1 THE STUDY OF INTERNATIONAL COMMERCIAL LAW

"…[B]y increasing the general mass of productions,
[international trade] diffuses general benefit, and binds
together by one common tie of interest and intercourse, the
universal society of nations throughout the civilized world."[1]

– David Ricardo

Economist David Ricardo wrote those words almost 200 years ago, solidifying the argument for free international trade,[2] and yet the concept is still as important and as controversial today as it was then, perhaps more so.[3] "International trade" describes the flow of resources across borders.[4] Thus it involves the exchange of goods, services, labor, or capital[5] between entities from different nations.

This chapter will present a helpful background to the study of the law governing these transactions through discussion of (I.) the theory, the institutions, and the law of international trade. Ultimately, the chapter will focus specifically on one area of international trade law, the core of this text, the international sale of goods, highlighting (II.) the commercial and legal considerations anyone participating in this type of transaction should consider.

To begin with, however, consider the following hypothetical situation:

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[1] David Ricardo, *On the Principles of Political Economy and Taxation* 7.11 (3d ed., John Murray 1821) [hereinafter Ricardo, *On the Principles*].

[2] Economist Adam Smith is attributed with initially causing the split in economic ideology between protectionist mercantilism to free trade. Douglas A. Irwin, *A Brief History of International Trade Policy* (Library of Economics and Liberty 2001).

[3] For example, on July 3, 2012, World Trade Organization Deputy Director-General Valentine Rugwabiza called on the United Nations Economic and Social Council to fortify free international trade by fighting protectionist measures that nations have implemented in response to the 2008 global economic crisis and those protectionist measures that have been implemented under the auspices of arbitrarily applied environmental policies. Valentine Rugwabiza, *Call on ECOSOC to Fight Protectionsim* (N.Y.C. July 3, 2012), in WTO: 2012 News Items (July 3, 2012), http://www.wto.org/english/news_e/news12_e/ddg_03jul12_e.htm.

[4] Donald M. McRae, *The Contribution of International Trade Law to the Development of International Law*, in Hague Acad. Intl. Law, *Collected Courses of the Hague Academy of International Law* 99, 110-111, 132-133 (260, Martinus Nijhoff Publishers 1996).

[5] *Id*. at 110, 132.

Example 1-1

Johnson & Gamble ("J&G") is a diversified multi-national consumer products company headquartered in the United States and listed on the New York Stock Exchange. J&G is represented by the company vice president who resides in central New Jersey and has had little international exposure.

China Metals is a huge state controlled conglomerate organized under the laws of the People's Republic of China and headquartered in Beijing. It is engaged in the production of copper, aluminum, and nickel, among other metals. China Metals is also one of the largest metals trading companies in the world, trading over 12 million tons of steel annually. China Metals is represented by a team including a Senior Vice President of the company and an executive whose title is Chief of Discipline Inspection Committee.

J&G wants to import Chinese steel in order to make its new MAK X disposable razor blades. Chinese steel is considerably lower cost than US steel, making this deal extremely attractive to J&G. China Metals is interested in expanding its sales to the United States but has also been instructed by its government ownership to encourage investment by J&G into China. All of the individuals involved personally want a deal to be struck because such a success would advance their careers and no doubt also result in personal financial gain.

Both parties understand that disputes might arise during the course of their dealings. However, neither party is interested in submitting any disputes to the state or national courts of its counterparty's country.

Imagine representing one of the parties above. One of the major roles of a business attorney is to identify the client's goals, foresee potential conflicts, and craft a creative business arrangement that will meet the client's goals while preventing any problems from developing in the future.

Of course, the attorneys on the other side of the transaction will be doing the same thing for their client, and the goals of all the parties to a transaction may not coincide. Yet another role of the business lawyer is to attempt to create solutions and compromises when the goals of the parties to a transaction conflict. It is sometimes in the best interests of the client to compromise on various points if it means being able to reach an agreement with the counterparty. Sometimes,

however, the best business decision for a client is not to compromise but simply to walk away from a deal. As a word of caution, business lawyers should be careful not to obstruct a deal by fighting for points that a client (after being educated about the point) really does not consider a concern. Do not let "winning" in negotiations stand in the way of making a deal that works for a client.

There are many basic business and legal issues that should be considered when contemplating this type of transaction. The fact that this transaction involves the international sale of goods complicates matters considerably. While reading the following pages, try to contemplate in advance what the true goals of each of the parties to this potential transaction are and attempt to structure an arrangement to meet those goals. Anticipate all of the possible pitfalls that might hinder a successful business venture. This scenario will be re-visited toward the end of this chapter and throughout this book.

I. INTERNATIONAL TRADE: THE THEORY, THE INSTITUTIONS, AND THE LAW

Before going into the commercial and legal considerations attorneys involved in international commercial transactions must face, it is important to understand some basic background on international trade. Accordingly, this section will focus on: (A) the competing theories underlying international trade, (B) the protectionist measures nations adopt to reduce foreign competition, (C) the institutions that support international trade generally, and (D) the sources of law that govern international commercial transactions.

A. TRADE THEORY

Economists and politicians throughout the world have long debated whether international trade is positive or negative. (1.) Advocates for international trade argue international trade can increase the overall wealth of all countries engaged in it, instead of enriching one at the expense of others.[6] Nonetheless, (2.) others insist that international trade can harm nations, citing phenomena such as unemployment and industry decline as a result of foreign competition,[7] among

[6] Consider, for example, the following statement of noted economist John Maynard Keynes: "I was brought up, like most Englishmen, to respect free trade not only as an economic doctrine which a rational and instructed person could not doubt but almost as a part of the moral law." John Maynard Keynes, *National Self-Sufficiency*, in *XXI The Collected Writings of John Maynard Keynes* 233 (1933).

[7] *See e.g.* Charles Schumer & Paul Craig Roberts, *Exporting Jobs Is Not Free Trade: Rethinking Protectionism*, Intl. Herald Trib. Op. 6 (Jan. 7, 2004) (identifying a New York securities firm that planned to replace its team of 800 American software engineers, who each made approximately

other arguments. These theorists believe that some level of protectionism is in a country's best interest. As you think about international trade, consider for yourself which arguments persuade you.

1. Theories Supporting Free Trade

Economists' explanations of why international trade is beneficial date back to (a.) Adam Smith and his seminal work, *The Wealth of Nations*, published in 1776,[8] and to (b.) David Ricardo and his work, *The Principles of Political Economy and Taxation*, published in 1817.[9] To illustrate their theories, these economists simplified the complex world in which we live by using models based on a world with two countries that make two products. After analyzing their models, Smith and Ricardo each came to the clear conclusion that international trade was a benefit to both of the trading nations.

a. Absolute Advantage

Smith offered the intuitive reasoning that if each of the two countries makes one of the two products more efficiently than the other, then each country should specialize in making the product that it makes more efficiently and trade with the other country to get the other product. The situation Smith was describing involves the concept of absolute advantage. When one country can produce something more efficiently than another country it is said to have an absolute advantage over the other country with respect to that good. In Smith's example, each of the two countries has an absolute advantage over the other country with respect to one of the goods. Accordingly, trade should ensue because it will result in both countries enjoying more products than would otherwise be the case.

Smith's concept can be understood more easily with an example. Keep in mind that the example has to be set in a simplified world consisting of two countries and two goods that are identical whether made in one country or the other. The only input needed is labor, which is freely transferable to production of either good, and trade between the countries (including transport of goods) is free. Admittedly, that is a lot to assume. Nonetheless, with those assumptions, imagine that the two countries, A and B, each make both shirts and shoes.

In a pre-trade world, Countries A and B are capable of producing the following units per 100 hours of labor:

$150,000 per year, with a team of software engineers from India, who would each make approximately $20,000 per year).

[8] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Edwin Cannan ed., Random House 1937).

[9] Ricardo, *On the Principles*, *supra* n. 1.

Country	Shirts		Shoes
A	50	*or*	50
B	30	*or*	100

Here Country A has an absolute advantage in producing shirts. It is more efficient for Country A to produce shirts because 100 units of labor will produce more shirts in Country A than it will in Country B. Likewise, Country B has an absolute advantage in producing shoes since it can produce more pairs of shoes than Country A with the same amount of labor. In this scenario, the two countries should engage in trade and specialize in the product in which they have an absolute advantage – Country A specializing in shirts and Country B specializing in shoes.

For example, before trading, each country may decide to produce the following units per 100 hours of labor:

Country	Shirts		Shoes
A	25	*and*	25
B	15	*and*	50
Totals	40		75

However, if each country specializes in producing the good in which it has an absolute advantage, then (with the same 100 hours of labor) each country can produce the following units:

Country	Shirts	Shoes
A	50	–
B	–	100
Totals	50	100

This result yields more units of both shirts and shoes than existed before specialization and overall global wealth has been maximized. The countries

should trade shirts for shoes until each country has reached its optimal level of consumption. For example, Country A could trade 20 shirts for 40 pairs of shoes. In the end, Country A would have 30 shirts and 40 pairs of shoes (much better than in the pre-trade world). Country B would have 20 shirts and 60 pairs of shoes (also much better off than in the pre-trade world).

b. Comparative Advantage

David Ricardo expanded on the concept of absolute advantage by imagining a world with two countries that produce two goods where one of the countries was more efficient than the other at producing both goods. In other words, one country had an absolute advantage over the other country with respect to both goods. In this world, it is not so intuitive that the countries should trade. It is not clear that the more efficient country would gain anything from trade. Similarly, it is not so clear that the less efficient country could effectively afford to trade with the more efficient country.

Despite being less efficient than the first country at producing both goods, the second country would still likely be relatively better at producing one of the two goods when compared to the other country. Ricardo called this that country's comparative advantage.

Ricardo argued that each country should specialize and produce that good for which it has a comparative advantage and should then trade that good with the other country to get the product which it does not produce itself. The result, he argued, should increase wealth for both countries. In that way, global wealth will be maximized. The following example should make this complex notion easier to grasp:

In a pre-trade world, Countries A and B are capable of producing the following units per 100 hours of labor:

Country	**Shirts**		**Shoes**
A	100	*or*	200
B	25	*or*	100

Here, Country A has an absolute advantage over Country B in shirts since it can produce more shirts than Country B with the same inputs (4 times as many). Likewise, Country A has an absolute advantage over Country B in shoes since it can produce more shoes than Country B with the same inputs (2 times as many).

Country B does not have an absolute advantage over Country A in either shirts or shoes since it cannot produce either more efficiently than Country A.

However, according to Ricardo, trade should occur because, when compared with Country A, Country B is better at producing shoes than it is at producing shirts. Country A is four times as efficient as Country B in shirts (100 units versus 25 units); but only two times as efficient as Country B in shoes (200 units versus 100 units). According to this analysis, Country A has a comparative advantage in producing shirts; shirts production is its strongest production capability when compared with Country B. Similarly, Country B has a comparative advantage in producing shoes; shoes production is its strongest production capability when compared with Country A. This is true even though Country A generally is more efficient than Country B at producing both shirts and shoes.

If that is not entirely clear, one can also use relative opportunity cost to analyze the situation. Opportunity cost in the simplified world under consideration (where there are just the two countries that produce the two goods) means the quantity of one good that the country has to give up in order to produce the other good. It would cost Country A two pairs of shoes to produce one shirt. (Each hour of labor in Country A could produce two pairs of shoes or one shirt.) By contrast, it would cost Country B four pairs of shoes to produce one shirt. (Four hours of labor would yield either four pairs of shoes or one shirt.) So the opportunity cost for Country A to produce shirts is lower than for Country B (two pairs of shoes versus four). Thus, with this opportunity cost analysis, Country A again is shown to have a comparative advantage in producing shirts.

Conversely, it would cost Country A half of a shirt to produce one pair of shoes. (In Country A one half of an hour of labor would produce one pair of shoes or half of a shirt). It would cost Country B one-fourth of a shirt for one pair of shoes. (One hour of labor would produce one pair of shoes or one-fourth of a shirt). So, the opportunity cost for Country B of producing shoes is lower (one-fourth of a shirt) than the opportunity cost for Country A of producing shoes (half of a shirt). Accordingly, with this opportunity cost analysis, Country B has a comparative advantage in producing shoes.

For example, before trading, each country may decide to produce the following units per 100 hours of labor:

Country	Shirts		Shoes
A	70	*and*	60
B	20	*and*	20
Totals	90		80

However, if each country specializes in producing the good in which it has a comparative advantage, then (with the same 100 hours of labor) each country can produce the following units:

Country	Shirts	Shoes
A	100	–
B	–	100
Totals	100	100

This result yields more shirts and shoes production than in the pre-trade world. Again, overall global wealth has been maximized. The countries should trade shirts for shoes until each country has reached its optimal level of consumption. For example, Country A could trade 25 shirts for 65 pairs of shoes. After trading, Country A would have 75 shirts and 65 pairs of shoes (better than in the pre-trade world). Country B would have 25 shirts and 35 pairs of shoes (also better off than in the pre-trade world).

Based at least in part on this Ricardian model showing the wealth gains resulting from international trade, international trade and development organizations, including the World Trade Organization and the World Bank, have pursued free trade among nations as an ideal. In fact, the World Trade Organization even discusses the principle of comparative advantage on its web site.[10] It goes on to describe empirical results from global trade in the 25 years after the end of World War II and concludes that as trade among nations increased, so too did wealth.[11]

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[10] World Trade Org., *Understanding the WTO* 13-14 (3d ed. 2007) (available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf).

[11] *Id.* For more on comparative advantage, see Russell Roberts, *Treasure Island: The Power of Trade. Part I. The Seemingly Simple Story of Comparative Advantage* (Library of Economics and Liberty 2006); Russell Roberts, *Treasure Island: The Power of Trade. Part II. How Trade Transforms Our Standard of Living* (Library of Economics and Liberty 2006).

2. The Critics of Free Trade

The push for free trade, however, has not been universally well received. In fact, many scholars, politicians, and social activists fiercely fight against the idea of attempting to move toward more free trade. From some scholars' perspectives, the absolute and comparative advantage models are plagued with too many assumptions that are simply unworkable in the complex modern world.[12] The models make many assumptions. A few of those assumptions were described above: that the world is a simple one that consists of two nations, with two products; that the products are interchangeable no matter where produced; that labor is the only input needed; that labor is freely transferable from the production of one good to another; and that trade is costless. These conditions simply do not exist in the world today, and some of these critics would hold that the results for the Ricardian model break down in light of true market imperfections.[13]

Some critics argue that increased trade often means factory closings and lay-offs in jurisdictions where production is shifting as a result of increased trade.[14] Environmentalists argue that freer trade potentially means environmental standards being ignored by countries attempting to produce goods more cheaply and gain a comparative advantage. Health advocates worry that the health and safety standards of products are, similarly, overlooked by countries seeking to manufacture products or supply foodstuffs at comparatively cheap prices.

Perhaps more cutting is the argument of many developmentalists that a free trade agenda, which is being pushed primarily by developed economies, is disingenuous. These critics point out that the developed economies built most of

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[12] *See* James M. Cypher & James L. Dietz, *The Process of Economic Development* (Routledge 1997); Paul R. Krugman, *Rethinking International Trade* 118–122 (MIT Press 1990).

[13] See, for example, Sir James Goldsmith, who wrote on the movement toward more free trade, "it will impoverish and destabilize the industrialized world while at the same time cruelly ravaging the third world." Sir James Goldsmith, *The Trap* 25 (Fixot 1993). Later in that same book, Goldsmith insists, provocatively, that "[i]t must surely be a mistake to adopt an economic policy which makes you rich if you eliminate your national work force and transfer your production abroad, and which bankrupts you if you continue to employ your own people." *Id.* at 28. *See also* James Fallows, *Looking at the Sun* (Vintage 1994) (focusing on the growth of Asian economies and differences in cultural norms as complicating factors that challenge traditional economic thinking).

[14] International meetings of international trade organizations like the World Trade Organization (WTO) have become extraordinarily controversial. In 1999, a WTO ministerial meeting in Seattle, Washington was met with loud protests and meeting participants were unable to come to any agreements regarding crucial issues affecting trade. Since then, meetings in Doha, Qatar in 2001, Cancun, Mexico in 2003, and Hong Kong, China in 2005 all resulted in controversy between developed and developing countries over who is gaining from the development of trade. Much of the developing world took a position that it is not gaining from trade, and new policies must be put in place to redress that situation. This controversy continues, although it is principally concerned with how to structure trading rules to make the benefits of trade available to all parties involved.

their industry in an environment that was indeed protectionist and may have benefited from the exploitation of colonial holdings.[15] To insist that developing countries today proceed without those same benefits is to lock those countries into their status of being lesser-developed.[16]

As recently as 2005, the United States met intense opposition as it attempted to promote the Free Trade Area of the Americas (FTAA). That arrangement would have allowed for the free flow of goods between the countries of the Americas, while at the same time restricting the flow of labor. At a meeting in Argentina to discuss the FTAA, thousands protested against the FTAA.[17]

B. PROTECTIONIST MEASURES

In addition to theoretical commentaries critical of free trade, all one has to do is observe the breadth of protectionist measures that have been adopted by countries all over the world to understand that, despite the rhetoric of free trade employed by many, the reality is that countries do not always believe that unfettered free trade is truly in their best interest. A protectionist measure is one that helps any particular nation or state to protect its industry from the

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[15] *See e.g.* Carmen G. Gonzalez, *Deconstructing the Mythology of Free Trade: Critical Reflections on Comparative Advantage*, 17 Berkeley La Raza L.J. 65-93 (2006).

[16] Along these lines, it is interesting to note the view of a few influential politicians from developing countries. Discussing agricultural trade subsidies granted by many developed countries, Colombian President Andres Pastrana posed the following question:

> How is it possible that the most powerful countries of the world, with most of the resources on the planet, may channel these to their agricultural sectors not fully understanding, it would appear, that in doing so they close the doors to the growth and the livelihoods of those subsisting on farming in the rest of the world?

Nicole Winfield, *Developing Countries Tell the US, EU to Stop Subsidies, Open Markets*, Associated Press Worldstream (June 11, 2002). Also reflecting on the difficult situation for the agricultural sector in his country, Jamaican Agriculture Minister Roger Clarke complained:

> Already, we're reeling under the effects of dumped cheap goods on us, and this puts us in a terrible position, because were not even in a position to subsidize. In countries like Jamaica, cheap imported foodstuffs have exacted a heavy toll on local farmers unable to compete with the low-cost subsidized produce… We have to rethink our strategy because we were going along a road which they called free trade... This is really flying in the face of whatever we're talking about at the WTO, and it is going to be for us now to rethink. We have to find a way because it cannot go like this, our people are going to be totally wiped out.

Dionne Jackson Miller, *US Farm Bill Prompts Regional Rethink*, SUNS - South-North Dev. Monitor No. 5120 (May 17, 2002), http://www.sunsonline.org/results.php.

[17] *See Bush Fails to Revive Free Trade Talks in Latin America Amid Mass Protest*s (Democracy Now! Nov. 7, 2005) (TN broad., transcr. available at http://www.democracynow.org/article .pl?sid=05/11/07/1438223).

competition that results from free trade. There are many reasons why nations might employ protectionist measures and many types of measures that can be used.

First and probably foremost among the reasons why a country might be protectionist is the notion that countries do not want to disadvantage or abandon entire industries (and the workers and owners of those industries), regardless of whether that country's comparative advantages might lie elsewhere. An example of this is the agricultural industries of developed economies. Despite the fact that lesser-developed economies might have comparative advantages in agriculture, protectionist measures, such as government subsidies, still support the agricultural industries of those countries.[18]

A second motivation for adopting protectionist measures is the strategic notion that a country does not want to rely on other nations for basic necessities. An example of this phenomenon might be found in the oil and gas industry. Some countries have kept those industries largely regulated or even owned by government in an attempt to make sure that the domestic supply of those strategic goods is not threatened.

1. Dumping

Yet another reason why countries adopt protectionist measures is to counter-act dumping. Dumping occurs when one country decides to sell a particular product to a foreign market at prices that are below the prices paid for that product in its own country, or below production costs. Countries or industries that engage in dumping are attempting to lock in a share of the market for the particular good in the foreign country. In the extreme, those engaging in dumping would like to run the local industry out of business in the foreign country, and then later raise prices to capture greater profits.[19] Countries combat this predatory practice through anti-dumping efforts, which might include any or a combination of protectionist measures.[20] In fact, the World Trade Organization, discussed below,

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[18] Developed countries' use of government subsidies for the agricultural industry is a topic of heated debate. In 2003 at the 5th Meeting of the WTO in Cancun, Mexico, delegates from Asia, Africa, Latin America, and the Caribbean walked out of negotiations due to the United States' and the European Union's refusal to cut back on the $300 billion in governmental subsidies given to farmers in their countries. Elizabeth Becker, *Poorer Countries Pull Out of Talks over World Trade*, N.Y. Times A1 (Sept. 15, 2003).

[19] See James Fellows, *Looking at the Sun*, where the author quotes Peter Drucker and describes a phenomenon he calls "adversarial trade" where the aim is "to drive the competitor out of the market altogether rather than to let the competitor survive." James Fallows, *Looking at the Sun*, *supra* n. 13, quoting Peter Drucker, *The New Realities* (Harper & Rowe 1989).

[20] For example, the United States Department of Commerce utilizes a controversial methodology called "zeroing" to calculate antidumping duties on a foreign producer's imports. Dan Ikenson,

adopted an Anti-Dumping Agreement pursuant to which countries are authorized to take anti-dumping measures when there is material injury to the a domestic industry.[21]

2. Tariffs, Licenses, Quotas, and Subsidies

Among protectionist measures a nation might employ are tariffs, licenses, quotas, and government subsidies. Tariffs are customs duties that are imposed by a country on certain imported goods to make those imported goods less competitive on that country's domestic market.[22] Tariffs are one of the easiest ways to restrict the access of a country's markets to foreign imports.

Licenses are similar to tariffs in that they typically simply make the imported product more expensive. Where an import license is required, anyone importing a foreign good must apply for such a license and pay any related fee.[23] This process, like tariffs, raises the price of the imported good and makes that good less competitive on the domestic market. To the extent granting licenses is discretionary and not automatic, countries exert even more control over imported goods. With discretionary licensing, a country might exclude an import altogether by not granting an import license.

Quotas are a direct restriction on imports. Import quotas restrict the amount of foreign imports of any particular good to a certain quantity.[24] Quotas can be

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Zeroing In: Antidumping's Flawed Methodology under Fire, Free Trade Bull. No. 11, Ctr. for Trade Policy Stud. (Apr. 27, 2004) (available at http://www.freetrade.org/pubs/FTBs/FTB-011.pdf). Using this methodology, sales made by the foreign producer at or above fair market value are all treated as having a zero dumping margin (rather than a negative margin), while sales from the same foreign producer made below fair market value are treated as having a positive dumping margin. *Id*. Thus, when combined together, the foreign producer's overall margin of dumping is significantly higher and higher anti-dumping duties can be imposed. *Id*.

[21] *Uruguay Round Agreement: Agreement on Implementation of Article VI of the General Agreement on Tariffs & Trade 1994* (Apr. 15, 1994), http://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

[22] Interestingly, most countries apply a significantly higher than average tariff to imported alcohol and tobacco products. For more information on country-specific tariff schedules, see World Trade Organization, *Get Tariff Data,* http://www.wto.org/english/tratop_e/tariffs_e/tariff_data_e.htm (last accessed Aug. 10, 2015).

[23] For example, Thailand allows most goods to be imported into the country without a license, with the exception of certain textiles, food-processing products, and used vehicles. This is offset by notably high tariffs. Indonesia, on the other hand, implements extensive licensing requirements. To review the import regulations and other trade barriers of numerous countries, see Office of the United States Trade Representative, *Reports: National Trade Estimate Report on Foreign Trade Barriers*, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2015/2015-national-trade-estimate (last accessed Aug. 10, 2015).

[24] For example, in 2014 the European Union maintained a trade quota on Australian imported meat, limiting the amount of beef imported from Australia to just over seven thousand tons per year. *See*

designed to apply specifically to imports from a particular country or to all imports of a particular good.

Government subsidies are a less obvious protectionist measure and may be more difficult to readily recognize. When a government subsidizes domestic production of any particular product or industry, it makes those products cheaper for the domestic market to produce and therefore makes competition from foreign products more difficult.[25] Subsidies can take many different forms, making them potentially difficult to identify. Subsidies frequently take the form of direct payments from government to the selected industry, or might exist in the form of reduced taxes for the selected industry.

3. Prohibitions on Trade

Of course the most dramatic example of a protectionist measure is an outright *prohibition on trade* from any particular industry or country. While this may seem extreme, it was generally the position of the former Soviet Union to prohibit trade with foreign nations, with certain exceptions. Politically motivated embargoes have the same result. Proponents of free trade argue that politically motivated embargoes, such as the United States' embargo of Cuban products, fail to change the behavior of targeted regimes but rather inflict additional suffering on the citizens of those countries.[26]

4. Non-Tariff Barriers

There are also other *non-tariff barriers* to trade, including government requirements about the quality, labeling, or production standards for certain products. An example is provided by the labeling requirements for bottles of wine in the United States. It is possible that small wineries in South Africa may not want to spend the additional money required to investigate those requirements and comply with them in order to export their wines to the United

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Australian Government Com Law, *Australian Meat and Live-stock Industry Order 2014*, https://www.comlaw.gov.au/Details/F2014L00506 (last accessed Aug. 10, 2015).

[25] As discussed *supra* n. 18, government subsidies for the agricultural sector are common for developed countries but garner significant resistance and criticism from developing countries.

[26] Daniel T. Griswold, *The Embargo Harms Cubans and Gives Castro an Excuse for the Policy Failures of His Regime*, Insight on the News (May 27, 2002) (available at http://www.freetrade.org/node/330) (identifying that economic sanctions against the countries of North Korea, Iran, Iraq, and Burma have failed to change the behavior of the regimes). See also Peter Fitzgerald, *The Cuban Thistle Crisis: Why the Rest of the World Will Never Understand the United States Sanction Policy*, Commentary and Analysis, SanctionsWatch.com October 15, 2004 (available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=938129) (arguing that the United States embargo against Cuban products has failed to lead to political change for over forty years).

States markets. In that sense, the labeling requirement acts as a barrier to trade. Another example of this is the quality of food items. Where a government, for example Germany, requires that its seafood have no more than a certain level of cadmium, then other jurisdictions will have to be certain that their products comply with that requirement if they want to export their seafood into Germany.[27] This quality standard acts as a kind of barrier to trade.

It is not at all clear that these types of measures are undertaken by countries under the auspices of protectionism. It is likely that many of these standards and requirements are genuinely adopted in the best interests of consumers, their health, and perhaps the environment. However, the true purpose of a non-tariff barrier to trade may be difficult to ascertain in any specific case.

C. INTERNATIONAL ORGANIZATIONS

Because international trade is of such importance to the stability and operation of the global economy, many international organizations have emerged to support and facilitate trade among nations. Among the most important of these organizations are: (1) the World Trade Organization, (2) the World Bank, (3) the International Monetary Fund, (4) the International Institute for the Unification of Private International Law (UNIDROIT), (5) the United Nations Commission on International Trade Law (UNCITRAL), and (6) the International Chamber of Commerce (ICC).

1. The World Trade Organization[28]

The World Trade Organization (WTO) is an international organization that promotes, facilitates, and regulates trade between nations.[29] The WTO grew out of the General Agreement on Tariffs and Trade (GATT),[30] created in 1947 and adopted by 23 nations in 1948.[31] That agreement represented a multi-lateral

[27] *See Swiss Seller v. German Buyer (New Zealand Mussels Case),* Bundesgerichtshof case VIII ZR 159/94, Germany, Mar. 8, 1995 (available at http://cisgw3.law.pace.edu/cases/950308g3.html). The decision of the German Supreme Court is further explained in Chapter 3.

[28] *See generally* World Trade Org., http://www.wto.org (last accessed Aug. 10, 2015).

[29] World Trade Org., *What is the WTO?*, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last accessed Aug. 10, 2015).

[30] World Trade Org., *What is the World Trade Organization?*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last accessed Aug. 10, 2015).

[31] The 23 founding members were: Australia, Belgium, Brazil, Burma, Canada, Ceylon, Chile, China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, United Kingdom, and the United States. World Trade Org., *The 128 Countries that had Signed GATT by 1994,* http://www.wto.org/english/thewto_e/gattmem_e.htm (last accessed Aug. 10, 2015).

attempt by nations to reduce tariffs and thereby promote international trade.[32] At the time it was created, the GATT was intended only to be provisional.[33] It was originally hoped that an International Trade Organization (ITO) would be created to oversee and facilitate the growth of international trade; however, an ITO never materialized.[34] Nonetheless, the signatory nations to the GATT met periodically at "rounds" of discussions to continue negotiations concerning the regulation and promotion of international trade.[35] Through those years the provisions of the GATT, along with the number of its signatories, increased dramatically.[36]

At the eighth round of negotiations, the Uruguay Round (1986–1994), 123 country participants agreed to replace the GATT with a much more expansive set of provisions that would constitute and be administered by the WTO.[37] Beginning in 1995, the WTO substantially expanded on the terms of the GATT and included provisions regarding services and intellectual property rights – subjects that were previously not included in the GATT.[38] As of April 26, 2015, the WTO had 161 member nations from across the globe.[39] In its current state, the WTO's main functions are to administer WTO trade agreements, provide a forum for trade negotiations, handle trade disputes, monitor national trade policies, provide technical assistance and training for developing countries, and cooperate with other international organizations.[40]

Moving toward freer trade is a clear and focused goal of the WTO.[41] As a result of the WTO's predecessor, the GATT, tariffs on industrial goods across the globe had fallen to less than 4% on average by the mid 1990s.[42] The WTO has continued to work to lower trade barriers; as a result, merchandise exports have

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[32] World Trade Org., *The Gatt Years: from Havana to Marrakesh*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm (last accessed Aug. 10, 2015).
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] World Trade Org., *Understanding the WTO*, *supra* n. 10, at 18-22 (available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf).
[38] World Trade Org., *The Uruguay Round*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact5_e.htm, (last accessed Aug. 10, 2015).
[39] World Trade Org., *Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last accessed Aug. 10, 2015).
[40] World Trade Org., *The WTO in Brief*, 8 (2014) (available at http://www.wto.org/english/res_e/doload_e/inbr_e.pdf). For additional information pertaining to the WTO, including *The 10 Benefits of the WTO Trading System* and *The 10 Common Misunderstandings of the WTO*, see http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm.
[41] *Id.* at 1 (highlighting that the WTO's "main function is to ensure that trade flows as smoothly, predictably and freely as possible").
[42] World Trade Org., *Understanding the WTO*, *supra* n. 10, at 11.

grown approximately 6% annually over the past 50 years.[43] However, the WTO is not blindly devoted to the pursuit of free trade. The WTO officially acknowledges in its constituent agreements that in certain circumstances trade barriers are appropriate if in the best interests of consumers, developing countries, health, or environmental welfare.[44] Thus, the WTO attempts to take a somewhat balanced position between free trade and restricted trade. Nonetheless, the WTO has been frequently criticized for serving the agendas of developed countries while sacrificing the welfare of the developing world.[45]

The chief guiding principle of the WTO is the most favored nation principle.[46] Although the name implies favorable or preferential treatment for a country, the principle actually means that there can be no favored nation.[47] The best treatment a member nation accords another member nation in terms of free trade and access to markets must be applied to all member nations.[48]

2. The World Bank[49]

The World Bank is an international organization dedicated to the reduction of global poverty.[50] Like the WTO, the World Bank also dates back to the post World War II years. It was founded at the Bretton Woods Conference in 1944 as the International Bank for Reconstruction and Development (the IBRD) and was

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[43] World Trade Org., *The WTO in Brief*, *supra* n. 40, at 3.

[44] For example, the WTO Agreement on the Application of Sanitary and Phytosanitary Measures specifically allows countries to adopt rules that protect the health of its citizens and makes special additional rules for developing countries. *Agreement on the Application of Sanitary and Phytosanitary Measures* (Apr. 15, 1994), available at http://www.wto.org/english/tratop_e/sps_e/spsagr_e.htm. In addition, the Fourth Ministerial Conference held in Doha, Quatar in 2001 resulted in a Ministerial Declaration that focuses work of the WTO on the needs and interests of developing nations. See the Doha WTO Ministerial Declaration of November 14, 2001 (available at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm).

[45] *E.g.* Helen Theung, *Spinning Globalization Towards Human Rights: A Letter to the WTO*, 3 L. & Soc'y Rev. UCSB 29 (2004).

[46] This principle is so important that it is set forth in Article 1 of the 1947 General Agreements on Tariffs and Trade.

[47] As with most legal principles, however, there are exceptions. For instance, countries can set up free trade agreements that apply to goods traded only within those countries—therefore discriminating against countries that are not parties to the free trade agreement. World Trade Org., *Understanding the WTO*, *supra* n. 10, at 11.

[48] World Trade Org., *Principles of the Trading System*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last accessed Aug. 10, 2015).

[49] *See generally* The World Bank, http://www.worldbank.org (last accessed Aug. 10, 2015).

[50] The World Bank, *What We Do*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20103838~menuPK:1696997~pagePK:51123644~piPK:329829~theSitePK:29708,00.html (last accessed Aug. 10, 2015).

dedicated to post-war reconstruction efforts in Europe.[51] Today, the World Bank continues to provide assistance for reconstruction efforts following natural disasters and conflicts, but has expanded its scope dramatically to include the alleviation of poverty around the world.[52]

To facilitate its mission, the World Bank is currently made up of two organizations —the IBRD, which focuses on middle-income developing countries, and the International Development Agency (IDA), which focuses its efforts on the world's poorest nations.[53] Through these two organizations, the World Bank makes loans to developing countries and their businesses.[54] It also makes grants to nations to help promote economic environments where development can flourish.[55]

The IBRD is made up of 188 nations that all fund the IBRD in proportion to their subscription for shares in the IBRD.[56] As of August 10, 2015, the United States has the largest stake in the IBRD, holding more than 17% of the shares of the IBRD, and Japan has the second-largest stake in the IBRD with slightly less than 8% of the shares.[57] As of August 10, 2015, the IDA has 173 member nations[58] with the United States again holding the largest stake at just over 10% of the shares.[59]

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[51] The World Bank, *History*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/0,,contentMDK:20653660~menuPK:72312~pagePK:51123644~piPK:329829~theSitePK:29708,00.html (last accessed Aug. 10, 2015).
[52] The slogan of the World Bank is "working for a world free of poverty." *supra* n. 49.
[53] *Supra* n. 50.
[54] *Id.*
[55] One of the current projects of the World Bank, among many others, is the Bangladesh Central Bank Strengthening Project, which will cost approximately $46.13 million. The goal for this project is to "achieve a strong, and effective regulatory, and supervisory system for Bangladesh's banking sector." http://www.worldbank.org/projects/P062916/bangladesh-central-bank-strengthening-project?lang=en. To review the database of over 10,000 projects from 1947 until the current date, listed according to location, goal, theme, or sector, visit The World Bank, *supra* n. 49, *select* Projects & Operations.
[56] The World Bank, *International Bank for Reconstruction and Development*, http://web.worldbank.org/WBSITE/EXTERNAL/EXTABOUTUS/EXTIBRD/0,,menuPK:3046081~pagePK:64168427~piPK:64168435~theSitePK:3046012,00.html (last accessed Aug. 10, 2015).
[57] The World Bank, *IBRD 25 Largest Voting Power Members* (July 12, 2012) (available at https://finances.worldbank.org/Shareholder-Equity/IBRD-25-Largest-Voting-Power-Members/2etb-xgpf).
[58] The World Bank, *World Bank Group Finances* (July 6 2012) (available at https://finances.worldbank.org/Shareholder-Equity/IDA-Voting-Power/4g6v-z4mt).
[59] *Id.* .

3. The International Monetary Fund[60]

The International Monetary Fund (IMF) was also established in the post World War II era. It was founded in 1945 with the goal, among other things, of helping to promote the growth and development of balanced international trade.[61] To accomplish this, the IMF attempts to address balance of payment problems that member nations may have and to facilitate economic development generally in order to promote trade.[62]

The IMF is funded by contributions from its member nations, and as of August 10, 2015, the IMF had 188 member nations.[63] The size of each member's economy determines the contribution amounts. Consequently, more developed nations contribute more to the IMF but also have a corresponding amount of voting power within the organization. Similar to the IBRD and the IDA, the United States is the largest stakeholder with more than 16% of the voting power at the IMF.[64]

The IMF uses its contributions to make loans and financial assistance available to member nations in need.[65] It frequently attaches conditions to its loans, attempting to encourage countries in need to reform their economies to prevent any future financial crises.[66]

4. International Institute for the Unification of Private Law[67]

Situated in Rome, the International Institute for the Unification of Private International Law (UNIDROIT) is a private institution created as part of the League of Nations in 1926.[68] After the demise of the League of Nations,

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[60] Intl. Monetary Fund, http://www.imf.org (last accessed Aug. 10, 2015).
[61] *See generally* Intl. Monetary Fund, *Articles of Agreement*, art. 1 (available at http://www.imf.org/external/pubs/ft/aa/index.htm#art1).
[62] *Id*. For more on the concept of balance of payments, see Intl. Monetary Fund, *Factsheet- How the IMF Helps to Resolve Balance of Payments Difficulties* (Oct. 2008) (available at http://www.imf.org/external/np/exr/facts/crises.htm).
[63] Intl. Monetary Fund, *IMF Members' Quotas and Voting Power, and IMF Board of Governors* (Sept. 23, 2012) (available at http://www.imf.org/external/np/sec/memdir/members.aspx).
[64] *Id.*
[65] For example, in 2002, the IMF Executive Board approved a $16 billion loan to Turkey in order for the country to continue implementing its comprehensive economic reform policy. Intl. Monetary Fund, *supra* n. 60, at http://www.imf.org/external/np/sec/pr/2002/pr0207.htm.
[66] However, the "conditionality" of the IMF loans is highly criticized by developing countries. *See* Anthony Rowley, *Winds of Change Poised to Sweep IMF, World Bank*, The Bus. Times Singapore World (Sept. 29, 2005).
[67] Intl. Inst. for the Unification of Priv. L. (UNIDROIT), http://www.unidroit.org (last accessed Aug. 10, 2015).
[68] Intl. Inst. for the Unification of Priv. L., *Unidroit: An Overview,* http://www.unidroit.org/about-unidroit/overview (last accessed Aug. 10, 2015).

UNIDROIT was re-constituted in 1940 with the goal of unifying private commercial law around the globe.[69] As of July 29, 2014, UNIDROIT had 63 member states, all of which contribute financially to the organization.[70] Over the years UNIDROIT has been responsible for drafting many international conventions and model laws relating to private commercial transactions.[71]

The most relevant UNIDROIT text for our study of the sales of international goods is the UNIDROIT Principles of International Commercial Contracts (the UNIDROIT Principles), drafted in 1994 and then expanded upon in 2004[72] and 2010.[73] The UNIDROIT Principles were designed to reflect general principles and norms of contract law prevailing internationally. The members of the working group who drafted the UNIDROIT Principles envisioned a multitude of situations in which the UNIDROIT Principles would apply.[74] In fact, the Preamble to the UNIDROIT Principles states that they will apply when: (i) the parties so choose; or (ii) the parties agree to be governed by general principles of law or the *lex mercatoria*; or (iii) the parties have neglected to choose a governing law.[75] Further, the UNIDROIT Principles may supplement or help interpret international or domestic law.[76] Finally, the UNIDROIT Principles may serve as a model for national or international legislators.[77] The UNIDROIT Principles are reflective of international norms that tend to prevail in international commercial transactions. Even when they do not apply directly, the UNIDROIT Principles can be used as persuasive authority for tribunals to consider.[78]

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[69] *Id.*
[70] *Id.*
[71] For example, UNIDROIT is responsible for the Convention relating to a Uniform Law on the International Sale of Goods (The Hague 1964), available at http://www.unidroit.org/english/conventions/c-ulis.htm, and the Convention on Agency in the International Sale of Goods (Geneva 1983), available at http://www.unidroit.org/english/conventions/1983agency/1983agency-e.htm.
[72] UNIDROIT Principles 2004 (available at http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2004).
[73] UNIDROIT Principles 2010 (available at http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010).
[74] UNIDROIT Principles Preamble (2010) (available at http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/418-preamble/862-preamble-purpose-of-the-principles).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *See id*. at Preamble (providing that the UNIDROIT Principles "may be used to interpret or supplement international uniform law instruments"); Michael Joachim Bonell, *The UNIDROIT Principles of International Contracts and CISG: Alternative or Complementary Instrument?* 26 Unif. L. Rev. 26, 33 (1996) ("[B]esides clarifying unclear language, the UNIDROIT Principles

5. The United Nations Commission on International Trade Law[79]

The United Nations Commission on International Trade Law (UNCITRAL) was formed in 1966 by the General Assembly of the United Nations. Its mandate is to facilitate international trade by harmonizing the diverse bodies of international trade law that exist in nations around the world. It is now the United Nations' principal legal body that deals with international trade.[80] UNCITRAL is currently made up of 60 member nations, all of which are elected by the General Assembly and are representative of all the world's regions and economic systems.[81]

Over the years, UNCITRAL has drafted many different influential texts to harmonize and facilitate international trade. Three of those texts—the Convention on Contracts for the International Sale of Goods (CISG), the Model Law on International Commercial Arbitration (UNCITRAL Model Law), and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)—are fundamental to the study of international sales and arbitration. The CISG was finalized in 1980 and became effective in 1988.[82] It provides a uniform law to govern international sales contracts[83] and will, of course, be the focus of Part II of this casebook. The UNCITRAL Model Law has been adopted by many countries around the world and therefore generally governs arbitrations in all of those jurisdictions. The UNCITRAL Model Law will be the subject of much of Part III of this book. [84] Finally, UNCITRAL is

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may also be used to fill veritable gaps found in CISG"). See Chapter 2 for a further discussion of the UNIDROIT Principles.

[79] *See generally* UN Commn. on Intl. Trade L., http://www.uncitral.org (last accessed Aug. 10, 2015) [hereinafter UNCITRAL].

[80] For a history of the development of UNCITRAL, see *id.* at http://www.uncitral.org/uncitral/en/about/origin.html. In addition, to review a manual providing the basic facts on the UNCITRAL, see UNCITRAL, *Basic Facts about the United Nations Commission on International Trade Law* (2007) (available at http://www.uncitral.org/pdf/english/texts/general/06-50941_Ebook.pdf).

[81] http://www.uncitral.org/uncitral/en/about/origin_faq.html. In April 2012, the UN General Assembly elected Canada to fill the latest vacant position. United Nations Information Service, *Press* Releases, http://www.unis.unvienna.org/unis/en/pressrels/2012/unisl179.html (last accessed Aug. 10, 2015).

[82] UNCITRAL, *Status: 1980 United Nations Convention on Contracts for the International Sale of Goods*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html (last accessed Aug. 10, 2015).

[83] UNCITRAL, *1980 United Nations Convention on Contracts for the International Sale of Goods*, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html (last accessed Aug. 10,, 2015).

[84] UNCITRAL Model L. on Intl. Com. Arb. (1985, amended in 2006) (available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf). The UNCITRAL Model Law is discussed in detail in Part 3. UNCITRAL has also adopted a set of

now responsible for promotion of the New York Convention.[85] The New York Convention is one of the key reasons why arbitral awards in international cases are enforceable around the world. Enforceability of arbitral awards is one of the main reasons why international arbitration is a viable and attractive option for the resolution of international disputes. The New York Convention will also be the subject of further study in Part III of this book.

UNCITRAL has also developed a reporting system named Case Law on UNCITRAL Texts (CLOUT).[86] Through the CLOUT system, researchers can find case law and arbitration decisions from around the globe that relate to UNCITRAL's principal texts. Selected CLOUT cases and arbitrations are referenced, summarized, or reprinted in this book to illustrate how the CISG has been interpreted by various jurisdictions across the world. UNCITRAL has also joined with Shearman & Sterling LLP and Columbia Law School to create a search engine providing information on the New York Convention including case law and status information.[87]

6. The International Chamber of Commerce[88]

The International Chamber of Commerce (ICC) is a non-governmental organization made up of businesses and associations from approximately 130 nations.[89] It was founded in 1919 to facilitate and promote open trade and engages in a wide variety of activities and functions to further that goal.[90]

The ICC has adopted international commercial terms (Incoterms) that represent a set of pre-defined conditions relating to the risks involved with international commercial transactions.[91] The first set of these terms was published in 1936.[92]

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arbitration rules, which will also be considered in Part 3 of this book. UNCITRAL Arb. R. (1976) (available at http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf).

[85] The New York Convention was adopted by the United Nations before the formation of UNCITRAL. It entered into force in June 1959, and as of August 10, 2015, 156 countries are signatories to the Convention. The text of the New York Convention, along with the list of signatory countries, is available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html (last accessed Aug. 10, 2015).

[86] The CLOUT system is located at http://www.uncitral.org/uncitral/en/case_law.html (last accessed Aug. 10, 2015).

[87] New York Convention Guide, http://www.newyorkconvention1958.org (last accessed Aug. 10, 2015).

[88] Intl. Chamber of Com., http://www.iccwbo.org/ (last accessed Aug. 10, 2015).

[89] *Id.* at http://www.iccwbo.org/global-influence/icc-network/. (last accessed Aug. 10, 2015).

[90] *Id.* at http://www.iccwbo.org/about-icc/history/ (last accessed Aug. 10, 2015).

[91] *Id.* at http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/ (last accessed Aug. 10, 2015).

[92] *Id.* at http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/history-of-the-incoterms-rules/ (last accessed Aug. 10, 2015)

The most recent definitions were published in 2010.[93] Incoterms facilitate transactions by allowing trading parties to adopt the well-known Incoterms into their contract without having to spend time negotiating all of the more specific provisions incorporated thereby. Incoterms will be discussed briefly in Section II. D. below and more fully in Chapter Four.

The ICC also contributes to trade finance. The ICC promulgated the Uniform Customs and Practice for Documentary Credits (UCP) in 1933.[94] The UCP contains a set of standards used by banks to govern the terms of trade finance transactions.[95] The UCP's current version became effective in 2007.[96]

The ICC also established the International Court of Arbitration (ICA) in 1923 and thereby paved the way for popularizing arbitration as a forum for international dispute resolution.[97] The ICA is now one of the world's leading bodies for organizing and overseeing international arbitrations.

D. SOURCES OF LAW RELATING TO INTERNATIONAL SALES OF GOODS

To understand the sources of law relating to international sales of goods, it is crucial to understand first how different legal systems approach the law and what sources of law exist in those different legal systems. This section will address those issues and then go into a discussion about the sources of international law that may be applicable in any given international sale of goods.

1. Civil Law versus Common Law

Any attorney engaged in an international transaction must consider the differences that exist between the jurisdictions of the counterparties to any given transaction. Not only will the governing law in each jurisdiction likely be different, but the entire legal system may be different. The most basic distinction among the legal systems of the world is whether a particular nation has a civil law system, a common law system, or a mixed system.[98] Attorneys from one

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[93] *Id.*
[94] *Id.* at http://www.iccwbo.org/news/articles/2006/icc's-new-rules-on-documentary-credits-now-available/.
[95] *Id.*
[96] *Id.*
[97] *Id.* at http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/.
[98] For additional scholarly commentary on the legal systems of the world, see R. David & J. Brierly, *Major Legal Systems in the World Today* (3d rev. ed., Stevens Publg. 1985), and Rudolf Schlesinger, *Comparative Law: Cases, Text, Materials* (6th ed., Found. Press 1998).

system must understand how their counterparts from a different system find, understand, and interpret the law.[99]

Civil law systems trace their roots back to Rome and the codified law of Roman Emperor Justinian, the *Corpus Juris Civilis*, which dates back to the sixth century A.D.[100] Indeed, most of continental Europe, including France and Germany, inherited this civil law tradition and promoted it throughout the world where those countries exercised a significant amount of influence.[101] Common law systems, by contrast, are based on the English jurisprudential system.[102] It is principally England, Ireland, Scotland, and nations that came under the influence of England that inherited this tradition.[103] Included among those countries are England's former colonies, including Australia and the United States.[104]

In a civil law system, the law is primarily found in written legislation enacted by the government. Frequently that legislation will be in the form of a written codification of the law that represents the entire body of law on a particular topic in that jurisdiction.[105] Perhaps the most influential of the civil law codes that exist are the French Napoleonic *Code Civil* (adopted in 1804) and the German *Bürgerliches Gesetzbuch* (enacted in 1900).[106] However, not all civil law countries have enacted comprehensive codes.[107] Nevertheless, all civil law

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[99] In relation to "gaps" not explicitly stated in the CISG, Professor Honnold discussed a distinction between civil and common law systems: "If judges simply follow habit, common law courts will be less inclined than civil law courts to extract 'general principles' from the Convention and, conversely, will be more likely than civil law courts to see a 'gap' in the statute that requires the use of domestic law." John Honnold, *The Sales Convention in Action—Uniform International Words: Uniform Application?* 8 J.L. & Com. 207-210 (1988) [hereinafter Honnold, *The Sales Convention in Action*].

[100] Peter Stein, *Justinian's Compilation: Classical Legacy and Legal Source*, 8 Tul. Eur. & Civ. L. Forum 1 (1993).

[101] For example, China's Civil Code, inherited from Japan, is based on the German model. *See* Edward J. Epstein, *The Theoretical System of Property Rights in China's General Principles of Civil Law: Theoretical Controversy in The Drafting Process and Beyond*, 52 L. & Contemp. Probs. 177, 183 (1989); Xu Guodong, *Structures of Three Major Civil Code Projects in Today's China,* 19 Tul. Eur. & Civ. L. Forum 37, 54 (2004).

[102] William Tetley, Q.C., *Mixed jurisdictions: common law vs civil law (codified and uncodified)* (pts. 1 & 2), N. S. 3 Unif. L. Rev. 591 (1999), N.S. 4 Unif. L. Rev. 877 (1999).

[103] *Id*.

[104] *Id*.

[105] *Id*.

[106] *See* John Merryman, *The Civil Law Tradition: An Introduction to the Legal Systems of Western Europe and Latin America* 26-33 (Stanford U. Press 1985) (providing an excellent discussion of the difference between the French Code Napoleon (the *Code Civil*), based upon divination of the "natural order" of things (the pronouncement of which would abolish all that had come before), as compared to the German approach, wherein the drafters engaged in a "scientific" study of the pre-existing legal norms and attempted to incorporate them into the *Bürgerliches Gesetzbuch*, along with the essential elements of Roman law).

[107] For example, South Africa. Tetley, *supra* n. 102.

countries do give primacy to written enactments of law.[108] Courts and other adjudicatory bodies must look to the appropriate enactments for guidance in any particular dispute and resolve the dispute solely with reference to that written law. In a civil law system, previous case law does not constitute a source of law, though it might be somewhat persuasive in attempting to argue for an outcome that is consistent with the majority of previous cases.[109] In fact, and by way of example, the French *Code Civil* specifically states that judges may not make general or normative pronouncements.[110] On the contrary, in such civil law jurisdictions the written law is supreme.[111]

By legislating basic principles, civil law countries seek to ensure consistency in judicial proceedings through uniform adherence to those written enactments.[112] Accordingly, the rule of law – the primacy of those legal principles – will always be carried out in practice. In civil law systems, scholarly commentary on the written enactments of law is particularly persuasive in aiding adjudicators as they attempt to apply the enactments to a variety of factual circumstances.[113]

By contrast, in a common law system, case law forms binding precedent that subsequent courts must follow.[114] In this way, common law jurisdictions seek to ensure that the rule of law is carried out and that the law is consistently applied from case to case, with subsequent cases always following the rules and outcomes of similar cases that were decided in the past.

Of course, the common law system is not as clear cut as it may seem. Because so many factual distinctions exist in any given situation, it is often difficult to find a previous case with the exact same facts as those in the principle case under consideration.[115] Where any differences do exist, advocates have leeway to argue that the new factual circumstance must be governed by a new rule of law and that such a result would still be consistent with previous case law.[116] The potential for such arguments, critics claim, actually destabilizes the law and leads citizens

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[108] *Id.*
[109] *Id.*
[110] French Civ. Code, Prelim. Title of the Publication, Operation and Application of Stats. in Gen., art. 5 (translation available at http://195.83.177.9/upl/pdf/code_22.pdf).
[111] Tetley, *supra* n. 102.
[112] *Id.*
[113] *See* Honnold, *The Sales Convention in Action*, *supra* n. 99, at 207 (highlighting the importance of scholarly writing in the civil law world).
[114] Tetley, *supra* n. 102.
[115] In the United States, lawyers state that a case "is on all fours" if he or she finds a previous case with the same circumstances as the case at hand. Very seldom, however, does this occur.
[116] As Roscoe Pound famously pronounced, "Law must be stable and yet it cannot stand still." Roscoe Pound, *Interpretations of Legal History* 1 (Harv. U. Press 1946).

and advocates to believe that they can frequently achieve the results they desire in a particular dispute, no matter what binding precedent exists.[117]

Common law systems also generally have written enactments of law in addition to binding case law. For example, the United States Constitution is in fact a written enactment of law that provides the supreme law of the nation.[118] In addition to the Constitution, in the United States, statutes govern specific subject areas. Most relevant to sales law is the Uniform Commercial Code (UCC), which is a model law governing commercial transactions, including the sale of goods. Some version of the UCC exists in almost every state in the United States.[119] Statutory law in common law jurisdictions, such as the UCC in the United States, differs from the codified law found in many civil law countries in that statutes in common law jurisdictions do not purport to represent the entire body of law on a given subject.[120] In common law systems, a statute is a specific pronouncement of law that is supplemented by the body of case law that existed on the relevant topic prior to the statute's enactment. In addition, subsequent cases also interpret and apply statutes. Those cases then become binding sources of law and therefore must be consulted even if a statute exists on a particular topic.

When comparing a civil law jurisdiction to a common law jurisdiction, other subtle differences become apparent. Because civil law jurisdictions do not have the multitude of cases that form sources of law in common law jurisdictions, the sources of law in civil law jurisdictions are necessarily less detail-oriented. In a common law system, it is possible to find hundreds or possibly thousands of cases that describe a specific rule of law and apply that rule in many different circumstances. That amount of specificity is simply not possible in a civil law jurisdiction where broader principles of law are set forth in written enactments of law, leaving adjudicators to apply those principles as they see fit in each case.

For example, in a civil law jurisdiction, a civil code might state that one must not misrepresent any material fact in connection with a contract for that contract to

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[117] Allan C. Hutchinson characterizes the competing perspectives on the common law tradition as balancing "the restraining push of tradition and the liberating pull of transformation[.]" Allan C. Hutchinson, *Evolution and the Common Law* 2 (Cambridge U. Press 2005).

[118] In fact, Article VI of the United States Constitution states, "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any state to the contrary notwithstanding." U.S.Const. art. VI.

[119] *E.g.* Fla. Stat. § 672 (2015); Ill. Compiled Stat. 810 ILCS 5 (2015)..

[120] Honnold, *The Sales Convention in Action*, *supra* n. 99, at 210 (arguing that the UCC is not a "code" in the civil law sense because "[t]he UCC does not lay out the basic rules of contracts and torts ("obligations") and generally applicable remedial principles that are needed to solve problems that arise beyond the borders of the specific rules").

be valid. That general principle would need to be applied to every case where misrepresentation in a contract matter was alleged, and a tribunal would need to use its best judgment to carry out the principle. The tribunal might consider the results of previous cases and scholarly commentary on the topic, but the tribunal can only base its decision on the written code. In these systems, tribunals are entrusted with carrying out the basic guiding principles set forth in the code.

By contrast, in a common law jurisdiction, there might be thousands of cases over hundreds of years where courts have held that misrepresenting material facts in connection with a contract invalidates the contract. However, all of those cases set forth specific circumstances providing more guidance on what might be a material fact in any given matter. Moreover, the cases themselves might address what constitutes a misrepresentation. Further, materiality and misrepresentation might change depending on the type of transaction involved. In small transactions, the level of materiality might be different than in larger transactions. There might also be a statute that applies and prohibits fraud in connection with contract formation. That statute would also need to be considered, as would any cases that had interpreted that statute. In a common law world, advocates would research existing statutes and case law, searching for cases that closely resemble their fact pattern to determine the law governing the outcome of their case.[121]

2. Sources of International Law

Perhaps a discussion about the sources of international law should start with the fact that most laws are not specifically international in scope. Most laws around the world are designed to apply to the jurisdiction in which they exist. However, an international application of domestic laws is possible. For example, a United States company doing business with a Russian company might opt to have Russian law govern their relationship. Even if parties from two countries do not agree to have any particular law govern their relationship, a conflict of laws analysis will likely lead to application of the laws of one of the two countries involved. Thus, even domestic laws have an international aspect. However, the sources of commercial law that are truly international are very limited, consisting of (a.) treaties on the one hand, and (b.) the *lex mercatoria* on the other.[122]

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[121] For further discussion on the differences between civil and common law systems, *see* John Spanogle, Jr., *The Arrival of International Private Law*, 25 Geo. Wash. J. Intl. L. & Econ. 477, 507-521 (1991) (describing the effect of differences between the two legal regimes on the reception of international private law conventions).
[122] The 1946 Statute of the International Court of Justice (the United Nations' primary court) includes international treaties and customary sources of international law (i.e. *lex mercatoria*) in the list of sources of international law to be considered by the Court. 1946 Statute of the International

a. Treaties

A treaty or convention is a written document that has been agreed to by the nations that have ratified it. They are essentially contracts between nations.[123] Typically a treaty is first signed on behalf of a country by someone vested with appropriate authority. Nonetheless, a treaty must then be ratified by the government of the signatory nation in order to become binding on that nation.

This means that treaties typically also become law in ratifying nations. For example, Article VI of the United States Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Other countries that do not have such a provision automatically making treaties law can choose to implement any given treaty through the adoption of a domestic statute.[125]

Treaties interfere with the sovereignty of nations and are, therefore, often difficult to enact. At the heart of sovereignty is the notion that every nation has the right to exercise jurisdiction over its own people and territory and should not have to submit to any external source of authority, most particularly to any foreign nation. In this way, nations maintain their own independence and control over their own citizenry. Through a treaty, ratifying nations agree to cede some of their sovereignty and willingly agree to be governed by an external instrument. The tension that exists when nations contemplate entering into treaties is always based on this dynamic—giving up a country's own sovereignty over a particular matter and submitting to some external source of authority.[124]

Treaties may or may not include dispute resolution provisions for occasions when conflicts arise. Further, just as a contract may or may not be formally called a contract, a treaty may or may not be formally called a treaty. Treaties might also be referred to as conventions, protocols, and agreements. Of course,

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Court of Justice art. 38 (April 18, 1946), http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[123] For more on treaties as contracts, see Curtis J. Mahoney, *Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties*, 116 Yale L.J. 824 (2007) (arguing that contract law principles should be used to interpret treaties).

[125] For example, the United Kingdom is a "dualist" state, meaning treaties must be incorporated into national law before they are binding. UK Parliament, *The UK's legal relationship with the EU*, http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/633/63304.htm (last accessed Aug. 10, 2015).

[124] The concern over national sovereignty was present in the creation of the CISG. In the Sixth Meeting of the General Assembly of the United Nations on the establishment of a New International Economic Order, the delegate from Russia stated, "it was necessary to establish rules that would facilitate commercial transactions on the basis of respect for sovereignty and national independence, non-intervention in the domestic affairs of States and mutual benefit." Bruno Zeller, *International Trade Law—Problems of Language and Concepts?* 23 J.L. & Com. 39, 39 (2005).

the most significant treaty for international commercial transactions, and the focus of the next five chapters of this book, is the CISG. Likewise, the most significant treaty for international commercial arbitration is the New York Convention (discussed further in Part III of this book).

b. Lex Mercatoria

While treaties contain specific written provisions that can be interpreted like a statute or code, the *lex mercatoria*, or the law merchant, has no specific codification and very little clarity. *Lex mercatoria* is the phrase used to describe international customs and norms that are so deeply entrenched in the international community that they can be said to be international laws. While conceptualizing the *lex mercatoria* may be easy, identifying what constitutes the *lex mercatoria* is extremely difficult. The very definition of the *lex mercatoria* suggests the question of what customs and norms are so entrenched and so widespread internationally as to be included. In fact, critics of the notion argue that the vagueness of the *lex mercatoria* allows advocates to advance arguments on behalf of clients that are well beyond the scope of any relevant written identifiable law.

Despite the critics' perspective, some certainty exists with the *lex mercatoria* in the area of international commercial transactions. As mentioned earlier, UNIDROIT adopted a document called the Principles of International Commercial Contracts (the UNIDROIT Principles) to reflect the fundamental principles of international commercial law that are applied around the world. Because such a well-respected organization has reflected on those principles and spent many years creating this document, it is arguably a very valuable source of the *lex mercatoria*.[125] As discussed above, the Preamble to the UNIDROIT Principles states that they shall apply to a transaction when parties have agreed that "their contract be governed by general principles of law, the *lex mercatoria* or the like."[126] The UNIDROIT Principles are particularly useful when the law designated by the parties to govern their transaction is silent on a particular topic that is addressed by the UNIDROIT Principles.[127]

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[125] *Costa Rican Co. v. French Co.*, Ad Hoc Arbitration, Cost Rica, Apr. 30, 2001 (available at http://www.unilex.info/case.cfm?pid=2&do=case&id=1100&step=FullText) (applying the UNIDROIT Principles when the parties' contract simply stated that disputes should be resolved "on the basis of good faith and fair usages and with regard to the most sound commercial practices and friendly terms").
[126] UNIDROIT Principles Preamble.
[127] *See Swiss Buyer v. Austrian Seller (Chemical Fertilizer Case)*, ICC Arbitration no. 8128, Switzerland, 1995 (available at http://cisgw3.law.pace.edu/cases/958128i1.html). After finding that the CISG was silent as to the applicable rate of interest, the arbitral tribunal applied the solution that was adopted by the UNIDROIT Principles. Relying upon Article 7(2) CISG, discussed further

Similarly, the Principles of European Contract Law (PECL) were drafted and designed to reflect fundamental principles of contract law that exist throughout the European Union.[128] PECL is the work product of a commission of experts from countries throughout the European Union, the Commission on European Contract Law working under the European Commission. A first draft of PECL was adopted in 1995, with subsequent revisions and additions in 1998 and 2002. Similar to the UNIDROIT Principles, the preamble to the PECL states that if parties agree that their contract should be governed by general principles of international law or the *lex mercatoria*, then PECL shall apply.[129] However, the PECL has not been as well-received as the UNIDROIT Principles in this regard.[130]

It is important to note that the *lex mercatoria* should not be viewed as being mutually exclusive with other sources of law. In fact, tribunals often rely on both the *lex mercatoria* and codified sources of law, such as the CISG, in conjunction with each other.[131] Furthermore, when the parties in a dispute have not expressly chosen a governing law, tribunals have applied codified sources of law such as the CISG as representative of the *lex mercatoria*.[132]

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in Chapter 2, the tribunal reasoned that the UNIDROIT Principles were applicable because they are considered general principles on which CISG is based.

[128] *See generally* Principles of European Contract L. (available at http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/) [hereinafter PECL].

[129] PECL art. 1:101(3)(a).

[130] *See Natl. Bank of Country X v. Defendant Y (Printed Banknotes Case)*, ICC Arbitration no. 9474, France, Feb. 1999 (available at http://www.unilex.info/case.cfm?pid=1&do=case&id=716&step=FullText) (describing the UNIDROIT Principles and the PECL as "other recent documents that express the general standards and rules of commercial law").

[131] Specifically, Article 9 of the CISG provides that international trade usages impliedly apply to the parties' contract, unless the parties have expressly agreed otherwise. This provision, therefore, illustrates the point that the *lex mercatoria* does not compete with codified bodies of law, but rather that the two sources complement each other. Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in *Lex Mercatoria and Arbitration* 174 (Thomas E. Carbonneau ed., rev. ed. [reprint of a chapter of the 1990 edition of this text], Juris Publg. 1998).

[132] *See Turkish Seller v. Swiss Buyer*, ICC Arbitration no. 5713, France, 1989 (available at http://cisgw3.law.pace.edu/cases/895713i1.html) (finding that the CISG applied in absence of the parties' choice because the Convention "may be fairly taken to reflect the generally recognized usages regarding the matter of the non-conformity of goods in international sales"). It is interesting to note that at the time of this arbitral decision, only 17 nations were signatories to the CISG. *See also Yugoslavian Seller v. Italian Buyer (Cowhides Case)*, ICC Arbitration no. 7331, Paris, 1994 (available at http://www.unilex.info/case.cfm?pid=1&do=case&id=140&step=FullText) (applying the CISG in the absence of express choice by the parties because the Convention embodies "general principles of international commercial practice").

II. COMMERCIAL AND LEGAL CONSIDERATIONS

Part I of this chapter just described why countries trade with each other, what institutions exist to support free trade, and what laws may apply to an international commercial transaction. Part II will present a variety of commercial and legal issues that parties to an international sale of goods should consider when structuring a transaction or participating in the resolution of a dispute. The issues that will be presented include: (A) managing applicable laws; (B) considering arbitration for dispute resolution; (C) limiting financial risk; (D) allocating shipping risks; (E) hedging currency risk; and (F) navigating cultural differences.

A. MANAGING APPLICABLE LAWS

Parties should generally attempt to include a governing law provision in their contract to avoid the confusion that ensues without one. If parties do not specify a governing law in their contract, then conflict of laws rules will determine the applicable law with the result not always being what one or the other party would have wanted or anticipated when entering the transaction.[133] In most of the world, parties are given the autonomy to choose the law that they want to govern their transaction. However, that is not always true. In the United States, for example, that autonomy might be circumscribed by the UCC's choice of law provisions.[134] A very common version of that provision insists that the choice of law must be from a state that "bear[s] a reasonable relation" to the transaction. Even with this provision governing, however, an attorney structuring a transaction should be sure to include a choice of law provision in the agreement. The choice should simply be one with a reasonable relation to the transaction.

In certain cases, the CISG will govern international sales of goods transactions where a law to govern an international commercial transaction has not been chosen by the parties. As will be discussed in Chapter 2, the CISG will apply by default if both parties are from countries that are contracting states to the CISG, or if the rules of private international law[135] lead to the law of a country that is a contracting state.[136]

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[133] Parties might even agree that sources of *lex mercatoria* govern their contract, such as the UNIDROIT Principles. However, as the UNIDROIT Principles themselves explain, if the parties desire such a choice they should also opt for arbitration since arbitrators are more likely to honor that choice while state or national tribunals may feel confined to apply state or national laws. UNIDROIT Principles off. comment 4(a) (2004).

[134] The UCC in §1-301 limits the applicability of the UCC to transactions that "bear a reasonable relation" to the state.

[135] In the United States, the rules of private international law generally refer to any law that governs relationships between private parties from different countries. By contrast, in many civil law

If the parties have not chosen a governing law and the CISG does not apply to the transaction, then conflict of laws rules become relevant. It is not always clear which choice of law rules will apply to a given transaction. Some national arbitration laws specify that the arbitrators should use whatever conflict of laws rules they deem applicable,[137] while many arbitration rules invite arbitrators to choose applicable law without reference to conflict of laws rules at all.[138] Even if the appropriate conflict of laws rules are clear, the results that follow from those rules are not always clear. Frequently, conflict of laws rules specify that the applicable law should be the law of the country with the closest relation to the contract.[139] When a contract has been signed in one country, negotiated in another, and the goods are produced in a third country and delivered in a fourth, it becomes very difficult to apply the closest connection standard. The unexpected result from a conflict of laws analysis may not be desirable for either of the parties to the transaction. Once again, this underscores the desirability of choosing a governing law in the first place. Applicable laws will be discussed in more detail in Chapter 2.

B. CONSIDERING ARBITRATION FOR DISPUTE RESOLUTION

A detailed study of arbitration is presented in Part III (Chapters 7 – 10) of this book. However, it is important to address arbitration even at this early stage as

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countries, the rules of private international law refer more specifically to conflict of laws rules that apply to situations involving parties from different countries. Commentators generally agree that the phrase, as it is used in the CISG, has the narrower meaning of choice of law or conflict of law rules in the forum court. *See* Joseph Lookofsky, *The United Nations Convention on Contracts for the International Sale of Goods*, in *International Encyclopaedia of Laws—Contracts* supp. 29, 33 (J. Herbots & R. Blanpain eds., Kluwer L. Intl. 2000). For additional discussion pertaining to the applicability of the CISG to a dispute, see Chapter 2.

[136] *See* CISG art. 1(a)-(b), discussed in detail in Chapter 2.

[137] *See e.g.* UNCITRAL Model L. on Int'l Comm. Arb. art. 28(2). .

[138] *See, e.g*, Arb. R. of the Intl. Chamber of Com. art. 21(1) (allowing arbitrators to make a direct choice of substantive law without reference to any conflict of laws rules); UNCITRAL Arb. R. 35(1) (2010).

[139] If the parties have not expressly or impliedly determined the law to govern a parties' contract, many national courts apply the law of the court with the closest connection to the transaction. *See e.g. Mansonville Plastics Ltd. [Canada] v. Kurtz GmbH [Austria/Germany]*, 2003 BCSC 1298, Canada, 2003 (available at http://cisgw3.law.pace.edu/cases/030821c4.html) (finding that the transaction had its "closest and most substantial connection with Toronto and thus the law that should apply is the Law of Ontario"). In addition, Article 5 of The Foreign Economic Contract Law of the People's Republic of China, adopted by the National People's Congress in 1985, also provides that the law of the country having the closest connection with the contract applies in the absence of an express choice by the parties. *See* http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1076&context=bjil (last accessed Aug. 10, 2015). The Swiss Rules of International Arbitration also provide directly for a closest connection test in Article 33.

one of the issues to consider when engaging in an international sale of goods. This section will briefly address: (1) the pros and cons of arbitration; (2) the basic nature of an arbitration agreement; and (3) the private rules and governing law applicable to arbitration.

1. The Pros and Cons of Arbitration

For parties to an international sale of goods, arbitration provides an alternative to dispute resolution in national courts. Arbitration is a private means for resolving legal disputes in which the parties ask one or more arbitrators to decide their dispute and agree to be bound by that decision. Arbitration is especially attractive in international commercial transactions for its perceived neutrality. Using arbitration avoids any perception of bias that might exist if one of the parties is subjected to the national courts of the other party's country. Unlike national courts, the members of an arbitral panel do not necessarily have ties to any particular country, and a panel of three arbitrators from multiple countries is often chosen by the parties.

Arbitration is also favored because arbitration awards are generally much easier than national court decisions to enforce outside of the country in which they are rendered. As a result of the wide acceptance of the New York Convention, an award made by a tribunal in one country, perhaps chosen for convenience or neutrality, can easily be enforced in almost any country in which either party may have financial assets. The subject of enforcement of awards is explored further in Chapter 10.

Arbitration in International Commercial Transactions

– The Two Most Important Factors –

(1) Neutral Decision Makers

(2) Internationally Enforceable Awards

There are a variety of additional reasons why parties might choose arbitration, including the confidentiality and expeditiousness of the arbitral process, as well as the expertise of available decision makers.

While there are many benefits to arbitration, especially in the international context, there are also potential detriments that should not be overlooked. The parties to an arbitration agreement will sometimes be unable to join additional claims, and third parties cannot be required to participate in arbitration without

express consent. Court involvement may be required during the arbitral process, perhaps adding additional disputes on top of those arising from the parties' commercial agreement. Lastly, an erroneous decision by the arbitrators is not generally subject to appeal. All of these factors must be considered by the parties in deciding whether or not arbitration is appropriate for any given transaction.

Finally, the cost of arbitration should be mentioned. In terms of the cost of the tribunal itself, arbitration will almost always be more expensive because the parties must pay the arbitrators and, likely, pay for the services of an arbitral institution. Arbitration, however, will often result in other cost savings that will offset the additional costs of the tribunal. The expedited and simplified nature of arbitration will frequently reduce other associated costs, such as the cost of legal counsel. Moreover, for most businesses, "time is money," and each of the parties may realize substantial savings in terms of the reduced time spent by their employees involved in dispute resolution.

In deciding whether arbitration is appropriate for any particular transaction, the parties and their counsel will need to consider all of these issues, as there is no single correct answer for all commercial disputes. This subject is explored further in Chapter 7.

2. The Arbitration Agreement

Arbitration is primarily a creature of contract. The jurisdiction of an arbitral tribunal is grounded entirely in the consent of the parties. In contrast, the jurisdiction of national courts is typically based on some combination of governmental power and implied party consent—the latter arising from relevant contacts of the parties with the place whose courts are seeking to assert jurisdiction. Accordingly, contract law principles often come into play in the interpretation and performance of an arbitration agreement.

The parties' arbitration agreement may be contained within the broader contract at issue in the parties' dispute or in a separate agreement. It may relate to a range of possible future disputes or to a pre-existing dispute the parties subsequently decide to submit to arbitration. The terms of the agreement may be extensive or may be quite brief. Under virtually all current national laws, the primary requirement is that the arbitration agreement be evidenced by a signed writing.[140]

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[140] *See* New York Convention Article II (June 10, 1958), http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf; UNCITRAL Model Law Article 7(2); *but see* UNCITRAL Model Law Article 7 (*Option II*), as revised in 2006, which provides an alternative version of Article 7 requiring only "agreement by the parties" and eliminating any writing requirement. From a practical perspective, an award rendered pursuant to such an oral arbitration agreement would present enforceability issues. This issue is discussed

Whatever form it may take, an arbitration agreement is generally treated as autonomous or separable from the main contract governing the transaction subject to dispute—even if the arbitration agreement is contained in a clause within that main contract. This concept of "separability" is of great importance to the effectiveness of any arbitration regime, as it may, in certain circumstances, preserve the jurisdiction of the tribunal—even if the main contract containing the arbitration clause is deemed invalid by that tribunal. The subject of separability is explored in considerable detail in Chapter 8.

As indicated above, arbitration is largely a matter of contract. However, the parties' autonomy in this regard is not unlimited. An arbitration agreement is governed by a variety of laws—most importantly the law of the place of arbitration and the law of any potential place of enforcement of an award made by the arbitrators.[141] For example, any governing law will protect the basic "due process" rights of the parties, irrespective of any agreement between them to the contrary.[142] The parties' right to arbitrate certain disputes may also be subject to certain limitations based on public policy of a relevant jurisdiction. These limits are explored further in Chapter 8.

For the most part, however, the law governing the arbitration will consist of various "default legal rules," which are fully subordinate to the parties' right to choose different rules, as a matter of contract. This interplay between the default legal regime and any contractually agreed upon rules is explored further in Chapter 7 and developed throughout Part III of this book. However, a brief introduction is provided below.

3. The Rules and Law Governing Arbitration

Parties will often choose a specific set of arbitration rules to govern the resolution of their dispute. Such privately agreed upon rules are not laws enacted by any governmental body or representative. They are merely rules agreed upon by the parties for conducting any necessary arbitration proceedings. These rules are generally effective, as long as they are not contrary to any mandatory legal provisions of the governing national arbitration law.

The "place" or "seat" of arbitration will provide the governing arbitration law, or *lex arbitri*. The governing law will often supply a substantial body of default legal provisions controlling issues not addressed by the parties' arbitration agreement or any privately chosen arbitration rules. The UNCITRAL Model

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further in Chapter 8. However, the inclusion of such an option in the current version of the Model Law may be indicative of an increasing pre-enforcement trend where the parties have agreed on arbitration—whatever the means of that agreement.

[141] This book will focus primarily on the UNCITRAL Model Law and the New York Convention.

[142] *See*, *e.g.*, UNCITRAL Model Law Article 18; New York Convention Article V.1.(b).

Law is a prime example of such a law. It has been adopted in over 50 countries and seven states of the United States, and it is exemplary of modern commercial arbitration law.[143] The relationship between national law and any arbitration rules selected by the parties is more fully addressed in Chapter 7. However, stated in its simplest form, the provisions of the governing national law control issues not addressed by the parties (either in their agreement or any chosen rules), while the parties' agreement (including any chosen rules) controls over default provisions of the national law. National law controls over the parties' agreement only where such law is mandatory.

Most arbitration rules are drafted and supplied by private institutions that provide administrative services to assist the parties in facilitating the arbitration of their dispute. For example, the International Chamber of Commerce (ICC), arguably the world's leading organization in the field of international commercial dispute resolution, provides its own set of rules and recommends that parties adopt these rules in their arbitration agreement. Like many arbitration institutions, the ICC has a model clause that it recommends parties use in their agreements if they wish to resolve their disputes with arbitration administered by the ICC.

ICC Model Clause

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.[144]

In this model clause, the ICC Arbitration Rules are incorporated into the parties' agreement by reference. The rules then essentially become additional express terms of the parties' arbitration agreement. Of course, any conflict between the

[143] *See* Appendix A (listing Model Law jurisdictions). The UNCITRAL Model Law can be viewed at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. Many of the specific details of United States federal arbitration law, as well as conflicts between United States state and United States federal arbitration law are well beyond the scope of this course. We will make occasional references to a few basic United States cases and the influence of United States practitioners on international commercial arbitration; however, United States arbitration law is in many ways inconsistent with mainstream, modern international commercial arbitration law, as found in most other sophisticated states involved in international trade. These latter nuances and anomalies of United States law are better left to a course that focuses specifically on arbitration under United States federal and state law.

[144] Int'l Chamber Com., *International Court of Arbitration, Standard ICC Arbitration Clauses*, http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/standard-icc-arbitration-clauses/(last accessed Oct. 8, 2012).

precise terms written within the contract itself and the incorporated terms referenced should be resolved in favor of the specific contract terms. However, the parties' express terms, whether specifically stated in the agreement, or incorporated by reference, will take precedence over any default law of the place of arbitration. All of these concepts are developed further in Chapter 7.[145]

In addition to institutional rules, the parties may also choose to use the UNCITRAL Arbitration Rules.[146] Many institutions allow the parties to choose these rules instead of the institution's own rules. They may also be used if the parties choose to submit their dispute to arbitration without any institutional assistance—a process called *ad hoc* arbitration. This distinction between institutional and *ad hoc* arbitration will be developed further in Chapter 7.

When considering the relationship between "rules" and "law," one must, again, remember to distinguish between mandatory laws and default laws. The parties' agreement, including any private arbitration rules, is given priority over any default laws. However, the parties may not, under any circumstances, change or negate a mandatory law, such as the requirement that each party be afforded basic due process. This distinction between mandatory and default law is important in both the CISG and in the law of arbitration and will be discussed throughout this book. That distinction is also illustrated by the chart set forth in Appendix B.

C. LIMITING FINANCIAL RISK

For any seller in a commercial transaction, the largest risk may be the financial risk of delivering goods, but not getting paid. For any buyer, the largest risk may be the financial risk of paying for goods, but not receiving them. These risks are greatly magnified in an international commercial transaction, as the parties are located across national borders and possibly across the globe. In a domestic transaction, a party is likely to be more comfortable attempting to enforce payment or delivery from another party in the same country. However, attempting to use courts or enforcement mechanisms across national borders is much more daunting.

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[145] *See also* Appendix B.

[146] One other point about "rules" is worth mentioning here at the outset in hopes of avoiding confusion later. UNCITRAL, the same body that is responsible for the UNCITRAL Model Law originally promulgated in 1985 and recently revised in 2006, also promulgated the UNCITRAL Arbitration Rules in 1976, revised in 2010. Each of these will be discussed thoroughly in Part III. However, it is important at the outset to distinguish between the UNCITRAL Model Law, which is positive law (once adopted by a sovereign) and the UNCITRAL Rules, which are only relevant if expressly adopted by the parties in the same manner as any other set of private rules.

To manage these financial risks, many transactions are structured through the use of commercial *letters of credit*. Letters of credit represent promises made by banks that essentially guarantee payment on a sales contract, provided that the seller submits the appropriate documents. Such an exchange of documents for payment is called a *documentary sale*. The required documents typically include the following.

Letter of Credit Transactions

Typical Required Documents

(1) Commercial invoice

(2) Packing list

(3) Certificate of Origin

(4) Negotiable bill of lading

(5) Insurance certificate

(6) Certificate of inspection

The commercial invoice includes the basic contract terms, including a description of the goods, the quantity, and the price, as well as the carriage and delivery terms. In essence, the commercial invoice represents a "bill" to be paid by the buyer pursuant to the letter of credit. The packing list provides the details of packing the goods for transport (often in a sealed "container"), and the certificate of origin provides information required for import/export controls.

The bill of lading is particularly important in a documentary sale, because this is the document that actually controls title to the goods. A documentary sale requires a *negotiable* bill of lading. This negotiability is what allows one party to transfer title to the goods by transferring (*negotiating*) a negotiable bill of lading. In contrast, a straight bill of lading is not negotiable. Because the documents, including the bill of lading, are to be exchanged for payment, negotiability is crucial.

The seller will also typically be required to insure the goods and provide a certificate of such insurance, thus protecting the insurable interest of each party throughout the process of carriage, irrespective of when title actually passes between the parties. The buyer will often require a certificate of inspection. In view of the fact that the buyer is actually paying for the goods before seeing them (documents and payment are usually exchanged while the goods are in route), the buyer will often arrange for inspection of the goods prior to shipment from the

port of embarkation. The inspectors will be employed by the buyer, who will provide the appropriate instructions regarding inspection of the goods, but will then provide a certificate to seller, which the seller can then include with the documents to be presented for payment.

By using banks and letters of credit, sellers are guaranteed payment if they submit the appropriate documents. Likewise, buyers are guaranteed that they will pay only if they receive the appropriate documents allowing them to take title to the goods. The banks and their agents act as middlemen to ensure that the documents provided by the seller conform to the letter of credit agreement and only allow payment when they do. Of course, the parties to the transaction pay the banks a fee for their involvement, but that fee reduces the risk the parties undertake. Once trading partners establish a certain amount of confidence with each other, they often choose to reduce transaction costs by eliminating the letter of credit arrangement and taking upon themselves the risk of non-payment or non-delivery.

In a letter of credit transaction governed by United States law, UCC Article 5 will provide the applicable law. However, Article 5 largely consists of default rules, which may be varied by agreement of the parties. In an effort to promote the application of uniform rules to letter of credit transactions, the International Chamber of Commerce (ICC) issues a set of Uniform Customs and Practice for Documentary Credits (UCP), which are incorporated in most letter of credit agreements. The current version of these terms is contained in UCP 600, which became effective on 1 July 2007.

Letter of Credit Transactions

-The Two Most Important Principles-

(each reflected in UCC Article 5 and UCP 600)

(1) *The Independence Principle*. Under the *Independence Principle*, the issuing bank's promise to pay against documents is entirely independent of underlying contract for the sale of goods, and the bank's obligation (and thereby buyer's obligation) is not subject to any defenses arising out of that underlying contract.

(2) *Perfect Tender*. Payment pursuant to a letter of credit obligation requires *"perfect tender"* or *"strict compliance"* by the seller in the submission of the required documents.

When one considers the effect of the independence principle, the significance of the list of required documents, including any inspection certificate, becomes clearer. The buyer cannot rely on a breach of the contract for sale to avoid payment. The only basis for refusing payment under the letter of credit is seller's failure to submit the appropriate documents. Of course the buyer can still bring an action for damages arising out of the contract of sale, but this is one of the risks a buyer hopes to avoid through the use of a letter of credit. In recognition, however, of buyer's risk, seller is required to tender documents that perfectly comply with the requirements specified in the letter of credit. Again, we find a balanced approach in an effort to protect the interests of both seller and buyer.

The specifics of a documentary sales transaction are somewhat complex and certainly vary from deal to deal. However, the basic documentary sales transaction generally involves the same basic steps.

The Letter of Credit Transaction

(1) In the first step of a typical transaction, the buyer and the seller enter into a sales contract that specifies the goods to be tendered and the method of shipment.

(2) In the second step, the buyer of goods establishes an arrangement with its bank in its country whereby that bank agrees to issue a letter of credit in favor of the seller, also known as the beneficiary of the letter of credit. Buyer's bank is thus referred to as the issuing bank. The letter of credit will commit the issuing bank to make payment on buyer's behalf when the bank receives the required documents (showing that the seller has shipped the goods).

(3) In a possible third step, the seller might set up an arrangement with a bank or banks in its own country to interact with the buyer's issuing bank. One possibility is that seller may ask its own bank to serve as a "confirming" bank, thereby, independently promising to pay seller in exchange for submission of the required documents. Alternatively, the seller may use an "advising" bank, which will serve as an intermediary between seller and the issuing bank, but will not independently guarantee payment to seller. Confirming and advising banks may also be used in combination. While the seller could forgo the use of any additional bank and interact with the issuing bank itself (thereby saving some expense) this option may introduce increased risk as the

seller must rely entirely on the letter of credit agreement with a bank in a foreign country. For the remainder of this sample transaction, seller's use of a confirming bank is assumed.

(4) In the fourth step, the seller arranges for any required inspection and actually ships the goods. When seller does so, it will receive any inspection certificate from the party designated by buyer and will receive the negotiable bill of lading from the carrier. Seller will also prepare or obtain the additional required documents.

(5) In the fifth step, the seller delivers the required documents to its bank (the confirming bank) in return for payment. If for any reason the shipping documents do not conform to the requirements of the letter of credit, the bank will refuse payment. Assuming, however, the seller has provided conforming documents, the bank must pay the seller.

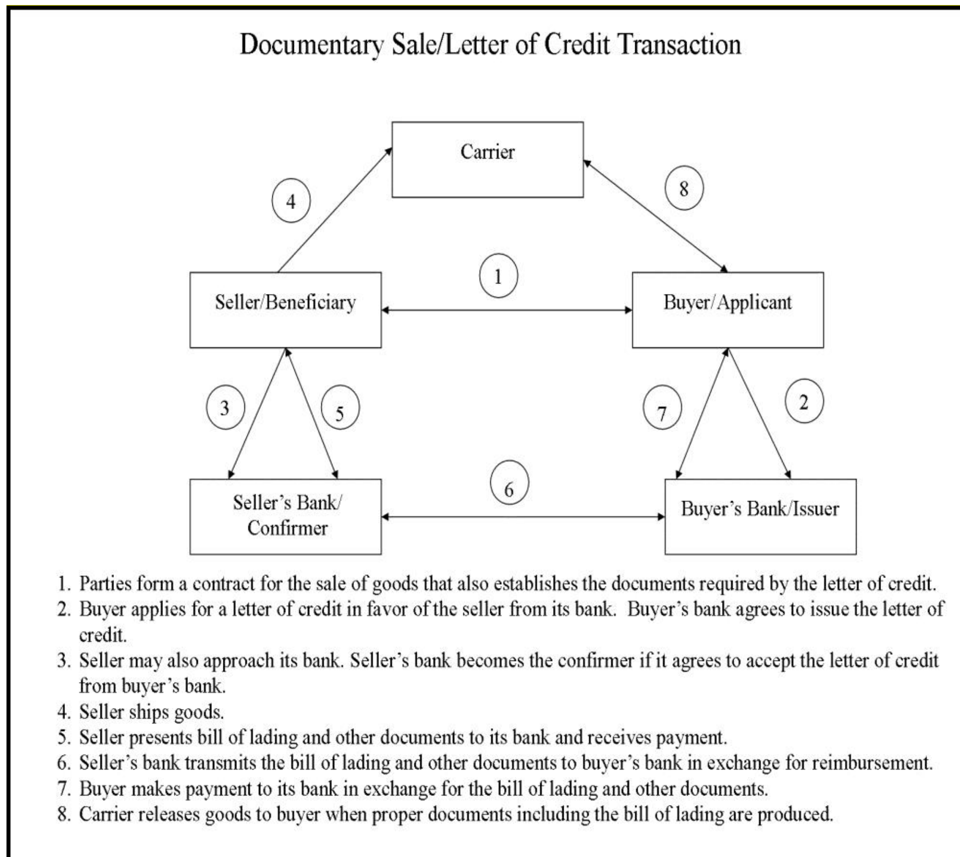
(6) In the sixth step, the confirming bank (the seller's bank) will present the documents to the issuing bank (the buyer's bank) in exchange for payment of the promised price for the goods. Again, the issuing bank is obligated to pay the confirming bank, as long as the documents precisely conform to the requirements of the letter of credit.

(7) In the seventh step, the issuing bank provides the documents to the buyer in exchange for the buyer's payment of the price. The buyer then has paid for the goods and has the documents necessary to retrieve the goods.

(8) In the eighth and final step, the buyer picks up the goods at the port of delivery with the documents it received from its bank. The most crucial document at this step is of course the negotiable bill of lading, which controls title to the goods.

Notice how the financial risk of this transaction has been minimized. When the seller ships goods, it is confident that it will be paid for the goods, as long as it presents conforming documents (which are within its control to generate or obtain). If the seller's bank does not pay as it should, the seller has familiar channels of dispute resolution available in its own country. From the buyer's perspective, the buyer only pays its bank in exchange for documents showing that seller has actually shipped the goods (conforming goods if an inspection certificate is also required) and that buyer will acquire title to the goods and can thereby retrieve them. If for some reason the buyer's bank does not follow

through with its obligations on behalf of the buyer, the buyer can bring an action against its own bank in its own jurisdiction. The diagram below helps to illustrate this transaction.



D. ALLOCATING THE COSTS AND RISKS OF CARRIAGE

In every sale of goods transaction there are risks and responsibilities related to the shipping or "carriage" of the goods involved. The goods could be lost in a storm at sea, stolen by the carrier, or may have appeared to conform at the time they were dispatched by the seller but no longer conform by the time they reach their point of delivery to the buyer. Someone must arrange and pay for carriage of the goods from seller to buyer. Someone must also pay for any insurance against casualty to the goods during transit. Every contract for a sale of goods must allocate these costs, as well as the risk of loss. These are typically the three most significant issues that arise in the carriage of goods: (1) who will be responsible to arrange and pay for carriage; (2) who will be responsible to

arrange and pay for any insurance against loss or casualty to the goods during transit; and (3) when does the risk of loss or casualty to the goods transfer from seller to buyer?

Each of these three issues might involve substantial negotiations in efforts to reach mutually agreeable solutions as to the broad variety of details arising with respect to the transfer of goods from buyer to seller. Alternatively, the parties could simply incorporate, as part of their agreement, a set of pre-defined terms commonly used and understood in international commercial transactions that describe how each of these three issues will be addressed. These terms are called Incoterms. Like the UCP terms addressed in the previous section, Incoterms are issued by the ICC.

Incoterms are acronyms (like FOB or CIF) that stand for a comprehensive set of delivery terms defined in advance by the ICC. Incoterms describe who bears which of the burdens and risks associated with carriage of the goods.[147] Incoterms can be incorporated into a sales contract explicitly, avoiding the need for lengthy negotiations concerning these shipping terms. Incoterms also have become accepted as international trade usages and are therefore sometimes even implied into contracts governed by the CISG.[148] When the terms are explicitly used in a contract, it is helpful to indicate that the ICC definitions are being contemplated and the year of the edition referenced (the ICC revises Incoterms periodically). For example, the delivery term in a contract for the sale of goods by a New York seller might read "delivery FOB, New York (Incoterms 2010)."[149]

The use of a particular set of Incoterms is also important in the documentary sales transaction explained in the previous section.

For example, the CIF term specifically requires a negotiable bill of lading, unless otherwise agreed by the parties. This negotiable bill of lading allows a current holder of the bill of lading to sell or transfer the goods in transit by transferring (negotiating) the bill of lading in exchange for payment. Incoterms and their use

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[147] For a listing of all Incoterms and their respective definitions, see http://www.iccwbo.org/Incoterms/id3040/index.html. Incoterms are discussed in more detail in Chapter 4.

[148] *See* Marc Rich & Co. A.G. [Switzerland] v. Iritecna S.p.A. [Italy], Corte di Appello di Genova no. 211, Italy, Mar. 24, 1995 (available at http://cisgw3.law.pace.edu/cases/950324i3.html) (ruling that the term F.O.B, Free on Board, was binding on the parties as an international trade usage pursuant to Article 9(2) CISG); BP Oil Intl., Ltd. [U.S.] v. Empresa Estatal Petroleos de Ecuador (PetroEcuador) [Equador], 332 F.3d 333, 337-338 (5th Cir. 2003) (available at http://cisgw3.law.pace.edu/cases/030611u1.html) ("Even if the usage of Incoterms is not global, the fact that they are well-known in international trade means that they are incorporated through article 9(2)").

[149] The list of Incoterms has been updated most recently in 2000.

will be discussed at greater length in Chapter 4 in relation to the obligations of the seller and buyer under a sales contract.

Example 1-2
In a documentary sale transaction supported by a letter of credit, the seller will almost always specify "C" terms (e.g., CIF), which place a greater burden on seller than "F" terms (e.g., FOB), but give seller considerably more control over the goods until the seller has negotiated the bill of lading and turned over the required documents in exchange for payment, thereby allowing buyer to take delivery of the goods. In contrast, a seller will typically specify the less burdensome (to seller) "F" terms when selling to an established customer on open account (i.e., trusting the buyer to pay the price when due, but leaving it to buyer to arrange and pay the cost of carriage).

E. HEDGING CURRENCY RISK

Another risk that is only present in an international commercial transaction is the risk of currency fluctuations. In our hypothetical sale between a United States company and a Chinese company, the currency risk would involve fluctuations in the value of the Chinese Yuan against the United States dollar. Currency fluctuations can be magnified by political considerations and, generally speaking, developing countries have much wider fluctuations in the value of their currencies than developed countries.

Again, careful planning of a transaction in advance can minimize the risk posed by currency fluctuations. One way that companies protect against currency fluctuations is to enter into a currency hedge transaction in addition to the sale of goods transaction. For example, if the United States – Chinese contract is priced in Chinese renminbi, the Chinese company might feel comfortable but the United States company may want to enter into a futures contract to lock in a certain exchange rate between the renminbi and the dollar to hedge against any harmful currency fluctuations.[150]

A creative way to avoid currency risk is to structure a barter transaction. In a barter transaction, companies exchange products and never exchange money. A

[150] Coincidentally, at the time of writing this second edition, the Chinese renminbi dropped almost 2% in value against the U.S. dollar in one day. See Neil Gough and Keith Bradsher, *China Devalues Currency as Worries Rise about Economic Slowdown*, New York Times, August 10, 2015.

classic example of a barter transaction dates back to 1972 when PepsiCo agreed to exchange its Pepsi syrup to the Soviet Union in exchange for Stolichnaya Vodka. By 1988 one billion Pepsis per year were sold in the Soviet Union, and 676,000 cases of Stolichnaya were sold to the United States.[151] This barter transaction avoided any currency issues that Pepsi would have had in attempting to trade with the Soviet Union. This was especially important since the ruble at the time was not a freely convertible currency. Barter is also referred to as counter trade.

F. NAVIGATING CULTURAL DIFFERENCES

Cultural differences can make counterparties to trade suspicious of each other. Cultural and linguistic differences may also stand in the way of parties actually understanding what their counterpart wants and needs. Because of these potential problems that are unique in international transactions, it is imperative for parties to account for cultural differences when forming and developing a relationship and the contracts that govern any particular transaction. Focus should be placed on cultivating a relationship by getting to know trading partners, their traditions, their language, and their expectations.[152]

Cultural differences can also become an impediment to trade based on the notion that certain developed nations are engaging in cultural imperialism. Cultural imperialism is the practice of pushing one's cultures, values, and institutions onto other cultures in a way that diminishes the cultural identity of those cultures. While it is not clear to what extent cultural imperialism actually exists (many theorists argue that this phenomenon is more of a specter than a reality), the fear of cultural imperialism can cause some nations to erect barriers to trade, in the interest of preserving a national culture or identity.[153]

In fact, on October 20, 2005, the United Nations Education, Scientific and Cultural Organization (UNESCO) adopted the Convention on the Protection and

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[151] William F. Buckley, Jr., *Pepsi at the Summit*, Natl. Rev. (June 24, 1988).

[152] It is important for each party to research the business and social etiquette of its counterparty because there are cultural differences that could make the difference in closing a deal with a foreign party. Export America, the monthly publication of the U.S. Department of Commerce's International Trade Administration, published an article cautioning United States exporters of the importance of learning the cultures of prospective international business partners. *See* Margaret Kammeyer, *The Other Customs Barrier: Cultural Research Avoids Business Blunders*, Vol. 2, no. 6 Export Ame. 32 (Apr. 2001) ("Savvy exporters are now not only expected to be familiar with country marketing reports but should also conduct research on their clients' culture and regional etiquette when preparing to enter new markets."). For example, in India, the significance of a business deal is often determined by the amount of time spent in negotiations. *Id.* In Germany, only for family members and close friends should refer to persons by their first names. *Id.*

[153] *See* David Rothkop, *In Praise of Cultural Imperialism, Effects on Global Culture*, For. Policy (June 22, 1997).

Promotion of the Diversity of Cultural Expressions (the Culture Convention).[154] The Culture Convention came into effect on March 18, 2007[155] with the goal of promoting and preserving the cultural institutions and identities of the countries that have ratified it.[156] In pursuit of that goal, the Culture Convention specifically authorizes sovereign nations to take measures designed to promote those goals, including trade protection.[157] The Culture Convention was adopted by an overwhelming majority of the countries participating in the General Conference, with 148 countries approving and only two, the United States and Israel, opposing it.[158]

On a transactional basis, overcoming cultural resistance to trade may involve making a counterparty understand that it and its country will benefit by going forward with a particular transaction. It may also involve adjusting the ways in which a particular client produces or markets its products to take into account the cultural sensitivities of its counterparty.

PROBLEMS

Problem 1-1: Re-Considering the International Commercial Transaction. As you contemplate representing the United States or the Chinese company in the example presented at the beginning of this chapter, you probably will not be considering the comparative advantages that are motivating the trade, though they are surely present. What do you need to consider? This chapter has given you an overview of many of the legal and commercial considerations that are important in structuring an international commercial sale. How do those considerations apply here? What do you perceive to be the biggest risk of the

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[154] UNESCO, *Historical Background of the 2005 Convention*, http://www.unesco.org/new/en/culture/themes/cultural-diversity/diversity-of-cultural-expressions/the-convention/historical-background/ (last accessed Aug. 10, 2015).

[155] UNESCO, *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, http://www.unesco.org/eri/la/convention.asp?KO=31038&language=E (last accessed Oct. 8,2012).

[156] UNESCO, *Historical Background of the 2005 Convention*, *supra* n. 153.

[157] UNESCO, *supra* n. 153 at art. 5-8.

[158] Despite the Convention's adoption, the WTO has been reluctant to recognize cultural exceptions to free trade obligations. *See* WTO, *Dispute Settlement: Dispute DS363: China- Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds363_e.htm (last accessed Aug. 10, 2015); Steven Van Uystel, *Sustainable Development: Linking the Convention on the Diversity of Cutural Expressions to WTO?*, Society of Int'l Economic Law (3rd Biennial Global Conference, June 25, 2012) (available at http://ssrn.com/abstract=2091519 or http://dx.doi.org/10.2139/ssrn.2091519). For a thoughtful discussion of the Culture Convention, *see* Christopher M. Bruner, *Culture, Sovereignty and Hollywood: UNESCO and the Future of Trade in Cultural Products* (Bepress Leg. Series Working Paper no. 1972, February 1, 2007) (available at http://law.bepress.com/expresso/eps/1972).

transaction? What might you include in your contract to minimize the risk of this transaction and the likelihood that your parties will end up in a dispute? Will you opt for arbitration as your dispute resolution mechanism? Is it possible or advisable to manage the parties' relationship in stages and structure this first transaction in a certain way with expectations that future transactions might be structured differently? What other questions about the situation might bear on how you would structure the deal? Again, imagine you were representing the United States party, how would you advise it? What if you represented the Chinese party? How might your advice differ? Remember as an attorney working in international sales, you will not always be representing parties from your own country, perhaps not even often.