effects of the exemption to one remedy alone and reserves to the party who did not receive the agreed performance all of its remedies except damages. These remedies include the right to reduce price (Article 50), the right to compel performance (Articles 46 and 62), the right to avoid the contract (Articles 49 and 64) and the right to collect interest as separate from damages (Article 78).

It could be argued that paragraph (5) entails unrealistic results. It would allow an action for specific performance in a case where the goods are destroyed and thus, the performance is physically impossible. A German proposal to extinguish the obligor's obligation to perform if the grounds for exemption existed was, however, rejected at the Vienna Conference. The foremost reason for the rejection was the fear that a release from the obligation to perform could also extinguish collateral rights and secondary claims such as interest. It was also argued that, in cases where obligations are physically impossible to fulfill, the domestic legal doctrine of *impossibiliumnullaestobligatio* (applicable according to Article 28) would generally prevent a demand for performance anyway. The general belief expressed at the Vienna Conference that judgment for a physically impossible performance would neither be sought nor obtained should lead to a reasonable limitation of Article 79(5)

INVOICES AND PACKING

Invoices

Invoices

Correct invoicing is a matter of great importance in the export trade. The smooth performance of the contract of sale will often dependon it. The seller may sometimes regard the buyer's instructions on this point as too exacting, but it should be borne in mind that the buyer may require certain details in order to comply with regulations in force in his own country with respect to such matters as import licences, customs duties and exchange restrictions. In certain circumstances the buyer may request a *pro forma* invoice in advance, or for the invoice to be dated a month, or some other fixed time, later than the date of the last invoice.

<u>The invoice must be true and correct</u>

The exporter should make it a firm principle of business policy in international sales arid other international supply contracts only to issue invoices which are correct in all respects. He is sometimes requested by the buyer abroad to insert inaccurate particulars into the invoice. The buyer may ask that the price for the goods be understated in the invoice because he wants to reduce or evade taxes or import duties in his country. Or, alternatively, he may ask that the invoice price be inflated and the excess be transferred to an account outside his country because he wishes to evade local exchange control on the transfer of funds abroad. False invoicing almost invariably has an improper motive. A contract in which the parties agree that a false invoice be issued is often unenforceable in law. The exporter should, in his own interest, decline to accommodate the buyer if he requests that the invoice contain false statements. If the seller agrees to the request, knowing that the contract stipulating for a false invoice is illegal under the buyer's law, the English courts will refuse to enforce the contract because they give no legal assistance to a party who intends to break the laws of a friendly foreign country. If in such circumstances the buyer fails to perform his obligations, the seller may be without a contractual remedy in the English or foreign courts, unless in English proceedings the court holds that the remainder of thecontract can be severed from the illegal part. Moreover, false invoicing may infringe English law directly. Overpricing in the invoice in order to evade foreign exchange control may contravene the Bretton Woods Agreements, which form part of English law. If this is the case, the contract is unenforceable in the English courts as far as the excess price is concerned. The refusal of the exporter to be a party the issue of a false invoice will thus avoid a potential source of subsequent legal embarrassment to himself. Normally the seller's statement that the issue of a false invoice is contrary to his business practice will be accepted by the buyer.

The commercial invoice

The trading invoice should state the names and addresses of the seller and buyer, the date and reference number of the buyer's order, a description of the goods sold, details of package (including the weight of every bale or case), exact marks and numbers appearing onthe package, and the price. If possible, the shipping details (including the name of the vessel and the route) should be added. It is not unusual for the invoice to contain the note,*”e and o.e."* (errors and omissions excepted).

The invoice price has to be stated in accordance with the agreed terms of the contract, as explained earlier; it may be the ex worksprice, or the f.o.b. price, or the c.i.f price and so on. In the case of ac.i.f. contract, the price calculation in the invoice has to comply, in the absence of an agreement of the parties to the contrary, with the principles explained earlier. The buyer will often ask that a detailed breakdown of the price be shown on the invoice, setting outseparately the actual net price ex factory and the further charges, because these details are required for submission to his own authorities. In an f.o.b. contract with additional services the seller is requested by the buyer to arrange freight and insurance for the consignment. As this goes beyond the normal duty of the f.o.b. seller and represents a separate arrangement, the buyer should be debited for these items not on the goods invoice, but on a separate invoice which would cover the prepaid freight, the insurance premium and the incidental commissions and charges.

Invoices in letter of credit transactions

Where payment under a letter of credit is agreed, it is normal that the commercial invoice is one of the documents which have to betendered to the advising bank. Here the invoice is an important, if not the most important document. Great care should be taken that it contains the correct description of the goods and. any other particulars relating to them, as specified in the contract of sale. These details are likely to be transmitted by the buyer (the applicant for the credit) to the issuing bank when instructed to open the credit; they are passed on to the advising bank and the documents may be rejected by either bank if the required details are not stated, or are stated incorrectly, in the invoice. Article 18 of the UCP (2007 Revision) provides:

a. A commercial invoice:

I. must appear to have been issued by the beneficiary (except as provided in article 38);

II. must be made out in the name of the applicant (except as provided in sub-article 38(g);

III. must be made out in the same currency as the credit; and

IV. need not be signed.

b. A nominated bank acting on its nomination, a confirming bank, if any, or the issuing bank may accept a commercial invoice issued for an amount in excess of the amount permitted by the credit, and its decision will be binding upon all parties, provided the bank in question has not honoured or negotiated for an amount in excess of that permitted by the credit.

c. The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.

The details in the invoice must also correspond with the general description of the goods in the other documents tendered to thebank.

Packing

<u>The obligation to provide suitable packaging</u>

The exporter has to give careful consideration to the packing of the goods to be shipped abroad. Unless otherwise agreed in the contract of sale, it is his duty to pack the goods in a manner which assures their safe arrival and facilitates their handling in transit and at the place of destination. Neglect in this respect will invariably result in delay in the delivery of the goods and might entitle the overseas customer to reject the goods or to claim damages.

<u>Packing in the sale of goods</u>

The buyer is, in certain circumstances, entitled to refuse the acceptance of the goods if they are not packed in accordance with his instructions or with the custom of the trade. Where a particular package is stipulated, the packing of the goods often forms part ofthe description of the goods within the meaning of s.13 of the Sale ofGoods Act 1979. It may be essential for the overseas buyer that the goods should be supplied in the stipulated packings. If he has ordered jam in one and two pound jars, the contract is breached if the jam is supplied in 10 pound tins. According to s.13(1) of the1979 Act it is an implied condition, where goods are sold by description, that the goods shall correspond with the description.

This, however, has to be read in the light of the doctrine of the innominate term according to which it depends on the nature and gravity of the breach whether it entitles the buyer to rescind the contract or whether the contract still subsists and he is only entitled to damages. If the deficiency in the packing affects the "substantial identity" of the goods, it will be treated as a breach of the condition implied by s.13(1).In one case, where the description qualified as a condition, the buyer of Australian canned fruit was held to be entitled to reject the whole consignment because the cases did not all contain 30 tins each, as agreed upon, but there were included in the consignment smaller cases containing 24 tins each, and this, although an umpire had declared that there was no difference in the market value of thegoods whether packed 24 or 30 tins in a case. This case, if decided correctly, would indicate a remarkable extension of the rule. In an earlier case, where Siam rice was rejected because it was supplied in single bags instead of double bags, (i.e. gunny bags) as stipulated, the buyer was required to prove that the rice was more easily saleable indouble bags, and today this kind of evidence or other evidence asto the gravity of the breach is necessary to establish breach of a condition. When goods are sold on f.o.b. or c.i.f. terms, the price quotation includes export packing charges, unless it is stated expressly that an extra charge will be made for package. The exporter who wishes to make an extra charge for package should state this clearly when sending out the quotation or confirmation.

In the law of carriage of goods by sea, freight is paid on the weight or measurement or value of the cargo and the carrier is entitled to demand the calculation of the freight at the highest rate. The seller should consult his freight forwarder in order to ascertain the mode of packing which is required to secure a favourable rate of freight, but he should not place this consideration higher than the safety ofthe consignment and the convenience of the customer, whose agents have to handle the packages on arrival. Where stowage on deck is agreed upon, presumably stronger package will have to be provided than where the goods are stowed in the holds, unless the goods are stowed in containers. The master of the ship will refuse to sign a clean bill of lading if the package is defective, and the seller, who under his contract with the buyer may be obliged to tender him a clean bill, will be unable to do so. The individual packages should be marked and branded in strict compliance with the directions of the buyer, who is entitled to refuse the acceptance of a bill of lading which refers to goods that are marked and branded differently. The description of the goods in the bill of lading or other transport document should, at least in general terms, correspond to that in the invoice and other documents, so that an identification of the goods throughout the whole set of documents is possible. UnderArt.lV, s.5(a) of the Hague-Visby Rules, to which effect was given in the United Kingdom by the Carriage of Goods by SeaAct 1971, the liability of the carrier for loss of or damage to the goods in transit is limited in amount. Unless the nature and value of the goods have been declared before shipment and inserted in the bill of lading, the liability does not exceed 666.67 units of account per package or unit, or two units of account per kilo of gross weight of the goods lost or damaged, whichever is higher. In the case of transportation by air, the statutory maximum limitation of liability ofthe carrier is calculated by weight and not by the number ofpackages. In international transport by road, it is likewise expressedby reference to weight, and not to package or unit.

Packing in containers

In container transport by sea a difficult legal problem arises: is the container itself a "package" within the meaning of Art.IV, r.5(a) of the Hague-Visby Rules, or is each of the pieces of cargo carried in the container a separate "package" within the meaning of that provision?" The practical importance of this problem is obvious. If the container is the "package", the liability of the carrier is limited as indicated earlier. But if each part of its contents is a "package", and the container carries e.g. 100 pieces of cargo, the maximum liability of the carrier under the Hague-Visby Rules would be 100 times higher than in the former case.

Import regulations relating to packing

The package should conform with the legislation in force in the country of destination. In some countries, certain types of packing are prohibited or restricted and import duties may be levied on particular types of packing material, e.g. glass containers or metal sheeting. Many countries have strict regulations about the marking and branding of packages. The seller, if in doubt, should obtain full instructions from his buyer or, if it is more convenient, consult the trade publications or inquire of the institutions referred to subsequently.

Dangerous goods

There exist stringent legal requirements for the packing and labelling of dangerous goods in transit. These regulations are different for transportation by sea, air, road and rail. Information about these requirements can be obtained from firms specialising in export packing, freight forwarders and in the trade publications mentioned elsewhere.

PRODUCT LIABILITY

Liability for Death or Personal Injury

Damage to Buyer's Property Distinguished

Competition Between Convention and Domestic Delictual Rules

Article 5 of the CISG regulates the applicability of the Convention to claims which fall under the heading of 'product liability'. Article 5 provides as follows:

'This Convention does not apply to the liability of the seller for death or personal injury caused by the goods to any person.'

1. Liability for Death or Personal Injury

Within domestic systems, the area of law known as 'product(s) liability' regulates the liability of sellers (hereunder manufacturers, producers and others) for personal injury and/or property damage caused by the sale of defective goods to *any* person. In some systems, product liability claims are seen as grounded in delictual (tort) principles; other systems, which also view such claims as contractually based, sometimes allow the two rule sets to compete.

Clearly, a product liability claim advanced by any person who is *not* a party to a CISG contract cannot be governed by the CISG, in that all third party claims against the seller in such a situation would lie outside the CISG by virtue of Article 4. And as regards the CISG question of *inter partes* product liability, Article 5 expressly excludes CISG application as regards the seller's liability to any person (including the buyer) for *death or personal injury* caused by the goods. Therefore, a CISG seller's liability for death or personal injury - both as regards the injury to the buyer and to third parties - must be governed by non-Convention law, typically the law of delict applicable by virtue of the rules of private international law.

It is widely recognized, that art 5 CISG excludes claims for death or personal injury to not only the buyer but also to other people either participating indirectly in the contract or non-participating third parties. The legislative history and the wording of Article 5 of the CISG suggest that excluded from the Convention is not only a buyer´s claim based on death or personal injury suffered by the buyer himself, but also includes the buyers own liability for damages due to death or personal injuries of the ultimate buyers because of the insertion of the fraise “to any person” in Article 5. It was suggested by the delegates at the Vienna Conferences to distinguish between cases where the relation was simply between buyer and seller and cases where action was taken by an injured third party against a previous seller. 33 This suggestion was, however, rejected because it was clear that the Convention did not cover the relationship between the buyer and a previous seller but was only concerned with contracts of sale. It is therefore reasonable to conclude that third party claims regarding damages for death or personal injury is included by the scope of Article 5 of the CISG and is governed by domestic law. However, the issue of recourse claims for death or personal injury demands further examination.

2. Damage to Buyer's Property Distinguished

This leaves a narrow, yet commercially significant product liability question within the CISG regime: the seller's liability to the buyer for damage to the buyer's property caused by the seller's delivery of non-conforming goods, for example, the sale and delivery of a corrosive chemical in leaky containers causing damage to the floor of buyer's warehouse. Note in this connection that goods which would be regarded as 'defective' in a product liability context are also describable as goods which do 'not conform' under Article 35 of the CISG, and note further that delivery of non-conforming goods renders a CISG seller liable for all 'loss ... suffered by the other party as a consequence of the breach'.

By clear implication, Article 5 of the CISG permits a buyer to make a claim for compensation under the Convention regime in situations, where non-conforming goods cause damages to the buyer´s property. Thus, damage to property is regarded as within the scope of the Convention.This is supported by the wording of Article 5 of the Convention, which excludes only damages due to death or “personal” injury. The word “personal” was specifically inserted in the provision in an attempt to eliminate any possibility of doubt, as to whether the provision also covered damages to property. Consequently, the legislative history of Article 5 demonstrates that there is no gap which needs to be filled by an analogy of Article 5.

Consequently, in cases of damage to property due to a breach of contract, the buyer can claim damages for the loss incurred according to Article 45(1)(b) of the CISG if the buyer has fulfilled the notice requirements in Article 39 of the CISG and if the preconditions in Article 74 of the CISG have been fulfilled.

3. Competition Between Convention and Domestic Delictual Rules

Because such claims for buyer's property damage traditionally have been regulated by domestic rules of delict (tort, negligence, strict product liability, etc.), a question arises as to whether the application of these older rules should now be displaced by the new CISG regime, or whether the two rule-sets should be permitted to 'compete'. Although there would seem to be good reason to at least allow some degree of competition (concurrent claims), the question will ultimately have to be resolved by the various national courts on a case-by-case basis.

The core of Article 5 is clear. Liability for death or personal injury has been completely excluded from the scope of the Convention and consequently domestic product liability rules remain unaffected in this area.

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UNIT IV

- Exports – Insurance of Goods in Transit
- Marine Insurance and kinds
- Law on Carriage of goods by sea, land and air
- Container transport
- Pre-Shipment Inspection
- Licensing of Export and Imports

What is insurance?

What is export?

Need for insurance in export

Exporter may suffer financial loss if goods are damaged during transportation from the place of dispatch to the point of destination. To protect from loss, exporter may have to take insurance policy to protect him from physical damage to the goods.

The need for insurance is mainly for two reasons, Legal and Commercial.

Difference between Cargo Insurance and Marine Insurance

In case, goods are shipped by sea, the insurance is known as Marine Insurance'. The term cargo insurance is used in case of air shipment.

In practice, both the terms are interchangeably used and their regulations are common.

Marine Insurance and its types

- On the basis of insured interest

1. Hull Policy

2. Cargo policy

3. Freight policy

- On the basis of time period

1. Time policy

2. Voyage policy

3. Mixed policy

- On the basis of value of the insured subject matter

1. Valued policy

2. Unvalued or open policy

Law On Carriage Of Goods

Goods may be carried by land (including inland waterways), sea or air. Accordingly, the law relating to carrying of goods is contained in the following enactments:

1. In case of carriage of goods by land: (i) The Carriers Act, 1865. (ii) The Railways Act, 1989.

2. In case of carriage of goods by sea: (i) The (Indian) Bills of Landing Act, 1856. (ii) The Carriage of Goods by Sea Act, 1925. (iii) The Merchant Shipping Act, 1958. (iv) The Marine Insurance Act, 1963.

3. In the case of carriage of goods by air: The Carriage by Air Act, 1972.

<u>Container Transport</u>

Container transport refers to the transportation of goods in standardized re-sealable transportation boxes by rail and sea. Data are expressed in tons and twenty-foot equivalent units(TEU)

Pre-shipment inspection

A pre-shipment inspection is a step taken by trade operators (buyers, suppliers, agencies) to inspect newly manufactured products before they are shipped for export/import.

- Purpose of inspection

Licensing of exports and imports

- Requirements
- Procedure

INSURANCE

Insurance is a legal agreement between two parties i.e. the insurance company (insurer) and the individual (insured). In this, the insurance company promises to make good the losses of the insured on happening of the insured contingency.

Insurance may be described as a social device to reduce or eliminate risks or loss tolife and property. It is a provision which a prudent man makes against inevitable contingencies, loss or misfortune.

Insurance provides financial protection against a loss arising out of happening of an uncertain event. A person can avail this protection by paying premium to an insurance company.

A pool is created through contributions made by persons seeking to protect themselves fromcommon risk. Premium is collected by insurance companies which also act as trustee to the pool. Any loss to the insured in case of happening of an uncertain event is paid out of this pool insurance workson the basic principle of risk-sharing.

A great advantage of insurance is that it spreads the risk of afew people over a large group of people exposed to risk of similar type.

Insurance is a contract between two parties whereby one party agrees to undertake the risk ofanother in exchange for consideration known as premium and promises to pay a fixed sum of moneyto the other party on happening of an uncertain event (death) or after the expiry of a certain period in case of life insurance or to indemnify the other party on happening of an uncertain event in case of general insurance.

The party bearing the risk is known as the 'insurer' or the 'assurer' and the party whose risk iscovered is known as the 'insured' or 'assured".

RISK- The concept is closely related to an uncertainty. Risk is defined as an uncertainty, related to theoccurrence of a loss.

IMPORTANT FEATURES OF RISK ARE-

unpredictable,

uncertainty about the future event,

deviation from desired outcome &

not favourable.

In a competitive economy, risk bearing is essential. Since every one of us is exposed to some or otherrisk, the best way is to accept the presence of risk and manage the affairs without being affected.

FEATURES OF INSURANCE:

1. Principle of indemnity.

2. Pooling of risk principle.

3. Principle of spreading the risk.

ADVANTAGES OF INSURANCE:

Losses if occurred are compensated by insurer.

Uncertainty is reduced and business can be transacted without having the fear of losing itsinfrastructure and capabilities.

Insurance premium is business expenditure. It reduces your income as well as income taxliability.

In the case of certain insurances, especially in the nature of life insurance, medical claim insuranceetc.(income tax concessions are available)

You can also avail certain value added services from insurer like loss control advice, exposureanalysis, etc.

BENEFITS OF INSURANCE:

It is one of the techniques of risk management process.

It reduces the fear and anxiety in the mind of an individual and also a business unit.

It is compensatory in nature.

It restores the insured position.

When property or person is brought the umbrella of insurance cover, it adds to the creditworthiness.

EXPORTS

Exports are explained as the goods and services manufactured in one country and acquired by citizens of another country. The export of good or service can be anything. This trade can be done through shipping, e-mail, transmitted in private luggage on a plane. Basically, if the product is manufactured domestically and traded in a foreign country, it is known as an export.

NEED FOR INSURANCE IN EXPORT

The need for insurance is mainly for two reasons:

Legal

Commercial

Legal

Legal liability of the intermediaries is Limited. Intermediaries include clearing and forwarding agents, carriers port and customs authorities etc. that handle the goods at various stages. They do not incur any liability, if the damage is due to circumstances beyond their control or if the loss caused despite their reasonable care taken by them.

Commercial

Insurance is required even on commercial considerations. Once goods are damaged, importer may not accept the bill of exchange, in case of D/A bill. He may not make payment in case of D/P bill. When loss occurs, such loss may not be just shipment of goods, but also loss of profits too.

General needs :

Exporter may suffer financial loss if goods are damaged during transportation from the port of dispatch to the point of destination.

To protect from loss, exporter may have to take insurance policy to protect him from physical damage to the goods. Here is the importance of ‘cargo Insurance’. In case, goods are shipped by sea, the insurance is known as Marine Insurance’. The term cargo insurance is used in case of air shipment. However, in practice, both the terms are interchangeably used and their regulations are common.

MARINE INSURANCE

Contract of "marine insurance" means a contract of marine insurance as defined by section3.

A contract of marine insurance is an agreement whereby the insurer undertakes to indemnify theassured, in the manner and to the extent agreed, against losses incidental to marine adventure. Thereis a marine adventure when any insurable property is exposed to marine perils ie perils consequentto navigation of the sea.

The term ‘perils of the sea' refers only to accidents or casualties of the sea, and does not include theordinary action of the winds and waves. Besides, marine perils include, fire, war perils, pirates,seizures and jettison etc.

"Freight” includes the profit derivable by a ship-owner from the employment of his ship to carry hisown goods or other movables, as well as freight payable by a third party, but does not include passagemoney.

“Insurable property" means any ship, goods or other movable property which are exposed to maritimeperils.

"Marine adventure" includes any adventure where:

Any insurable property is exposed to maritime perils;

The earning or acquisition of any freight, passage money, commission, profit or otherpecuniary benefit, or the security for any other advances, loans or disbursements isendangered by exposure of insurable property to maritime perils,

Any liability to a third party may be incurred by the owner of, or other person interested in orresponsible for, insurable property by a reason of maritime perils.

"Maritime Perils" Means the perils consequent on,or incidental to, the navigation of the sea, that is tosay. perils of the sea, fire, war perils, pirates, rowers, thieves, captures, seizures, restraints, anddetainments of princes and peoples, jettisons, barratry and any other perils which are either of the like

kind or may be designed by the policy.

“Movables" Means any movable tangible property other than the ship, and includes money, valuablesecurities and other documents.

'Ship" Includes every description of vessel used in navigation

"Suit' Includes counter-claim and set-of.

"Policy" Means a marine policy. An instrument containing the contract of marine insurance. It containsterms and conditions on which contract are entered between the two parties. Section 24 of the actprovides for the same. It is concluded when proposal is accepted by the insurer, it is deemed to beaccepted when ship or covering note of the instrument of contract is issued through undersignedsection 23.

PRINCIPLES OF MARINE INSURANCE :

The contracts or insurance are based on the following principles:

1. Principle of utmost good faith i.e. the insured must disclose to the insurer all the material facts or circumstances which are known to him or which ought to be known to him in the ordinary course of business.

2. Principle of insurable interest i.e. no person can enter into a valid contract of insurance unless he has insurable interest in the object or the life insured. Insurable interest is understood as an interest in the preservation of a thing or continuance of a life, recognized by law. Thus one can have an insurable interest only when one would stand to benefit financially by the continuance of the life or object insured otherwise financial loss would result. Thus,a person can take policy on his ship an owner of the goods can take policy on cargo and person entitled to receive freight can take policy on freight. All such persons have insurable interest in the subject matter. Without insurable interest such contracts are merely wagering agreements which are not valid contracts.

3. Principle of indemnity i.e. the contracts of insurance only indemnify a loss resulting from risk covered under the policy. However the cargo owner are usually allowed a reasonable anticipated profit. In other words we can say that the marine insurance policy provides a commercial indemnity rather than indemnity in a strict legal sense.

4. Causal proxima: This principle implies that the insurer becomes liable to pay for loss if the insured peril or risk is the proximate cause of loss. Thus the insurer would not pay for the loss to the goods if they are stolen because of unworthy packing in case the policy covers the risk theft,

pilferage and non delivery. In this case the proximate cause of loss is the faulty packing which facilitated the goods to be stolen. Since this is not covered under the risks specified in the policy the insurer would not indemnify the loss.

CONTENTS OF AN INSURANCE POLICY: According to section 25 of the Act, a marine insurance policy must specify:

The name insured, or of some person who effects the insurance on behalf of the insured.

The subject matter insured and the risk insured against losses.

The voyage or period of time or both, as the case may, covered by the insurance,

The sum or sums insured.

The name or names of the insurer or insurers.

WHO CAN INSURE? The shippers/exporters have an insurable interest by virtue of their ownership of goods and they can insure. Similarly the buyer to whom the goods are sent can also insure by virtue of his acquiring an interest in the goods at a later date. In practice insurance is effected either by shippers/exporters or buyer depending upon their contract of sale of goods. There are mainly three types of sales of goods in the overseas trade as follows: 1. CIF (Cost, Insurance and Freight) 2. CFR(Cost and Freight) 3. FOB(Free on board) These terms of sale are agreed upon mutually by both the parties to the contract. It is recommended by the Reserve Bank of India that the exporter should obtain the seller's contingency insurance to protect himself against the possible loss to the goods taking place before the insurable interest passes on to the buyer. This policy is not negotiable to the overseas buyers and the claims under the his policy are paid in India in rupees. In case the exporter is paying insurance premium on behalf of the foreign buyer, then he is required to declare that: (a) Insurance charges on the shipment have to be borne by him in terms of his contract with the overseas buyer and that he is not making payment on behalf of any non resident. (b) He is defraying the insurance charges in respect of the shipment in question on account of the overseas buyer and he undertakes to add the amount on the invoice and recover the same from the buyer in an approved manner.

FEATURES OF MARINE INSURANCE POLICY:

The basic features of marine policies are as follows:

1. The marine cargo insurance policies are freely assignable as the consignee finally takes the goods pass through various hands before the consignee finally takes their delivery. The assignment of insurance policy is allowed in terms of section 52 and 53 of the Marine Insurance Act 1963.A Marine Insurance Policy can be assigned either before or after the loss. 2. The assignment is done by endorsement and delivery.

3. Insurable interest of the claimant must exist at the time of loss of the cargo.

4. The value of the insurance policy is the sum agreed between the insured and the insurer. Thus these policies are always on agreed value basis. Since contracts of insurance provide for indemnity the loss suffered by the insured is not just the loss suffered by the 66 insured is not just the loss represented by the value of the goods but also the amount of profit that the parties would have earned from the sale of those goods. That is why the marine insurance policies are taken for a value equal to 110% of the CIF value of the goods i.e. 10% more than the CIF value to account for the anticipated profits.

5. The contract of marine insurance is a contract of commercial indemnity and not pure indemnity because this insurance provides for indemnity against the loss of profits as well. 6. The duration of the marine insurance policy is based on the institute cargo clause yet it is provided to include the period of transit, the time of discharge of the goods and the time of arrival of the goods. Generally the duration of the policy covers time upto 30 days after arrival of the goods in case of air shipments and 60 days after the arrival of shipments by sea to allow for the transportation of cargo from the final port of discharge to the warehouse of the importer.

Marine insurance is an important component of international trade and commerce and subject to international regulations in every stage of operations. It is governed by the Marine Insurance Act 1963 in India and guided by the various clauses formulated by the Institute of London Underwriters (ILU) and the international commercial terms known as ‘ Incoterms’. The need to insure property against the economic consequences of its loss or damage has become a fundamental feature of modern society. Insurance underpins key aspects of society by providing security and protection to individuals, communities and businesses. It facilitates trade and commerce; generates employment; provides risk sharing; encourages innovation by allowing individuals and businesses to engage in more risky business activities, thereby fostering higher levels of economic activity; and mobilizes domestic savings through the collection of premiums by insurance companies which can help build a country‘s financial market. In the context of globalization, maritime transport is the backbone of international trade with over 80 per cent of world merchandise trade by volume being carried by sea. Marine transport involves risks related with the ―perils of the sea‖. In this respect, marine insurance is a mechanism that helps to mitigate the risks of financial loss to the property such as ship, goods or other movables, in maritime transport. Insurance is, thus, a necessary component of doing business on an international basis and plays an important role in the international trade. Its purpose is to enable ship-owner, the buyer and seller of the goods to operate their businesses, while relieving themselves, at least partly, of the burdensome financial consequences of their property‘s being lost or damaged as a result of various risks of the high seas. Thus, marine insurance adds the necessary element of financial security so that the risk of an accident happening during the transport is not an inhibiting factor in the conduct of international trade. In this sense, marine insurance is an aid to the conduct of seaborne international trade. Therefore, developing an efficient and competitive insurance market is of key importance for developing countries like India as they integrate into the world economy. The normal practice in export /import trade is for the exporter to ask the importer to open a letter of credit with a bank in favor of the exporter. As and when the goods are ready for shipment by the exporter, he hands over the documents of title to the bank and gets the bill of exchange drawn by him on the importer, discounted with the bank. In this process, the goods which are the subject of the sale are considered by the bank as hysical security against the monies advanced by it to the exporter. A further security by way of an insurance policy is also required by the bank to protect its interests in the event of the goods suffering loss or damage in transit, in which case the importer may not make the payment. The terms and conditions of insurance are specified in the letter of credit. For export/import policies, the-Institute Cargo Clauses (I.C.C.) are used. These clauses are drafted by the Institute of London Underwriters (ILU) and are used by insurance companies in a majority of countries including India. Over 50 years later, when the world of trade and commerce had changed very significantly, the Court of Appeal was faced with a similar predicament in the case of *Container Transport International v. Oceanus Mutual Underwriting Association* [1984] 1 Lloyd‘s Rep 476. In his comprehensive and well known judgment, Kerr L.J. considered extensively the theoretical and practical difficulties concerning the interpretation of section 18(2) MIA 1906 concerning materiality. He balanced the competing interests in the following way: ―the principle is that if a certain fact is material for the purposes of ss. 18(2) and 20(2), so that a failure to draw the underwriter‘s attention to it distorts the fairness of the brokers presentation of the risk, then it is not sufficient that this fact could have been abstracted by the underwriter from material to which he had access or which was cursorily shown to him. On the other hand, if the disclosed facts give a fair presentation of the risk, then the Underwriter must enquire if he wishes to have more information.‖ It seems therefore, that once the threshold point has been reached, in any specific circumstances, where a fair presentation has been made, the burden transfers to the insurer or reinsurer to request more information, if he wishes. However, at that time, the insured‘s duty of disclosure has been satisfied. In such a situation, the preferable view seems to be that, after the disclosure threshold point had been reached, in any individual case, a failure by the insurer to ask further questions should not lead to an inference of wavier against the insurer because this may result in the dangerous erosion of the duty of disclosure which Lord Justice Scrutton feared, over 50 years previously. In any event, the *Oceanus case* became notorious for interpreting the definition of materiality in s. 18 MIA 1906 in a much criticized way. The facts are as follows: CTI hired out containers for ocean transportation. Frequently, problems occurred regarding the liability of the container lessees for repairs under the container hire contracts. It was agreed that CTI would cover an initial part of certain repair costs. CTI obtained insurance of their exposure to the cost of repairs for the containers, initially through Crum & Forster. As a result of their concerns with the claims experience, Crum & Forster quoted renewal on terms which were not acceptable to CTI. The cover was placed subsequently with Lloyd‘s but, Lloyd‘s also became unhappy with the claims experience - following which the insurance was proposed to and placed with Oceanus. Subsequently, Oceanus, became unhappy with the claims and alleged that incomplete information concerning the claims history was presented to them, constituting a material misrepresentation. Expert evidence was produced to the Court, on behalf of Oceanus, that a prudent insurer, within the terms of s. 18 (2) of MIA 1906, would have been influenced in his judgment in determining whether he would take the risk or in fixing the premium, if he was made aware of the full facts. The Court of Appeal decided that the correct test of materiality was whether the fact which was undisclosed or misrepresented was one which a notional prudent insurer would have taken into account in reaching his decision whether or not to accept the risk or in fixing the premium. Controversially, the Court of Appeal determined that it was not necessary to show that the actual underwriter would have been influenced by the nondisclosure or misrepresentation to act in a different way.

ESSENTIALS OF A VALID MARINE INSURANCE POLICY:

It must fulfil all the essentials of a valid contract

It must be in writing and duly stamped under the stamp act

Insured must have insurable interest in the subject matter at the time of loss

Time period of insurance must not be more than one year

Good faith must be observed between the parties

TYPES OF MARINE POLICY

On the basis of insured interest

Hull Policy

Cargo Policy

Freight Policy

On the basis of time period

Time Policy

Voyage Policy

Mixed Policy

On the basis of value of the insured subject matter

Valued Policy

Unvalued or open policy

On the basis of description of insured ships, goods orsubject matter

Unnamed Policy

Named Policy

Fleet Policy

Floating Policy

Blanket Policy

Policy Proof of Interest (PPI)

Block Policy

Currency Policy

Yatch Policy

On the basis of issuing authority

Lloyd's Policy

Company Policy

ON THE BASIS OF INSUREDINTEREST

Hull Policy:

The insurance policy taken by the owner of ship anditsequipments are known as Hull policy. It isbasically a property insurance which covers theship itself, the machinery and equipment.

Furthermore, the insurance covers some liabilities,normally collision liability withanother ship and sometimes also liability for colliding with other objects than another ship.

Claims include

Total loss of the ship

Damage to the ship, engines and equipment

Explosions and fire

Collisions - damage sustained to the ship andsometimes also liability towards the other ship

Cargo Policy

The insurance policy taken by owners of thegoods.Cargo insurance (also called marine cargoinsurance) covers physical damage to, or loss of goodswhile in transit by land, sea and air and offersconsiderable opportunities and costadvantagesifmanaged correctly.

The 'cargo' transported by sea is subject to manifoldrisks such as:

Loss or damage at the port and

Loss or damage during the voyage.

Marine cargo insurance' providesthe insurance cover in respect of:

Lossof or damage to cargo during transit by rail, road,sea or air.

Export and import shipments by ocean

Shipment by inland vessels

Consignments sent by rail, road, air & articles sent bypost

Damages from bad weather

Seawater or freshwater flooding

Freight Policy

Freight insurance indemnifies the ship owner for theloss of earnings if the goods are damaged or lostand are not delivered.

ON THE BASIS OF TIME PERIOD:

Time Policy: This is designed to give cover for somespecific period of time. Time policies are usual in caseof hull insurance.

Voyage Policy: This is a policy in which the limits ofthe risks are determined by place of particular voyage.Generally done for goods insurance, sometimes forfreight insurance.

Mixed Policy: A mixed policy is blend of time policy

and voyage policy.

ON THE BASIS OF VALUE OF THEINSURED SUBJECT MATTER

Valued Policy:

A type of insurance coverage that placesa specific value on the insured property, such as thehull or cargo of a shipping vessel. A valued marine

policy pays up to, the specified value in the event of atotal loss.

Unvalued Policy: The value of the property would be

determined following the event of a loss.

ON THE BASIS OF DESCRIPTION OF INSUREDSHIPS, GOODS OR SUBJECT MATTER

Unnamed Policy: The marine policy in which the name

of the ship, the name of voyage and the name of the

route of the voyage are not mentioned .

Named Policy: The marine policy in which the name of the vessel, name of the voyage, the kind of the goods,

the description of the quota of goods and route etchave been mentioned .

Fleet Policy: When a single policy is taken for a group

of vessels, the policy is known as a fleet policy.

Floating Policy: An 'open policy' is also known as 'floating policy'.It is issued for a long duration and all consignments sent during theperiod are covered by the insurer's. This policy is suitable for bigcompanies that have regular shipments it saves them from the tediousand expensive process of acquiring an insurance policy for eachshipment. The rates are fixed in advance the assured has to declare the nature of each shipment and the cover is provided to all the shipmentsthe assured needs to deposit a premium for the estimated value of theconsignment during the policy period. It only mentions the amount forwhich the insurance is taken out, and leaves the name of the ship orships and other particulars to be defined by subsequent declarations,which will be declared by the assured by endorsement on the policy orin other customary manner policy the type of the goods andthe geographical boundaries have been informed. Underthis policy the amount is indemnified for a fixed timeperiod to the insured. The policy is taken to cover losseswithin the particular time and place.

The policy is taken fora certain amount and premium is paid on the whole of it inthe beginning of the policy and is re-adjusted at the end ofthepolicyaccording to the actual amount at risk.

If the actual coverage of risk is less than the total amount ofinsurance, the premium related to the excess amount isreturned to the insured.

On the other hand, if the amounts of shipments are greaterthan the insured sum, additional premium is charged overthe excess protection.

Policy Proof of Interest (PPT): The policy is issued toavoid the complication of the principle of insurableinterest. These are called 'Policy Proof of Interest' and-arehonoured by the insurer even in absence of insurableinterest.This policy is based on mutual understanding, so, it iscalledhonoured policies. This is also called wageringpolicies because insurable interest is not required,consequently, it cannot be legally enforceable.

Block Policy: This policy is considered to be wide-spread because it includes the risk of marine and landroutes. It can cover the risk right from themanufacturing factory to the distant over sea'sdestination. It covers the inland risk as well as themarine perils.

Construction or Builder's Risk Policy: This policy is designed to cover the risks incidental to the building ofa vessel, usually given cover from the time of layingthe keel until completion of trails and handling over toowners. In the case of very large vessel, the periodmay extend over several years.

Yacht Policy: This policy is provides the risks to thesmall boats, used for boating for pleasure. It providesto cover the risk against the mechanics and the parts ofthe boats. It is used for the specific area used forboating, racing etc. Ii does not provide a cover to therisks in the open sea. ii is popular in rich countries likeAmerica.

Currency Policy: This policy provides the risk againstthe rates of foreign exchange. Policy issued in foreigncurrency is called currency policy, where sum assuredis stated in foreign currency.

ON THE BASIS OF ISSUING AUTHORITY

Lloyd's Policy: Marine insurance when effectedby Lloyd's underwriter it is Lloyd policy.

Company Policy: Marine insurance when effectedby marine insurance companies and policies areknown as the company policy.

DISCLOSURES AND REPRESENTATIONS: A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party. Subject to the provisions of this section, the assured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the assured, and the assured is deemed to know every circumstance which, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

(2) Every circumstance is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) In the absence of enquiry the following circumstances need not be disclosed, namely-

(a) any circumstance which diminishes the risk;

(b) any circumstance which js known or presumed to be known to the insurer. The insurer is presumed to know matters of common notoriety or knowledge, and matters which an insurer in the ordinary course of his business, as such, ought to know;

(c) any circumstance as to which information is waived by the insurer;

(d) any circumstance which it is superfluous to disclose by reason of any express or implied warranty.

(4) Whether any particular circumstance, which is not disclosed, be material or not is, in each case, a question of fact.

(5) The term ―circumstance‖ includes any communication made to, or information received by, the assured. Subject to the provisions of section 23 as to the circumstances which need not be disclosed, where an insurance is effected for the assured by an agent, the agent must disclose to the insurer-

(a) every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him; and

(b) every material circumstance which the assured is bound to disclose, unless it came to his knowledge too late to communicate it to the agent.

(1) Every material representation made by the assured or his agent to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. If it be untrue, the insurer may avoid the contract.

(2) A representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk.

(3) A representation may be either a representation as to a matter of fact, or as to a matter of expectation or belief.

(4) A representation as to a matter of fact is true if it be substantially correct, that is to say, if the difference between what is represented and what is actually correct would not be considered material by a prudent insurer.

(5) A representation as to a matter of expectation or

(6) A representation may be withdrawn or corrected

(7) Whether a particular representation be material belief is true if it be made in good faith. before the contract is concluded. or not is, in each case, a matter of fact.

A contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and for the purpose of showing when the proposal was accepted, reference may be made to the slip or covering note or other customary memorandum of the contract, although it be unstamped.

CARRIAGE OF GOODS IN EXPORT TRANSACTION

Goods which are matter of an export transaction, whether a contract of sale or of construction, have to be moved from the place of dispatch to that of destination. This carriage invariably has an international character. It may be executed by sea, air or land or by a combination of these modes of transportation. If it is done by only one of them, the international transport is unimodal and if it is carried out by combination of them, it is multimodal or combined transport.

LAW ON CARRAIGE OF GOODS

Law relating to carriage of goods can be studied under three heads:

- Carriage by land
- Carriage by sea
- Carriage by air

Unimodal international transport is governed by International Conventions. They have been adopted by many countries and are of great practical effect. The most important of them are:

Sea transport: the Hague-Visby Rules relating to Bills of Landing.

LIABILITY IN CONNECTION WITH THE CARRIAGE OF GOODS BY SEA-

Till 1921 no rules were issued. However, the International Law Association formulated a body of rules in 1921.4 Later on these rules were adopted by almost all the maritime states as International Convention for Unification of Certain Rules of Law Relating to Bills of Lading (commonly known as Hague Rules), signed at Brussels in 1924 and amended by Brussels Protocol in 1968.5 These rules were quickly adopted into the municipal legislations of a large number of countries and have been widely used ever since. The Hague rules are in effect a collection of rules which define the rights and liabilities of the two parties concerned in an agreement to carry goods by sea, namely, the carrier and the cargo interest, including the right of the carrier to limit his liability to cargo claims.

Generally in any contract of affreightment, the ship owner must deliver the cargo in the same order and condition, as it was, when shipped. But Hague Rules contain specific provisions exonerating the ship owner from this liability in certain circumstances listed as :

(a) act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) fire, unless caused by the actual fault or privity of the carrier;

(c) perils, dangers and accidents of the sea or other navigable waters;

(d) act of God;

(e) act of war;

(f) act of public enemies;

(g) arrest or restraint of princes, rulers of people, or seizure under legal process;

(h) quarantine restriction;

(i) act or omission of the shipper or owner of the goods, his agent, or representative;

(j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general;

(k) riots and civil commotions;

(l) saving or attempting to save life or property at sea;

(m)wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) insufficiency of packing;

(o) insufficiency or inadequacy of marks;

(p) latent defects not discoverable by due diligence;

(q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage. The carrier who seeks the benefit of these exception clauses has the burden of proving that the

THE VISBY AMENDMENTS –

The Visby Amendments brought very important changes concerning the 1924 Convention. The main points of the revision concerned the widening of the scope of the Hague Rules and the adoption of the limits of carrier's liability to the changed monetary circumstances. In particular, the Visby rules raised the ceiling of the limit of liability and placed the unit of limitation on a more inflation resistant basis. The unit of limitation amount was to be determined by reference to Poincare Francs. Neither the carrier nor the ship is entitled to the benefit of the limitation of liability if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result. Moreover, the Protocol included provisions concerning the carriage of goods by sea in containers and extended the privilege of liability limitation to the servants and agents of the carrier. The carrier or the ship is not responsible for loss or damage or in connection with, goods if the nature or value thereof has been knowingly mis-stated by the shipper in the bill of lading. Hague-Visby Rules did not affect the provision of any international convention or national law governing liability for nuclear damage. 30 The provisions of the Convention applies to every bill of lading relating to the carriage of goods between ports if:

(a) the bill of lading is issued in a Contracting State;

(b) the carriage is from a port in a Contracting State;

(c) the contract contained in or evidenced by the bill of lading provides that the rules of this convention or legislation of any State giving effect to them are to given the contract, whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person The Hague Rules stipulate that the carrier is discharged from all liability if no suit is brought within a year after the delivery of goods or from the date when such delivery would have been expected. Under Hague-Visby Rules this period may be extended if the parties agree after the cause of action has arisen.

HAMBURG RULES-

The Hamburg Rules are applicable to all 'contracts of carriage by sea' between two different States, if:

(a) the port of loading as provided for in the contract of carriage by sea is located in a Contracting State; or

(b) the port of discharge as provided for in the contract of carriage by sea is located in a Contracting State; or

(c) one of the optional ports of discharge provided for in the contract of carriage by sea is the actual port of discharge and such port is located in a Contracting State; or

(d) the bill of lading or other document evidencing the contract of carriage by sea is issued in a Contracting State; or

(e) the bill of lading or other document evidencing the contract of carriage by sea provides that the provisions of this convention or the legislation of any State giving effect to them are to govern the contract The application of the Hamburg Rules does not depend upon the nationality of the ship, the carrier, the shipper, the consignee or any other interested person. These rules do not apply to charter parties. However, they apply to bills of lading issued pursuant to charter parties, if the bill of lading governs the relation between the carrier and a holder of the bill of lading who is not the charterer. The Hamburg Rules have been given a relatively wide scope of application substantially wider than that of Hague Rules. Unlike the Hague Rules, which applyonly when a bill of lading is issued by the carrier, the Hamburg Rules govern the rights and obligations of the parties to a contract of carriage regardless of whether or not a bill of lading has been issued. This is becoming important as more and more goods46 are carried under non-negotiable transport documents, rather than the bills of lading.

2. Air transport: the Warsaw Convention; or the Warsaw convention as amended.

3. Land transport by road: the CMR. The acronym CMR stands for Convention relative au contract de transport international des merchandise per route.

There are several conventions on the international carriage of goods, all of them essentially unimodal.

1 The Montreal Convention (MC) on carriage by air,

2 The (amended) CIM 1999 on carriage by rail,

3 The CMNI on inland navigation .

The CMR was signed in Geneva in 1956 and the provisions of the convention have not been amended ever since. The general (academic) consensus is that several provisions and the limitation of liability should be revised as soon as possible. Article 1 CMR (scope of application) is currently interpreted in two different ways, article 2 CMR (mode-on-mode transport) is almost incomprehensible, the combination of articles 29 and 31 CMR (wilful misconduct and jurisdiction) triggers forum shopping, and article 34 and further CMR (successive carriage) regulates a relic from the past. Nevertheless, none of the contracting states has felt the need to take the initiative to amend, update or even re-evaluate the convention. The Hague Rules(HR) were signed in 1924 and (only) amended with the Visby protocol in 1968. Consequently, the limitations of liability have not been revised for half a century now. Besides, the bill of lading has seen some serious competition over the last 50 years. The bill of lading has already given way to the (non-negotiable) sea waybill in some trades, and its traditional paper form will undoubtedly be substituted for an electronic equivalent in due course. Finally, whereas the rise of the container has boosted multimodal transportation, the HVR just regulate carriage by sea, and then only within the tackle-to-tackle period. Clearly, the drafters of the Rotterdam Rules (RR) have recognized these factors, and they have also addressed them in the convention. The rules do not require a bill of lading or any similar document of title for their application. Furthermore, the rules prescribe a limited network system to regulate multimodal contracts of carriage (as long as a sea leg is involved) in article 26 RR. Still, the requirement of a sea leg implies that the rules will not apply to other multimodal contracts of carriage. Contracts of carriage such as in *Quantum Corp v Plane Trucking (air/road), Datec v UPS (road/air/road*), and in fact most multimodal parcel delivery services will not be regulated by the rules. Furthermore, the RR contain so many provisions on the contract of carriage (wholly or partially by sea) that the rules may have overshot their objective. Apart from the number of provisions (96), and the danger of overregulation, some of these provisions are also very complex and at times difficult to read.
Finally, a rather practical problem isthat the rules have managed to secure just three ratifications since the signing ceremony in Rotterdam in 2009. Only Togo, Congo and Spain have ratified the convention at this point, but the major shipping countries, such as Australia, Canada, China,

Germany, India, Japan, Singapore, the UK and the US, are not showing much enthusiasm to follow suit. Given these issues and uncertainties, it makes sense to have a contingency plan in place, an alternative to step in if necessary. In fact, this alternative should ideally remedy the shortcomings of the CMR and the HVR in the process. It is submitted that these two objectives can best be reached by means of an entirely new convention: the Carriage of Goods Convention (CGC).

BASIC PRINCIPLE OF CONVENTION-

First, the starting point of the CGC is the contract of carriage in general. Whereas the existing

conventions all depart from a unimodal contract of carriage, the

CGC does not discriminate between unimodal and multimodal contracts of carriage. The convention gives uniform rules for all contracts of carriage within its formal scope of application. Second, the establishment of mandatory rules is not an objective in itself. Any convention should obviously be mandatory to have any effect in the first place, but the CGC gives way to the agreement of the parties whenever this is possible. The convention therefore only aims to cover the necessities, and for the rest it intends to interfere as little as possible. This means, for instance, that the CGC will not regulate jurisdiction. In the commercial practice, the contracting parties will often agree on a competent court to settle their disputes, and they are perfectly free to do so. The parties can also agree on arbitration; the CGC does not intend to restrict party autonomy in this respect either.

Third, and therefore not just a positive side effect of freedom of contract, the convention aims to be consumer friendly. The convention needs to be easily accessible for merchants, carriers, bankers, insurers and claims handlers, not just for trained and specialized legal practitioners.

LIABILITY UNDER THE CONTRACT OF CARRIAGE –

The carrier is liable for the loss of, damage to or delay in the delivery of the goods in the course of the contract of carriage, irrespective whether the goods were in his own care or in the care of his agents, servants or subcontractors. The carrier and the shipper are free to agree that any storage, handling, loading, stowage and discharge of the goods at the place of receipt and at the place of delivery are performed without any expense and liability for the carrier. The shipper shall inform the carrier about the nature, specifications and other relevant characteristics of the goods, and he is liable for loss or damage suffered by the carrier because of any shortcomings or inadequacies in the information provided. Arguably, the convention's main rule follows from Art 3.1 CGC. The contract of carriage requires the carrier to deliver the goods, on time, in the same (sound) condition as in which they were received for transportation. The carrier is liable throughout the entire period between receipt and delivery, and he cannot excuse himself for any actions of his agents, servants and subcontractors used in the performance of the contract. The reference to agents, servants and subcontractors is deliberately wide in order to include 'all persons of whose services he makes use for the performance' in the sense of art 3 CMR. Article 3.2 CGC combines art II HVR, art VII HVR and art 13(2) RR, the codification of *Renton v Palmyra and The Jordan II.* The CGC covers the entire period between receipt and delivery, but the convention does allow parties to define the scope of their contract. The parties are therefore free to agree on 'before and after' clauses and FIOS clauses in their contract, and this irrespective of the means of transportation. This freedom only relates to such operations at the place of receipt and the place of delivery. Interim storage, handling, loading, stowage and discharge operations because of transhipment in the course of the voyage may perhaps be allowed under the (through or multimodal) contract of carriage, but the carrier's liability for these operations remains all the same subject to the mandatory provisions of the CGC.58 The convention imposes liabilities on the carrier, but also on the shipper. Ultimately, the shipper is the party with (access to) accurate information on the nature, specifications and other relevant characteristics of the goods. Article 3.3 CGC does not distinguish between 'dangerous' goods and other goods. The shipper's obligation to provide adequate information therefore applies to all goods. Given the wording of the provision, the shipper cannot raise the absence of adequate information as a valid defence. On the other hand, the obligation is not a warranty. The shipper's liability under art 3.3 CGC only relates to loss or damage as a result of any shortcomings or inadequacies in the information provided.

Exemptions –

1 The carrier is not liable for loss, damage or delay resulting from an act of the shipper or his agents, servants and subcontractors, an inherent defect, quality or vice of the goods, (attempted) rescue or salvage operations or a cause that could neither be prevented nor avoided.

2 The carrier cannot rely on the exemptions listed for loss, damage or delay attributable to defects in the means of transportation, including defects in any container supplied by the carrier. The 'catalogue of exemptions' in art 4.1 CGC is not a combination of all the exemptions under the different unimodal conventions, but instead just a rather short list.

The first two exemptions will hardly raise any questions; they correspond with art IV(2)(i) and (m) HVR, but also with art 18(2)(a) and (b) MC and art 17(4)(b), (c) and (d) CMR. The explicit mention of (attempted) rescue or salvage operations is necessary because such operations can of course simply be avoided, but should never be avoided. The problem with the other events listed in art IV(2) HVR is that it is not always easy to see why they would exempt the carrier. As a contract of carriage requires the carrier to achieve a certain result – the delivery of the goods to the consignee in the same sound condition – he should only be able to escape liability in exceptional circumstances. An error in navigation, for instance, is always avoidable, and the consequences thereof should therefore remain for the account of the carrier. The occurrence of a 'fire' alone should not per definition exempt the carrier from liability. This depends on the question of whether the cause of the fire could be prevented or avoided. The perils of the sea or an act of God will often be unavoidable, but surely not if the master obtains a storm warning in advance. Mutatis mutandis the same then applies for the remaining exceptions. Since these are exceptions to the general rule of art 3.1 CGC, the carrier bears the onus of proof of the occurrence of one of the causes listed in art 4.1 CGC, the causal link between that cause and the loss, damage or delay and, if required, the extent to which the exempted cause contributed to the loss, damage or delay. If the carrier succeeds, the onus of proof shifts to the shipper/consignee. Article 4.2 CGC stipulates that the carrier remains liable if (and to the extent that) the shipper/consignee proves that the loss, damage or delay is attributable to the use of a defective ship, train, truck, airplane or other means of transportation. These defects also extend to containers. The carrier cannot escape liability if the loss, damage or delay is attributable to the use of leaking containers or malfunctioning reefer containers that he has supplied.

THE ISSUANCE OF A TRANSPORT DOCUMENT-

The carrier will issue a transport document at the request of the shipper upon the receipt of the goods under the contract of carriage. This transport document provides prima facie evidence of the specifications and the apparent order and condition of the goods, and proof to the contrary shall not be admissible against the consignee acting in good faith. If the transport document contains contractual provisions, these provisions provide prima facie evidence of the contract of carriage, and proof to the contrary shall not be admissible against the consignee acting in good faith. The issuance of a bill of lading, waybill, consignment note or other (electronic) document is common practice. It is likely that these documents will more and more often be in an electronic form, probably even in forms that are currently not yet in existence. The parties to the contract of carriage are free to choose any suitable (electronic) document they deem fit, but they are equally free not to choose any document at all (if the shipper does not require one). The CGC prescribes the issuance of the transport document 'upon the receipt of the goods under the contract of carriage'. This moment will usually coincide with the receipt of the goods by the carrier, but that may be different if the carrier holds the goods in storage under a separate warehouse agreement pending instructions for their carriage. Article 5(2) CGC is based on art III(4) HVR. The transport document provides prima facie evidence of the specifications and condition of the goods between the carrier and the shipper. This implies that the initial parties to the contract of carriage may still give counterevidence against the prima facie evidence of the transport document. The consignee will often not have been privy to the discussions and negotiations between the carrier and the shipper, and he may rely on the information in the transport document when he is unaware of, and could reasonably not have been aware of any other arrangements. The key difference between art III(4) HVR and art 5(2) CGC is that the former only covers documents of title, whereas the latter covers all transport documents including documents of title. The justification lies in the function of the transport document, namely a representation by the carrier with the objective to serve as evidence. Given this specific function, it is not so much relevant whether it is a document of title or not, but only whether the consignee in good faith relied on the information in that document.

This principle, the protection of someone who could reasonably rely on information given by someone else, is also found in § 242 German Civil Code and art 3:36 Dutch Civil Code as well as in the doctrine of estoppel.69 Article 5 (2) CGC codifies this principle in line with art 41(c) RR.70 The ratio behind art 5(3) CGC is really the same, but then related to the contractual provisions in a transport document. Article 5(3) CGC in fact extends the operation of art 5(2) CGC to contractual provisions. The mere issuance of a transport document cannot affect the agreement between the contracting parties. Their relation remains governed by the contract of carriage, and the transport document is then a mere receipt. Again, however, this changes when the transport document comesinto the hands of a third party consignee acting in good faith, and again it makes no difference whether the transport document is a document of title or not. The provision is similar to art 11 MC and art 9 CMR, and codifies the rule of *Leduc v Ward.*

The rights (and obligations) under the contract of carriage -

1 The shipper has the right of disposal until such time that the consignee takes or demands delivery of the goods in accordance with article 6.5 or the right of disposal passes in accordance with point 3.

The party mentioned as the shipper on the transport document is the shipper for the purpose of article point 1.

3 If the transport document is a bill of lading or similar document of title, the right of disposal passes to the transferee with each transfer of all the originals of that bill of lading or similar document of title.

4 The consignee may take or demand delivery of the goods upon their arrival at the place of delivery against a receipt and payment of all freight due, and from then on exercise all rights and be held to all obligations under the contract of carriage.

5 The consignee's acquisition of rights and obligations under the contract of carriage pursuant to article 6.4 does not affect the shipper's rights and obligations under the contract of carriage, other than the right of disposal.

Apart from the (sole) exception of art 6.3 CGC, the right of disposal rests with the shipper until the consignee takes or demands the delivery of the goods. At that moment, the shipper loses the right of disposal, and the consignee acquires the right of disposal. Article 6.1 CGC so ensures that the right of disposal is exclusive; it either rests with the shipper (or transferee, see art 6.3 CGC) or the consignee, but never with two parties at the same time. The party mentioned in the shipper's box of the transport document will often indeed be the shipper, but not necessarily. If the contract of carriage is concluded pursuant to an FOB or FCA sale of the goods, the buyer is the contractual shipper, but the seller is commonly mentioned in the shipper's box of the transport document, and the transport document is also issued to the seller. This practice makes considerable sense given the position of an FOB or FCA seller on the one hand, and the operation of a documentary sale on the other. The seller needs the transport document (proving his compliant delivery under the sale contract) as one of the documents to present to the buyer for 'cash against documents' or to ensure payment under a letter of credit. So long as the seller has not been paid, however, he should be able to exercise his grip on the goods even though they are already underway. The documentary shipper therefore has the right of disposal, and the carrier can safely follows his instructions.

This provision does not violate the shipper's rights under the contract of carriage in any way. As the conclusion of the contract of carriage precedes the issuance of the transport document, the shipper under the contract of carriage can steer the information in the shipper's box. As such, the shipper effectively controls the identity of the documentary shipper. The convention does not deal with documents of title, but art 6.3 CGC scratches the surface. In the case of a contract of carriage under a bill of lading or similar document of title, the right of disposal attaches to that document, and transfers together with the transfer of that document. This means that the initial shipper loses the right of disposal with the transfer of the bill of lading or similar document of title, and that the transferee then acquires the right of disposal. The consignee may require the delivery of the goods when they arrive at their destination. This will usually be a form free transaction between a stevedore, a warehouse keeper or a freight forwarder acting on behalf of the consignee on the one hand and the carrier or his agent on the other, although the carrier will of course require a receipt, perhaps payment of the outstanding freight, and if necessary identification before releasing the goods. When the goods travel under a bill of lading or similar document of title, however, the consignee will have to prove his entitlement to the delivery by presentation of the bill of lading. The CGC deliberately avoids the regulation of the presentation rule (and in fact any document of title function of the bill of lading), and relies on the commercial practice developed over the years, and undoubtedly still to develop in the future.

The consignee may exercise all rights under the contract of carriage from the moment that he takes or demands the delivery of the goods. All rights obviously include all rights of suit. The objective of this rule is to avoid the discussion on the underlying dogmatism. Article 6.4 CGC simply prescribes that the consignee may exercise all rights under the contract, and can subsequently also be held to all obligations under the contract. The position of the shipper under the contract of carriage, apart from the right of disposal, remains unchanged. The acquisition of rights by the consignee is not at the expense of the shipper. The shipper is, and stays, a contracting party, and as such he is entitled to exercise all rights (of suit) under the contract of carriage. Other than the right of disposal, the right of suit is thus not an exclusive right. An accumulative right of suit implies that the carrier may find himself confronted with two (or more) claims for the same loss or damage, in fact sometimes even issued by claimants that did not suffer the financial consequences. This is in practice hardly a problem, though. The goods are generally insured during the voyage, and the (subrogated) insurers will then take the lead in any claim against the carrier. They may indeed bring proceedings against the carrier in their own name, but perhaps (also) in the name of the shipper and/or the consignee at the same time, and often even on different grounds, ie under the contract but at same time in tort or bailment. Still, the carrier will only have to pay once. The carrier, who pays either the shipper or the consignee in good faith, is discharged from further liability in future claims for the same loss or damage.

Extra-contractual claims –

The provisions of this convention apply irrespective of whether a claim is brought in contract or otherwise. Agents, servants and sub-contractors employed in the performance of a contract of carriage may rely on the provisions of this convention whenever a claim is brought directly against them. This article prevents the circumvention of the convention and it probably channels liability claims in the process. The CGC applies irrespective of the basis of the claim against the carrier, shipper or consignee. The CGC also applies when a claim is brought directly against one of the agents, servants or sub-contractors of the carrier, shipper or consignee

INDIAN LAWS ON CARRIAGE OF GOOD

In the commercial life of any country, the need for carrying goods from one place to another cannot be overemphasised. Also, goods are to be moved from one country to another. For these purposes, a contract of carriage is to be entered into.

Definition of a Contract of Carriage

'A contract of carriage of goods is a contract of bailment for reward, or locatiooperisfaciends'. However, the contract of bailment is modified by the different statutes in the case of carriage of goods by land, sea or air.

Indian laws in various modes of carriage of goods

1. In case of carriage of goods by land:

(i) The Carriers Act, 1865.

(ii) The Railways Act, 1989.

2. In case of carriage of goods by sea:

(i) The (Indian) Bills of Landing Act, 1856.

(ii) The Carriage of Goods by Sea Act, 1925.

(iii) The Merchant Shipping Act, 1958.

(iv) The Marine Insurance Act, 1963.

3. In the case of carriage of goods by air:

(i) The Carriage by Air Act, 1972.

Wherever there is no specific provision for a particular matter in these statutes, then the Indian Courts resort to English Common Law.

Carriers

The persons, organisations or associations which carry goods are known as carriers. Carriers can be classified into:

- Common carriers
- Private carriers
- Gratuitous carriers

-*Common Carriers:*

The Carriers Act, 1865 defines a common carrier as any individual, firm or company (other than the government, who or which transports goods as a business, for money, from place to place, over land or inland waterways, for all persons (consignors) without any discrimination between them. A carrier must carry goods of the consignor for hire and not free of charge in order to be called a common carrier. Further, he must be engaged in the business of carrying goods for others for money from one place to another. A person who carries goods occasionally or free of charge is not a common carrier. Furthermore he is bound to carry goods for all persons (consignors) without any discrimination provided:

(i) The freight chargeable by him is paid to him;

(ii) There is accommodation on his conveyance; and

(iii) There is nothing objectionable or illegal about the carrying of goods of a particular consignor.

If, in spite of the above conditions being satisfied, a carrier reserves to himself the right to accept or reject an offer, he is not a common carrier. It is worth noting that the Carriers Act, 1865 covers only common carriers of goods and not passengers.

-*Private Carriers*:

A private carrier is one who does not transport goods from one place to another regularly; he may engage in some casual jobs of carrying goods for certain selected persons between certain terminals. In fact, he carries his own goods and that's why he is known as a private carrier and not a common carrier. Also, he does not make a general offer to carry goods for any one from one place to another for hire. However, he may enter into a contract with someone to carry goods on the terms agreed upon between them. In such a situation, it is a contract of bailment. Therefore, such transactions are not covered by the Common Carriers Act, 1865.

-Gratuitous Carrier:

When a person carries goods of another free of charge, he is a gratuitous carrier. Similarly a person may give lift in his transport to another person voluntarily without any compensation. Thus a gratuitous carrier may carry not only goods but persons also free of charge.

Carriage of Goods by Land

As mentioned above, the following two statutes govern the carriage of goods by land:

(i) The Carriers Act, 1865. (ii) The Railways Act, 1989.

The Carriers Act, 1865.

This Act defines the term "common carrier" and provides for his rights, duties and liabilities. As regards matters not covered by this Act, the rules of English Common Law will apply.

Rights of Common Carrier.

His rights are:

(i) He is entitled to the settled remuneration and in case no remuneration was settled, to a reasonable remuneration.

(ii) He has a right to refuse to carry goods under certain circumstances (as enumerated under the duties of a common carrier).

(iii) He has a lien on the goods for his remuneration. He can refuse to deliver them until his charges are paid.

(iv) If the consignee refuses to take delivery of the goods, when tendered, the common carrier has a right, to deal with the goods as he thinks reasonable and prudent under the circumstances.

(v) He has a right to recover reasonable expenses incurred by him as a result of the consignee's refusal to take delivery. After giving notice to the consignee, the common carrier may even sell perishable goods.

(vi) He can recover damages from the consignor if the goods are dangerous or are loosely packed and the carrier suffers injury therefrom.

(vii) He can limit his liability subject to the provisions of the Carriers Act.

Duties of Common Carrier.

His duties are:

1. A common carrier is bound to carry goods of all persons who choose to employ him. He can, however, refuse to carry goods under the following circumstances:

(a) if there is no accommodation in the carriage;

(b) if the person employing him is not willing to pay reasonable charges for the carriage of goods;

(c) if the goods are such which he is not accustomed to cany;

(d) if the goods are to be carried over a route which is not his regular route;

(e) if the goods are-dangerous and as such subjecting him to extraordinary risk;

(f) if the consignor refuses to disclose the nature of the goods to be carried; and

(g) if the goods are not properly packed.

If a carrier refuses to carry the goods of a person for any reason other than those mentioned above, he may be held liable for damages.

2. He must carry the goods over the usual and customary route and take all reasonable precautions for their safe carriage. He must not deviate from the usual route unless rendered necessary by exceptional circumstances.

3. He must deliver the goods at the agreed time and if no time had been fixed, within a reasonable time.

4. At Common Law, he is an insurer of the goods in the sense that he warrants to carry the goods safely and securely.

Liabilities of a Common Carrier :

The liability of a common carrier of goods is laid down in the Carriers Act, 1865. For this purpose, the Act has classified the goods into two categories:

(i) Scheduled goods and

(ii) non-scheduled goods.

The scheduled goods are those which are enumerated in a Schedule to the Act. They are valuable articles like gold, silver, precious stones and pearls, bills and hundis, currency and bank notes, glass, china silk, articles of ivory, time pieces, musical and scientific instruments, etc. All other goods are non-scheduled.

For scheduled articles exceeding Rs. 100 in value, the carrier is liable for loss and damage only:

(i) if the value and the description of the goods are disclosed by the consignor to the carrier; or

(ii) if the loss or damage is due to a criminal act of the carrier, his agent or servant.

The carrier can charge extra for carrying scheduled articles, but he cannot limit his statutory liability by any special agreement.

As regards non-scheduled articles, a common carrier can limit his liability by special agreement with the consignor. But even in this Section case he will be liable under 8 of the Act (explained below).

In case of loss or damage, the claimant must notify the carrier within six months of the date of knowledge of the loss or damage.

Carriage of Goods by Rail:

Summary of More Important Provisions The carriage of goods by rail is regulated by the Railways Act, 1989. Some of the more important provisions contained in the Act are summarised below:

1. Maintenance of rate books, etc., for carriage of goods (Section 61). Every railway administration shall maintain, at each station and to such other places where goods are received for carriage, the rate books or other documents which shall contain the rate authorised for the carriage of goods from one station to another and make them available for the reference of any person during all reasonable hours without payment of any fee.

2. Provision of rate risks (Section 63). Where any goods are entrusted to a railway administration for carriage, such carriage shall, except where owner’s risk rate is applicable in respect of such goods, be at railway risk rate.

Any goods, for which owner's risk rate and railway risk rate are in force, may be entrusted for carriage at either of the rates and if no rate is opted, the goods shall be deemed to have been entrusted at owner's risk rate.

3. Forwarding note (Section 64). Every person entrusting any goods to a railway administration for carriage shall execute a forwarding note in such form as may be specified by the Central Government.

The consignor shall be responsible for the correctness of the particulars furnished by him in the forwarding note. He shall indemnify the railway administration against any damage suffered by it by reason of the incorrectness or incompleteness of the particulars in the forwarding note.

4. Railway receipt (Section 65). A railway administration shall issue a railway receipt in such form as may be specified by the Central Government:

(a) in a case where the goods are to be loaded by a person entrusting such goods, on the completion of such loading; or

(b) in any other case, on the acceptance of the goods by it.

A railway receipt shall be prima facie evidence of the weight and the number of packages stated therein.

5. Carriage of dangerous or offensive goods (Section 67). No person shall take with him on a railway or require a railway administration to carry such dangerous or offensive goods, unless (i) he gives a notice in writing of their dangerous or offensive nature to the railway servant authorised in this behalf; and (ii) he distinctly marks on the outside of the package containing such goods their dangerous or offensive nature.

6. Liability of railway administration for wrong delivery (Section 80). Where a railway administration delivers the consignment to the person who produces the railway receipt, it shall

not be responsible for any wrong delivery on the ground that such person is not entitled thereto or that endorsement on the railway receipt is forged or otherwise defective.

Responsibilities of a Railway Administration as a Carrier of Goods. Sections 93 to 112 of the Railways Act, 1989 contain provisions on this subject. These provisions are summarised below.

1. General responsibility of a railway administration as carrier of goods (Section 93). A railway administration shall be responsible for the loss, destruction, damage or deterioration in transit, or non-delivery of any consignment (goods entrusted to a railway administration for carriage), arising from any cause except the following, namely:

(i) An act of God;

(ii) An act of war;

(iii) An act of public enemies;

(iv) Arrest, restraint or seizure under legal process;

(v) Orders of restrictions imposed by the Central Government or a State Government or by an officer or authority subordinate to the Central Government or a State Government authorised by it in this behalf;

(vi) Act of omission or negligence of the consignor or consignee endorsee or the agent or servant of the consignor or the consignee or the endorsee;

(vii) Natural deterioration or wastage in bulk or weight due to inherent defect, quality or vice of the goods;

(viii) Latent defects;

(ix) Fire, explosion or any unforeseen risks.

Liability of a common carrier vis-a-vis the liability of a railway administration.

The liability of a railway administration is the same as that of a common carrier. In other words, even where any loss, destruction, damage, deterioration or non-delivery is proved to have arisen from any one or more of the aforesaid nine cases, a railway administration shall not be relieved of its responsibility unless it further proves that it has used reasonable foresight and care in the carriage of the goods [Union of India v Orissa Textile Mills, AIR (1979) Ori. 165].

A railway administration, like a common carrier, is bound to carry the goods of every person who is willing to pay the freight and comply with other requirements.

2. Delay or retention in transit (Section 95). A railway administration shall be responsible for the loss, destruction, damage or deterioration of any consignment proved by the owner to have been caused by the delay or detention in their carriage. The railway administration can, however, avoid liability if it proves that the delay or detention arose for reasons beyond its control or without negligence or misconduct on its part or on the part of any of its servants.

3. Owner's risk rate or railway risk rate (Section 97). A consignment may be carried by a railway administration either at owner's risk rate or railway risk rate. Owner's risk rate is a special reduced rate whereas railway risk rate is an ordinary tariff rate. Owner's risk rate is lower than the railway risk rate for the simple reason that the goods in this case are carried at the owner's risk. In case of owner's risk rate, the railway administration is not responsible unless it is proved that any loss, destruction, damage or deterioration or non-delivery of goods arose from negligence or misconduct on the part of the railway administration or its servants.

4. Liability for damage to goods in defective condition or defectively packed (Section 98). Goods tendered to a railway administration to be carried by railway may be (a) in a defective condition or (b) defectively packed. As a result of these, goods are liable to damage, deterioration, leakage or wastage. If the fact of such condition or defective or improper packing has been recorded by the sender or his agent in the forwarding note, the railway administration is not responsible for

any damage, deterioration, leakage or wastage unless negligence or misconduct on the part of the railway administration or of its servants is proved.

5. Liability after termination of transit (Section 99). Whether the goods are carried at owner's risk rate or railway risk rate, the liability of the railway administration for any loss of goods within a period of seven days after the termination of transit is that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act, 1872. But where the goods are carried at owner's risk rate the railway administration is not liable for such loss, destruction, damage, deterioration or non-delivery of goods except on proof of negligence or misconduct on the part of the railway administration or any of its servants.

After seven days from the date of termination of transit the railway administration is not liable in any case for any loss of such goods. Notwithstanding this provision, the railway administration is not responsible after the termination of transit for the loss, destruction, damage, deterioration or non-delivery of articles of perishable goods, animals, explosives and other dangerous goods.

6. Responsibility as carrier of luggage (Section 100). A railway administration shall not be responsible for the loss, destruction, damage, deterioration or non-delivery of any luggage unless a railway servant has booked the luggage and given a receipt therefor. Also it is to be proved that the loss, etc., was due to the negligence or misconduct on the part of the railway administration or on the part of any of its servants.

In the case of luggage which is carried by the passenger in his own charge, the railway administration shall not be responsible for the loss, etc., unless it is proved that the loss, etc., was due to the negligence or misconduct on the part of the railway administration or on the part of any of its servants.

7. Responsibility as a carrier of animals (Section 101). A railway administration shall not be responsible for any loss or destruction of, or injuries to, any animal carried by railway arising from fright or restiveness of the animal or from overloading of wagons by the consignor.

8. Exoneration from liability in certain cases (Section 102). A railway administration shall not be responsible for the loss, destruction, damage or deterioration or non-delivery of any consignment —

(i) When such loss, etc., is due to the fact that a materially false description of the consignment is given; or

(ii) Where a fraud has been practised by the consignor or the endorsee, or by an agent of the consignor, consignee or the endorsee; or

(iii) Where it is proved by the railway administration to have been caused by, or to have arisen from –

(a) Improper loading or unloading by the consignor, or the consignee or the endorsee, or by an agent of the consignor, consignee or the endorsee;

(b) riot, civil commotion, strike, lock-out, stoppage or restraint of labour from whatever cause arising whether partial or general; or

(iv) For any indirect or consequential loss or damage or for loss of particular market.

Carriage of Goods by Rail

Contract of Affreightment- A contract to carry goods by sea is called the "contract of affreightment" and the consideration or charges paid for the carriage is called the "freight". A contract of affreightment may take either of the two forms, namely—

(i) a charter party, where an entire ship, or a principal part of a ship is placed at the disposal of merchant (known as a charterer); or

(ii) a bill of lading where the goods are to be carried in a general ship and the person consigning the goods is known as a shipper.

In both these contracts, the ship owner (the carrier) undertakes the responsibility of carrying the goods of a consignor (i.e., either the charterer or the shipper) safely and securely to the destination.

A contract of affreightment—whether in the form of a charter party or a bill of lading — is governed by the (Indian) Bills of Lading Act, 1856 and the Carriage of Goods by Sea Act, 1925.

Conditions Contained in a Contract of Carriage by Sea.

The terms included in a contract of carriage by sea are of two kinds. These are:

(i) Express terms, and

(ii) Implied terms.

Express terms are those which the parties have specifically agreed to and embodied in the contract.

Implied terms are those which law implies in every contract of carriage by sea unless excluded specifically. There are four implied terms:

(i) Implied warranty of seaworthiness. The ship owner, when he enters into a charter — party for a voyage impliedly warrants that the ship is seaworthy. This is an assurance by the ship owner, at the time of entering into the charter party, that (a) the ship is fit to encounter the ordinary perils of navigation during voyage and (b) to carry the specific cargo.

This warranty of seaworthiness extends only to (a) seaworthiness at the time of sailing and (b) ‘fitness at the time of loading the cargo. Once the ship has sailed or the goods are on board, this warranty ceases to operate. But in case the voyage is divided into stages, the ship must be seaworthy at the commencement of each voyage.

(ii) Implied warranty of commencement of voyage. Another implied warranty is that the ship shall be ready to commence the voyage and shall carry out the same with all reasonable dispatch and diligence.

(iii) Non-deviation of voyage. Also there is an implied condition that there shall be no unnecessary deviation. Deviation means the going off from the settled or the usual or customary course of voyage between the two termini.

(iv) Shipper not to ship dangerous goods. The shipper (i.e., the consignor of goods in case the charterer undertakes to carry goods of others under bills of lading) shall not ship dangerous goods. If the shipper ships dangerous goods and if on account of it the charterer suffers any damage, he can recover it from the shipper.

Bill of Lading.

A bill of lading is a document acknowledging the shipment of goods, signed by or on behalf of the carrier and containing the terms and conditions on which it has been agreed to carry the goods. It is a quasi-negotiable instrument. It is a document of title and can be transferred by endorsement and delivery. It is generally used for the carriage of goods on a general ship, i.e., a ship which is used for the carriage of the goods of several merchants who wish to have them conveyed by her and which is not employed for the carriage of a charterer’s goods only. Lord Blackburn says, “a bill of lading is a writing, signed on behalf of the owner of the ship in which goods are embarked, acknowledging the receipt of the goods and undertaking to deliver them at the end of the voyage, subject to such conditions as may be mentioned in the bill of lading. It is sometimes an undertaking to deliver the goods to the shipper by name, or his assigns, sometimes to order of assigns, not naming any person which is apparently the same thing and sometimes to a consignee by name or assigns, but in all its usual forms it contains the word assigns”.

A bill of lading may be issued even where the ship is chartered. In such a case charter party will be the document evidencing the contract of affreightment, while the bill of lading would only operate as a mere acknowledgement of the receipt of the goods.

The law relating to shipping in India is contained in the Indian Bills of Lading Act,The (Indian) Carriage of Goods by Sea Act 1925 and the Merchant Shipping Act,1983.

• The Indian Carriage of Goods by Sea Act 1925 applies to carriage of goods by sea under bills of lading, or similar documents of title, from a port in India to any other port in or outside India. The substantive rights, recognised by the statute, are of equal application to foreign merchant ships as they are to Indian merchant ships. The Brussels Convention, 1922 has been adopted by virtue of the Act and has been made applicable to India.

• Carriage of goods covers the period from the time when the goods are loaded on to the vessel till the time that they are discharged.

• This Act establishes the responsibilities, liabilities, rights and amenities of a carrier covered by the bill of lading.

• Under Article III to the Schedule to the Act, the Carrier is responsible to inter alia make the ship seaworthy, properly man, equip and supply the ship, and properly and carefully load, handle, stow, carry, care for and discharge the goods.

• A Bill of Lading issued by the carrier constitutes prima facie proof of the receipt of goods by him.

• The Shipper is deemed to have guaranteed to the carrier the accuracy of the marks, numbers, quantity and weight of the goods at the time of shipment, and is liable to indemnify the carrier from any loss, damage and expenses arising out of any inaccuracy in such particulars.

• Under Article III Clause 6, notice of loss or damage to be given at the time of taking delivery at destination, or within 3 days of delivery if damage is notapparent. Else, such delivery is prima facie evidence of the delivery of goods by the carrier as described in the Bill of Lading.

• Suit to be brought within one year after delivery of goods, or date of delivery, or within an additional 3 months if allowed by Court, unless parties agree to a longer period.

• Under Article III Clause 8, clauses, covenants or agreements excluding or lessening the liability of the carrier for negligence, fault or failure in duties and obligations of carrier, are null and void.

• As per Article IV of the Schedule:

"Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds, refrigerating and cool chambers and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section."

• Clause (2) of Article IV excludes the liability of the carrier in case of any act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of ship; fire (unless caused by the actual fault or privity of the carrier); perils, dangers and accidents of the sea or other navigable waters; act of God; act of war; arrest of seizure under legal process; quarantine restrictions; act or omission of the shipper or owner of the goods etc.

Clause (5) of Article IV, limits the liability of the carrier to 666.67 Special Drawing Rights per package or unit or two Special Drawing Rights per kilogram of the gross weight of the goods, unless the nature and value of goods have been declared by the owner of the goods before shipment and inserted in the Bill of Lading.

• However, this limitation does not apply in cases of proven acts or omissions of the carrier done with the intent to cause damage, or recklessly and with knowledge that damage would probably result.

• Given the aforesaid limitation of liability of carriers under the Act, value of disputes concerning loss, damage or destruction of cargo, in several cases, may not meet the 'Specified Value' under the Commercial Courts Act i.e. Rs. 1 Crore. However, there may be cases where the plaintiffs would seek to get around this limitation by alleging willfulmisconduct or recklessness of the carrier. The veracity of such allegation would be crucial to determine the jurisdiction of the

Commercial Courts.

Types of Bill of Lading

The bill of lading can be classified on the basis of "how it is executed" and "Method of operation"-

On the basis of execution:

1. Straight bill of lading reveals that the goods are consigned to a specified person and it is not negotiable free from existing equities. It means any endorsee acquires no better rights than those held by the endorser. This type of bill is also known as a non-negotiable bill of lading, and from the banker's point of view, this type of bill of lading is not safe. This type of bill is prominently used for military cargo.

2. Open bill of lading – This is a negotiable bill of lading where the name of Consignee can be changed with consignees' signature and thus transferred. This can be transferred multiple times. Switch bill of lading is a type of open bill of lading.

3. Bearer bill of lading is a bill states that delivery shall be made to whosoever holds the bill. Such bill may be created explicitly or it is an order bill that fails to nominate the consignee whether in its original form or through an endorsement in blank. A bearer bill can be negotiated by physical delivery. They are used for bulk cargo that is turned over in small amounts.

4. Order bill of lading is the bill uses express words to make the bill negotiable. This means that delivery is to be made to the further order of the consignee using words such as "delivery to A Ltd. or to order or assigns. The cargo is only delivered to the bonafide holder of the bill of lading, and it has to be verified by an agent who issues delivery order and the verified bill of lading. The order bill of lading:

– is the most modern type bill which is widely used all over the world

– ensures the safety of delivery of cargo to a bonafide holder of B/L

– Since the ship visits several foreign ports where the language, practice, procedures may be different the master might be inconvenienced during the delivery of the cargo. People might fraudulently collect the cargo.

– To overcome this difficulty and avoid future cargo claims and litigations, the consignee or the holder is required to surrender the bill of lading to the ship's agent at the discharge port who will verify the genuineness of the bill of lading. When satisfied, the agent will issue a delivery order and the verified bill of lading. Now any person can collect the cargo from the ship by surrendering the bill of lading and the delivery note to the ship.

As the bill of lading is made to "to order" of the consignee, it is a negotiable instrument of title. This means that the ownership of the bill of lading can be transferred from one person to another by authorising signature and delivery of the bill of lading.

All goods which have not been paid in advance and are shipped under "To order" of the bill of lading can be categorised into two types:

To Order, Blank Endorsed: not consigned to any named party but 'To Order' of the consignor, with the intended – consignee's name given under 'notify party.' The consignor must stamp and sign (endorse) this B/L so that its title can be transferred.

To Order, Bank: consigned to a bank with the intended consignee's name given under 'notify party.' The bank endorses the B/L to the intended consignee against payment of (or a pledge to pay) the amount of the accompanying bill of exchange. 'To Order' B/Ls are used commonly in the letter of credit transactions and may be bought, sold, or traded, or used as security for borrowing money from banks or other lenders.

On the basis of Method of Operation:

Received for shipment bill of lading–

This bill is sent from agent /charterer to shipper. The endorsement of this bill ensures that the carrier has received goods but does not confirm it is onboard of the assigned vessel

Shipped B/L – This bill of lading is Issued when cargo is loaded on board. It binds the shipowner and the shipper directly

A clean bill of lading is one which states that the cargo has been loaded onboard the ship in apparent good order and condition. Such a bill of lading will not bear a clause or notation which expressively declares a defective condition of goods and/or the packaging. The opposite term is a soiled bill of lading. It reflects that the goods were received by the carrier in anything but good condition.

Through B/L – This bill of lading is a legal document that allows for direct delivery of cargo from point A to point B. The bill allows transportation of goods both within domestic borders and through international shipment as it serves as a receipt of the cargo, a contract of carriage, and sometimes title for the products as well

Combined transport B/L – This bill gives information about cargo being transported in large containers by sea and land, i.e. through multi-model transport

Dirty bill of lading: If the shipowner raises an objection about “the condition of the cargo is in good order”, he/she can include a clause thereby causing the bill of lading to be “claused or dirty” along with the remarks as per the finding of the cargo condition. E.g. torn packing, broken cargo, shortage in the quantity of the goods etc.

Carriage of goods by air

• Carriage by Air Act, 1972 came into force on May 15, 1973, superseding the erstwhile Indian Carriage Act, 1934. It is an Act to give effect to:-

- the Warsaw Convention for the Unification Of Certain Rules Relating To International Carriage By Air, 1929 as amended by the Hague Protocol on September 28, 1955; and

- the Montreal Convention (Convention for the Unification of Certain Rules for International Carriage by Air) signed on May 28, 1999.

•The Act makes provision for applying the rules contained in the said Conventions to international and non-international carriage by air and for matters connected therewith.

•The above Conventions govern the liability of air carriers for injury or death of passengers, for destruction or loss of or damage to baggage and cargo, and losses caused by delay in international carriage of passengers, baggage and cargo. These Conventions have been incorporated as Schedules to the Act.

Warsaw and Montreal Conventions

• The Warsaw Convention regulates liability for international carriage of persons, luggage or goods performed by aircraft for reward.

• The Warsaw System allowed four choices of jurisdiction for filing of a claim by the passenger namely, place of issue of ticket, principle place of business of the carrier, the place of destination of the passenger and the place of domicile of the carrier. Through the Montreal Convention a fifth jurisdiction is added which is the place of domicile of the passenger, provided the airline has a presence there. Therefore an Indian would be able to file claim in India even if the journey was undertaken outside India.

• Under Article 5 of this Convention, the consignor is required to issue a air consignment note to the carrier, declaring inter alia the value of the goods. If the carrier accepts goods without such note, he loses his right to seek benefit of the limitation of liability under the Convention for loss of, damage to or destruction of goods:-

(i).250 Francs per kilogram for registered luggage and goods;

(ii)5,000 Francs for the hand luggage per passenger.

Warsaw and Montreal Conventions

•The above limit of 250 Franc for registered luggage does not apply in cases where the consignor has declared the value at delivery and has paid supplementary sum. In such cases, carrier is liable to pay the declared amount, unless he proves that the declared value is greater than the actual value.

•Further, such limitation does not apply in case of wilful misconduct of the carrier.

•Article 29 sets the limitation period of 2 years from the date of arrival or expected arrival at destination for instituting any claim for damages.

Montreal Convention – Key provisions

• The Montreal Convention was signed in 1999, and changed several aspects of the Warsaw Convention system. The provisions of the Montreal Convention have been enshrined in Schedule III to the Act, and are applicable to carriage by air that is not international.

• Liability has been fastened on the carriers for damages sustained in the event of the destruction, damage or loss to cargo. However, the carriers are not liable in case of any inherent defect in such cargo, defective packing, act of war etc.

• Under Article 22 of the Convention in the case of carriage of baggage, the liability of the carrier in the case of destruction, loss, damage, or delay is limited to Rs.20,000 per passenger. Said Article provides that in the case of carriage of cargo, the liability of the carrier is limited to a sum of Rs. 350 per kilogram. However, the above limits for carriage of baggage and cargo do not apply in cases where the consignor has declared the value at delivery and has paid supplementary sum. In such cases, carrier is liable to pay the declared amount, unless he proves that the declared value is greater than the actual value.

• Under Article 31, a complaint is a pre-condition for instituting any action against the carrier, except in cases of fraud. Such complaint should be made forthwith after discovery of the damage, and, at the latest, within 7 days from the date of receipt of checked-in baggage and 14 days from the date of receipt of cargo. In case of delay, such complaint should be made within a period 21 days from the date on which cargo was placed at his disposal.

• The right to claim damages is extinguished if no action is instituted within a period

2 years from the date of arrival or expected arrival at destination for instituting any claim for damages.

• Given the aforesaid limitation of liability of carriers under the Act, value of disputes concerning loss, damage or destruction of baggage/ luggage of passengers, generally would not meet the 'Specified Value' under the Commercial Courts Act i.e. Rs. 1 Crore. However, there may be cases where the plaintiffs would seek to get around this limitation by alleging wilful misconduct or recklessness of the carrier. The veracity of such allegation would be crucial to determine the jurisdiction of the Commercial Courts.

CONTAINER TRANSPORT

Container transport refers to the transportation of goods in standardized re-sealable transportation boxes by rail and sea. Data are expressed in tons and twenty-foot equivalent units(TEU).

In modern international transport goods other than bulk cargoes are often carried in containers. Containers are particularly suitable for multimodal transport. If for example. The goods have to pass through three stages of transportation, they are carried by land from an inland depot to the port of loading, then by sea, and finally again by land to an inland destination. They will travel in the same container from the place of loading to that of discharge and the physical labour as well as the cost of conveying them from one vehicle of transportation to the next is reduced. In addition, the danger of theft and pilferage is reduced as is the risk of damage through repeated handling of goods.

Conceptualisation of containers in the Convention for Safe Containers CSC/CCC and Pool Conventions As containerisation developed, it became necessary to raise the minimum safety standards for containers. This resulted in the adoption of the (CSC). Although it is one of the few texts exclusively dedicated to containers, the CSC does not directly illuminate the debate about the conceptualisation of containers. The exclusion of packages and vehicles from the application of the CSC suggests that, at least from a safety point of view, containers cannot be conceptualised as packages or vehicles. On the other hand, the registration, safety approval, periodical visitation and owner liability required by the CSC make the container's practical use consistent with the concept of `means of transport'. The Customs Container Conventions (1956/1972-the CCC Conventions) give a similar yet not identical definition of containers. The CCC 1972 introduces a potentially important element by (eventually) linking a container to a country of registration. It is also interesting to note that, from a customs' point of view, there are good grounds for including containers with other means of transport, as their temporary import status means that they are exempt from tax. The Convention on Customs Treatment of Pool Containers used in International Transports (the Pool Convention) takes a similar approach.

The course of business in container transport

The course of business in container transport is that the exporter, having made arrangements with a forwarder or directly with the office of a container shipping line will send his goods to the nearest container depot of the forwarder or shipping liner is also called container freight station (CFSs)

If the exporter intends to stuff a full container load(FCL), the forwarder or shipping line will be prepared to send an empty container to the exporter for loading. If the exporter has arranged for the delivery of goods to the overseas buyer's place of business, the container would be door-to-door container.

If the cargo is less than a full container load (LCL) the exporter will send it to the container freight station, where it will be consolidated with the goods of other exporters in a groupage container. On arrival at the place of destination it will be taken to a container freight station where it will be degrouped.

Liability of the container operator

If the goods conveyed in the container are lost or damaged in transit or delay occurs and it is sought to hold the container operator liable, a difficulty arises. The international conventions applying to the various modes of international differ considerably with respect to the conditions of liability of the carrier and the maximum limits of his ability.

Container bills of lading

If a shipping line engages in combined transport, it may issue container bills of lading. Such documents are genuine bills of lading. They are subject to Hague or the Hague-Visby Rules by force of law , as far as the carriage by sea is concerned.

PRE-SHIPMENT INSPECTION

A pre-shipment inspection is a step taken by trade operators (buyers, suppliers, agencies) to inspect newly manufactured products before they are shipped for export/import.

The purposes of a pre-shipment inspection are to:

- Check the quantity and quality of the merchandise
- Check products for any defects
- Ensure products meet the safety requirements of the destination market
- Issue report for import and billing
- Pre-shipment inspections were officially introduced in 1994 as an agreement to improve international trade standards under the General Agreement on Tariffs and Trade (GATT), which was later replaced by the World Trade Organisation (WTO).

A number of obligations were included in the "Agreement on Pre-Shipment Inspection," stating that pre-shipment investigations should be applied according to the following principles:

- Non-discrimination
- Transparency
- Protection of confidential business information
- Avoidance of delays
- Price verification based on the price of identical or similar goods in the country of exportation, in which the exporter has the opportunity to explain the price charged
- Inspection agencies establish appeals procedures, the findings of which are made available to other exporters

With global development, international buyers will continue to face significant impediments to growth in World markets. Differing national standards and requirements, an increase in fraudulent trade-conduct are some of the obstacles that distort the trade equation. A solution with minimum cost and delay needs to be found. The most effective method is Pre-Shipment Inspection.

Pre-Shipment Inspection Procedure

- Visit suppliers with the necessary equipment and instruments
- Sign compliance documents before PSI inspection services are performed
- Perform quantity verification
- Conduct final random inspection
- Package, label, tag, instruction checking
- Workmanship checking and function test
- Size, weight measurement
- Carton drop testing
- Bar code testing
- Sealing of carton

LICENSING OF EXPORT AND IMPORT

Import and export of all goods are free, except for the items regulated by the EXIM policy or any other law currently in force. Registration with regional licensing authority is a prerequisite for the import and export of goods. The customs will not allow for clearance of goods unless the importer has obtained an Import Export Code (IEC) from the regional authority.

An import-export license is mandated by various federal agencies, and it identifies what products are shipped or delivered between international locations. A license may or may not be required for importers or exporters, depending on the product.

IMPORT POLICY

The Indian Trade Classification (ITC)-Harmonised System (HS) classifies goods into three categories:

- Restricted
- Canalised
- Prohibited

Goods not specified in the above mentioned categories can be freely imported without any restriction, if the importer has obtained a valid IEC. There is no need to obtain any import license or permission to import such goods. Most of the goods can be freely imported in India.

Licensed (Restricted) Items

Restricted items can be imported only after obtaining an import license from the relevant regional licensing authority. The goods covered by the license shall be disposed of in the manner specified by the license authority, which should be clearly indicated in the license itself. The list of restricted goods is provided in ITC (HS). An import license is valid for 24 months for capital goods, and 18 months for all other goods.

Canalised Items

Canalised goods are items which may only be imported using specific procedures or methods of transport. The list of canalised goods can be found in the ITC (HS). Goods in this category can be imported only through canalising agencies. The main canalised items are currently petroleum products, bulk agricultural products, such as grains and vegetable oils, and some pharmaceutical products.

Prohibited Items

These are the goods listed in ITC (HS) which are strictly prohibited on all import channels in India. These include wild animals, tallow fat and oils of animal origin, animal rennet, and unprocessed ivory.

EXPORT POLICY

Just like imports, goods can be exported freely if they are not mentioned in the classification of ITC (HS). Below follows the classification of goods for export:

- Restricted
- Prohibited
- State Trading Enterprise

Restricted Goods

Before exporting any restricted goods, the exporter must first obtain a license explicitly permitting the exporter to do so. The restricted goods must be exported through a set of procedures/conditions, which are detailed in the license.

Prohibited Goods

These are the items which cannot be exported at all. The vast majority of these include wild animals, and animal articles that may carry a risk of infection.

State Trading Enterprise (STE)

Certain items can be exported only through designated STEs. The export of such items is subject to the conditions specified in the EXIM policy.

Requirements

The exact documents required vary slightly based on whether your business is a proprietorship, partnership, LLP or company. Here's the list of documents required for each one.

Proprietorship – Photograph (3×3); PAN card copy; ID proof (passport / voter id / driving license / aadhar card); Address proof (sale deed for self-owned; or rental / lease agreement + electricity bill or telephone bill); Bank certificate (see below) or cancelled cheque with printed name of applicant and bank a/c number.

Partnership – Photograph (3×3) of managing partner; PAN card copy of partnership firm; ID proof (passport / voter id / driving license / aadhar card / PAN of managing partner whose signature is on application); Address proof (sale deed for self-owned; or rental / lease agreement + electricity bill or telephone bill); Bank certificate (see below) or cancelled cheque with printed name of applicant firm and bank a/c number.

LLP and Company (both public and pvt ltd) – Photograph (3×3) of partner or director who is signing the IEC application form; PAN card copy of applicant LLP or company; ID proof (passport / voter id / driving license / aadhar card / PAN of partner or director whose signature is on application); Certificate of incorporation; Address proof

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UNIT V

- **Foreign Collaboration and Investment Policy**
- **Foreign Direct Investment in Industries and Governing Policies**
- **Foreign Institutional Investors (FIIs)**
- **Investment by Non-resident Indians (NRIs) and Overseas Corporate Bodies (OCBs)**
- **Foreign Collaboration Agreement- Foreign Technology Agreement**
- **Foreign Companies and Foreign Nationals in India.**

FOREIGN COLLABORATION

Introduction

Types of Foreign Collaboration

Investment Policy in India

Introduction

"Foreign Collaboration is an alliance incorporated to carry on the agreed task collectively with the participation (role) of resident and non-resident entities."

Foreign Collaboration is such an alliance of domestic (native) and abroad (non-native) entities like individuals, firms, companies, organisations, governments, etc., that come together with an intention to finalize a contract on some tasks or jobs or projects.

A Foreign company and a domestic company coming together to start a business in a Host country to achieve a common goal.

Why Collaboration

- Exchange of Knowledge
- Accelerate Financial growth
- Improvement in the Market share

- Reduce higher operating cost
- Strengthening capacity and capability
- Optimum and effective use of resources
- Generate employment
- Global recognition
- Promotion and Self esteem.
- Features of Foreign Collaboration
- It's a type of Partnership.
- A Foreign company and Domestic company is a pre-requisite.
- Agreement.
- Government approval.
- Possible exchange of ideas.
- Gives a Legal identity.
- Common goal.

Foreign Collaboration may take place in three possible forms

- Collaboration between Domestic and Foreign Private Company/s
- Collaboration between Government of the Host Country and Foreign Private Company/s
- Collaboration between the Governments of the Host country and Foreign Country.

Foreign Collaboration could happen in one of the following ways:

- Mergers
- Acquisition /Takeover
- Joint Ventures
- Consortium
- Strategic Alliances
- Approving authorities for Foreign Collaboration
- Reserve Bank of India (Financial)

- Department of Industrial Development in the Ministry of Industry, Government of India (Technical)

Types of Foreign Collaboration

1) Financial Collaboration

2) Technical Collaboration (Technological)

3) Marketing Collaboration

4) Consultancy Collaboration

<u>Financial Collaboration</u>

When the foreign contribution is in the form capital/ money, that contract/agreement is known as foreign collaboration. When the foreign company agrees to provide financial assistance to the domestic company (Indian Company) that collaboration is called as financial collaboration.

The Foreign Company provides financial assistance in three forms:

(a) Purchasing ownership shares
In this case, the foreign company purchases shares of the domestic company (through equity) and in return receives dividend for these shares.
(b) Giving long-term loans
Foreign Company lends long-term loans to the Domestic Company and thereby gets interest on the loaned amount.
(c) Giving credit facility
Foreign company gives credit facility to the domestic company. This credit facility is used by the Domestic Company to purchase raw-materials, plant and machinery.
Thus, in this collaboration, there is an inflow of finance from developed countries to developing countries. Example: Japanese conglomerate, SoftBank's investment (financial assistance) in Indian companies vis-a-vis Flipkart, Oyo, PayTm, Ola, etc.

Technical Collaboration

Technical collaboration includes integration of foreign technology with domestic (indigenous) technology. In technical collaboration, the foreign company provides technological know-how, professional services and expertise, installs automated machineries, etc., in the domestic country. Here, an inflow of modern technology takes place from the developed country to the developing country. Technical collaboration helps to remove an existing technological gap. Therefore, the governments of developing countries encourage such collaborations. In developing countries, most of the foreign collaborations are technical in nature. Example: Tata's alliance with the world class Coffee brewing company- Starbucks, to produce and market the Coffee in India.

Marketing Collaboration

In marketing collaboration integration of domestic and foreign market takes place. The foreign company agrees to sell goods produced by the domestic company. The foreign company sells these goods in its own country and/or in the international market. It uses its distribution network to sell the goods. Further the contracting companies use their products or brand name to increase the sales of their products. Thereby, increasing the total revenue of both companies. From the viewpoint of a developing country, marketing collaboration is very beneficial for increasing its exports of goods and services. Example: Amazon Prime's collaboration with Airtel (set-top box) was engineered to increase the sales of companies.

Consultancy Collaboration

In a Consultancy collaboration, the Foreign company and the Domestic company exchange or receive professional advices, services, deliver management skills etc. In some cases, the foreign company helps the domestic company to modernize and diversify its business process. On the contrary, the domestic company also provides professional service to the foreign company. Example: Microsoft joined hands with Tata Consultancy Services to improve customer experience.

Investment Policy in India

The Government of India in the year 1949 under the aegis of Prime Minister Jawaharlal Nehru made the following assurances to the International business community. The Government would not make any discrimination between the Foreign and Domestic undertakings. Foreign exchange position permitting reasonable facilities would be given to foreign investors. If the foreign enterprises are compulsorily acquired, compensation would be paid on a fair and equitable basis. Foreign companies were allowed to remit profits and repatriate capital to their home countries, subject to foreign exchange considerations. The Industrial Policy of 1965 allowed MNCs to venture through technical collaboration in India.

However, the basic policy remained unchanged, where foreign private investment were allowed only in those sectors on preferential basis which were advantageous to the Indian economy. The Indian Govt. set up Free Trade Zones (FTZs) with a host of tax and other concessions, yet the policy had failed to attract FDI. In 1969, the government defined three groups of industries for the purpose of foreign investment – FDI without technical collaboration, FDI with technical collaboration, and FDI with no foreign participation.

The Foreign Exchange Regulation Act (FERA) came into force in 1974, which specified the detailed list of industries in which foreign firms could participate with or without FDI, with exemptions in tea plantations, and drugs and pharmaceuticals sectors. Thus, 1970–80 was considered a ‘FDI restrictive period’, as FERA acted as an instrument of control rather than provider of incentives. The policy during the period 1950–80 was largely shaped by the struggle between the state and monopoly foreign interests, where the major Transnational Companies were oil companies.

Liberalisation period

Foreign investment through FDI was introduced in the year 1991 under the Foreign Exchange Management Act (FEMA). It started with a baseline of $1 billion in 1990. Due to this India was considered as the second favourite destination for foreign investment. The major sectors that attracted FDI are services, telecommunication, construction activities and computer software and hardware.

The Industry Policy 0f 1991 gave automatic permission for Foreign direct investment up to 51% equity in a Domestic Company in 47 high priority industries. For export trading houses, FDI 74% was allowed. This policy of liberalisation allowed the acceleration of Foreign collaboration in the Indian Business community.

This policy ended the “Permit Raj” or the industrial licensing for all industries for a short list of 18 industries. The Government of India in 1997 allowed foreign direct investment in cash and carry wholesale and also eased the approval requirement to Automatic route in 2006. NRIs were allowed to 100% equity investments on non-repatriation basis in all activities except the negative list. During the period from August 1991 to November 1993, total number of foreign collaboration proposals approved by the Government was 3,467. The Government has enforced The Foreign Exchange Management Act 1999 (FEMA) in place of the Foreign Exchange Regulation Act,1973 (FERA). The Old act aimed at controlling foreign exchange whereas the new Act seeks to regulate foreign exchange. With the enactment of FEMA, Foreign collaboration has become much easier.

Post Liberalisation Period

1. The Ministry of Industry expanded the list of industries under various sectors that are eligible for automatic approval of Foreign investment

2. The upper limit or the ceiling limit of the rate of foreign investment in business has been raised to 74% from the earlier 51%; in certain cases this has been increased to 100%.

3. Indian companies are exempted from seeking prior clearance from the Reserve Bank of India(RBI) for inward remittance of foreign exchange or for issuing of shares to foreign investors/companies.

4. The Government of India has amended the exchange control regulations.

5. There was a ban against the use of foreign brand names/trademarks, however, the same has now been removed.

6. The corporate tax on foreign companies has been reduced from 65% to 55% by the government in the annual budget of 1994-95.

7. The Government of India reduced long term capital gains rate for overseas companies to 20%

8. Earnings through export are exempted from corporate income tax for both domestic and overseas firms under the Indian Income Tax Act.

9. 100% inflow of foreign investment is permitted in strategic sectors such as roads, ports, tunnels, highways and harbors on the condition that the total investment in any of the sector should not exceed ` 1500 crore.

10. Any increase within the prescribed limit does not require permission from the foreign investment promotion board.import policy of Government of India and register under the Ministry of Commerce.

Advantages of Foreign Collaboration

- Increase in indigenous production of components and spare parts.
- Fostering cultural changes with respect to work ethos and discipline.
- Gaining a competitive edge in the global market.
- Improving brand image of the domestic company.
- Increased Foreign exchange earning owing to the increase in exports.
- Enlarging the scale of operations and reducing costs.
- Employment
- Improved skill sets and transfer of technical know-how

Disadvantages of Foreign Collaboration

- Herd mentality
- Reduced motivation
- Cultural clashes
- Unequal workload
- Interpersonal conflicts
- Outflow of capital in the form of dividends, royalties etc.

- Suppression of entrepreneurship and extension of oligopolistic practices, passing of unsuitable technologies.
- Interference with local politics.

Conclusion

With the technological advancements and the change in the growing global market, it has become increasingly important for the Business community to attain a competitive edge in the global scenario. This can be attained only by way entering to Foreign collaborations.

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FOREIGN DIRECT INVESTMENT

Introduction

Types of FDI (Strategic)

Greenfield FDI

Brownfield FDI

FDI Policy after 1991 Industrial Policy or Position of FDI

Introduction

Foreign Direct Investment is long term investment by private international corporations in countries over seas.

IMF- FDI is an investment through which an investor acquires lasting and substantial management control (at least 10% equity or voting rights) in the foreign affiliate.

Investment in a business by an investor from another country for control over the business. OECD defines control as owning 10% or more in the business. In other words, owning more than 10% shares of the total number shares in a company.

<u>Why FDI?</u>

"usually preferred over other forms of external finance because they are non-debt creating, non-volatile and their returns depend on the performance of the projects financed by the investors. FDI also facilitates international trade and transfer of knowledge, skills and technology."

<u>Methods of FDI</u>

The foreign direct investor may acquire voting power of an enterprise in an economy through any of the following methods:

a. by incorporating a wholly owned subsidiary or company in India.

b. by acquiring shares in an associated enterprise

c. through a merger or an acquisition of an unrelated enterprise

d. participating in an equity joint venture with another investor or enterprise

Significance of FDI

- Stabilize balance of payments.
- Boosts developments in various fields
- Employment
- FDI encourages export from India
- Transfer of knowledge
- Higher wages
- Generates competitive environment thereby reducing the overall prices of the commodities.

Types of FDI (Strategic)

- Horizontal
- Vertical
- Conglomerate

Horizontal

A horizontal direct investment refers to the investor establishing the same type of business operation in a foreign country as it operates in its home country.

When a company duplicates its home country basic activities at the same value chain stage in a host country through FDI

Example: FDI regulations in India relaxed now allows 100% FDI in single-brand retail without government approval. The regulatory decision reportedly facilitates Apple's desire to open a physical store in the Indian market. Thus far, the firm's iPhones have only been available through third-party physical and online retailers.

Vertical

A vertical investment is one in which different but related business activities from the investor's main business are established or acquired in a foreign country, such as when a manufacturing company acquires an interest in a foreign company that supplies parts or raw materials required for the manufacturing company to make its products.

Conglomerate

A conglomerate type of foreign direct investment is one where a company or individual makes a foreign investment in a business that is unrelated to its existing business in its home country. Since this type of investment involves entering an industry in which the investor has no previous experience, it often takes the form of a joint venture with a foreign company already operating in the industry.

Example: Conglomerate FDI- Google invested in Dunzo, whose business is completely unrelated to what Google generally does.

Greenfield FDI

Green field FDI is created by investing in a new company or an enterprise Greenfield FDI is widely considered as the most productive, development friendly and relational form of Foreign investment mostly because it creates jobs and leads to technology transfer to the receiving country. It gives complete control and ownership over their operations unless they are in a joint venture or in country that doesn’t allow 100% ownership in a company. This also encourages companies from foreign countries to commit for a longer term with the host country

Downside

When the Greenfield company doesn’t hire local labour

Could force the local government to give disproportionate tax, environmental and legal exemptions.

Brownfield FDI

Created by acquisition or through investing in an existing form. It is also called as cross border merger or an acquisition No new construction of a facility. Access to established market.

Downside

Doesn’t create new jobs.

Expansion & scalability issues.

Entry routes for Foreign Investment In India

Automatic route

The Reserve Bank of India accords Automatic approval to all proposals and permits foreign equity upto 24%, 26%, 49%, 50%, 51%, 74% and 100% depending on the category of the industries and the sectorial caps applicable.

Foreign companies don’t prior approval from the government to start business.

Another feature of the automatic route is that foreign investor needs to inform the RBI only within thirty days of bringing their investment into the country, and within thirty days of issuing any shares. Most of the FDI are now allowed under automatic route.

Under this route, Foreign Direct Investment up to 100% is allowed and no Central Government permission is required except the following. The services/activities listed below require prior approval of the government.

Where more than 24% foreign equity is proposed to be inducted for manufacture of items reserved for the Small Scale sector.

- Investment proposals falling under the automatic route and matters related to FEMA are dealt with by RBI, while the Government handles investment through approval route and issues that relate to FDI policy

Revised position in allowing entry of Chinese investments-

Para3.1.1:

3.1.1(a) A non- resident entity can invest in India, subject to the FDI Policy except in those sectors/activities which are prohibited. However, an entity of a country, which shares land border with India or where the beneficial owner of an investment into India is situated in or is a citizen of any such country, can invest only under the Government route. Further, a citizen of Pakistan or an entity incorporated in Pakistan can invest, only under the government route, in sectors/activities other than defence, space, atomic energy and sectors/activities prohibited for foreign investment.

Explanation: The Government of India through Department of Promotion of Industry and Internal trade came out with the above press note with an intention to stop the Chinese companies from resorting to hostile takeover of Indian companies during the Covid-19 crisis as most companies were financially weak at this point of time.

Government route

Sectors and activities that are not covered under the automatic route require an approval from the Government of India and Foreign Investment Promotion Board (FIPB). However, FIPB was scrapped in the year 2017.

The respective administrative Ministry or Department is responsible for according permission to the Foreign investors intending to invest in India.

Procedure for Government Approval:

Foreign Investment Facilitation Portal (FIFP) is the new online single point interface of the Government of India for investors to facilitate Foreign Direct Investment. This portal is designed to facilitate the single window clearance of applications which are through approval route. Upon receipt of the FDI application, the concerned Administrative Ministry/Department shall process the application as per the Standard Operation Procedure (SOP).

Subsequent to abolition of the Foreign Investment Promotion Board (FIPB) by the Government, the work of granting government approval for foreign investment under the extant FDI Policy and FEMA Regulations, has been entrusted to the concerned Administrative Ministries/Departments.

The eleven notified sectors/activities requiring government approval are:

- Mining,
- Defence/cases relating to FDI in small arms
- Broadcasting
- Print media
- Civil Aviation
- Satellites
- Telecommunication
- Private Security Agencies
- Trading(Single, Multi brand and Food Products)
- Banking (Public and Private)
- Pharmaceuticals.
- Prohibited Sectors
- Lottery business including Government/ private lottery, online lotteries etc.
- Gambling and Betting including Casinos etc.
- Chit funds.
- Nidhi company.
- Trading in Transferable Development Rights (TDRs)
- Real Estate Business or Construction of farm houses.
- Manufacturing of cigars, cheroots, cigarillos and cigarettes, of tobacco or of tobacco substitutes.

Activities/sectors not open to private sector investment E.g. (i) Atomic energy (ii) Railway operations (other than permitted activities)

Foreign technology collaboration in any form including licensing for franchise, trademark, brand name, management contract is also prohibited for lottery business and gambling and betting activities.

FDI Policy after 1991 Industrial Policy or Position of FDI

1991- FDI was introduced in India

De-licensing

Existing companies with foreign equity can raise it to 51 per cent subject to certain prescribed guidelines.

b) 1992- FDI in mining was allowed.

-India signed the Multilateral Investment Guarantee Agency protocol for the protection of foreign investment

c) 1997- FDI upto 100% was allowed under the Automatic route in Cash & Carry (Wholesale)

-The upper limit for foreign equity participation under automatic approval was raised from 51 to 74 percent of the equity capital {and 100 per cent in case of Non-Resident Indian (NRI)} in select industries in January 1997.

d) 1999- Foreign exchange Management Act(FEMA) introduced in place of FERA.

e) 2005- FDI up to 100% foreign equity ownership under the automatic route in townships, housing, built-up infrastructure and construction-development projects

f) 2006- FDI upto 51% was allowed under the Government approval route in Single brand retail.

g)2009- Hundred percent foreign direct investments in Maintenance, Repair and Overhauling, (MRO) was allowed.

-100%FDI permitted in mining of titanium bearing minerals.

h)2011- FDI upto 51% was allowed in Multi brand retail and upto 100% in Single Brand retail.

i) 2013- FDI above 26% in defence production under government route. FDI in Petroleum refining by PSUs 49% under automatic route.

j) 2014- 100% private and FDI investment under automatic route in Rail infrastructure.

k)2015- Make in India.

l)2018- 100% FDI is allowed in the marketplace-based model of e-commerce

m)2019- FDI in Single brand retail trade is permitted 100% under the automatic route.

- 100% FDI under the automatic route in coal and lignite mining for captive consumption for power projects.

Factors affecting FDI in India

Rate of interest

Speculation

Profitability

Cost of production

Economic condition

Government policies

Political policies

Stable democratic Government since 1947

Large size of the economy and innumerable consumers

Resources

Diversified industrial sectors

Abundant availability of cheap labour and technical manpower.

Legal system

Large English speaking population

Emerging trend towards privatization and globalisation

Large network of banking institutions

Liberal policy towards capital goods

Compliance towards the policies of IMF, WTO and World Bank

Price stability

Advantages of FDI

Development of the Economy by bringing in extra money into the country i.e supplements domestic capital formation

Stimulate overall growth in all sectors as a result of FDI

Increase in Employment-> new businesses

Increase in tax revenue.

Development of Human Capital Resource (Not immediate). Increase the education and number of skilled workmen.

Increase in income. (larger corporations give more salaries)

Promotes competition. (Gives example Jio)

Provides quality products at competitive prices.

Promotes diversification

Reduce factor price differentials

Disadvantages of FDI

Destruction of local entrepreneurship and small scale industries

Contribution to pollution

Exchange crisis. Eg. During the 2000 South Asian countries suffered Currency Crisis because of the presence of the FDI. Inflation problem.

Political Corruption.

Inflation in economy

They aggravate or worsen income and regional inequalities

Repatriate huge forex in the form of high dividends, interests, etc

Induce consumerism and indulge in excess advertising and superficial product differentiation. It affects savings and capital formation

Foreign companies may not add value to the industry.

CONCLUSION

A foreign direct investment happens when a corporation or individual invests and owns at least ten percent of a foreign company. For example: When an American tech company opens a data center in India, it makes an FDI.

Many developing countries need FDI to facilitate economic growth or repair. International trade agreements have paved the way for increasing FDI flows. FDI has benefited countries through:

Raised living standards in emerging markets.

Competitive global capital allocation.

Dampening of market volatility caused by asset bubbles.

FOREIGN INSTITUTIONAL INVESTORS

Introduction

Features of FII

Introduction

1) Foreign Institutional Investor (FII) means an institution established or incorporated outside India which proposes to make investment in securities in India.

2) Honourable FM during Budget 2012-13 announced his intention to go by the internationally accepted definition for FIIs and FDIs, as stated below:

"In order to remove the ambiguity that prevails on what is Foreign Direct Investment (FDI) and what is Foreign Institutional Investment (FII), it is proposed to follow the international practice and lay down a broad principle that, where an investor has a stake of 10 percent or less in a company, it will be treated as FII and, where an investor has a stake of more than 10 percent, it will be treated as FDI. A committee will be constituted to examine the application of the principle and to work out the details expeditiously."

India opened to its doors to FII in the year 1993.

They are registered as FIIs in accordance with Section 2 (f) of the SEBI (FII) Regulations 1995. FIIs are allowed to subscribe to new securities or trade in already issued securities. This is just one form of foreign investments in India.

However, FII as a category does not exist now. It was decided to create a new investor class called "Foreign Portfolio Investor" (FPI) by merging the existing three investor classes viz. FIIs, Sub Accounts and Qualified Foreign Investors.

Accordingly, SEBI (Foreign Portfolio Investors) Regulations, 2014 were notified on January 07, 2014 followed by certain other enabling notifications by Ministry of Finance and RBI. In order to ensure the seamless transition from FII regime to FPI regime, it was decided to commence the FPI regime with effect from June 1, 2014 so that the requisites systems and procedures are in place before migration to the new FPI regime.

FPIs have been made equivalent to FIIs from the tax perspective, vide central government notification dated 22nd January 2014

They are regulated by the Securities and Exchange Board of India and operate in the country under the newly notified SEBI (Foreign Portfolio Investors) Regulations, 2014. Earlier they were regulated by SEBI (FII) Regulations, 1995

They are distinct from companies that invest in India under foreign direct investment rules. FPIs are investment vehicles, hence the term 'portfolio investments.'

Who are eligible to be registered as FII?

- Hedge Funds
- Foreign Mutual Funds
- Sovereign Wealth Funds
- Pension Funds
- Trusts
- Asset management Companies
- Endowments, University Funds, etc
- Investment Trust
- Insurance Companies
- Institutional Portfolio Managers
- Banks
- Power of Attorney Holders

Features of FII

1) FII can individually purchase up to 10% and collectively up to 24% of the Paid-up capital of an Indian Company and 20% in a PSU.

2) Limit of 24% can be increased under rare circumstances.

3) FII can invest only in listed and to be listed companies.

4) FII can invest only in the securities in the primary and secondary markets including shares, debentures and warrants of companies. They can also invest in Security receipts , Indian Depository receipts, dated Government securities, Commercial paper, Units of schemes floated by Domestic mutual funds & Collective investment scheme.

5) FII is driven by market emotions sometimes. For example: In flow of FII during 2008 was negative in India due to the Global recession.

6) Short- term capital.

7) Investments in Financial assets.

8) Largest non-promoter shareholders in India.

9)Volatility

Monitoring of FII by RBI

RBI monitors the ceiling of FIIs on a daily basis.

For effective monitoring, RBI has fixed the cut off at 22% though the ceiling limit is 24%.

Once the aggregate purchase of equity shares of FIIs reach the cut off mark, the RBI cautions all banks as not to purchase anymore equity shares on behalf of FIIs without approval of RBI.

The details are sent by RBI to banks

On receipt of the proposal, RBI gives clearance till the investment reaches the stipulated limit.

Volatility

The increase in investment by FIIs increases stock indices and also stock prices and encourages further investment. In this event when any correction takes place the stock prices decline and there will be pull out the FIIs in a large numbers as earning per share declines.

The FIIs manipulate the situation of boom in such a manner that they wait till the index rises up to a certain height and exit at an appropriate time. This tendency increases the volatility further.

What attracts FII

1) Higher growth potential

2) GDP growth

3) International relations

4) Politics and Government Policies

5) Rate of Interest

Advantages of FII

FII’s will enhance the flow of capital into the country

These investors generally prefer equity over debt. So this will also help maintain and even improve the capital structures of the companies they are investing in.

They have a positive effect on the competition in the financial markets

FII help with the financial innovation of capital markets

These institutions are professionally managed by asset managers and analysts. They generally improve the capital markets of the country.

Increase in FOREX reserves.

Increase in Domestic savings and investment.

Disadvantages of FII

The demand for the local currency (rupee) increases. This can cause severe inflation in the economy.

These FII’s drive the fortune of big companies in which they invest. But their buying and selling of securities have a huge impact on the stock market. The smaller companies are taken along for the ride.

Sometimes these FII's seek only short-term returns. When they pull out their investments banks can face a shortage of funds.

Adverse effects on exports.

Instigate proxy fights in the management (by threatening to walk out)

FDI	FII
FDI is a direct investment made in one particular business or company. The aim is to get a controlling interest in the business. There are many regulations and rules with respect to FDI. In fact, there are some industries like nuclear energy, agriculture etc. FDI is not only transfer of funds or capital. There is a transfer of technology, R&D, know-how, strategies, technical knowledge, and many other such aspects. FDI normally brings in long term capital. FDI flows into primary market	FII, on the other hand, are funds which are invested in the foreign financial market. where there can be no foreign direct investment. But FII has fewer barriers for entry or exit from the market. In the case of FII, only the transfer of funds is there.

Entry and exit is relatively difficult Investment is not speculative Has a direct impact on employment of labour and wages. Investment in both physical and financial assets.	FII normally brings in short term capital. FII normally flows into secondary market Entry and exit is relatively easy. Investment is speculative. Has no direct impact on employment of labour and wages. Investment in financial assets.

Companies in which FII Investment is allowed upto 30% of their paid up capital

Asian Paints (India) Ltd

Gujarat Ambuja Cements Ltd

Ranbaxy Laboratories Ltd

Companies in which FII Investment is allowed upto 40% of their paid up capital

Balaji Telefilms Ltd

Hero Honda Motors Ltd

Companies in which FII Investment is allowed upto 49% of their paid up capital

HDFC Bank Ltd

Reliance Industries Ltd.

United Breweries (Holdings) Ltd.

Zee Telefilms Ltd.

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INVESTMENT BY NON-RESIDENT INDIAN

Who is an NRI?

According to the Foreign Exchange Management Act (FEMA), 1999, "an NRI is a person resident outside India who is either a citizen of India or a person of Indian origin (PIO).“

Non Resident Indian (NRI) means a person who has gone out of India or who stays outside India, in either case for or on taking up employment outside India, or for carrying on outside India a business or vocation outside India, or for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period. Simply, it means a person resident outside India who is a citizen of India or is a Person of Indian Origin. (As per Notification No. FEMA 5/2000-RB dated May 3, 2000).

A non-resident Indian (NRI) is a citizen of India who has spent less than 183 days of the financial year (or tax year) in India. The tax year stretches from April 1st to March 31st in the succeeding year. This means NRIs have to be outside of India between April 1st of last year until March 31st of this year for more than 182 days. NRI’s are still citizens of India but they don’t pay tax there.

Factors that influence NRI investment

Better returns on rupees

Favourable laws

Higher interest rates

Booming stock market

Fastest growing economy

Retirement plans

Investment by NRI on Repatriation and Non- Repatriation

Repatriation:

The funds in the accounts can be repatriated by transferring them back to the NRIs country of residence or by converting to any foreign currency. In other words, funds can be remitted back to the NRI's resident country.

Non- repatriation:

The funds cannot be transferred back to the NRIs country of residence nor can they be converted to any foreign currency.

Types of Bank Account for NRIs

To encourage NRIs and PIO staying overseas to invest in India, the government has allowed these individuals to open three types of NRI accounts:-

NRE Account

NRO Account

FCNR Account

NRE Account:

An NRE Account stands for Non-Resident External.

Transfer of Foreign earnings.

The money transferred to this account in any foreign currency is converted to INR.

Repatriable.

Transfer of funds from NRE to NRO or FCNR account is allowed.

Interest earned is tax free.

NRO Account:

An NRO Account stands for Non-Resident Ordinary.

Account of NRIs to manage their income they earn in India such as rents, dividends, or pension from abroad.

Limitation on profits or interests that can be repatriated.

Interest levied on Profits.

The account holder can deposit and manage accumulated rupee fund conveniently through this account.

Foreign Currency deposited into the account is converted into Indian Rupees.

Any NRI can open an NRO account.

The transfer of funds from NRO to NRE account is not allowed.

FCNR Account:

FCNR stands for Foreign Currency Non-Resident Account.

It is denominated in one of the major six currencies .

It is a fixed deposit foreign currency account.

These accounts are used by NRIs to park overseas incomes as foreign exchange in India without having them to convert them to rupees.

The principal amount received is in foreign currency, and therefore, the interest earned is in the same currency and also completely tax-free.

FCNR Accounts are fully repatriable, and transfer of funds from FCNR to NRE account and vice versa is allowed.

The funds from the local sources are not authorized to be transferred to FCNR accounts.

These accounts can be held either as a joint account or in a single account. The joint account holder should be an NRI, but the beneficiary can be an NRI or a resident.

What are the ways in which an NRI can invest?

- Fix deposit bank deposits
- Mutual funds
- Direct Equity
- Real Estate
- Bonds and Non-Convertible Debentures
- Government securities
- Certificate of Deposits
- National pension scheme

Double Taxation Avoidance Agreement

Aim is to avoid double taxation of same income or the interest arising out of an investment.

Treat can be bilateral or Multilateral.

India has entered into DTAA with over 85 countries.

To avail the benefit, an NRI has to file Tax residency certificate.

The benefit of DTAA can be used by two methods:

Tax credit: Tax relief under this method can be claimed in the country of residence.

Exemption: Tax relief under this method can be claimed in any one of the two countries.

OVERSEAS CORPORATE BODIES (OCBS)

Definition:

Overseas Corporate Body (OCB) means a company, partnership firm, society and other corporate body owned directly or indirectly to the extent of at least sixty per cent by Non-Resident Indians and includes overseas trust in which not less than sixty percent beneficial interest is held by Non-resident Indians directly or indirectly but irrevocably, which was in existence as on September 16, 2003 and was eligible to undertake transactions pursuant to the general permission granted under Foreign Exchange Management Regulations.

De-recognition

Stock scam of 1992.

Glaring issues in the regulatory framework were exposed.

Investigation by SEBI led to a discovery of huge investments made by Mauritius based OCBs to gain tax benefit.

Previously, OCBs were neither regulated nor registered with SEBI.

OCBs did not fall under the regulatory framework of RBI.

OCBs were banned from investing in Indian securities in 2001.

OCBs were de-recognized as an investor class in 2003

Aftermath of De-recognition

OCBs will not be allowed to make fresh investments in India under various routes/schemes available under extant FEMA.

OCBs will continue to hold the shares and convertible debentures purchased under PIS till such time these are sold on stock exchanges in India.

An unincorporated entity and OCB will not be allowed to make fresh investment under the FDI Scheme (including automatic route). However, the unincorporated entities and OCBs may continue to hold shares and convertible debentures till they are sold/redeemed.

OCBs will not be allowed to undertake purchase of shares/convertible debentures on non-repatriation basis. However, the OCBs may continue to hold such shares/convertible debentures till they are sold/redeemed.

OCBs will not be allowed to invest in government securities, treasury bills, units of mutual funds, etc. However, the OCBs may continue to hold these securities till they are sold.

A person resident outside India including OCBs will not be allowed to transfer by way of sale or gift, the shares or convertible debentures held by them to another OCB.

OCBs will not be allowed to purchase equity or preference shares or convertible debentures offered on a rights basis by an Indian company.

A person resident in India will not be allowed to borrow in foreign currency from OCBs.

An Indian company will not be allowed to borrow in rupees on repatriation and non-repatriation basis from OCBs by way of investment in non-convertible debentures.

An Indian company, a proprietorship concern or a firm in India will not be allowed to accept deposits from OCBs on a non-repatriation basis. As regards investment on repatriation basis (including investment-related income which is repatriable) ADs may allow repatriation as authorised.

RBI has further clarified that the overseas entities owned by NRIs can enjoy all the facilities available to any foreign investor, including automatic route for FDI.

No fresh investment will be permitted in housing and real estate development sector under the automatic route, therefore fresh investment will have to comply with government guidelines and FDI in the township development sector

OCBs that have shares in companies will not be allowed to subscribe to rights issues as and when they come up.

OCB cannot transfer shares by way of sale to another OCB after September 16, 2003.

an OCB may -

-transfer an existing investment in the form of shares or convertible debentures held by it, by sale or gift to any non-resident Indian (NRI);

-dispose of the existing investment in the form of shares held by it, by sale at a rate not exceeding the prevailing market rate through a registered stock broker on a recognised stock exchange in India;

Re-recognition

As earlier, the 60% NRI control was required now amended to hold 50 % Capital or control the management.

The Department of Industrial Policy and Promotion released Press note No.12 of 2015 series wherein the policy on Foreign Direct Investment was reviewed in various sectors. The Press note also brought about changes to para 2.1.28 which directly had an impact on the investment by OCBs.

"A company is considered as 'Owned' by resident Indian citizens if more than 50% of the capital in it is beneficially owned by resident Indian citizens and/or Indian companies, which are ultimately owned and controlled by resident Indian citizens."

No need to be a corporate body, it can be a company or trust or partnership firm.

In terms of Regulation 5(1) of RBI Notification No.20/2000-RB, investments by NRIs and OCBs are allowed, both, through the RBI route and also through the Government route under the FDI scheme.

No prior approval from RBI is necessary except obtaining a NOC to the effect that the OCB is not in the RBI's adverse list; in case the investee company is under automatic route. Where the investee company is under Government approval route, besides NOC from RBI.

NRIs and OCBs are permitted to invest up to 100% equity in real estate development activity and civil aviation sectors.

Investment, made by the NRIs and OCBs, are fully repatriable, except in the case of real estate, which has a 3 year lock-in period on original investment and, 16% cap on dividend repatriation.

For those proposals that do not qualify under the automatic route, Government approval is granted.

A liberal policy for permitting investment of upto 100% equity with full repatriation facilities in industrial ventures in high priority industries by Non- Resident Indians (NRIs) and Overseas Corporate Bodies (OCBs) has been announced. It has also been decided to permit 100% NRI investment with full repatriation benefits in Export/ Trading/Star Trading House etc.

OCBs have been de-recognised as a class of investors from September 16, 2003. Therefore companies desiring to issue rights share to such erstwhile OCBs will have to take specific prior permission from RBI. As such, entitlement of rights share is not automatically available to erstwhile OCBs. However bonus shares can be issued to erstwhile OCBs without the approval of RBI.

Banking Sector- This 74% limit will include investment under the Portfolio Investment Scheme (PIS) by FIIs/FPIs, NRIs and shares acquired prior to September 16, 2003 by erstwhile OCBs, and continue to include IPOs, Private placements, GDR/ADRs and acquisition of shares from existing shareholders.

Transfer by Resident to Non-resident (i.e. to foreign national, NRI, FII, FPI and incorporated non-resident entity other than erstwhile OCB) Price of shares transferred by way of sale by resident to a non-resident where the shares of an Indian company are: (a) listed on a recognized stock exchange in India ,shall not be less than the price at which the preferential allotment of shares can be made under the SEBI guidelines , as applicable, provided the same is determined for such duration as specified therein, preceding the relevant date, which shall be the date of purchase or sale of shares, (b) not listed on a recognized stock exchange in India, shall not be less than the fair value to be determined by a SEBI registered Merchant Banker or a Chartered Accountant as per any internationally accepted pricing methodology on arm's length basis. The price per share arrived at should be certified by a SEBI registered Merchant Banker or a Chartered Accountant.

Transfer by Non-resident (i.e. by incorporated non-resident entity, erstwhile OCB, foreign national, NRI, FII, FPI) to Resident Sale of shares by a non-resident to resident shall be in accordance with Regulation 10 B (2) of Notification No. FEMA 20/2000-RB dated May 3, 2000 which shall not be more than the minimum price at which the transfer of shares can be made from a resident to a non-resident.

The sale proceeds of shares (net of taxes) sold by an OCB may be remitted outside India directly if the shares were held on repatriation basis and if the shares sold were held on non repatriation basis, the sale proceeds may be credited to its NRO (Current) Account subject to payment of taxes, except in the case of OCBs whose accounts have been blocked by Reserve Bank.

If the sellers are NRIs/OCBs, the copies of RBI approvals evidencing the shares held by them on repatriation/non-repatriation basis. The sale proceeds shall be credited NRE/NRO account, as applicable.

Conclusion:

Though the erstwhile OCBs do not enjoy the privileges that they once did before the De-recognition in 2003, yet they have managed to make a come-back with the new guidelines by the Government in place. At present, they are allowed to invest in India under the Foreign Direct Investment scheme. Also the NRIs investing through OCBs have been given certain leeway which will certainly aid their investment in India as compared to the other foreign companies.

Foreign Technological Agreement

Exponential Growth of Technology in India has played a significant role in all round development and growth of economy in our country. Technology can either be developed through own research and development or it can be purchased through indigenous or imported sources. India has opted for a judicious mix of indigenous and imported technology. Purchase of technology is commonly called "Technology transfer" and it is generally covered by a technology transfer agreement or Technology Collaboration agreement.

'Technology transfer' means the use of knowledge and when we talk about transfer of the technology, we really mean the transfer of knowledge by way of an agreement between the states or companies. 'Transfer' does not mean the movement or delivery; transfer can only happen if technology is used. So, it is application of technology and considered as process by which technology developed for one purpose is used either in different applications or by a newuser.

Technology generally would comprise the following elements:

- Process Know how
- Design Know how
- Engineering know how
- Manufacturing know how
- Application Know how
- Management know how

Foreign technology coordinated efforts are allowed either through the automatic route under designated powers practiced by the RBI, or by the Government. In any case, cases including mechanical licenses/little scale saved things don't fit the bill for automatic endorsement and would require thought and endorsement by the Government. The automatic route for technology collaboration would likewise not be accessible to the individuals who have or had any past technology transfer/exchange check assertion in the same or unified field in India.

GOVERNMENT OF INDIA'S TECHNOLOGY TRANSFER POLICY

Procedures for Approvals of Foreign Technology Agreements-Sec 39C

Government Approval – Project Approval Board (PAB)

Liberalisation Of Foreign Technology Agreements

Foreign Technology Collaboration Payments According To FEMA Provisions

For advancing technological capacity and aggressiveness of the Indian business, procurement of foreign technology is empowered through foreign technology coordinated effort agreements. Acceptance of information through such joint efforts has allowed either through automatic route or with earlier Government approval.

The Central Government exhibited the Statement on Industrial Policy in 1991, which gave disentangled strategies to the better administration of the Foreign Technology Agreements. The segment managing the Foreign Technology Agreements is Sec 39C.

Procedures for Approvals of Foreign Technology Agreements-Sec 39C

The high priority industries would be given automatic approval under the norms of RBI, for foreign technology agreements, subject to a maximum limit of payments up to 1 crore.

The royalty to be paid is restricted to 5 % in case of domestic sales, 8 % in case of exports and total payment should be 8 % on sales for a period of 10 years

The royalty period should not exceed 7 years from the date of starting of the business or 10 years from the date mentioned in the agreement

The royalty rates would be calculated in accordance with the standardized methods

Industries apart from high priority ones would be allowed by the means of automatic approval in case no free foreign exchange is required in case of payments.

Any other kinds of proposals would require particular approval under the general procedures

Permissions pertaining to foreign testing of developed technological applications, employing foreign technicians. The manufacturing and products should be compliant with the small scale industries

In the case of an extension of the foreign technology collaboration agreements which had been automatically approved earlier.

Automatic Approval

The Reserve Bank of India, through its provincial offices, concurs automatic approval to all ventures for foreign technology joint effort agreements subject to

The singular amount payments not surpassing the US $ 2 Million;

Royalty payable being constrained to 5 for every penny for household deals and 8 for each penny for fares, subject to an aggregate instalment of 8 for each penny on deals over a 10-year time span; and

The period for instalment of royalty not surpassing 7 years from the date of initiation of business creation, or 10 years from the date of assertion, whichever is prior (The aforementioned royalty points of confinement are net of duties and are computed by standard conditions).

Instalment of royalty up to 2% for fares and 1% for household deals is permitted under automatic route on the utilization of trademarks and brand name of the foreign teammate without technology transfer. If there should be an occurrence of technology transfer, instalment of royalty subsumes the instalment of royalty for utilization of trademark and brand name of the foreign colleague. Royalty on brand name/exchange check should be paid at a rate of net deals, viz., net deals fewer operators'/merchants' bonus, transport cost, including sea cargo, protection, obligations, charges and different charges, and cost of crude materials, parts, segments imported from the foreign licensor or its auxiliary/associated organization.

Instalment of royalty up to 8% on fares and 5% on local deals by entirely possessed backups (WOS) to offshore parent organizations is permitted under the automatic route with no limitation on the length of royalty payments.

Government Approval

For the accompanying classifications, Government approval would be fundamental:

Proposals pulling in obligatory permitting.

Items of produce reserved for the little scale part

Proposals including any past joint wander, or technology transfer/trademark understanding in the same or partnered field in India. The meaning of “”same”” and “”partnered”” field would be according to 4 digits NIC 1987 Code and 3 digit NIC 1987 Code.

Extension of foreign technology joint effort agreements (counting those cases, which may have gotten automatic approval in the main instance)

Proposals not meeting any or the majority of the parameters for automatic approval

The things of foreign technology coordinated effort, which are qualified for approval through the automatic route, and by the Government are technical ability charges, instalment for outline and drawing, instalment for designing administration and royalty. Payments for enlisting of foreign specialists, assignment of Indian professionals abroad, and testing of indigenous crude material, items, indigenously created technology in foreign nations are represented by discrete RBI methods and governs and are not secured by the foreign technology cooperation approval. Essentially, payments for imports of plant and apparatus and crude material are additionally not secured by the foreign technology coordinated effort approval. For any of these things, business visionaries may contact the RBI.

Government Approval – Project Approval Board (PAB)

Royalty instalment in the accompanying cases requires earlier Government approval (through PAB when just technical cooperation is proposed and FIPB where both money related and technical joint effort are proposed):

Sectors/exercises which are not on the automatic route for FDI, or

Proposals not meeting any of the parameters for automatic approval.

Proposals for foreign technology transfer/coordinated effort not secured under the automatic route should consider by the PAB in the Bureau of Industrial Policy and Promotion. Application in such cases has submitted in Form FC-IL to the secretary for modern Assistance.

The earlier arrangement uninhibitedly permitted payments and settlements up to a lump sum charge of $2million and royalty payments of 5% on household deals and 8% on fares. Payments over this required administrative approval. The new strategy evacuates any such limitations on payments for royalty, lump sum expense for transfer of technology and payments for utilization of trademark/brand name and puts it on the automatic route i.e. with no approval of the Government of India. The unwinding of the decades-old approach is a piece of advancement and deregulation of Indian foreign investment administration, which is functioning admirably for India considering that even in 2008, with the world in a monetary droop, India pulled in over $25billion in foreign investment. Unlimited foreign joint effort agreements in the field of technology gives less demanding access to the most recent technology from around the globe and in this way are significantly advantageous for the advancement of India's own technology enterprises.

Liberalisation Of Foreign Technology Agreements

The existing policy of Government of India on the payment of royalties under Foreign Technology Collaboration provides for automatic approval for foreign technology transfers involving payment of a lump-sum fee of $2 million and payment of a royalty of 5% on domestic sales and 8% of exports.

In addition, where there is no technology transfer involved, royalty up to 2% of exports and 1% for domestic sales is allowed under automatic route on the use of trademarks and brand names of the foreign collaborator. Separate norms are available for the hotel sector to vide Press Note 18 (1991 Series) and Press Note 1 (1995 Series).

Technology transfers involving payments above these limits required prior permission of the Project Approval Board, Department of Industrial Policy and Promotion, Government of India.The Department of Industrial Policy & Promotion, Ministry of Commerce & Industry said Thursday in a press note that the government has reviewed the policy and decided to permit, with immediate effect, payments for royalty, lump-sum fee for transfer of technology and payments for use of trademark/brand name on the automatic route, i.e. without any approval of the Government of India. However, all such payments will be subject to Foreign Exchange Management (Current Account Transactions) Rules, 2000 as amended from time to time.

Foreign Technology Collaboration Payments According To FEMA Provisions

Royalty and Foreign Technical collaboration payment are governed by the RBI circular AP (DIR Series) Circular No 5 dated 21 July 2003. Earlier, only wholly owned subsidiaries are allowed to pay a royalty to offshore parent companies abroad without any restriction on the duration of payment under the automatic route.

Earlier, under liberalized the foreign technology collaboration agreement policy through Press Note No 2 (2003 Series) dated 24 -06-2003, irrespective of who has entered into foreign technology collaboration agreements were permitted on the automatic approval route to make royalty payments at 8% on exports and 5% of domestic sales without any restriction on the duration of royalty payments.

An Indian company eligible to issue shares under the FDI policy and subject to pricing guidelines as specified by the Reserve Bank from time to time may issue shares to a person resident outside India, being a provider of technology / technical know-how, against Royalty / Lumpsum fees due for payment; and against External Commercial Borrowing (ECB) (other than import dues deemed as ECB or Trade Credit as per RBI Guidelines).

Provided, that the foreign equity in the company, after the conversion of royalty / lumpsum fee / ECB into equity, is within the sectoral cap notified, if any. RBI has delegated the powers, to make payments for royalty, lump sum fee for transfer of technology and payment for use of trademark/brand name in terms of the foreign technology collaboration agreement entered by the Indian company with its foreign partners, to the AD banks subject to compliance with the provisions of Foreign Exchange Management (Current Account Transactions) Rules, 2000.

M/S BQR Systems India Private Ltd. vs Union Of India & Ors.

Guidelines pertaining to approval of foreign/technical collaborations under the automatic route with previous ventures/tie-up in India.

The Government has reviewed the guidelines notified vide Press Note 18 (1998 Series) which stipulated approval of the Government for new proposals for foreign investment/technical collaboration where the foreign investor has or had any previous joint venture or technology transfer/trademark agreement in the same or allied field in India.

New proposals for foreign investment/technical collaboration would henceforth be allowed under the automatic route, subject to sectoral policies, as per the following guidelines:

(i) Prior approval of the Government would be required only in cases where the foreign investor has an existing joint venture or technology transfer/trademark agreement in the 'same' field. The onus to provide requisite justification as also proof to the satisfaction of the Government that the new proposal would or would not in any way jeopardize the interests of the existing joint venture or technology/trademark partner or other stakeholders would lie equally on the foreign investor/technology supplier and the Indian partner.

(ii) Even in cases where the foreign investor has a joint venture or technology transfer/trademark agreement in the 'same' field prior approval of the Government will not be required in the following cases: a. Investments to be made by Venture Capital Funds registered with the Securities and Exchange Board of India (SEBI); or b. Where in the existing joint-venture, investment by either of the parties is less than 3%; or c. Where the existing venture/collaboration is defunct or sick.

(iii) In so far as joint ventures to be entered into after the date of this Press Note are concerned, the joint venture agreement may embody a 'conflict of interest' clause to safeguard the interests of joint venture partners in the event of one of the partners desiring to set up another joint venture or a wholly owned subsidiary in the 'same' field of economic activity.

3) These guidelines would come into force with immediate effect."

4) It is the case of the appellant that, the licence agreement of the foreign company with the appellant, is in the nature of a “joint venture/technology transfer/trademark agreement” and the foreign company as per the Press Note (supra), was required to obtain prior approval of the Government for making investment in or entering into technical collaboration with the Indian Company and which approval had not been taken; that the respondents no.2 to 5 owing to the agreement with the appellant, were not entitled to take the automatic route as has been taken by them. It is contended that a false declaration was made by the Foreign and the Indian Companies while making investments in the Indian company to the effect that the Foreign Company did not have any joint venture/technology transfer/trademark agreement with any other person in India in the “same field”.

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